Law and Business Review of the Americas

Volume 1 | Number 3 Article 7

1995

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I. Introduction

> I have frequently said that today we have a Federal Government of, by and for the bureaucrats, instead of one that is of, by, and for the people. But even I did not realize how little control the people of this Nation now have over their own National Government.
>
> Once again we see the arrogance, the elitism, the public be damned, Big Brother knows best attitude of the powerful people who run this Government.[1]

On January 31, 1995, President Bill Clinton abruptly abandoned his plan to have Congress approve a $40 billion loan guarantee package for Mexico (Mexico I). The loan guarantees were intended to be used to stabilize the free-fall of the Mexican peso, which had declined in value from nearly $0.30 in U.S. cents in December 1994, to well below $0.20 by mid-January.[2] Fears of another Mexican debt crisis—a la 1982—prompted investors to withdraw billions of dollars in investment capital from Mexico and sent shock waves of panic throughout the Western Hemisphere.[3] In the face of a balking Congress, which feared U.S. taxpayers would never see this money repaid, the package was deemed dead on arrival when it arrived on Capitol Hill.

As angst mounted on Wall Street and the Mexican Peso continued its steady downward spiral, the President, in conjunction with Speaker of the House Newt Gingrich, Senate Majority Leader Bob Dole, Senate Minority Leader Tom Daschle, and House of Representatives Minority Leader Dick Gephardt, issued a statement that the U.S. would send $20 billion to Mexico.[4] The President announced that he had cobbled together $17.5 billion from the International Monetary Fund, $10 billion from the Bank for International Settlements, and another $2 billion from Canada several Latin American countries.[5] In effect, this new package—Mexico II—was almost as large as the President's initial rescue plan.

After the plan was announced publicly, members of both political parties praised Mexico II. As the President's announcement flashed across Reuters news screens on Wall Street, traders reacted positively by buying the peso, thus sending the currency soaring. At

1. 141 Cong. Rec. H1,145 (daily ed. Feb. 2, 1995) (statement of Rep. Duncan).
2. Geri Smith et al., *Mexico: Can It Cope?*, Bus. Wk., Jan. 16, 1995, at 44.
3. *See Id.*
4. Press Briefing by Secretary of State Warren Christopher and Secretary of the Treasury Robert Rubin (Jan. 31, 1995) (Press Secretary Mike McCurry reading the announcement).
5. David E. Sanger, *Mexican Rescue Plan: The Overview; Clinton Offers $20 Billion to Mexico for Peso Rescue; Action Sidesteps Congress*, N.Y. Times, Feb. 1, 1995, at A1.

the end of the day, the peso had strengthened substantially to 5.75 pesos to the dollar, after trading at 6.35 on Monday, January 30, 1995.[6]

However, several members of Congress, both Republican and Democrat, were not as ecstatic as the initial news accounts reported. As the introductory quote indicates, many felt that Congress had been circumvented. President Clinton's act confirmed to many freshman Republican congresspersons that the presidency had become an office in which the occupant acts imperialistic—a theory which historian Arthur Schlesinger, Jr. posited many years ago.[7] Had President Clinton overreached his article II powers? Had Congress authorized the President's acts?

This paper is intended to recount many of the events leading to the Clinton Administration's January 30, 1995, announcement that the U.S. would send $20 billion in financial assistance to rescue the peso; to examine the history and use of the Exchange Stabilization Fund; and to discuss the constitutionality of the President's exercise of executive authority.

II. Background

During the 1990's, Mexico was viewed as an exemplary model of an emerging market because Mexico had successfully overcome a horrific debt crisis during the 1980s and became a signatory Party to the North American Free Trade Agreement. Mexican President Carlos Salinas de Gortari told his citizens "that prosperity was within reach—that they were a First World nation waiting to happen."[8]

However, during the Salinas era, Mexican trade and finance officials allowed the nation's current account deficit to climb to $28 billion by 1994, which was nearly 8 percent of Mexico's Gross Domestic Product.[9] This current account deficit amounted to more than 50 percent of the nation's exports of goods and non-factory services.[10] By comparison to other nations, the largest recorded current account deficits in relation to exports, since the 1960's, were in the range of 20-30 percent.[11]

According to the Director of the Institute for International Economics, C. Fred Bergsten, the key factor of Mexican mismanagement was:

> . . . excessive use of the nearly-fixed exchange rate as an 'anchor' for the purpose of reducing domestic inflation, rather than a more balanced policy permitting a somewhat faster glide in the rate to ensure that Mexico's exports remained competitive and imports were not unsustainably cheap. The strate-

6. *Id.* at A1.
7. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1973.
8. Smith, *supra* note 2, at 42.
9. *The Peso Crisis and Financial Support for Mexico: Hearings Before the House Comm. on International Relations*, 104th Cong., lst Sess. (1995) (statement of C. Fred Bergsten, Director of the Institute for International Economics).
10. *Id.*
11. *Id.* (E.g. Australia, New Zealand, Thailand and Korea).

gy succeeded dramatically in reducing inflation (from over 150 percent in 1987 to single digits), but at the cost of growing overvaluation of the peso.[12]

The event that triggered the peso's devaluation was a dip in the nation's foreign currency reserves to $6 billion.[13] With more than $17 billion in foreign-owned *tesobonos*, or short-term bonds, maturing in 1995, and a meager amount of hard currency reserves on account, currency traders began to fear that Mexico would endure an illiquidity crunch.[14] Traders speculated that as foreign owners of *tesobonos* attempted to exchange their bonds into dollars, Mexico's currency reserves would dry-up; hence, Mexico would necessarily be forced into rescheduling its debt.

As panic swelled in the financial markets, the new administration of Mexican President Ernesto Zedillo de Leon decided to devalue the peso by 14 percent, from its rate of nearly 3.5 pesos to the dollar, on December 20, 1994.[15] This devaluation set off a frenzy on the currency markets which caused the peso to plunge nearly 35 percent during this initial devaluation period.[16]

On January 2, 1995, President Zedillo scheduled a prime-time news conference to outline his plan to prevent a further decline in the value of the peso.[17] However, President Zedillo failed to show because he was still mired in negotiations with Mexican labor and business leaders regarding his plan's austerity measures.[18] After a deal was struck, the President emerged the following day and announced Mexico's economic adjustment program, which included wage and price controls to restrain inflation and plans to privatize ports, railroads, and radio and television telecoms.[19] To bolster Mexico's adjustment program, an $18 billion package of credit lines from the U.S. ($9 billion), Canada ($1 billion), the Bank for International Settlements ($5 billion) and $3 billion from other private banks—Citicorp and J.P. Morgan—were announced.[20]

Despite Mexico's adjustment program and the $18 billion dollar international loan guarantee package, fear continued to escalate. "In the second week of January there were pronounced runs on financial markets and currencies in a range of not only emerging market countries but also in some industrial countries (Canada, Italy, Sweden and Spain).[21] The peso also continued its decline. By late January, the peso had fallen to 5.5 to the dollar, a loss of nearly of 40 percent from December's 3.5 rate of exchange.[22]

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Smith, *supra* note 2, at 43.
18. *Id.*
19. *Id.*
20. *The Peso Crisis, supra* note 9.
21. *Id.*
22. *Federal Reserve and Price Stability: Hearings Before the Joint Economic Comm. of the U.S. Cong.*, 104th Cong., lst Sess. (1995) (statement of Lawrence Kudlow, Economics Editor of the National Review).

In Washington, the Clinton Administration reacted to the tumultuous currency markets by drafting a proposal to Congress which increased the U.S. financial commitment to the stabilization of the peso. Under the plan—Mexico I—President Clinton fashioned together $40 billion in U.S. loan guarantees, $7.8 billion from the International Monetary Fund, of which the U.S. is a major contributor, and the elements of the previous rescue package, either including or excluding the U.S. contribution of $9 billion, depending on whether the Congress viewed the guarantee as a substitute.[23] Hence, Mexico I totaled either $57 billion or $66 billion.

When the central components of Mexico I were proposed to Congress, several members indicated that they would advocate linking various political conditions to the aid package. For instance, California Senator Dianne Feinstein sought the following commitments from Mexico: (1) increased resources devoted to patrolling the border; (2) transfer of convicted Mexican nationals imprisoned in the U.S. to Mexico; (3) infrastructure improvements to enhance border crossings; (4) cooperation in repatriating illegal aliens to the interior of Mexico in order to prevent recurring illegal border crossings back into the U.S.; (5) cooperation and increased investigation of for-profit illegal alien trafficking; and (6) stricter prevention of forged immigration and identification documentation.[24] As other congresspersons publicly floated additional political conditions to be linked to Mexico I, the Clinton Administration became increasingly concerned that Mexico might reject U.S. assistance.[25]

Additionally, many members of Congress argued that Mexico I should be defeated. Members of the House and Senate considered the bill to be nothing more than a "bail out" of wealthy investors and Wall Street firms who had invested heavily in pension funds that purchased government-issued junk bonds and lost.[26] As congressional acrimony over Mexico I continued to build, the peso continued its downfall.

As of the afternoon of Monday, January 30, 1995, the Clinton Administration continued to lobby for Mexico I's adoption by Congress. Treasury officials continued to finalize the bill's details despite public statements from congresspersons that the bill was dead.[27] However, by Monday evening, White House officials realized that the bill was hopeless after Speaker of the House Newt Gingrich, and Senate Majority Leader Robert Dole, called President Clinton's Chief-of-Staff, Leon Panetta.[28]

Left with few options, Secretary of the Treasury Robert E. Rubin and Federal Reserve Board Chairman Alan Greenspan began conferring with Speaker Gingrich, House Banking Committee Chairman Jim Leach, Senate Majority Whip Trent Lott, and Senator Robert F. Bennett as to the next step of action. "When the Congress indicated difficulty in arriving at

23. *The Peso Crisis, supra* note 9.
24. Finlay Lewis, *IMF Planning $7.8 Billion Emergency Loan for Mexico,* San Diego Union-Trib., Jan. 27, 1995, at C-1.
25. Clay Chandler, *Mexico Aid Plan Contains Major Changes; Money Could Flow Immediately; More Nations Cooperating; Increased Flexibility Cited,* Wash. Post, Feb. 1, 1995, at A7.
26. Sanger, *supra* note 5, at A1.
27. *Id.*, at A1.
28. *Id.*, at A1.

support for the $40 billion loan guarantee . . . the leadership indicated to the President, 'We think you should use the Exchange Stabilization Fund.'"[29]

At first hesitant, Secretary Rubin stated that use of the Exchange Stabilization Fund (ESF), located in the Treasury Department, would be "politically unwise."[30] In fact, "when it was first suggested by the Republican leadership to the Administration that they use the Economic [sic] Stabilization Fund they said it was impossible."[31] However, one of the lawmakers stated, "'What if I told you that no one in Congress is going to complain?'"[32] Secretary Rubin replied, "'That would change things entirely.'"[33]

By the morning of January 31, 1995. President Clinton, in a signed statement with Speaker Gingrich, Senate Majority Leader Dole, Senate Minority Leader Daschle, and House of Representatives Minority Leader Gephardt, announced that the U.S. would "provide appropriate financial assistance for Mexico" in order to "ensure orderly exchange arrangements and a stable system of exchange rates."[34] The statement continues:

> the United States should immediately use the Exchange Stabilization Fund to provide appropriate financial assistance for Mexico. We further agree that under Title 31 under the United States Code, Section 5302, the President has full authority to provide this assistance.[35]

The statement noted that the International Monetary Fund would contribute an additional $10 billion for a total of $17.8 billion.[36] Additionally, the Bank for International Settlements added another $5 billion for a total contribution of $10 billion.[37] According to the statement, "we must act now in order to protect American jobs, prevent an increased flow of illegal immigrants across our borders, ensure stability in this hemisphere and encourage reform in emerging markets around the world."[38] The statement concluded, "This is an important undertaking, and we believe the risks of inaction vastly exceed any risks associated with this action."[39]

Within hours of what had appeared as a monumental setback to the Clinton Administration, the President had crafted, adopted and implemented Mexico II. In a speech to the National Governors Association on the evening of January 31, 1995, President Clinton stated:

29. 141 Cong. Rec. S4,862 (daily ed. Mar. 30, 1995) (statement of Sen. Sarbanes).
30. 141 Cong. Rec. H2,448 (daily ed. Mar. 30, 1995) (statement of Rep. Roukema) (quoting article by Clay Chandler, *Fund Used for Peso Faces Scrutiny*, Wash. Post, Mar. 1, 1995).
31. 141 Cong. Rec. H2,450 (daily ed. Mar. 30, 1995) (statement of Rep. DeFazio).
32. 141 Cong. Rec. H2,448, *supra* note 30.
33. *Id.*, at H2,448.
34. Press Briefing, *supra* note 4.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

> This crisis poses . . . great risks to our workers, to our economy and to the global economy, and it poses these risks now. We must act now. It has gotten worse day by day since I asked for legislative action about two weeks ago.
>
> Because Congress cannot act now, I have worked with other countries to prepare a new package. As proposed now, it will consist of a $20 billion share from the United States' Exchange Stabilization Fund, which we can authorize by executive action without a new act of Congress.[40]

Senate Majority Leader Dole signaled congressional support of the Administration's action during a press conference, wherein he stated, "He won't be out there by himself."[41] Speaker Gingrich commented, "The president exercised his authority, he took a tremendous burden on his shoulders, he did what key leaders felt was necessary."[42] Moreover, the General Chairman of the Democratic National Committee, Senator Christopher Dodd, announced, "Any time a Congressman or Senator doesn't have to vote on something, it's a great day."[43]

However, a few members of the House and Senate were not quite as acquiescent. Representative Jim Bunning stated, "I for one do not think it's wise for the United States to underwrite bad decisions by Mexico, big international banks and all others who have overextended."[44]

Recently, members of the House of Representatives and the Senate have expressed serious reservations regarding the President's authority to use the ESF to extend credit to a foreign government. Representative DeFazio stated on the floor of the House, "What authority was used to enter into this agreement? Never before in the history of the [ESF], 60 years, has this kind of credit been extended to a foreign power."[45] Representative Visclosky agreed with the comments of Representative DeFazio and added, "Given the magnitude of the Mexican bailout and the exposure of the American taxpayers I believe that congressional approval should have been sought originally."[46] Representative Traficant, never one to mince words, thundered:

> We have gone too far, Congress, and I do not blame the President. I blame Congress, and this should not have happened without the people's representatives, duly elected being there to approve it. And that President was going to ask, but our congressional leaders, both Republican and Democrat, gave him the wink, gave him the nod, and said go ahead on it because it is too hot for us.[47]

40. Remarks by the President in Speech to the National Governors Association (Jan. 31, 1995).
41. *Clinton Ducks Congress on Mexico Aid; President to Provide $20 Billion in Funds Not Needing Approval*, Chi. Trib., Jan. 31, 1995, at C1.
42. George Graham et al., *Congress Supports Clinton's Dollars 50 Billion Package for Mexico*, Fin. Times, Feb. 2, 1995, at 1.
43. Sanger, *supra* note 5, at A1.
44. *Clinton Ducks Congress*, *supra* n.41, at C1.
45. 141 Cong. Rec. H2,450 (daily ed. Mar. 1, 1995).
46. 141 Cong. Rec. H2,451 (daily ed. Mar. 1, 1995).
47. 141 Cong. Rec. H2,451 (daily ed. Mar. 1, 1995).

In reaction to the Senate's apathy, New York Senator Alfonse D'Amato proposed an amendment to Section 5302(b) of Title 31, United States Code, which would prevent the ESF to be used for loans, in the amount of $5 billion or more, without congressional approval.[48] The amendment would apply retroactively and could have jeopardized Mexico II.[49] Attempts to attach the amendment to other legislation have thus far failed.

The House of Representatives recently requested full disclosure of the Mexico-II package. On March 1, 1995, Resolution 80 passed the House by a vote of 407-21.[50] Resolution 80 requested that the Clinton Administration divulge all documents relevant to the Mexican rescue package by March 15, 1995;[51] but, the White House failed to meet the deadline. Consequently, on April 5, both the House and Senate conferees added an amendment to a $3.1 billion supplemental defense appropriations bill which threatens to cut off future loan guarantees to Mexico if the Clinton Administration continues to withhold these documents.[52] Representative Christopher Cox of California, the sponsor of the amendment, stated that the cut off of funds would occur only if the White House continues to resist congressional requests to disclose the documents pertaining to Mexico.[53]

As these events indicate, the necessity for U.S. action to provide assistance to Mexico to bolster the peso was unquestioned. However the authority of the President to send billions of dollars from an unknown fund, located deep in the bowels of the Treasury Department, previously utilized to stabilize the dollar in foreign exchange markets, has become an issue of increasing debate in Congress. What is the ESF? Under which circumstances and for what purposes may ESF money be utilized? The following section discusses the history and use of the ESF and the scope of authority which the President has to use its funds to stabilize foreign currencies.

III. The Exchange Stabilization Fund

A. History

In 1934, the Gold Reserve Act was adopted into law establishing a fund to be utilized by the Secretary of the Treasury, with the authorization of the President, to stabilize the exchange value of the dollar.[54] That same year, Congress appropriated $2 billion to the fund to be used to protect the dollar on foreign exchange markets.[55] This fund, the ESF, was authorized to conduct transactions for a period of two years.[56] Subsequently, President

48. 141 Cong. Rec. S4,846 (daily ed. Mar. 30, 1995).
49. *Id.*
50. 141 Cong. Rec. H2,458 (daily ed. Mar. 1, 1995).
51. *Id.*
52. Jerry Gray, *Mexican Aid Cutoff Pushed Into Defense Appropriations Bill*, N.Y. Times, Apr. 6, 1995, at A15.
53. *Id.* As of the time of this writing, the Cox Amendment had not been approved by either the House or the Senate.
54. Exchange Stabilization Fund Annual Report, For the Year Ended Sept. 30, 1993, at 1.
55. *Id.*, at 2.
56. *Id.*, at 2.

Franklin D. Roosevelt issued a proclamation extending the operations of the ESF for an additional year and Congress, through amendments to the Act, empowered the ESF to continue operations through June 30, 1945.[57] In 1945, Section 7 of the Bretton Woods Agreements Act authorized the operation of the ESF on a permanent basis.[58]

Although ESF funds belong to the Treasury Department, the money is stored at the Federal Reserve Bank of New York.[59] Over the years, the original $2 billion dollars has accumulated into a fund worth $25 billion.[60] Also, the ESF may draw on an additional $11 billion from the International Monetary Fund.[61]

Although the ESF was created to stabilize the exchange value of the dollar, the Fund has been used in recent times to stabilize other currencies, such as the Mexican peso in 1982.[62] Furthermore, "Treasury officials have concluded that the fund's mandate is sufficiently broad that it can be used to stabilize [foreign currencies] through other means, including currency swaps, shortterm loans . . . and even providing U.S. guarantee . . .."[63]

In order to understand the scope of the President's powers under the 1934 Gold Reserve Act, a discussion of the organic statute creating the ESF will be discussed next.

B. The Gold Reserve Act of 1934 and its Subsequent Amendments

In 1934, Congress adopted the Gold Reserve Act authorizing the Secretary of the Treasury, with the approval of the President, to operate a fund. Section 10 of the Act stated:

> For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purpose of this section.[64]

In 1978, amendments to the International Monetary Fund (IMF) Articles of Agreement revised the obligations of IMF members. In 1976, Congress enacted amendments to section 10 stating that the ESF is to be operated as the Secretary "may deem necessary to and consistent with the United States obligations in the International Monetary Fund."[65] These amendments became effective April 1, 1978, which was the date of entry into force of the Second Amendment of the IMF Articles of Agreement.[66]

In 1977, Public Law 95-147 amended the language of section 10 by substituting "neces-

57. *Id*,. at 2.
58. *Id.*, at 2.
59. John Crudele, *Misused Funds Bails Out Mexico*, Chi. Sun-Times, Feb. 13, 1995, at 42.
60. Clay Chandler, *supra* note 25, at A7.
61. *Id.*
62. *Id.*
63. *Id.*
64. Exchange Stabilization Fund Annual Report, *supra* note 54, at 1.
65. *Id.*, at 2.
66. *Id.*

sary, consistent" for "necessary to and consistent," adding the phrase "regarding orderly exchange arrangements and a stable system of exchange rates," and inserting the following:

> no loan or credit to a foreign government or entity shall be extended by or through such Fund for more than six months in any twelve-month period unless the President provides a written determination to the Congress that unique or exigent circumstances make such loan or credit necessary for a term greater than six months.[67]

C. The Gold Reserve Act Recodified

Following the Act's recodification, the current statute, known as Section 5302(b) of Title 31 of the United States Code, provides as follows:

> Consistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates, the Secretary or an agency designated by the Secretary, with the approval of the President, may deal in gold, foreign exchange, and any other instruments of credit and securities the Secretary considers necessary. However, a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months.[68]

D. Section 5302: Stabilizing Exchange Rates and Agreements

Section 5302, of Title 31 of the United States Code, has several other provisions which must be discussed since they are vital to understanding the scope of the statute's delegation of authority to the Secretary of the Treasury and the President.

First, Section 5302(2) states that the "fund is under the exclusive control of the Secretary," subject to the President's approval, "and [the ESF] may not be used in a way that direct control and custody pass from the President and the Secretary."[69] The Act also states that the "Decisions of the Secretary are final and may not be reviewed by another officer or employee of the Government."[70]

Second, Congress limited the manner in which ESF resources could be used. In Section 5302(a)(1), Congress required that the ESF's administrative expenses not be paid from the money in the Fund.[71]

Finally, Congress did reserve itself some oversight powers. In Section (c) (1) and (2),

67. *Id.*
68. 31 U.S.C. § 5302(b) (1994).
69. 31 U.S.C. § 5302(2) (1994).
70. *Id.*
71. 31 U.S.C. § 5302(a)(1) (1994).

the Treasury Secretary must file financial statements and reports regarding the Fund's financial standing throughout the year.[72]

E. Section 5302 and its Current Use by the Secretary of the Treasury and the President

Prior to President Clinton's use of the ESF to extend $20 billion in loan guarantees to Mexico, the Fund had never been used to extend a loan of similar proportions to a foreign country. According to Representative Roukema, "The recent action of the U.S. Treasury is absolutely unprecedented in both magnitude and duration. It is 20 times larger than the largest prior use of this particular fund."[73]

Previous lending transactions indicate that the ESF had been used primarily for short-term lending of 3 to 6 months in duration.[74] However, under Mexico II, "the fund could be used to provide guarantees for maturities of up to 10 years."[75]

Internal legal opinions from the general counsel of the Treasury Department, issued to Secretary Rubin, state that the ESF may not be used for foreign aid.[76] In the midst of Senator D'Amato's recent unannounced attempt to amend the 1934 Gold Reserve Act, the Senator read the above-mentioned legal opinion. The opinion stated, "Although loans and credits are clearly permitted under the ESF, their purpose must be to maintain orderly exchange arrangements and a stable system of exchange rates, and not to serve as foreign aid."[77]

Mexico II marks a "critical change" in the use of the ESF.[78] With eighty percent of the ESF's reserves extended to Mexico in order to stabilize the peso, and Congress being circumvented after the representatives of the people signaled their growing displeasure with the content of the rescue package, the constitutionality of the President's action is open to assessment. Did President Clinton exceed his authority under Section 5302? Could Mexico II be challenged successfully before the federal courts? The following section outlines fundamental aspects of the separation of powers doctrine in relation to the President's ability to conduct foreign affairs and provide national security to the nation.

72. 31 U.S.C. § 5302(c)(1) — (2) (1994). Section 5302(c)(1) requires the Treasury Secretary to file a detailed financial statement on the ESF disclosing all new or renewed agreements, all monthly transactions, and all potential liabilities. A financial statement shall be submitted to both the Committee on Banking, Finance and Urban Affairs of the House of Representatives and the Committee on Banking, Housing and Urban Affairs of the Senate. Additionally, the Treasury Secretary must file yearly reports to the President and Congress regarding the ESF's operations.
73. 141 Cong. Rec. H2,447 (daily ed. Mar. 1, 1995).
74. *The Peso Crisis*, *supra* note 9.
75. *Id.*
76. 141 Cong. Rec. S4,852 (daily ed. Mar. 30, 1995) (statement of Sen. D'Amato).
77. *Id.*
78. *The Peso Crisis*, *supra* note 9.

IV. The Constitutionality of Mexico II

A. Executive Authority Under the Constitution

Under traditional notions of the separation of powers doctrine, a president may exercise executive power only where: (1) the U.S. Constitution grants plenary powers; or (2) the Congress delegates power by statute.[79]

1. Executive Authority Under the Constitution

Article II of the Constitution states that the "executive Power shall be vested in a President of the United States of America.[80] Article II also states that, "The President shall take Care that the Laws be faithfully executed," and that the President "shall Commission all the Officers of the United States."[81] Additionally, the President is authorized to nominate and appoint, with the advice and consent of the Senate, officers of the United States.[82]

Article II grants few express powers to the President to conduct foreign relations.[83] The President is the "Commander in Chief" of the United States military,[84] is empowered to make treaties with the advice and consent of the Senate,[85] and able to appoint[86] and receive ambassadors.[87]

Some have argued that the plenary powers authorized in the Constitution are not the only powers vested in the President. According to Alexander Hamilton, one of the original framers of the Constitution, "the enumerated powers of Article II are only examples of the President's vast 'executive power.'"[88] Hamilton reached his conclusion by comparing the first sentence in Article II, which reads, "The executive Power shall be vested in a President of the United States of America,"[89] with the first clause of Article I, which reads, "All legislative Powers *herein granted* shall be vested in a Congress of the United States."[90] Hamilton considered the language "herein granted" to be a restraint on the Congress, while such a restriction was omitted from references to the executives powers.

Hamilton's theory pertaining to the scope of the President's powers has been subject to criticism. For instance, "James Madison vehemently opposed Hamilton's view and accused him of wanting to create a monarchy."[91] More recently, Supreme Court Justice Robert H.

79. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585; 72 S.Ct. 863, 866; 96 L.Ed. 1153 (1952).
80. U.S. Const. art. II, § 1, cl. 1.
81. U.S. Const. art. II, § 3.
82. U.S. Const. art. II, § 2, cl. 2.
83. *See generally* U.S. Const. art. II.
84. U.S. Const. art. II, § 2, cl. 1.
85. U.S. Const. art. II, § 2, cl. 2.
86. *Id.*
87. U.S. Const. art. II, § 3.
88. Jody S. Fink, *The Foreign Policy Role of the President: Origins and Limitations*, 11 Hofstra L.Rev. 773, 489 (1983).
89. U.S. Const. art II, § 2, cl. 2.
90. U.S. Const. art. I, § 1.
91. Fink, *supra* note 88, at 489.

Jackson, in *Youngstown Sheet & Tube Co. v. Sawyer*, responded to the situation of a president claiming virtually unlimited powers by writing:

> The example of such unlimited executive power that must have impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.[92]

Today, the concept of a president operating beyond the scope of the powers enumerated under Article II has neither been flatly adopted or completely dismissed. The Supreme Court has heeded the advice of Chief Justice John Marshall's "greatest judicial utterance" that "it is a constitution we are expounding."[93] According to Supreme Court Justice Felix Frankfurter, "this requires both a spacious view in applying an instrument of government 'made for an undefined and expanding future'... and as narrow a delimitation of the constitutional issues as the circumstances permit."[94] Moreover, as Justice Jackson wrote, "the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even a single Article torn from context."[95] He continued, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[96]

In the seminal case, *Youngstown Sheet & Tube v. Sawyer*, Justice Jackson, in his concurring opinion, suggested a tripartite classification system to assess the power of a President to act under given circumstances.

First, the President's power is at "its lowest ebb" where the President acts in a manner contrary to the expressed or implied "will of Congress."[97] According to Justice Jackson, the President can only "rely upon his constitutional powers minus any constitutional powers of congress over the matter."[98]

Second, if the President acts in light of the absence of a congressional grant or denial of power, a "zone of twilight" exists.[99] In this case, the President must rely upon his own powers, but there is the possibility that Congress and the President share concurrent authority over the matter.[100] Moreover, Justice Jackson wrote:

> Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to

92. *Youngstown*, 343 U.S. at 641.
93. *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 407).
94. *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).
95. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).
96. *Id.*
97. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
98. *Id.*
99. *Id.*
100. *Id.*

> depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[101]

Third, the President's authority is at its apex where the President exercises his/her powers pursuant to an express or implied grant of power from Congress.[102] In this situation, the President's authority "includes all that he possesses in his own right plus all that Congress can delegate."[103] Furthermore, a presidential act conducted pursuant to congressional authorization "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[104]

2. Congressional Grant of Authority by Statute

Besides a Constitutional grant of plenary power to the President, expressed or implied authority by statute has likewise been considered a sufficient basis for executive action by the President.[105] "Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis."[106]

When Congress has expressed its "will" by statute and the President acts in manner not provided for within the language of the Act, which tier of Justice Jackson's tripartite classification applies? In *Dames & Moore v. Regan*, then Supreme Court Justice William Rehnquist wrote:

> As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security imply 'congressional disapproval' of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.' At least this is so where there is no contrary indication of legislative intent and when, . . . there is a history of congressional acquiescence in conduct the sort engaged in by the President.[107]

Hence, where the Congress fails to expressly authorize a President's acts within the text of a broad statute, and the statute fails to limit the President's acts, the Executive's act are presumed authorized, especially where Congress subsequently fails to indicate its displea-

101. *Id.*
102. *Youngstown*, 343 U.S. at 636 (Jackson, J., concurring).
103. *Id.*
104. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
105. *Youngstown*, 343 U.S. at 585.
106. *Youngstown*, 343 U.S. at 662 (Clark, J., concurring).
107. *Dames & Moore v. Regan*, 453 U.S. 654, 678-79; 101 S.Ct. 2972, 2986; 69 L.Ed. 2d 918 (1981).

sure by enacting legislation or adopting a resolution to stem the President's conduct. The Court in *Dames & Moore* "implicitly created a presumption of legislative acquiescence . . . absent specific congressional disapproval."[108]

B. The Constitutionality of Mexico II

On January 31, 1995, when Mexico II was announced, the President stated that the use of the ESF was authorized under 31 U.S.C. §5302. Since the situation in Mexico was considered an "emergency circumstances," and the financial assistance extended to Mexico would be available for a term longer than six months in any 12-month period, Section 5302(b) granted the President "full authority to provide this assistance."[109]

Under the strict traditional view of executive power, President Clinton's Mexico II program appears to be authorized since the President's actions stemmed from an act of Congress.[110] Additionally, under Justice Jackson's classification system, the President's authority would appear to fit into the third category since the President acted pursuant to an express or implied authorization of Congress.[111] As a result, President Clinton's authority would be at its maximum.[112]

Section 5302(b) states that the Secretary of the Treasury may engage in foreign currency exchange, deal in gold, and utilize *other instruments* of credit and securities, *as necessary*, to achieve a stable system of exchange rates.[113] The Gold Reserve Act also empowers the Secretary to execute long-term loans, beyond six months, with foreign entities or governments if the President provides a written statement to Congress indicating that "unique and emergency circumstances require the loan or credit to be for more than six months."[114] The only limit to the Secretary's powers is Presidential approval.

Not only is statutory delegation to the Treasury Secretary and the President broad in scope, the Act stipulates that the "Decisions of the Secretary are final and may not be reviewed by another officer or employee of the Government."[115]

In the case of Mexico II, it was the leadership of Congress who proposed to the Clinton Administration that the ESF be used to stabilize the peso.[116] Consequently, President Clinton authorized Treasury Secretary Rubin to develop a $20 billion loan guarantee program to Mexico. The President announced that "the situation in Mexico raises unique and emergency circumstances,"[117] and that "[w]e must act now in order to protect American jobs, prevent an increased flow of illegal immigrants across our borders, ensure stability in this hemisphere and encourage reform in emerging markets around the world."[118] The

108. Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 Cornell L. Rev. 68, 102-03 (1982).
109. Press Briefing, *supra* note 4.
110. *Youngstown*, 343 U.S. at 585.
111. *Youngstown*, 343 U.S. at 635.
112. *Id.*
113. 31 U.S.C. § 5302(b) (1994).
114. *Id.*
115. 31 U.S.C. § 5302(2) (1994).
116. 141 Cong. Rec. S4,862 (daily ed. Mar. 30, 1995) (statement of Sen. Sarbanes).
117. Press Briefing, *supra* note 4.
118. *Id.*

President's announcement constituted written notice to Congress that the loan program would extend for more than six months in any 12-month period.

Subsequent to the President's announcement, several congressperson's supported the President's unilateral action. The most powerful Republican on Capitol Hill, Speaker of the House Newt Gingrich, stated unequivocally that the "President exercised his authority."[119] Even 1996 Republican Presidential contenders supported the President's rescue plan. Senator Gramm stated that Mexico II was, "A sound plan,"[120] while Senator Dole added, "In my opinion, most everbody's on board."[121]

Several opponents of Mexico II likewise agree that the President's acts were authorized by Congress. Statements similar to Representative Traficant's indicate that it was not the President who was at fault, but Congress since they instigated the President's use of the ESF. Another example is the amendment which Senator D'Amato has tried unsuccessfully to attach to other legislation. In general, the D'Amato Amendment would alter the language of section 5302(b) to require congressional approval of all foreign loans, utilizing ESF resources, aggregating more than $5 billion.[122] The sole purpose of the D'Amato Amendment is to reign in much of the power Congress delegated originally. Finally, the resolutions which have been adopted in the House of Representatives merely require the Clinton Administration to divulge existing documents pertaining to Mexico II.[123]

V. Conclusion

This paper began with a statement made by Representative Duncan Hunter of California during the House of Representative's consideration of Resolution 80. The quote strikes at the core of the problem underlying the Mexico II program—gross delegations of congressional power to the Executive branch. As the representatives of the people, the Framers intended that the House of Representatives have the power to lay and collect taxes,[124] declare war,[125] and execute several other governmental functions since these elected officials are the most accountable to the electorate. In regard to the issue at hand, the Framers expressly stipulated in the Constitution that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[126]

As a result of continuous amendments to the Gold Reserve Act of 1934, Congress expressed its "will" that Section 5302 become an instrument of exclusive power to bureaucrats.

President Clinton's Mexico II rescue package is more than likely safe from legal attack as an encroachment on congressional power. The statute supports long-term loan programs

119. George Graham et al., *supra* note 42, at 1.
120. William Neikirk, *The Mexico Rescue; How Clinton Sidestepped Congress; 'This is in the Interest of America'*, Chi. Trib., Feb. 1, 1995, at 1.
121. 141 Cong. Rec. S4,857 (daily ed. Mar. 30, 1995) (quoting Reuters article, *Dole Says Congress's Leaders Back Mexico Plan*, Reuters, Jan. 31, 1995).
122. 141 Cong. Rec. S4,846 (daily ed. Mar. 30, 1995).
123. See 141 Cong. Rec. H2,458 (daily ed. Mar. 1, 1995); Jerry Gray, *supra* note 52, at A15.
124. U.S. Const. art. I, § 8, cl. 1.
125. U.S. Const. art. I, § 8, cl. 11.
126. U.S. Const. art. I, § 9, cl. 7.

to stabilize currencies so long as the necessary procedural steps are taken. Second, the relevant case law regarding executive power to conduct foreign policy and national security indicates that the President is within his authority where s/he acts pursuant to congressional authorization or the Constitution. Finally, congressional acquiescence following the announcement of Mexico II indicates that Congress acknowledges the President's power to use the ESF to extend loan guarantees to Mexico.

Executive actions, such as Mexico II, can be prevented in the future if Congress simply adopts legislation revoking previous delegations of authority to the Executive branch. As Justice Jackson notified Congress in 1952:

> If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[127]

127. *Youngstown*, 343 U.S. at 654.