International Lawyer

Volume 26 | Number 3 Article 7

1992

Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law

Harold Hongju Koh

John Choon Yoo

PERSPECTIVES

HAROLD HONGJU KOH*
JOHN CHOON YOO**

Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law

In his first term President George Bush's most enduring achievements have relied upon the flexing of U.S. economic and national security power. The lightning-quick Persian Gulf War witnessed not only the use of American and allied military force, but also the sustained application of comprehensive, unilateral and multilateral economic sanctions. On a front closer to home, the Bush administration commenced negotiations that drew the nation closer to a hemisphere-wide free trade area that would include both Canada and Mexico. Both efforts required the United States to marshal dramatically its economic and national security powers, raising significant questions about the proper role of the three governmental branches in the legal regimes governing those powers.

This article examines the major areas in which the three branches have developed economics and national security law during the history of our republic. Such legal regimes generally fall into two broad categories: first, those laws that manipulate fiscal, monetary, and domestic economic policies to achieve national security goals; and second, those laws that control or respond to external rela-

*Professor of Law, Yale University. B.A., 1975, Harvard University; Honours B.A., 1977, Oxford University; J.D., 1980 Harvard University. This article was originally prepared for the Economics and National Security Project of the Committee on National Security and International Law of the ABA Section of International Law and Practice. The authors thank Eli Whitney Debevoise II and Alan Charles Raul for their invaluable assistance.

**B.A., 1989, Harvard University; J.D., 1992, Yale University.

tions through economic measures. The legal regimes governing each category show how the complex interaction among all three branches influences U.S. economics and national security policy. As important, they demonstrate how our constitutional system of government creates the legal means that both authorize and limit our political system's attempts to achieve its economics and national security goals.

Upon reflection, U.S. national security policy incorporates at least five identifiable economic elements. First, U.S. national security depends heavily upon a healthy domestic economy that is fully capable of supporting U.S. military and political goals. Second, national security policy regularly requires the use of economic power as a tool, either as a stick to sanction hostile nations or as a carrot to encourage the economic growth and development of friendly ones. Third, U.S. national security militates in favor of preventing hostile nations from obtaining crucial military technologies and materials. Fourth, the domestic economy's ability to satisfy defense needs hinges upon maintaining ample domestic stocks of critical materials. Fifth, national security may require that U.S. economic controls apply with sufficient force not just to adversaries, but also to allies, so as to ensure implementation of a unified and coordinated national policy.

Over the decades Congress, the President, and the courts have developed and elaborated five major statutory schemes to regulate economic and national security power. These schemes, which address a spectrum of problems ranging from domestic economic regulation, to emergency powers, to export controls, to trade and import controls, to extraterritorial application of U.S. law, have given the federal government broad powers to manage economic and national security affairs. Although the Constitution assigns Congress the task of regulating foreign and domestic commerce, more often than not the executive branch has won the dominant hand in setting policy in these areas. Hence, this article examines the parallel growth of governmental economic and national security power and of presidential power within the constitutional system.

Part I traces the historical development of American economics and national security decision making to show how our governmental institutions have distributed constitutional powers among themselves. Part II scrutinizes in closer detail the post-World War II relationship between economics and U.S. national security, and examines how the constitutional system has developed the decision-making mechanisms that have set the modern foundations of policy in those areas. Part III discusses how two parallel trends, the rising importance of economic factors for U.S. national security and the growing presidential power over both, have affected the five major categories of economics and national security laws outlined above.

In reviewing this terrain, our goal is not to be exhaustive. Instead, the article has a thematic purpose: to demonstrate the close linkage between the centralization of economics and national security power and the growth in presidential power. The Cold War threat pushed power into the hands of the executive,

which, as a matter of constitutional structure, was the branch best able to use it. However, in areas that have closely engaged the interests of constituency groups or have not required regular executive action, Congress and the courts have succeeded in enforcing a more balanced institutional approach to economics and national security decision making.

Hence, the five statutory schemes examined in the article occupy a broad spectrum of congressional-executive cooperation. At one end, representing an extreme of virtually unchecked executive discretion, sits the realm of emergency international economic powers. Further along the spectrum, an examination of export controls, defense production, trade, and fiscal controls reveals a striking increase in the degree of balanced participation among the decision-making branches. The article argues that changing institutional and international factors recommend that economics and national security power in the future operate closer to the latter, "power-sharing" model—what one of the authors has called the central theme of the United States' "National Security Constitution"[1]—than to the former paradigm of relatively unchecked executive discretion. More explicit acceptance of power-sharing as a constitutional norm would not only enhance the democratic nature of foreign policymaking, but would also recognize the indispensable checking function that other branches and international allies play vis-à-vis the exercise of U.S. economic and national security power. No single branch of government can mandate this reform. Instead, it must come about through a combination of presidential restraint, congressional reassertion of power, and judicial intervention into the balance of powers among the branches.

I. The Growth of Presidential Power in International Economic Affairs

During the last two centuries the growing interrelationship between U.S. economics and national security has steadily paralleled the rising power of the presidency within our constitutional system of government. This part of the article traces these historical developments by examining the various schemes that developed under the Jefferson, Lincoln, and Franklin Delano Roosevelt (FDR) administrations. First, we briefly outline the constitutional allocation of powers over the economy and national security. Then follows an examination of the use of the embargo in the early Republic to enforce Jeffersonian national security goals, the striking growth of emergency powers under President Lincoln, and finally, FDR's use of domestic economic regulation for national security purposes. The persistent theme is that events have forced these presidents to centralize power in both the federal government and in the office of the presi-

1. *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

dency. Moreover, these historical examples also show the precursors to the modern system of export, emergency, and domestic economic powers that form the core of today's economic and national security policies, described further in Part III.

A. Economics and National Security in the Founders' Constitution

When the delegates to the Constitutional Convention met during the summer of 1787, concerns about national security and the economy were forefront in their minds. Opening the "main business" of the Convention on May 29, the first speaker, Edmund Randolph, rose to cite the defects of the Articles of Confederation. "The confederation produced no security against foreign invasion," Randolph argued, nor could Congress "prevent a war nor support it by their own authority."[2]

Randolph noted that a stronger central government would permit the central government both to wage economic warfare, the "counteraction of the commercial regulations of other countries," and to push its own exports overseas.[3] Other delegates agreed. According to Roger Sherman of Connecticut, any national government must have the authority to pursue four primary goals, three of which involved national security and the economy: "defense against foreign danger"; defense "against internal disputes and a resort to force"; "treaties with foreign nations"; and "regulating foreign commerce and drawing revenue from it."[4]

To achieve these goals, the Framers expressly afforded the national government more power at the expense of the states. At the federal level they created an executive branch designed to act swiftly to guard the nation's safety, and to operate consistently with the core principle of separation of powers. Thus, while expanding the foreign affairs power of the federal government, the new Constitution subjected that power to the institutional checks and balances that also governed domestic affairs. Moreover, this design initially placed Congress in the leading role in foreign affairs, but also left room for the executive to take the initiative.

Accordingly, the Constitution gave Congress many, if not most, of the enumerated powers over national security and the economy. Article I, section 8 placed with Congress important national security powers to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; to "provide for the common Defense"; to "regulate Commerce with foreign nations"; to "define and punish Piracies and Felonies committed on the high seas" and offenses against the "Law of Nations"; to "raise and support

2. Notes of Debates in the Federal Convention of 1787 Reported by James Madison 29 (Adrienne Koch ed., 1966).

3. *Id.* at 29.

4. *Id.* at 74.

Armies," to "provide and maintain a Navy," and to set rules regulating them plus the power to "establish a uniform Rule of Naturalization."[5]

Article I also made Congress paramount in economic affairs. Congress received the power to regulate both interstate and foreign commerce; to "lay and collect Taxes, Duties, Imposts and Excises"; to "borrow Money on the credit of the United States"; as well as the power to "coin Money, regulate the Value thereof, and of foreign Coin." Article I further authorized Congress to grant patents and copyrights; to set uniform bankruptcy laws, and to "pay the Debts and provide for the . . . . general Welfare of the United States."[6] Beyond these specific grants, the Framers also granted Congress the broad, undefined power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[7]

Article II, by contrast, granted the executive branch only a few specified, but potentially expansive, powers. Article II named the President "Commander in Chief" of the military, recognizing his authority to wage war once Congress had declared it.[8] Article II further empowered the President to "make Treaties" with the advice and consent of the Senate, and to appoint and receive ambassadors.[9] Moreover, Article II vested all "executive power" in the President, coupled with an obligation that he take care that the laws be "faithfully execute[d]."[10]

As a counterweight to the political branches, Article III established one Supreme Court and envisioned a system of inferior federal courts exercising jurisdiction over all cases arising under "this Constitution, the Laws of the United States, and Treaties."[11] Article III expressly extended federal jurisdiction to "cases" affecting ambassadors and involving the admiralty and maritime laws, and to "controversies" with foreign states, citizens and subjects.[12] As implemented by the Judiciary Act of 1789, these powers placed the judicial department in a vital checking role over foreign affairs.[13]

Thus, the Constitution specified that powers relating to national security and the economy were to remain shared powers. Congress would legislate, the President would execute, and the judiciary would interpret the laws, whether they

5. U.S. CONST. art. I, § 8.
6. *Id.*
7. *Id.* cl. 8.
8. *Id.* art. II, § 2.
9. *Id.*
10. *Id.* art. II, § 1.
11. *Id.* art. III, § 2.
12. *Id.*
13. 1 Stat. 73 (1789). The first Judiciary Act included, for example, the Alien Tort Statute, 28 U.S.C. § 1350, 1 Stat. 77 (1789), which gave federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." *See generally* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2353 (1991).

pertained to domestic or foreign affairs, and each branch would check the excesses of the others.[14] In time, however, power would soon flow to the executive, which the Founders saw as the branch most structurally suited for the exercise of swift and unified power.[15]

B. The Jeffersonians and the Embargo Power

Economic and military competition among the European great powers threatened the security of the early Republic. North America remained an important source of trade for Europe and a battleground for European influence. Militarily weak, the foundling nation sought to maintain its independence by adopting economic measures. Almost from its inception the United States implemented trade statutes that guarded its national security by restricting imports or exports with offending great powers. As our national security increasingly required the use of active economic measures, the president grew in power as the enunciator and executor of U.S. policy. These dual developments culminated in the presidency of Thomas Jefferson, who made extensive use of embargoes to preserve U.S. national security.

International commerce proved at once to be the primary means for preserving U.S. security. In the long run, the Jeffersonians believed the nation needed to pursue free trade overseas, so as to provide markets for an agrarian, republican society.[16] In the short term, U.S. leaders sought to use commerce as a means of removing the United States from great-power conflicts. "The great rule of conduct for us in regard to foreign nations," George Washington said in his farewell address, "is, in extending our commercial relations to have with them as little *political* connection as possible."[17]

In attempting to preserve U.S. national security and commerce, subsequent presidents even risked open war. In response to French seizures of U.S. merchantmen in 1796-97, President John Adams led the nation into its first "quasi-war" with France to protect neutral shipping rights. But first he sought authority from Congress, which in 1798 passed a series of statutes authorizing an undeclared war. Pursuant to these statutes treaties with France were broken, an embargo went into effect, a navy was created with the power to seize French ships, and a provisional army was raised.[18] These measures, some economic and some military, were designed to safeguard U.S. shipping and to interrupt French activities until France recognized the right of neutral shipping.

---

14. Koh, *supra* note 1, at 76.

15. *See* The Federalist Nos. 64, 70, 74 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

16. *See generally* Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America (1980).

17. George Washington, Farewell Address, Sept. 17, 1796, *reprinted in* 2 Messages and Papers of the Presidents, 1789-1897, at 213, 222 (James D. Richardson ed., 1897).

18. Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power 144-45 (1976).

Adams set the stage for Jefferson, under whose presidency the executive's power to regulate the economy for national security purposes blossomed. However, Congress expressly authorized this expansion by steadily wider delegations of authority, thus preserving the Constitution's vision of power-sharing. The 1803 war engulfing Europe transformed the United States into the world's largest neutral carrier, leading to harassment of U.S. shipping by both the British and French. British warships impressed U.S. sailors[19] and blockaded all ships bound for the continent. Napoleon responded by seizing U.S. ships that had docked in Britain.

In response, Jefferson requested and received from Congress the Embargo Act, which prohibited all exports from the United States, and the Nonimportation Act, which forbade imports from Britain. Congress ceded Jefferson wide discretion to wage economic war. Congress gave the President power to suspend the embargo upon, in his judgment, "such changes in [Britain's and France's] measures affecting neutral commerce, as may render that of the United States sufficiently safe."[20] Congress also authorized Jefferson to apply or suspend the nonimportation laws at his discretion, to employ the army and navy to enforce the embargo laws, and to close U.S. harbors to foreign ships as he chose.[21]

Thus, the early Republic's leaders sought to guard U.S. security by delegating to the executive the power to decide when and how to wage economic warfare. One Federalist senator complained that President Jefferson had acquired "the power, not of declaring war in form, but of adopting a course of measures which will necessarily and inevitably lead to war."[22] But Jefferson had not acted unilaterally; rather, Congress had overwhelmingly supported his policies and chose to let him lead. This structure of presidential leadership and explicit congressional approval characterized Jefferson's other foreign policy achievements, including the Louisiana Purchase and pacifying the Barbary Pirates.[23]

This pattern similarly characterized events leading up to the War of 1812, the logical culmination of Jefferson's policies. In the trade statutes leading up to the war, the Non-intercourse Act and then Macon's Bill No. 2, Congress allowed President Madison wide discretion to clamp down or lift the embargo against Britain and France. Madison eventually used this delegated power to lift the embargo against France and to continue it against Britain.

Indeed, President Madison and Congress decided to wage war against Britain precisely because of the tight link between economic and national security issues. In his June 1, 1812, war message to Congress, Madison said: "Our commerce had been plundered in every sea, the great staples of our country have been

19. For an historical account of one famous impressment case, *see* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

20. 18 ANNALS OF CONG. 2065 (1808).

21. SOFAER, *supra* note 18, at 175-76; Act of Mar. 3, 1805, 2 Stat. 339, 341-42.

22. 17 ANNALS OF CONG. 332, 335 (1808) (remarks of Sen. Hillhouse).

23. SOFAER, *supra* note 18, at 225-26.

cut off from their legitimate markets, and a destructive blow aimed at our agricultural and maritime interests" by Britain.[24] Privately, Madison noted that the United States had gone to war to protect its sovereignty "on which all nations whose agriculture and commerce are so closely allied, have an essential interest."[25]

Throughout the embargo policies of Adams, Jefferson, and Madison, the third branch, the judiciary, maintained its balancing role in national security affairs. In a series of cases the Supreme Court upheld congressional power to wage economic warfare, but checked executive power to extend the scope of such wars. In *Bas v. Tingy* the Supreme Court held that the United States could wage an undeclared, "imperfect war" without a formal declaration because of explicit congressional authorization.[26] Similarly, in *The Cargo of the Brig Aurora v. United States* the Supreme Court upheld the congressional delegation of authority to President Madison to suspend commerce with Britain while continuing it with France. This act eventually forced war with Britain.[27] However, the Court invalidated actions authorized by executive instruction, but outside the powers delegated by Congress. In *Little v. Barreme,* the Court held liable a U.S. commander who had seized a neutral ship in violation of a congressional statute, even though he had acted pursuant to a presidential order.[28] Again, in the 1814 case *Brown v. United States,* Chief Justice Marshall held that the attorney general could not seize British-owned timber once war had begun if Congress had passed no law allowing such a measure.[29]

Thus, early U.S. policy regarding economics and national security rested upon a foundation of balanced institutional participation. Under President Jefferson and his successors Congress gave the executive broad powers with which to wage economic warfare. The courts acted as an umpire in upholding delegated power, but also in preventing the executive from exceeding its statutory mandates. Throughout, the presidency grew in power as it became the primary decision maker in setting national security policy and waging economic warfare. The Jeffersonian period also demonstrates how export measures first assumed an important role in national security policy. Significantly, the precedent of broad congressional delegations of authority to the executive would hold true over time and would become the defining characteristic of our modern export control system.

C. Lincoln and the Rise of Emergency Presidential Powers

National rebellion forced President Lincoln to adopt dramatic and unprecedented emergency measures to preserve the Union. Events had moved swiftly

24. Loyd C. Gardner et al., Creation of the American Empire 92 (1976).
25. Thomas G. Paterson, American Foreign Policy: A History 70 (1988).
26. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-41 (1800).
27. The Cargo of the Brig Aurora, Burnside v. United States, 11 U.S. (7 Cranch) 382 (1813).
28. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).
29. Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

even before Lincoln's inauguration. The Confederacy had established a government, installed Jefferson Davis as President, assembled an army, and begun seizing federal military facilities. Without convening Congress, Lincoln moved with equal speed. He called up the militia, enlarged the military beyond congressionally set limits, imposed a blockade on the South without a declaration of war, and suspended the writ of federal habeas corpus.[30]

Previous Presidents had claimed an ambiguous emergency power, at which the Framers had hinted, but scarcely described, in the Constitution's text. John Locke, whose works heavily influenced the Framers, had argued that the executive sometimes had to act "according to discretion, for the public good, without the prescription of law, and sometimes against it" during times of emergency.[31] In *Federalist No. 23* Alexander Hamilton noted that the power of the federal government to protect national security "ought to exist without limitation: because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them."[32]

Before the Civil War, several Presidents had taken limited emergency actions. Most notably, Thomas Jefferson had exercised, or laid claim to, emergency power during the Louisiana Purchase, an 1806 British attack on a U.S. ship, and the 1807 Burr Conspiracy.[33] However, in each instance Jefferson turned to Congress for approval of any unilateral actions. Recognizing the need for presidential emergency powers, Congress thereafter passed statutes during the wars of 1812 and 1848 granting special powers, to be exercised at the President's discretion, over economic warfare measures. These powers included prohibiting shipping, blocking trade with the enemy, regulating imported goods, and controlling foreign vessels in U.S. waters.[34]

But no previous U.S. President had gone as far as Lincoln would go in using unilateral emergency power. While some of Lincoln's actions invoked his constitutional powers as commander-in-chief or his duty to execute the laws,[35] others clearly encroached upon Congress's textually enumerated powers to make economic and national security decisions. Acting alone, Lincoln mobilized the national economy and declared a blockade, decisions which arguably fell within

30. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 246, 252 (Don Fehrenbacher ed., 1989).

31. JOHN J. LOCKE, TWO TREATISES OF GOVERNMENT §§ 159-160, at 392-93 (P. Laslett ed., 1970).

32. THE FEDERALIST No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

33. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392-93 (1989).

34. Harold Relyea, *Reconsidering the National Emergencies Act: Its Evolution, Implementation, and Deficiencies, in* THE PRESIDENCY AND NATIONAL SECURITY POLICY 274, 282 (R. Gordon Hoxie ed., 1984).

35. *Id.* at 283–90. The latter clause, however, is a questionable source of presidential power. "[B]y its own terms that phrase more clearly imposed upon the president a duty rather than a license." KOH, *supra* note 1, at 76.

Article I's interstate and foreign commerce clauses. Throughout the war Lincoln ordered the seizure of property, the suppression of newspapers, the emancipation of the slaves (which in addition to its human and political consequences, had far-ranging economic impact), and planned reconstruction.

Lincoln conceded that he had acted outside his constitutional powers, but defended himself by saying that the Constitution would mean little without the nation: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution through the preservation of the nation," Lincoln later said.[36]

Although acting unilaterally, Lincoln went to Congress and the courts for support after the fact. In his July 4, 1861, message to Congress Lincoln defended his emergency actions: "These measures, whether strictly legal or not, were ventured upon, under what appeared to be popular demands and a public necessity; trusting, then, as now, that Congress would readily ratify them."[37] Faced with this fait accompli, Congress enacted the President's measures into law.

The judiciary followed Congress in deferring to the President. In the *Prize Cases,* the Supreme Court upheld Lincoln's order imposing a blockade on the South, even though Congress had never issued the declaration of war necessary for a blockade.[38] The blockade constituted an indispensable economic weapon against the South, which relied on Europe as a market for its raw cotton and as a source of manufactured goods. Moreover, the South hoped these economic ties would bring England into the war on its side.[39] As in the early Republic, U.S. national security depended on international commerce, but this time the executive wanted to strangle trade, not promote it.

In supporting the President's authority to suppress rebellion, the Court deferred to the use of such expansive executive power. The Court found that the President had an inherent, unenumerated power to quell rebellions, and that Congress had ratified his decisions. Moreover, the Justices suggested that the judiciary ought not review this exercise of national security and economic power, even in an area textually granted to Congress. The Court then linked, for the first time, the political question doctrine to economic and national security decisions by the President. The President's means to subdue the insurrection, they said, were "question[s] to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted."[40]

The Civil War gave rise to an enormous enlargement of the executive's power to guide unilaterally economic and national security affairs. However, the Fram-

36. ABRAHAM LINCOLN: SPEECHES AND WRITINGS, *supra* note 30, at 283 (letter from Abraham Lincoln to Albert G. Hodges (April 4, 1864)).

37. *Id.* at 252.

38. Prize Cases, 67 U.S. (2 Black) 635 (1862).

39. PATERSON, *supra* note 25, at 139-40.

40. *Id.* at 670 (emphasis added).

ers' basic design of balanced institutional participation remained intact. Lincoln did not claim unchecked executive power, but turned to Congress for approval of his emergency actions. Although initially deferential, by 1866 the courts began rejecting Lincoln's theory of emergency power. In *Ex parte Milligan,* a habeas corpus case, the Court declared that the Constitution functioned "equally in war and in peace."[41] The Court said: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."[42]

The Lincoln administration's use of emergency powers set an example for later Presidents to follow. Put simply, external events forced political power to flow to the branch best suited structurally for its exercise. Beset by the dire events of the Civil War, Lincoln responded with a series of domestic emergency economic measures. Although consulted afterwards, neither Congress nor the courts challenged the President's action. While later Congresses would attempt to regulate emergency powers, Presidents usually would find themselves unopposed even if they exceeded their statutory mandates. But this exercise of emergency power, still formally domestic, had not yet been directed outward toward foreign governments or entities.

D. FDR, Economic Regulation, and National Security

If the Civil War years fueled a transient surge of presidential emergency authority, the New Deal years marked a more fundamental revolution in presidential power both at home and abroad. The Depression and World War II combined to make FDR not just the United States' leader, but the world's. In the realm of constitutional law, the executive branch claimed and received increasingly broad authority to decide economic and national security issues. Often, Congress and the Supreme Court helped give the President wide authority. However, FDR did not hesitate to act unilaterally when he believed that national security was at stake. His actions triggered sweeping new federal regulation of the domestic economy for national security ends.

FDR considered the Great Depression a powerful threat to the nation's security. In his inaugural address, the new President compared the Depression to a war against the United States that warranted extraordinary countermeasures:

> It is hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.
>
> I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a stricken world may require. . . .

41. *Ex Parte* Milligan, 71 U.S. (4 Wall) 2 (1866).
42. *Id.* at 120-21, 126.

> But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.[43]

Only forty-eight hours after assuming office, the new President put his words into action. On March 6, 1933, FDR issued the second emergency proclamation in U.S. history, unilaterally imposing a national bank holiday and halting all financial transactions.[44] Although he felt he could act unilaterally, FDR found questionable statutory support for such far-reaching economic intervention in the Trading with the Enemy Act of 1917. This act delegated broad economic powers to the President to be used against enemy nationals during wartime or national emergency.[45] Congress soon approved FDR's constitutionally suspect action with the passage of the Emergency Banking Act three days later.[46] This cycle of dubious presidential exercise of emergency power, followed by congressional acquiescence or ratification, set a pattern that would repeat itself to the present day.

FDR generally relied upon broad statutory delegations from Congress to guide economic and national security affairs. In his first "hundred days," Congress passed a torrent of legislation authorizing quick and almost limitless executive action to combat the Depression. FDR also developed effective new ways of exercising these powers by raising himself up in the public eye as a "plebiscitary president" and by creating an expansive presidential bureaucracy capable of acting more quickly and flexibly than the departments.[47]

Initially, however, the Supreme Court challenged these authorizations of presidential regulation of the economy. In two 1935 cases, the Court struck down provisions of the National Industrial Recovery Act as excessive delegations of power to the executive.[48] But FDR's Court-packing threat, followed by changes in Court personnel and FDR's landslide reelection in 1936, led the Supreme Court to reverse itself and approve New Deal economic regulation.[49] By 1944, the Supreme Court had reversed its nondelegation stand, allowing the President to exercise sweeping powers handed over by Congress.[50]

---

43. THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 15 (1938).

44. 48 Stat. 1689 (1933).

45. Regan v. Wald, 468 U.S. 222 (1984) (Blackmun, J., dissenting).

46. Bank Conservation Act, 12 U.S.C. §§ 201 *et seq.* (1988).

47. *See generally* THEODORE LOWI, THE PERSONAL PRESIDENT 99 (1985) (defining "plebiscitary president" as one in which the "lines of responsibility run direct to the White House, where the president is personally responsible and accountable for the performance of government"); JERRY L. MASHAW & RICHARD A. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 156 (2d ed. 1985); KOH, *supra* note 1, at 96-97.

48. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

49. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

50. *See* Yakus v. United States, 321 U.S. 414 (1944).

While the Court resisted delegation of purely domestic economic power, it proved more forgiving when the delegation also involved foreign affairs. The intersection between economic and national security power lay at the heart of *United States v. Curtiss-Wright Export Corp.*, a 1936 decision, which, as much as any other, symbolizes a constitutional vision founded on broad inherent presidential authority.[51] Curtiss-Wright attacked a joint resolution of Congress authorizing the President to stop arms sales to Bolivia and Paraguay as an invalid delegation of congressional power. Justice Sutherland, writing for the Court, upheld the President's action against the nondelegation attack: "[I]f, in the maintenance of our international relations, embarrassment . . . is to be avoided," he wrote, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[52] This language, which can be called the "*Curtiss-Wright* theory of statutory construction," has subsequently fostered unusual judicial deference when courts construe statutes that delegate powers to the President in foreign affairs.

The broader intellectual legacy of *Curtiss-Wright*, however, has been its expansive constitutional theory of inherent presidential powers over foreign affairs. Examining the history of U.S. foreign relations, Justice Sutherland postulated an extra-constitutional theory of sovereignty: "Investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[53] Such powers, he said, "if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality."[54] Because of the complexity of the external world, Sutherland suggested that the executive branch had the unenumerated inherent power, even without congressional authorization, to order U.S. foreign affairs:

> 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.
>
> . . . .
>
> . . . [W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .[55]

With these words, Justice Sutherland articulated a constitutional rationale for the unchecked executive power FDR sought, but rested it upon shaky legal and

51. United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).
52. *Id.* at 320.
53. *Id.* at 318.
54. *Id.*
55. *Id.* at 319-20 (citation omitted).

historical grounds. As historians have noted, Sutherland's historical analysis was deeply flawed. Meanwhile, legal scholars have emphasized that his constitutional reasoning constituted unnecessary dicta and without explanation awarded *federal* foreign affairs powers solely to the President, while repudiating the core constitutional notion that presidential powers are not inherent, but derive solely from the consent of the governed.[56] However, by its own terms, Justice Sutherland's opinion contained important, but often overlooked, words of limitation. By emphasizing the President's power "to speak and listen," Sutherland arguably defended only the long-recognized executive control over diplomatic communications, not a broader power to conclude international agreements or commit troops. Furthermore, *Curtiss-Wright* expressly acknowledged that the President's power "must be exercised in subordination to the applicable provisions of the Constitution," including both substantive and procedural limitations set by the Constitution, as well as the Bill of Rights.[57] Nonetheless, *Curtiss-Wright* has become the rhetorical touchstone for subsequent presidential claims of a plenary, exclusive, foreign affairs power that exists independent of the Constitution and of statutory authorization.[58]

A year later Justice Sutherland extended this inherent presidential power to include certain international agreements, giving the executive a boost in ordering the domestic economy for national security purposes. In *United States v. Belmont,*[59] the Court sanctioned the constitutionality of executive agreements, which did not require approval of two-thirds of the Senate, when implemented pursuant to recognition of a foreign government. Reacting to an executive agreement known as the "Litvinov Assignment," FDR had extended diplomatic relations to the Soviet Union in exchange for certain Soviet assets in the United States.[60] Again writing for the Court, Justice Sutherland upheld the executive agreement and the executive branch's seizure of the assets against a federalism challenge. Five years later the Court reaffirmed its finding in *United States v. Pink,* holding that the power to make such international agreements incident to

56. *See generally* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory,* 55 YALE L.J. 467, 472–78 (1946); Charles A. Lofgren, United States v. Curtiss-Wright Corporation: *An Historical Reassessment,* 83 YALE L.J. 1 (1973); KOH, *supra* note 1, at 93–95.

57. *Curtiss-Wright,* 299 U.S. at 320. By *substantive* constitutional limits, we mean that *Curtiss-Wright* did not give the President, as "sole organ," the power to declare war or regulate foreign commerce, substantive powers that the Constitution expressly granted to Congress. By *procedural* constitutional limits, we mean that *Curtiss-Wright* similarly did not authorize the President to make treaties or appoint ambassadors without the constitutionally requisite senatorial consent. Nor did that case authorize him, in the exercise of his foreign affairs authority, to override First Amendment or Due Process rights.

58. *See* KOH, *supra* note 1, at 94 (among government attorneys, Justice Sutherland's lavish description of the President's powers is so often quoted that it has come to be known as the "*Curtiss-Wright,* so I'm right" cite—a statement of deference to the President so sweeping as to be worthy of frequent citation in any government foreign-affairs brief).

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

60. *Id.* at 326-27.

recognition of a foreign government was a "modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.' "[61]

Significantly, the central issue in both *Belmont* and *Pink* was the vertical supremacy of such executive agreements over state law, not the horizontal supremacy of the President over Congress in the making of international agreements. But in the years leading up to World War II, that distinction blurred as FDR used both his judicially approved and congressionally delegated powers in economic and national security areas. Supported by a legal opinion from then-Attorney General Robert Jackson,[62] FDR employed a sole executive agreement to seal the destroyer-for-bases deal that shored up Britain's naval defenses, and ordered U.S. naval ships to convoy merchantmen bound for Great Britain, all without congressional assent. Although Congress had tried to keep the United States out of war by passing a series of neutrality acts from 1935-1937, FDR won broad legislative authorization in the Lend-Lease Act to "sell, transfer title to, exchange, lease lend, or otherwise dispose of" military equipment to "any country whose defense the President deems vital to the defense of the United States."[63]

As war neared, FDR depended on his delegated powers to wage economic warfare. After declaring a state of limited emergency when war broke out in 1939, Roosevelt issued a proclamation of unlimited national emergency by May 1941, thereby gaining access to an arsenal of delegated powers to conduct economic warfare.[64] He sent troops via executive agreement to Iceland and Greenland.[65] Roosevelt initiated a series of economic warfare measures against Japan, imposing embargoes on aviation fuel, scrap, and high-grade steel, freezing all Japanese assets in the United States, and embargoing the sale of oil to the Japanese war machine.[66]

World War II thrust the United States into a position of global hegemony, with its dominance in world affairs corresponding to a similar dominance by the executive branch within the constitutional order. The Depression forced the constitutional system to expand the federal government's economic authority. Congress proceeded to delegate this authority largely to the President. This flow of power spawned greater presidential use of economic measures not only to

61. United States v. Pink, 315 U.S. 203, 229 (1942) (quoting *Curtiss-Wright*).

62. 39 Op. Att'y Gen. 484 (1940).

63. Act of March 11, 1941, c.11, 55 Stat. 31 (1941).

64. Pres. Procl. No. 2487, May 27, 1941, 6 Fed. Reg. 2617 (declaration of unlimited national emergency); Pres. Procl. No. 2488, May 28, 1941, 6 Fed. Reg. 2461 (restriction of exports of weapons and strategic materials).

65. Exec. Agrmt. 1941-29-22, July 1, 1941 (Iceland Defense).

66. *See, e.g.*, Exec. Order No. 8832, 3 C.F.R. 969 (1938-1943) (imposing restrictions on Japanese foreign exchange transactions); Exec. Order No. 8889, 3 C.F.R. 1002 (1938-1943) (expanding controls on petroleum and strategic materials exports); Exec. Order No. 8712, 3 C.F.R. 910 (1938-1943) (same).

rescue the economy, but also to pursue a range of national security goals. Hence, the New Deal years simultaneously centralized executive power over both economic and national security affairs, offering the President the option of employing those powers as interchangeable or complementary policy instruments.

In sum, the administrations of Jefferson, Lincoln, and FDR forged and progressively strengthened the link between economics and national security. The three Presidents increasingly relied upon economic measures, in lieu of and supplemental to diplomatic and military measures, to safeguard the nation's security. Jefferson employed trade embargoes to maintain U.S. independence from the European great powers. Lincoln invoked emergency presidential powers to preserve the Union from the threat of rebellion. FDR implemented domestic regulation, both to restore the health of the economy, and to pursue U.S. national security policies.

These administrations laid three important foundations for current economic-national security statutory regimes. First, modern Presidents now count trade controls and embargoes, emergency economic powers, and domestic regulation as their most effective economic weapons in implementing national security policies. These three charismatic Presidents established patterns of presidential initiative in national security policy, and through broad congressional delegations of authority, implemented that policy through differing economic tools. Second, acquiescing to presidential leadership, Congress wrote laws that imposed relatively few conditions upon executive exercise of statutory powers. Third, the courts regularly tolerated expansive congressional delegations and presidential initiative, although they did not shy away from deciding such cases on the merits. This emerging systemic pattern of executive initiative, congressional acquiescence, and judicial tolerance increasingly characterized all phases of our national security policy.[67] This trend would crystallize during the postwar period into a growing tug-of-war between the constitutional vision of balanced institutional participation and the perceived need for unrestrained executive power.

II. The Cold War and the National Security State

The Cold War dramatically heightened U.S. concern for national security. Threats of Communist aggression and international instability spurred demand for centralized economic and national security controls. Policymakers sought to implement economic measures they could bring to bear in a coordinated and swift fashion upon national security crises. While the New Deal experience led to a rapid consolidation of power in the executive branch, the Cold War provided an ongoing external threat that accelerated the trend. Meanwhile, this ever-present threat forced policymakers to develop, for the first time, comprehensive statutory schemes for implementing economic and national security policy.

67. *See generally* KOH, *supra* note 1, at 5, 117-49.

This part of the article examines the evolution of the current structure of economics and national security policymaking, starting with the early Cold War years, which saw the reaffirmation of balanced institutional participation as the constitutional model for promulgating economic policy. Just as the early Cold War laid the foundations for the national security state, so too it established the modern relationship between economics and national security. The following discussion traces how all three branches, spurred by the Cold War, structured a system of presidential leadership in economic and national security decision making that elevated economic goals into an integral component of national security policy. At the same time, the Cold War fostered a rapid expansion in presidential power, forcing the Supreme Court to intervene and reinforce the constitutional vision of shared powers.

A. Economics, National Security, and *Youngstown*

World War II left U.S. leaders convinced of the interdependence between economics and national security matters. Just as Munich had taught the value of abandoning appeasement, so too the onset of war emphasized how economic stability, brought about through national economic controls, could have maintained peace. First and foremost, U.S. leaders linked the worldwide depression and ensuing economic instability of the 1930s to the rise of fascism. Thus, shoring up the economies of Western Europe and Japan and establishing a stable international economic system assumed top priority for the Truman administration.

President Truman realized that alliance politics rendered U.S. national security dependent upon the economic health of its allies. "Which is better for the country," Truman asked during consideration of the Marshall Plan, "to spend twenty or thirty billion dollars to keep the peace or to do as we did in 1920 and then have to spend 100 billion dollars for four years to fight a war?"[68] Accordingly, FDR and Truman committed themselves to jumpstarting Allied economies with the Marshall Plan and laid the multilateral foundations of the postwar economic order through the Bretton Woods Accords.

World War II also left policymakers convinced that national security required close control over the domestic economy and its links to the international economic system. Wartime mobilization had shown how management of the economy could sustain the military establishment necessary to fight a prolonged war with the Soviets. At the same time, congressmen noted that U.S. steel, in the form of Japanese bombs, had destroyed Pearl Harbor, thus revealing that exports could both aid enemy governments and drain the United States of scarce military resources.

68. John L. Gaddis, Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy 62 (1982) (quoting President Truman).

These perceptions formed the intellectual underpinnings of the current U.S. approach to economics and national security policy. In international relations, the United States has sought to provide a stable economic order to promote healthy economies for its allies. In domestic affairs, the federal government has extended wartime controls over the economy and over exports. U.S. Presidents have pursued these plans with the aim of buttressing the West in its efforts to contain the Soviet threat. Not coincidentally, ensuring economic health abroad and effective economic regulation at home also effected new power shifts in favor of the executive branch at the expense of Congress and the courts, severely straining our constitutional framework.

In 1950, North Korean troops suddenly poured across the border into South Korea. President Truman, relying on his inherent powers as President and as commander-in-chief, quickly ordered troops into combat and declared a national emergency. In 1952, to prevent stoppage of steel production by a labor strike, he ordered his secretary of commerce to seize the steel mills.[69] Invading a field of domestic and foreign commerce constitutionally assigned to Congress, Truman claimed "very great inherent powers" over the domestic economy for national security purposes. "I feel sure," he said, "that the Constitution does not require me to endanger our national safety by letting all the steel mills shut down."[70]

Truman's constitutionally questionable use of executive power over the domestic economy in support of national security ends prompted a judicial reaction of enduring import. The Supreme Court rejected Truman's broad theory of presidential power only eight weeks later in *Youngstown Sheet & Tube Co. v. Sawyer.* A six-to-three majority struck down the seizure as an unconstitutional usurpation of legislative authority.[71] The famous concurring opinion of Justice Jackson, whose earlier opinion as attorney general supporting the destroyer-for-bases deal had helped spur the recent expansion of presidential foreign affairs authority, reaffirmed the Constitution's underlying principle of balanced institutional participation in both national security and economic policy. "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," he wrote, going on to outline a now-familiar three-part framework:

1. 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 . . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

69. Exec. Order No. 10,340, 3 C.F.R. 861 (1949-1953).

70. *See* ARTHUR M. SCHLESINGER, THE IMPERIAL PRESIDENCY 142 (1989) (quoting President Truman).

71. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

3. 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.[72]

Justice Jackson's opinion, since elevated by the Court into numerous majority opinions, forcefully restored the balance among the branches in making national security policy.[73] Jackson recognized that Presidents could exercise certain plenary powers in both domestic and foreign affairs, such as the power to recognize foreign governments. But outside of those narrow constitutional grants, the President was obliged to recognize Congress's important role in setting national objectives. In those areas the President could find safe constitutional ground only when acting pursuant to congressional authorization.[74] Without legislative approval the President sailed into dangerous waters: If Congress had not specifically authorized the action, the question became whether the President had acted in an area of concurrent executive-legislative power. In such circumstances constitutional text as well as executive and congressional practice, quasi-constitutional custom,[75] could authorize or prevent presidential initiatives. But if Congress specifically opposed the executive's decision, pushing the case into the third of Jackson's categories, then the President had to cease his activities or seek legislative approval.

Youngstown suggested that in all cases involving the economy, the President would have to seek congressional approval for his actions. Jackson acknowledged the President's broad power to protect the nation from "the outside world." However, when national security policy involved the economy, Jackson suggested that claim of inherent presidential power must give way to Congress's plenary textual power over domestic and foreign commerce. "But, when [the power] is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, . . . [the executive] should have no such indulgence" from the Court.[76] In *Youngstown* the Court found that Congress had rejected a clause in the Labor Management Relations Act of 1947 granting the emergency power Truman claimed, thereby demoting Truman's

72. *Id.* at 635–37.

73. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area"); Mistretta v. United States, 488 U.S. 361 (1989) ("Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir"). For a detailed analysis of Jackson's reasoning, from which the following discussion derives, *see* KOH, *supra* note 1, at 107–12.

74. Thus, Jackson read *Curtiss-Wright* not as a constitutional decision, raising the broad "question of the President's power to act without congressional authorization," but as a case that fell into the first of his three categories, involving "his right to act under and in accord with an Act of Congress." *Youngstown*, 343 U.S. at 635-36 n.2.

75. *See* KOH, *supra* note 1, at 70 (defining "quasi-constitutional custom" as "a set of institutional norms generated by the historical interaction of two or more federal branches with one another . . . [that] represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters").

76. *Youngstown*, 343 U.S. at 645.

action into Jackson's third category. Thus, when national security policies involved the economy, Congress's express powers over commerce and the economy preserved its preeminent decision-making role.

Often overlooked is that *Youngstown* not only rejected claims of inherent presidential authority, but also reaffirmed judicial participation in resolving contested economic and national security questions. None of the Justices claimed that presidential actions in a state of emergency created political, nonjusticiable questions. Rather than abstain in such circumstances, Jackson warned, courts had the duty to "scrutiniz[e] [claims of presidential power] with caution, for what is at stake is the equilibrium established by our constitutional system."[77] *Youngstown* shows the Court not only refusing to treat domestic and foreign affairs cases differently, but also refusing to defer to presidential claims of executive, commander-in-chief, or inherent emergency power.[78] Finally, *Youngstown* shows the importance of public accountability in national security policy. By forcing Presidents to act in the open via the constitutional process, *Youngstown* allowed public opinion to be the ultimate judge of the wisdom of presidential policies.[79]

B. Presidential Dominance in National Security

Although *Youngstown* reaffirmed the constitutional vision of balanced institutional participation in economics and national security policy, developments within each branch have promoted a policy trend toward growing presidential dominance.[80] First, the executive has seized the initiative in policy making, primarily because it is the best structured to operate in a unified, swift, and secret manner. Power assigned to Congress, which is often too disorganized for its effective use, will naturally flow "through the inactions, acquiescences, and delegations of that body" to the executive, which can act vigorously and comprehensively.[81] As the world has become increasingly multipolar and U.S. hegemony has declined, complex and sudden world events have multiplied the occasions demanding quick responses from the executive branch.

77. *Id.* at 637.

78. Although some commentators have tried to treat *Curtiss-Wright* as a foreign affairs case and *Youngstown* as a domestic labor dispute, such a formalistic distinction proves untenable. Truman's domestic steel seizure was undeniably driven by perceived foreign affairs imperatives, and *Curtiss-Wright* could just as easily have been characterized as government regulation of a domestic arms sale. In any event, in Dames & Moore v. Regan, 453 U.S. 654 (1981), the entire Court applied Jackson's *Youngstown* reasoning to judge a quintessential foreign-affairs issue, the legality of the Iranian hostage accords.

79. *See Youngstown*, 343 U.S. at 653 (when the president acts under delegated authority, in Jackson category one, the "public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties").

80. *See* KOH, *supra* note 1, at 117–49.

81. Charles L. Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17, 20 (1980).

Second, Congress generally has acquiesced in the President's actions even though it can, when sufficiently energized and organized, act powerfully in national security affairs. Interest group pressure forces Congress to focus on pork-barrel concerns, instead of larger separation of powers issues, when considering economics and national security subjects such as international trade and military spending. When Congress does focus on larger issues, it often fails to muster the political fortitude to challenge the President. Not only are individual members motivated by credit-claiming and blame-avoiding motives, Congress as a whole suffers serious collective action problems. Only rarely can congressional opponents muster the necessary two-thirds majority in each house to override a presidential veto on national security issues, leaving the president largely free to set policy so long as he can retain the loyalty of thirty-four senators.[82] Hence, while Congress is often highly active, it tends to act aimlessly, ineffectually, or pursuant to constituent interests, which can easily be trumped by presidential invocation of national security concerns.

Even when Congress does legislate to check presidential discretion, it all too often leaves statutory loopholes that the president exploits to unlock sweeping delegated powers. Post-Vietnam era statutes sought to place a number of controls on presidential discretion, including requirements of fact findings and public declarations, committee oversight, legislative vetoes, and reporting and consultation with Congress.[83] However, these obstacles have proven to be of surprising little weight, allowing Presidents to evade them either by exploiting their definitional limits, procedures, and substantive terms, or by challenging their constitutionality in court.[84] Sunset review of legislation often provides the only occasion for congressional negotiation with the President.

Third and most forgotten, this is a tale of three branches, not two. *Youngstown* notwithstanding, in the post-Vietnam years the federal judiciary has steadily deferred to, if not expressly affirmed, executive claims of national security power. In a series of cases during the 1980s the Supreme Court rearranged Jackson's three-part scheme to permit presidential action in the face of congressional silence.[85] The Burger and Rehnquist Court's statutory interpretation techniques have eliminated the various limitations in congressional delegations, thereby granting the President unrestrained access to broad delegated powers over the economy and national security. Meanwhile, courts have increasingly

82. It is a crippled president indeed who cannot command so few Senators. In the wake of the Iran-Contra Affair, a weakened lame-duck President Reagan still secured forty-two votes for the nomination of Robert Bork to the Supreme Court, which was widely viewed as a major presidential defeat. *See* 133 CONG. REC. S15,011 (daily ed. Oct. 23, 1987).

83. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1911, 1227 (1986).

84. *See generally* KOH, *supra* note 1, at 128–31. *See also infra* parts III.B. & D. (discussing IEEPA and trade statutes).

85. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); Haig v. Agee, 453 U.S. 280 (1981); Regan v. Wald, 468 U.S. 222 (1984) (*discussed infra* part III.B.).

resorted to other judicially created doctrines, such as standing, mootness, ripeness, and the political question doctrine, to find national security cases nonjusticiable and beyond judicial competence.

Most notably, in its 1983 decision in *I.N.S. v. Chadha* the Supreme Court invalidated the legislative veto, Congress's most effective tool for reining in presidential discretion. *Chadha* left delegated power granted by dozens of statutes unchecked except through formal legislation.[86] A number of recent cases have also defended the President's ability to act to secure national security, sometimes in the face of statutory language to the contrary.[87] Taken together, these cases have sharply limited the role of courts as arbiter of the national policy making process and endorsed, rather than countered, a decision-making system increasingly characterized by presidential activism and congressional acquiescence.

III. Legal Regimes of Economic and National Security

The foregoing analysis illuminates both the structure and the evolution of the modern U.S. statutory scheme governing economics and national security. In a spectrum of activity spanning regulation of the domestic economy, emergency economic powers, export and trade policy, and wholly foreign trade, the Constitution assigns Congress primary authority, but a combination of executive initiative, congressional acquiescence, and judicial tolerance have gradually transferred de facto authority to the President. As a result, the President now has at his disposal a wide range of economic tools to use in protecting national security. At the same time, Congress and the courts have retained some role in many of these areas, suggesting the continuing vitality of the *Youngstown* vision of balanced institutional participation.

Yet these areas of economic and national security law have changed and developed over time. Although Jefferson, Lincoln, and FDR exercised many of the same powers under examination here, they did so pursuant to terse statutes granting broad powers with few conditions. Current law similarly delegates sweeping authority to the President, but clothes those statutory grants with numerous conditions and specified goals. These additions not only reflect congressional preference for use of delegated power, but also reflect a vital difference from pre-World War II statutes. Where pre-1945 statutes usually granted temporary power tailored for specific emergencies, today's laws set up comprehensive schemes designed to

86. I.N.S. v. Chadha, 462 U.S. 919 (1983). This formalistic result was confirmed in Bowsher v. Synar, 478 U.S. 714 (1986), but has been ameliorated by the Court's more recent rulings in Morrison v. Olson, 487 U.S. 654 (1988), and Mistretta v. United States, 488 U.S. 361 (1989). *See* KOH, *supra* note 1, at 143-44.

87. *See* Japan Whaling Assoc. v. American Cetacean Soc'y, 478 U.S. 221 (1986) (upholding executive agreement with Japan that allowed whaling as within commerce secretary's statutory discretion); Dep't of Navy v. Egan, 108 S. Ct. 818 (1988) (presidential control of national security information inherent in commander-in-chief power).

coordinate ongoing economic and national security power, reflecting the perception of an ongoing external threat created by the Cold War.

A. Domestic Economic Regulation

Domestic economic regulation can have a substantial impact on national security. Poor economic performance itself may cause national security problems by reducing defense budgets or producing political instability. Domestic economic setbacks also may reduce production of goods necessary for national defense. Moreover, as national security policy creates foreign economic implications, the President acquires increasing regulatory authority. This part of the article explores two methods that allow government regulation of the economy for national security purposes: first, through the national budget, and second, through the Defense Production Act. These two sources of law, one constitutional, the other statutory, also mark the endpoints of the spectrum of national security decision making, characterized at one end by balanced institutional participation and at the other end by relatively unchecked executive discretion.

1. *National Security and the Budget*

For national security purposes a President's most effective economic tool is often the budget. Unlike other national security areas, the budget principally involves domestic issues. This encourages vigorous institutional participation from all three branches, rather than deference to the executive. While the budget funds defense expenditures, it also serves as a vehicle for congressional intervention into national security policy. However, congressional goals often conflict with broader presidential strategies. Meanwhile, the courts have felt themselves competent to adjudicate budget disputes. Thus, the budget process has produced an open struggle over economics and national security policy among the three branches, all of which have significant constitutional powers at stake.

Democratic postwar administrations have used the budget for Keynesian growth policies on the assumption that a booming economy would pay for expansive national security commitments. Presidents Truman, Kennedy and Johnson linked an expansive policy of containment, a "symmetric response" strategy that sought to meet communist attacks everywhere, with a fiscally liberal budget policy. They believed that a large Cold War military establishment could be funded without sacrificing the U.S. standard of living by using Keynesian techniques to push the economy toward full employment. The seminal planning document that set out the containment policy, NSC-68, declared: "the American economy, when it operates at a level approaching full efficiency, can provide enormous resources for purposes other than civilian consumption while simultaneously providing a higher standard of living."[88]

88. NSC-68, April 14, 1950, *in* 1 Foreign Relations of the United States: 1950, at 243-44, *quoted in* Gaddis, *supra* note 68, at 93.

Thus, those administrations saw not only defense budgets, but also overall federal spending as crucial for national security. In contrast, Republican Presidents Eisenhower and Nixon adopted a more restrained policy of containment, an "asymmetric" response strategy that disavowed meeting the Soviet threat everywhere. Instead, these Presidents sought to strengthen vital areas of U.S. interest by linking containment to fiscally conservative budgetary policies. Their perception of fixed domestic economic means led their administrations to adopt more limited national security policies.[89] Moreover, their party's failure to control Congress undermined their ability to devise a coherent policy that fully integrated budgetary and national security policy.

Congress's appropriations power provides the Legislature with perhaps its most effective instrument for controlling executive discretion. Congress can use its exclusive power of the purse to determine defense budgets, cut off foreign aid, or block expenditure of funds for presidential national security goals, such as funding the Nicaraguan contras. However, in former Senate Armed Services Committee Chairman Barry Goldwater's words, the budget process "distorts the nature of congressional oversight."[90] Members tend to focus on constituency-related items, such as defense spending in their districts, or procurement scandals that have public appeal. As a result, the appropriations process leads Congress to concentrate on the structure of national security, how the armed services are financed, supplied, etc., rather than questioning the President's national security strategy.

Myopia is the least of Congress's afflictions in the budget arena. In customary practice and in Supreme Court decisions the executive and the judiciary have circumscribed congressional appropriation decisions. Statutes have granted the President "drawdown" authority, allowing him to withdraw appropriated funds if he deems it vital to the national security. Additional statutes have granted him access to special contingency funds for national security purposes, while still other laws grant him transfer or reprogramming authority to shift funds within appropriation accounts. These tools give the President the freedom to withdraw or spend new funds in support of his national security agenda. President Reagan showed the extent of this freedom when he used his drawdown and reprogramming authority to continue military aid in Central America over Congress's opposition.[91]

While Presidents have expanded their power through budgetary loopholes, the judiciary has limited Congress's power of the purse. In two cases the Supreme Court has struck down appropriations that have infringed on the plenary powers of other branches or have violated constitutional rights. In *United States v. Klein*

89. GADDIS, *supra* note 68, at 354-55.

90. PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, AN INTERIM REPORT TO THE PRESIDENT 5 (1986), *quoted in* AMOS A. JORDAN, ET AL., AMERICAN NATIONAL SECURITY 113 (3d ed. 1989).

91. KOH, *supra* note 1, at 131.

the Court held that Congress could not use appropriations to block presidential use of his plenary pardon power.[92] In *United States v. Lovett* the Court invalidated spending legislation that sought to affect a bill of attainder in violation of article I, section 9.[93] Some courts have suggested that Congress also cannot use appropriations to prevent the President from exercising his plenary, enumerated foreign affairs powers. In a now-vacated opinion one district court has even held that spending bills cannot preclude executive use of its unenumerated foreign affairs powers.[94]

Nevertheless, the budgetary story remains one of balanced institutional participation. All three branches play an active role in funding the government's operations. The executive proposes a budget and executes spending laws. Congress appropriates money, often with strings attached, that enacts its own national security desires. Finally, the Supreme Court ensures that the spending laws do not violate separation of powers or constitutional rights.[95] In that sense all three branches play an active role in setting a spending policy that directly affects national security.[96]

2. *The Defense Production Act of 1950*

The Defense Production Act (DPA)[97] tells a dramatically different story, one of almost unlimited executive power. The DPA, passed during the onset of the Korean War as an ostensibly temporary measure for mobilizing the economy, represents a vast source of national security power for presidential control over the economy. As the Cold War deepened, America's constant wartime footing required congressional extension of the DPA until the present day. As a result, Congress has kept in place a wartime statute granting the president "a sweeping delegation of power" to mobilize the economy.[98]

The DPA's chief focus is on industrial production and capacity. The statutory language, virtually unchanged since 1950, directs the President to mobilize industrial production for defense needs and to "assure domestic energy supplies" so as "to insure the national defense preparedness which is essential to national security."[99] Congress also declared that the President should seek to expand "productive capacity and supply beyond the levels needed to meet the civilian demand," so as to "reduce the time required for full mobilization."[100]

92. United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
93. United States v. Lovett, 328 U.S. 303 (1946).
94. Federal Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded sub nom.* American Foreign Serv. Ass'n v. Garfinkel, 109 S. Ct. 1693 (1989) (per curiam).
95. *See also* Bowsher v. Synar, 478 U.S. 714 (1986).
96. For further elaboration, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).
97. 50 U.S.C. app. §§ 2061 *et seq.* (1988).
98. Note, *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350 (1951).
99. 50 U.S.C. app. § 2062 (1990).
100. *Id.*

In order to establish "a broad and divers[e] mobilization base" that will keep up with changes in "technology and strategy," Congress decided to grant the President sweeping economic powers to make the economy's most basic purchasing and investment decisions.[101] A 1980 Senate report said: "The [DPA] is the sole statutory vehicle for insuring that the Nation's industrial base is kept in a state of readiness in peacetime."[102]

The DPA grants the President a number of powers to use in mobilizing the economy. First, the President can order industry to give priority to contracts "which he deems necessary or appropriate to promote the national defense" over civilian contracts.[103] Second, the President can "allocate materials and facilities in such manner, upon such conditions, and to such extent" as he thinks necessary for national security.[104] Third, the DPA authorizes the President to guarantee loans both to government contractors and to private businesses for the expansion of capacity, research and development, and exploration.[105]

Beyond these central powers, the DPA grants the President other authority with significant economic and national security implications. The DPA forbids individuals or corporations from hoarding materials designated by the president as scarce.[106] The DPA allows the President to exempt from antitrust suit cooperative industry agreements and programs to meet government production requirements.[107] Finally, the DPA permits the President to implement a purchase program for minerals, metals, and other materials, and to encourage natural resources exploration.[108]

Recent amendments have extended the President's DPA powers to reach foreign economic actors as well. In 1988 Congress extended the President's DPA powers to cover domestic financial transactions involving foreign buyers by passing the now-famous Exon-Florio provision. Exon-Florio gives the President the power to investigate and to "suspend or prohibit" on national security grounds any foreign merger with, or acquisition of, a U.S. entity. To date the President has exercised that power only once, preventing the acquisition of a Washington-based aircraft parts manufacturer by a Chinese-controlled corporation.[109] Although the Defense Production Act is still awaiting reauthorization

101. S. REP. No. 2237, 84th Cong., 2d Sess. 2 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2930, 2931; *see also* S. REP. No. 408, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1746, 1750.

102. S. REP. No. 96-166, 96th Cong., 2d Sess. (1979), *reprinted in* 1980 U.S.C.C.A.N. 1743, 1744 1744.

103. 50 U.S.C. app. § 2071 (1990).

104. *Id.*

105. 50 U.S.C. app. §§ 2091-2092 (1990).

106. 50 U.S.C. app. § 2072 (1990).

107. 50 U.S.C. app. § 2158 (1990).

108. 50 U.S.C. app. § 2093 (1990).

109. Andrew Rosenthal, *Bush Urged to Void Sale of Airplane-Parts Maker to Chinese*, N.Y. TIMES, Feb. 2, 1990, at A9.

after lapsing in 1990, President Bush signed legislation in August 1991 permanently enacting the DPA's Exon-Florio provisions.[110]

With these statutory authorizations in hand, the President can wield enormous power over the economy to satisfy national security requirements. He can force companies to stop civilian production altogether and divert their energies toward government contracts. He can order industry to manufacture goods they would otherwise not choose to produce, such as when President Johnson ordered chemical companies to produce Agent Orange. Under the DPA the President can determine which industries would receive crucial raw materials and components and how to organize each sector of the economy. Used to the hilt, DPA powers could theoretically place the President in the position of single-handedly making the economy's major market decisions.

Significantly, Congress placed few controls on the DPA's most sweeping provisions. The DPA does not require a declaration of war or a state of emergency before releasing to the President authority to give federal contracts priority or to allocate industrial resources. Nor did Congress obligate the President to consult or report on the use of these powers.[111] While Congress did include an unusual legislative veto provision that would have allowed both houses by concurrent resolution to terminate entirely the DPA, *Chadha* rendered that device meaningless. As a result, the only congressional constraint on the President's discretion has been a primitive sunset provision that has required the DPA's renewal every two or three years. The perils of that course revealed themselves during the Persian Gulf War, when Congress allowed the DPA to expire, forcing President Bush to cobble together a patchwork of statutory authorities to replace critical DPA powers.[112]

The federal judiciary has also failed to place checks on the President's DPA authority. In the few cases challenging executive action under the DPA the courts have ignored claims of unconstitutionality and instead upheld the President's use of the DPA to order the economy. In a case arising out of the Korean War, the Supreme Court turned away an aircraft manufacturer's challenge to price and wage controls promulgated pursuant to the DPA.[113] Refusing to entertain claims that the DPA violated the nondelegation doctrine, the unanimous Court required the appellants to exhaust all administrative procedures. In the late days of the Vietnam War, Eastern Air Lines brought suit against an aircraft manufacturer for

110. Defense Production Act Extension and Amendments of 1991, 105 Stat. 487, 102d Cong., 1st Sess. (1991).

111. However, some of the less central provisions of the DPA do require the president to make certain findings of national security need or scarcity and direct him to report to Congress after he has acted.

112. Exec. Order No. 12742, 56 Fed. Reg. 1079 (1991); *see U.S. Is Left Without Law to Cover Oil Emergencies,* N.Y. TIMES, Dec. 17, 1990, at D1.

113. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 553 (1954). *Allen* involved DPA powers, since eliminated at President Truman's request, to impose wage and price controls.

failing to deliver airplanes on time.[114] The Fifth Circuit found the defendant not liable for nonperformance of the contract because the Johnson administration, pursuant to the DPA, had informally ordered the aircraft manufacturer to give military orders priority.[115] The judiciary has yet to rule against presidential use of DPA authority.

Hence, the regulation of the economy for national security reasons proceeds under two markedly different regimes. Under the budgetary process, a system of balanced institutional participation sets economic and national security priorities. Congressional appropriations exert significant influence over the domestic economy, and, because of the growing relationship between economic strength and national defense, over national security as well. In contrast, under the DPA Congress has granted the President sweeping unilateral powers to mobilize the economy in peacetime. As with other laws involving economics and national security, Congress has failed to place significant checks on executive use of its delegated power. However, the President has seldom used his DPA powers, suggesting that Congress's strong interest in domestic economic regulation acts as an important political restraint upon his executive discretion.

B. Emergency Powers

Presidential emergency powers derive primarily from statute. Even though Presidents from Lincoln to Truman sometimes claimed an inherent executive emergency power, they continued to seek subsequent congressional approval for their actions. Moreover, in *Youngstown,* the one case in which the President claimed inherent constitutional emergency power in the face of congressional opposition, the Supreme Court resoundingly invalidated the executive action. Although the executive branch continues to claim such power, [116] it has not needed to rely on it due to generous congressional delegation of authority. Although Congress has tried to limit presidential emergency powers, Presidents have succeeded in maintaining wide discretion when it comes to declaring an emergency and applying emergency powers.

Two statutes, the International Emergency Economic Powers Act of 1977 (IEEPA) and the Trading with the Enemy Act of 1917 (TWEA), provide the President with broad powers to regulate the economy for national security purposes.[117] TWEA gave the executive the authority to freeze and seize assets and to block or regulate all international transactions, simply by declaring a national

114. Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976).

115. However, in a third case, *In re* Agent Orange Product Liability Litigation, 597 F. Supp. 740, 844 (E.D.N.Y. 1984), a district court held that the DPA only immunized defense contractors from breach of contract damages.

116. Witness, for example, some of the remarkable assertions of executive power made during the Iran-contra affair. *See* Koh, *supra* note 1, at 113–16.

117. Trading with the Enemy Act of 1917, 40 Stat. 415 (1917), (codified as amended at 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1989)) (hereinafter TWEA).

emergency (or war).[118] This simple requirement made TWEA one of the most potent economic and national security options available. As noted above, FDR used TWEA to effect a banking holiday, while Truman used TWEA during the Korean war to seize property and commodities.

In a far-reaching regulation of economics and national security, President Nixon resorted to TWEA in 1971 to implement his New Economic Policy. In issuing his order Nixon explicitly linked international economic affairs with U.S. national security, stating that: "[T]here has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired."[119]

To stop the loss in monetary reserves and declining trade balance, Nixon declared a national emergency, suspended the dollar's convertibility into gold, and imposed a 10 percent surcharge on most imports. In 1975, the Customs Court upheld the President's TWEA imposition of the import surcharge in *United States v. Yoshida International.*[120] Describing the TWEA's delegation of power as "broad and extensive," Judge Markey wrote: "[I]t could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by Congress."[121]

In the wake of Watergate and Vietnam Congress moved in the mid-1970s to control executive abuse of the TWEA. It sought to reform emergency powers by enacting statutes whose framework would define the branches' powers and establish elaborate procedures for initiating and continuing emergency powers. First, Congress passed the National Emergencies Act (NEA),[122] which required public declaration of national emergencies and subsequent presidential reporting. The NEA also allowed congressional termination of an emergency by concurrent resolution (another now-unconstitutional legislative veto). Second, Congress passed the IEEPA, which limited TWEA to wartime. However, the IEEPA did delegate emergency powers in peacetime upon a presidential finding of an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States."[123]

Congress placed further checks on presidential discretion to use emergency powers. The IEEPA conditioned exercise of its authority upon prior congressional consultation and subsequent congressional review, while the NEA pro-

118. *Id.*

119. Proclamation No. 4074, 85 Stat. 926 (1971). For a detailed discussion of Nixon's international economic policies, see DAVID P. CALLEO, THE IMPERIOUS ECONOMY 62–102 (1982).

120. United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

121. *Id.* at 573.

122. 50 U.S.C. §§ 1601, 1621-1622 (1989).

123. 50 U.S.C. § 1701 (Supp. V 1989).

vided for the termination of emergencies by legislative veto. Once the President satisfied these conditions, the IEEPA granted him powers almost as broad as those contained in the TWEA. Pursuant to the IEEPA, the President could prohibit any transactions using foreign exchange and "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" the transportation, export, import, or other transaction involving property owned by foreign governments or nationals.[124] Not only do the President's IEEPA orders reign supreme throughout the land, they also apply to any person "subject to the jurisdiction of the United States,"[125] a phrase that potentially encompasses U.S. citizens, corporations, and U.S.-owned property overseas.

In the past fifteen years Presidents have regularly sidestepped congressional restrictions, gaining access to IEEPA's broad grants of authority with almost no congressional opposition. They have declared national emergencies with little regard to whether a real emergency has actually existed.[126] President Reagan even used the IEEPA to continue policies Congress failed to approve. In 1983, 1984, and again in 1990, Presidents invoked the IEEPA sanctions to maintain export controls and foreign boycotts because Congress did not reauthorize the Export Administration Act. In invoking the IEEPA the Reagan Administration simply noted that the legislature's failure to renew the EAA had left unchecked a threat to U.S. national security: a find that liberally construed the statutory requirement that the threat originate at least substantially outside the United States.[127]

Presidents have not only construed IEEPA's definitions broadly, but have also expansively read its delegated powers to execute national security policies. In the Iranian hostage crisis, for instance, President Carter used the IEEPA to freeze some $12 billion in Iranian assets in the United States and in the possession of U.S. corporations at home or abroad. Other executive orders pursuant to the IEEPA blocked off all trade with Iran, halted any financial transactions with Iran, and limited travel to Iran except for journalists. [128] In order to secure the release of the hostages in Teheran, Presidents Carter and Reagan used the IEEPA to transfer billions of dollars back to Iran, lift judicial attachments on Iranian assets, and suspend private legal claims against Iran.[129] Nowhere did the IEEPA grant Presidents the power to seize or transfer private claims against foreign assets.

124. 50 U.S.C. § 1702 (1990).

125. *Id.*

126. Of the different countries against which the United States has used IEEPA sanctions—Iran, Libya, Nicaragua, South Africa, Panama, and Iraq/Kuwait—only Iran and Iraq/Kuwait could be said to have constituted unusual and extraordinary threats. *See* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 197–203 (1988).

127. Exec. Order No. 12,444, 3 C.F.R. 168 (1983); Exec. Order No. 12,470, 3 C.F.R. 168 (1984) (in both orders, which were worded almost identically, the President cited the need to "exercise the necessary vigilance" over exports to safeguard the national security); *see also* Exec. Order 12,730 (1990).

128. Exec. Order 12,170, 44 Fed. Reg. 65,729 (1979); Exec. Order 12,205, 3 C.F.R. 348 (1981).

129. Exec. Order No. 12,227, 3 C.F.R. 105 (1982); Exec. Order No. 12,294, 3 C.F.R. 139 (1982).

Such presidential action went unchecked because of congressional and judicial failure to stop executive abuses of IEEPA. Although the executive has perfunctorily reported on the status of emergencies, Congress has neither reviewed nor considered terminating them.[130] The federal courts have done even more to weaken the restraints on presidential emergency powers.[131] In *Dames & Moore v. Regan* the Supreme Court upheld President Carter's use of the IEEPA to nullify judicial attachments, transfer frozen Iranian assets, and suspend private claims against Iran as part of the deal to release U.S. hostages held by Iran.[132] Following *Youngstown* the Court could have construed the IEEPA's failure expressly to authorize suspension of claims as congressional silence, placing the acts in Justice Jackson's category two, or as implicit disapproval for such acts, dropping them into Jackson's disfavored third category. Yet Justice Rehnquist, writing in *Dames & Moore,* instead found that unchecked executive practice, IEEPA's grant of other powers, another statute (the Hostage Act), and congressional silence constituted an implied congressional *approval* of the President's unilateral suspension of private claims. In so doing Rehnquist dramatically redrew Jackson's three *Youngstown* categories, effectively merging category two, where the President's actions are at their twilight because of congressional silence, into category one, where the President is deemed to act with express or implied congressional approval.[133]

Two subsequent Burger Court decisions further boosted and consolidated presidential emergency powers. In *Chadha,* the Court struck down the legislative veto for failing to comport with article I's bicameralism and presentment requirements.[134] Legislative veto provisions were central to the NEA and IEEPA. Without them Congress would need a two-thirds majority, rather than a simple majority, to override any use of IEEPA powers (given the near-certainty of a presidential veto of a joint resolution). A year later, in *Regan v. Wald,* the Court upheld the President's power to block travel to Cuba under IEEPA's grandfather clause, which had maintained TWEA sanctions in force since 1977.[135] Thus, in *Dames & Moore, Chadha,* and *Wald* the Court expansively construed presidential emergency powers, while at the same time hindering Congress's ability to rein in those powers.[136]

Emergency powers have remained a bastion of presidential dominance in economics and national security largely because of the failure of the other two

130. Jules Lobel, *Emergency Power and the Decline of Liberalism,* 98 YALE L.J. 1385, 1416 (1989).

131. *See, e.g.,* Beacon Prods. Corp. v. Reagan, 814 F.2d 1 (1st Cir. 1987) (upholding presidential IEEPA regulations barring trade with Nicaragua).

132. Dames & Moore v. Regan, 453 U.S. 654 (1981).

133. What made Justice Rehnquist's ruling all the more ironic was that he was Justice Jackson's law clerk when *Youngstown* was decided. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 64 (1987).

134. I.N.S. v. Chadha, 462 U.S. 919 (1983).

135. Regan v. Wald, 468 U.S. 222 (1984).

136. KOH, *supra* note 1, at 138–43 (further discussing these cases).

branches to check the executive. Although Congress has attempted to place restraints on the use of such authority, they have proved largely ineffective. Presidents have used their discretionary powers to avoid the requirement of an "unusual and extraordinary threat," gaining access to broad, indefinite statutory grants of authority.[137] Congress has generally shown neither the institutional nor the political will to stop the President. Meanwhile, the Supreme Court has deferred to expansive interpretations of IEEPA power and struck down the legislative veto that checked that power. As a result, Congress and the Court have encouraged the President to act first, relying on existing statutory "blank-check delegations," while avoiding the more politically difficult, though constitutionally preferred, route of seeking specific legislative approval for emergency acts.[138]

C. Export Policy

A President's control over export policy extends almost as far as his authority over emergency powers. As enacted principally through the Export Administration Act (EAA),[139] U.S. export policy has sought three national security goals: first, to prevent domestic shortages of critical materials (short supply); second, to channel exports to important allies such as Western Europe and Japan (foreign policy); and third, to prevent military and strategic goods and technologies from reaching hostile countries, such as the former Soviet Union (national security).[140] The United States also has organized a multilateral organization, the Coordinating Committee on Multilateral Export Controls (CoCom), to enforce common national security export controls among its Western European and Japanese allies.

Until recently U.S. export laws underwent little change since World War II. Like the IEEPA, the EAA and other export statutes invest the President with wide discretion which Congress and the courts have allowed him to use virtually unchecked. U.S. laws provide no right to export; instead, they prohibit all exports except those licensed by the executive branch. Pursuant to the EAA, the executive branch promulgates the U.S. Commodities Control List, which is a list of products and technologies and authorized target countries for exports. The EAA further requires Commerce Department pre-approval for the export of more than 240 different types of goods, including transportation equipment, electronic equipment, and petrochemical equipment. The Commerce Depart-

137. *Id.* at 47.

138. *Id.* at 45–48, 140.

139. 50 U.S.C. app. §§ 2401 *et seq.* (1988).

140. *See* 50 U.S.C. §§ 2401–2420 (1989). *See generally* Committee on Science, Engineering, and Public Policy (U.S.), Panel on the Impact of National Security Controls on International Technology Transfer, Balancing the National Interest: U.S. National Security Export Controls and Global Economic Competition 70–101 (1987).

ment grants less sensitive items on the list a general license, allowing shipment to most countries, but prevents or limits the export of more sensitive items by granting a validated license. This grants permission only for single or multiple transactions. Many of these goods are known as "dual-use" items because a hostile country could potentially put them to military use. Moreover, the Defense Department examines and may block export of military goods and technologies that it has placed on its Munitions List.

Generally speaking, the President can block any shipment he believes threatens U.S. national security in three ways. First, he can stop export of any good if he believes it "would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States."[141] Second, he can block the export of goods that would drain the domestic economy of important national security materials.[142] Finally, he can stop exports if doing so will "further significantly the foreign policy of the United States."[143] Thus, the EAA gives the President the ability to block most exports to certain nations or to control the shipment of specific technologies and goods to any country. This power provides the President with an effective weapon for economic warfare, one he can use unhindered.

Like the TWEA, the export laws initially placed few checks on the President's broad powers. The EAA provided for no congressional say in placing or lifting export sanctions. Instead, it simply required the President to meet certain statutory definitions before exercising his authority. Moreover, the statute specifically excludes the courts from the export licensing process, saying that decisions of the Secretary of Commerce shall not be "subject to judicial review."[144] This allows the President to exercise essentially unchecked discretion in deciding when to block the export of a certain good or to prohibit all exports to a certain country on national security or foreign policy grounds. Similar provisions give the President even broader latitude in controlling the export of military or nuclear technologies and products.[145] Arguably, the export control laws give the President even more discretionary power than under the IEEPA.

In 1979 and 1985, Congress amended the EAA in order to restrain presidential discretion. To create periodic reconsideration of sanctions, the 1979 act required their termination after only one year. If the President chooses to renew the controls, he must notify Congress and determine that the original grounds for imposing them still exist. The President also must determine the foreign avail-

141. 50 U.S.C. app. § 2402(2)(A) (1989).
142. *Id.* § 2402(2)(C).
143. *Id.* § 2402(2)(B).
144. 50 U.S.C. app. § 2412(e) (1989).
145. *See, e.g.*, Atomic Energy Act of 1954, *as amended by* 42 U.S.C. §§ 2011 *et seq.* (1989); Nuclear Non-Proliferation Act of 1978, 22 U.S.C. § 3201 (1989) (controlling export of nuclear material and technology); Arms Export Control Act, 22 U.S.C. § 2754 (1989) (controlling exports of military arms, equipment and services).

ability of controlled goods and the likely success of sanctions.[146] The 1979 Act included a now-defunct legislative veto for foreign policy controls that applied to agricultural products and controls imposed because of domestic short supplies.[147] In 1985 Congress tightened the reins further, requiring the President to consult Congress before imposing foreign policy sanctions. Noting that the Constitution gave Congress the power to regulate interstate commerce, Congress hoped more consultation would lead to "greater deliberation . . . by the President" and "wiser control policies enjoying greater Congressional support."[148]

But Presidents Carter and Reagan easily avoided these checks. They routinely renewed export controls and expanded sanctions after consultation with Congress that was "perfunctory at best."[149] Moreover, the *Chadha* decision struck down the 1979 Act's legislative veto provision, which required Congress to muster a two-thirds vote to override presidential export controls.[150] As in the case of emergency powers, *Chadha* had the effect of freeing the President's hand, this time with regard to foreign policy and domestic short supply controls. Given the President's wide latitude in defining what constitutes a national security or foreign policy problem, export controls have become a favorite economic tool for presidential economic warfare.

Events during the Afghanistan war and the Soviet crackdown in Poland highlighted these themes. In response to the 1979 Soviet invasion of Afghanistan, President Carter, invoking the EAA, imposed an embargo on many products to the Soviet Union. Carter not only prohibited the sale of high technology to the Soviets, he also extended the embargo to agricultural products such as wheat, chicken, truffles, and to any goods, technology, or financial support for the 1980 Olympic Games in Moscow. Although strong resistance to these controls erupted both in Congress and the agricultural sector, Congress could do nothing to stop the export sanctions, although in later legislation it tried to place further controls on the use of agricultural embargoes.[151]

In 1982 President Reagan used export controls even more expansively, this time to counter Soviet repression in Poland. Unable to win multilateral economic sanctions against the Soviets, Reagan ordered controls placed on the export of oil and natural gas equipment and technology to the Soviet Union.[152] Specifically, the controls aimed at preventing completion of the Urengoy natural gas pipeline from the Soviet Union to Western Europe, a project the Soviets wanted urgently

146. *See* 50 U.S.C. app. § 2405(b) (1989).

147. *See* 50 U.S.C. app. § 2406(g)(3) (1982).

148. H. R. REP. NO. 180, 99th Cong., 1st Sess. 57 (1985). The 1985 amendments also direct the president to consult with the CoCom allies and affected American industries.

149. CARTER, *supra* note 126, at 72.

150. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

151. *See, e.g.*, 50 U.S.C. app. §§ 2404(g), 2406(g)(3)(A) (1989).

152. *See* Amendment of Oil and Gas Controls to the U.S.S.R., 47 Fed. Reg. 27,250 (1982) (to be codified at 15 C.F.R. §§ 376, 279, 385).

to complete for foreign exchange and foreign policy reasons.[153] The Reagan administration also sought to extend the sanctions extraterritorially, finding support in the EAA's authorization of controls over any good "subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."[154] As a result, Commerce Department regulations expanded the embargo to foreign subsidiaries of U.S. firms and to independent foreign companies exporting products made with U.S.-licensed technology.[155]

While the 1982 pipeline demonstrated the broad power available to the President under the EAA, it also revealed the limits of that power. Substantial opposition to the sanctions arose in Congress and from U.S. industry. Although Congress failed to pass two bills repealing the sanctions, a narrow 206-203 vote in the House expressed Congress's strong discontent. U.S. companies challenged the sanctions in court, only to be turned away by the federal judiciary.[156] However, a Dutch district court found that the extraterritorial reach of the export controls violated international law.[157] More powerful resistance came from the Western European governments. Many EC countries encouraged their companies to continue their Soviet contracts, and France directly ordered U.S. subsidiaries to perform their pipeline-related work. The Commerce Department responded by cutting off performing companies from all U.S. exports. European companies continued to perform their contracts and the Soviet pipeline work went on. Faced with the ineffectiveness of the Commerce Department's sanctions, congressional and industry criticism, and most importantly, stiff allied resistance, President Reagan repealed the export controls after only five months.[158]

Although President Reagan suffered a setback in 1982, the story on export laws remains similar to the one on emergency powers. The President retains broad discretion to cut off exports to any country, as long as it would further U.S. national security and foreign policy goals. Congressional attempts to place statutory checks on this broad delegation of power have failed. Presidents have expansively defined threats to national security, generously interpreted statutory grants of powers, and have been constrained only by non-onerous notification and consultation requirements. Congress has been unable to respond, while the courts have stayed out of export matters. In the aftermath of the Cold War, the basic premises of U.S. export control have been shattered, and the objectives of the entire CoCom system are being rethought. But the lesson remains the same:

153. The incident is recounted in HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS MATERIALS AND TEXTS 947 (3d ed. 1986).

154. 50 U.S.C. § 2405(a) (1989).

155. *See* 47 Fed. Reg. at 27,250.

156. Dresser Indus. v. Baldridge, 549 F. Supp. 108 (D.D.C. 1982) (denying motion for temporary restraining order). President Reagan rescinded the export regulations before the court could rule on the merits.

157. Compagnie Europenne des Petroles S.A. v. Sensor Nederland B. V., 22 I.L.M. 66 (1982).

158. *See* Revision of Export Controls Affecting the U.S.S.R. and Poland, 47 Fed. Reg. 51,858 (1982) (to be codified at 15 C.F.R. §§ 379, 385, 390, 399).

the export laws have provided another powerful economic weapon for the pursuit of national security goals, which the President may wield largely at his own discretion.

D. Import Laws

Unlike emergency power and exports, imports have historically won intense congressional involvement. Trade laws include more than national security concerns; equally at stake are whether certain industries and jobs will receive protection from foreign competition. Powerful constituency groups have pressured Congress to take an aggressive role in setting trade policy, where it holds the enumerated powers to lay "duties, imposts and excises" and to regulate international commerce.[159] Such pressure has pushed Congress to assert its dominant constitutional role in setting trade policy. However, executive initiative and structural superiority, the same institutional factors that have produced broad delegations in the areas of emergency powers and export controls, have spurred similarly broad delegations of trade powers to the President.

Global interdependence has made the impact of international trade more apparent upon both the domestic economy and national security. Importantly, the constitutional form of international trade agreements ensures that Congress will always have substantial input into trade policy. Such agreements have generally taken the form of either treaties consented to by two-thirds of the Senate, a congressional-executive agreement pre-approved by legislation, or a congressional-executive agreement implemented by post-negotiation legislation. While Presidents have traditionally been less protectionist than Congress, their stance often generates weaker interest group support. At the same time, Presidents have at their disposal a rarely invoked, controversial constitutional power to enter "sole" executive agreements independent of Congress through the exercise of their plenary authority. These divergent trade ideologies and competing interests have led to an ongoing struggle between the President and Congress over import policy.

1. *Trade Negotiations and Agreements*

In the recent past Congress has sought to increase controls over trade policy even as the executive branch has sought greater independence. Initially, Congress controlled all trade decisions, as reflected in the Smoot-Hawley Tariff Act of 1930,[160] which set unprecedently high tariffs for all imported goods without presidential input.[161] Smoot-Hawley's disastrous aftermath, the collapse of

159. U.S. Const. art. I, § 8 cl. 1.

160. Act of June 17, 1930, ch. 497, 46 Stat. 590.

161. Harold Hongju Koh, *Congressional Controls on Presidential Policymaking After* I.N.S. v. Chadha, 18 N.Y.U.J. Int'l L. & Pol. 1191, 1194 (1986). *See generally* Andreas F. Lowenfeld, Trade Controls for Political Ends (1983) [hereinafter Trade Controls]; Andreas F. Lowenfeld, Public Controls on International Trade (1983) [hereinafter Public Controls].

world trade that spurred the Depression, convinced the New Deal Congress to delegate broad authority to FDR to negotiate and conclude reciprocal tariff-reducing trade agreements.[162]

Even as it granted FDR broad authority over the domestic economy, the New Deal Congress jealously maintained controls over presidential decision making on trade. In the 1934 Act Congress enacted simple, yet effective, sunset provisions that terminated the President's authority after two or three years. These provisions allowed Congress to review and extract changes in executive trade agreements in return for renewing presidential authority. Trade agreements under the 1934 Act flourished. Presidents negotiated thirty-two bilateral agreements between 1935 and 1945 and the Act allowed for U.S. entry into the General Agreement on Tariffs and Trade (GATT). The courts supported this combination of delegated authority with sunset review, turning aside claims that such presidential authority violated the nondelegation doctrine.[163]

Increasingly, postwar Presidents sought greater discretion to negotiate trade pacts that went beyond tariffs. In response Congress tightened controls over negotiating authority to forestall unilateral presidential trade decisions via executive agreement. The Trade Expansion Act of 1962 reflected these fears. Congress granted the President advance negotiating authority, but required submission of multilateral trade agreements for congressional approval.[164] By the late 1960s, congressional-executive conflict over trade led Congress to withhold further renewals of delegated authority, undermining presidential credibility in nontariff trade barrier negotiations.

By the early 1970s, Vietnam and Watergate made Congress even more wary of unbridled presidential discretion, leading to an innovative restructuring of trade policymaking. First, to address problems of the President's negotiating credibility, Congress enacted a "fast-track" procedure in the Trade Act of 1974. The fast track gave the President advance negotiating authority, but required him to notify the relevant congressional committees ninety days before entering the agreement. In exchange, Congress altered its internal rules to review the agreement quickly and without amendment.[165]

Aside from structuring presidential authority, the 1974 Act also included a number of congressional controls on executive discretion. First, the Act specified negotiating goals.[166] Second, Congress subjected the President's negotiating authority to a sunset provision. Third, the Act required pre-negotiation consultations and post-negotiation reporting and certifications to Congress. Fourth,

162. *See* Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934).

163. *See* Star-Kist Foods v. United States, 275 F.2d 472 (C.C.P.A. 1959) (upholding President's 12.5 percent reduction of tariffs on Icelandic tuna imports pursuant to 1934 act).

164. Pub. L. No. 87-794, 76 Stat. 872 (1962).

165. 19 U.S.C. §§ 2112, 2191 (1982).

166. For these and other congressional controls, see generally Koh, *supra* note 161, at 1204–08; Koh, *The Fast Track and U.S. Trade Policy,* 18 BROOKLYN J. INT'L L. 143 (1992) (hereinafter *Fast Track*).

Congress sought to judicialize trade questions, specifically by giving private parties the right to bring complaints against foreign industry in courts and within the executive branch. Finally, Congress included several legislative vetoes to override disfavored presidential decisions.

Ironically, *Chadha*'s elimination of the legislative veto has spurred Congress to intervene even further into trade policy. In the 1984 Trade Act[167] Congress modified the fast-track provision to add a "committee gatekeeping" procedure. This requires the President to submit an agreement to congressional committees sixty days before the 1974 Act's ninety-day requirement and grants expedited procedures only if neither committee disapproves. This forces the executive to consult with the committees and preserves each house's ability to vote against the pact. Under this scheme the House Ways and Means and the Senate Finance Committees retain a power functionally analogous to the legislative veto. If either gatekeeper committee decides to vote against the agreement, it effectively ends the pact's chances, because without the fast-track procedure an agreement would be subject to procedural delays and "Christmas-tree" amendments.[168] The subsequently concluded United States-Canada Free Trade Agreement proved the versatility of fast track as a procedural device to secure congressional-executive cooperation in the management of U.S. international trade policy.[169]

Success in the U.S.-Canada pact inspired Congress to make the fast track the central mechanism in both bilateral and multilateral trade negotiations. In the 1988 Omnibus Trade and Competitiveness Act Congress extended the President's negotiating authority for five years and re-authorized the fast track subject to renewal every three years.[170] Moreover, changes wrought by the 1988 Act thrust Congress even deeper into trade policymaking.

In addition to the committee gatekeeping procedure, which governs initial access to the fast track, the 1988 Act added a one-house extension disapproval procedure. Through this procedure, the fast track could attach to bills submitted after May 31, 1991, but only if neither house of Congress had passed a disapproval resolution reported out of the Senate Finance Committee and jointly out of the House Ways and Means and Rules Committees. In addition, the 1988 Act provided a "reverse fast track" mechanism, a two-house derailment procedure, which allowed the gatekeeping committees to submit resolutions that if approved by both houses would terminate fast track. Congress included this provision specifically to ensure continuing executive-congressional cooperation, because the resolution can only be passed on the grounds that the President had "failed

167. Trade and Tariff Act of 1984, P.L. No. 98-573, 98 Stat. 2948.

168. Koh, *supra* note 161, at 1216-17.

169. *See* Harold Hongju Koh, *History of the Fast Track Approval Mechanism, in* JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE UNITED STATES-CANADA FREE-TRADE AGREEMENT § 1.01-.03 (1990).

170. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

or refused to consult with Congress on trade negotiations and trade agreements in accordance with" the 1988 Act.[171]

To date, the 1988 Act has maintained presidential negotiating authority while preserving channels of communication between the executive and legislative branches. This delicate balance has been maintained at considerable cost, however, as illustrated by the defeat in May 1991 of efforts to disapprove extension of fast track for both the North American Free Trade Agreement (NAFTA) and the Uruguay Round accords.[172] The result has been an unusually open public debate over the goals of U.S. trade policy, but one fought out, ironically enough, on the battleground of procedure, rather than substance. Furthermore, at this writing numerous possibilities remain whereby NAFTA may yet be derailed from the fast track, again illustrating the unusual permeability of the trade negotiation process to congressional pressure.[173]

2. *Presidential Power over Imports*

Notwithstanding Congress's substantial constitutional powers over import trade, the President can still resort to a reservoir of discretionary power, both constitutional and statutory, if he feels imports threaten national security. While the executive has traditionally pushed for open markets, it has also employed two means to protect domestic industries deemed crucial for national security, such as steel and high-technology industries.

First, Presidents have invoked their ill-defined authority to make executive agreements to enter into voluntary restraint agreements (VRA). These "nonagreement agreements" place informal quotas on imports from trading allies, such as Japan and the EC.[174] Because VRAs are informal and theoretically have no domestic legal effect—they only bind foreign producers to limit their imports—the President is not required to obtain authorizing or implementing legislation from Congress. In 1969 and again in 1972, the United States reached such agreements with Japanese and EC industry groups to restrain steel imports, which had led to a steep drop in U.S. steel production. A 1981 agreement between the U.S. and Japanese governments similarly restricted Japanese automobile imports, while another agreement has regulated semiconductor imports.[175]

171. *Id.* § 1103(c), 102 Stat. at 1131.

172. *See Fast Track*, supra note 166 (describing in detail the political struggle over fast track extension).

173. *See generally Fast Track, supra* note 166 (enumerating twelve congressional pressure points into the NAFTA negotiation process under the current regime and suggesting possible legislative revisions to the fast-track mechanism).

174. *See generally* PUBLIC CONTROLS, *supra* note 134, at 195–252; KOH, *supra* note 1, at 40–45 (discussing "nonagreement agreements").

175. JOHN H. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 619–22 (2d ed. 1986).

Although acting unilaterally, Presidents Johnson and Nixon did receive the implicit agreement of Congress to VRAs. Indeed, Congress had pressured the executive to limit steel imports because they threatened national security by reducing U.S. industry's ability to produce steel. In 1967, members of Congress argued that imports of foreign steel had so injured the U.S. balance of payments, reduced employment, and captured market share "as to threaten the soundness of the domestic iron and steel industry and therefore the national security."[176] In the 1970 Trade Act, the House Ways and Means Committee again encouraged the executive to expand the VRA, resulting in the 1972 agreement.

Because the courts generally have shied away from trade issues, they have deferred to such use of executive agreements. In *Consumers Union v. Kissinger* a consumer interest group challenged the 1972 steel VRA as an executive encroachment on Congress's power to regulate foreign commerce.[177] In upholding the VRA, the D.C. Circuit noted that "widespread concern" had mounted because of injury to the domestic steel industry, "which is deemed to be of great importance to the nation's security as well as to the peacetime economy."[178] Since the VRA had no binding domestic legal effect, nor precluded the President or Congress from taking further action, the Court held that the VRA fell within the President's plenary power over executive agreements.[179] In dissent Judge Leventhal argued that VRAs violated the separation of powers because they encroached on Congress's plenary power over international commerce.[180] However, for practical purposes, *Consumers Union* has given the President free rein to enter subsequent accords of this kind in a broad array of product areas.[181]

A second tool available to the President to limit imports derives from his delegated statutory powers. Section 232 of the 1962 Trade Expansion Act grants the President the authority to adjust imports of a good if it "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."[182] Section 232 confers on the President the broad power to block any imports that threaten "domestic production needed for projected national defense requirements."[183] He can enact section 232 sanctions on any number of grounds: that the imports will reduce industrial capacity, employment, supplies of raw materials or services, skills or investment, or even losses in government revenues.

176. S. 2537, 90th Cong., 1st Sess. § 2 (1967), *reprinted in* PUBLIC CONTROLS, *supra* note 161, at DS-567.

177. Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* at 174; *see also* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (invalidating sole executive agreement regulating import of Canadian seed potatoes because of conflict with Agricultural Act of 1948).

182. 19 U.S.C. § 1862(b) (1989).

183. *Id.*

Congress did try to place two checks on this seemingly limitless power to control imports. First, it required that the Commerce Department investigate an import's effect on the economy before releasing the delegated authority. Second, the 1974 Trade Act added a legislative veto to section 232. Additionally, Congress included legislative history focusing section 232 on shortages of raw materials, principally oil.[184] While the first constraint has proved of little force and the second was rendered invalid by *Chadha,* the legislative history may have influenced the executive to use section 232 primarily for petroleum imports.

Use of section 232 to control oil imports demonstrates how the executive has expanded the definition of national security to include protection of the general health of the economy. None of the statute's provisions sets out a definition of national security. When President Eisenhower first invoked section 232's predecessor[185] to establish a system of quotas for oil products, he had concluded that U.S. oil dependence was threatening national security.[186] In 1973 President Nixon replaced the program's quotas with fees on importers. In 1975 President Ford sharply accelerated the fee rates, and in 1980 President Carter imposed a complex system of fees on oil and gasoline. By 1980, section 232 oil controls had clearly shifted from pure national defense concerns to efforts to encourage domestic energy conservation. President Carter's 1980 use of section 232 was part of a broad energy-saving program designed to lower consumption of both foreign and domestic oil.[187] President Reagan broke the focus on oil in 1986 when he threatened to use section 232 against imports of machine tools, which are critical to the production of advanced weapons, but held off after reaching VRAs with the major suppliers.[188]

Presidents have also used section 232 as a foreign affairs tool. In both 1979 and 1982 Presidents Carter and Reagan employed the provision to wage economic warfare against radical Middle East regimes. In response to the Iranian seizure of U.S. hostages, President Carter used section 232 to cut off all Iranian oil imports and thereby deny Iran critical foreign revenue.[189] Three years later, President Reagan invoked section 232 sanctions against Libyan oil, even though Libyan oil accounted for only 3 percent of all oil imports. President Reagan clearly linked the sanctions to Libyan support for terrorism, rather than to domestic national security shortages. He proclaimed, "Libyan policy and action supported by the revenues from the sale of oil imported into the United States are inimical to U.S. national security."[190]

184. *See* CARTER, *supra* note 126, at 101-02.
185. Trade Agreements Act of 1955, ch. 169, § 7, 69 Stat. 162, 166 (1955) (containing almost the exact language of section 232).
186. Proclamation No. 3279, 24 Fed. Reg. 12,781 (1959).
187. *See* CARTER, *supra* note 126, at 104-08.
188. 22 WKLY. COMP. PRES. DOC. 1654 (1986).
189. Proclamation No. 4702, 44 Fed. Reg. 65,581 (1979).
190. Proclamation No. 4907, 47 Fed. Reg. 10,507 (1982).

While Congress and the courts generally have given the President a free hand with section 232, they have resisted him when he has clearly pursued domestic, rather than national security, goals. In 1975, eight state governors and other parties challenged President Ford's import fees on oil, claiming that section 232 allowed only the imposition of quotas. In *Federal Energy Administration v. Algonquin SNG Inc.*, the Supreme Court upheld the use of the fees, affirming the President's broad discretion to use whatever controls he chose.[191] The Court avoided the question of what constituted a proper "national security" use of section 232. While a D.C. district court also avoided this question in *Independent Gasoline Marketers Council, Inc. v. Duncan,* it struck down President Carter's use of section 232 to encourage energy conservation because his plan placed fees on both foreign and domestic oil.[192] Also responding to President Carter's conservation program, Congress passed legislation over his veto to repeal the plan, which had raised gasoline prices.[193]

Even though Congress has delegated broad import powers to the President, it has not hesitated to assert itself if his import policy has gone too far. Congress's action in the 1980 confrontation with President Carter highlighted its overall power and greater interest in oil policy. Whereas emergency powers and exports have largely fallen within the President's unchecked discretion, Congress has succeeded in keeping substantial control over trade policy. Even when Congress itself has not directly checked presidential authority, its statutory delegations have often provided private parties with tools to check the President. In 1986, for example, President Reagan ordered his trade negotiators to seek agreements limiting the export of machine tools to the United States from Japan, Taiwan, Switzerland, and West Germany, this time spurred by a section 232 complaint filed by the domestic machine tool industry, although he did not take action under that section.[194] Thus, trade statutes successfully have imposed both congressional and interest-group constraints on executive discretion on trade decisions. Meanwhile, the domestic impact of trade policy has often forced Presidents to seek congressional support for their unilateral actions. As a result, import decision making reflects the theme of balanced institutional participation, as envisioned by *Youngstown,* far more than the vision of unchecked executive discretion that characterizes other areas of this field.

E. Extraterritorial Application of American Law

Unlike the four areas previously reviewed, extraterritoriality has not received a great deal of attention from the executive or legislative branches. Nonetheless,

191. Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

192. Independent Gas Marketers Council, Inc. v. Duncan, 492 F. Supp. 614 (D.D.C. 1980); *see also* Texas American Asphalt Corp. v. Walker, 177 F. Supp. 315 (D. Tex. 1959) (President Eisenhower's decision that oil imports threatened national security not subject to judicial review).

193. *See* 126 Cong. Rec. 13,524-93 (1980).

194. *See* Carter, *supra* note 126, at 103.

it remains an aspect of international economics with significant implications for national security. Growing global interdependence has made the U.S. economy vulnerable to the development of long-term imbalances or sudden dislocations in the world market.[195] While neither the President nor Congress has sought substantially to regulate foreign trade, the courts have kept the option open by extending the jurisdiction of U.S. laws overseas.

Growing dependence on the world market has led U.S. policymakers to seek primarily domestic solutions. National defense producers today rely on foreign components to produce their high-tech weaponry, while the importance of oil needs no emphasis after the Persian Gulf War. In response, the United States Government has sought to improve domestic supplies of vital national security goods by, for example, encouraging semiconductor manufacturers to pool their efforts or by reducing domestic oil consumption. However, except for the pipeline case discussed earlier,[196] neither the President nor Congress has sought to address such dependence by regulating wholly foreign trade.

The courts have stepped into this vacuum to extend U.S. jurisdiction to include overseas transactions. Questions about the extraterritorial reach of U.S. economic regulation have arisen primarily in the antitrust and securities contexts. Initially, U.S. courts were reluctant to apply the Sherman and Clayton Acts overseas, particularly because the statutes made no mention of foreign transactions. The Sherman Act briefly outlaws agreements "in restraint of trade" between competing firms (horizontal agreements) or firms in a production and distribution chain (vertical).[197] The Clayton Act prohibits mergers and acquisitions that would lessen competition or create a monopoly.[198] Respecting comity among nations, the Supreme Court in *American Banana Co. v. United Fruit Co.* declined to construe this silence as authorizing antitrust suits for actions beyond the water's edge.[199]

As the United States' world position strengthened after World War II, so did its assertions of extraterritorial jurisdiction. Courts discarded *American Banana*'s water's edge test and turned instead to an "effects" test. In *United States v. Aluminum Co. of America* (Alcoa) Judge Learned Hand held that the antitrust laws could proscribe transactions occurring wholly overseas so long as the conduct had direct and substantial effects in the United States.[200]

Recent court decisions have substantially embroidered Judge Hand's effects test. In *Timberlane Lumber Co. v. Bank of America* the Ninth Circuit set out a multifactor balancing process for deciding when a court may exercise extraterritorial antitrust jurisdiction.[201] That test, which has now been adopted by the

195. *See* JORDAN, *supra* note 90, at 306. *See generally* ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977).

196. *See supra* notes 152-58 and accompanying text.

197. 15 U.S.C. §§ 1-2 (1990).

198. 15 U.S.C. §§ 15-27 (1990).

199. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

200. United States v. Aluminum Co. of Am. (ALCOA), 148 F.2d 416 (2d Cir. 1945).

201. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

Department of Justice Antitrust Division and section 403 of the *Restatement Third of the Foreign Relations Law of the United States,* instructs courts to consider factors such as international comity, effects on U.S. consumers, nationality, foreseeability, and significance of effects when extending jurisdiction extraterritorially.[202] In a powerful opinion by Judge Malcolm Wilkey, however, the D.C. Circuit has questioned such complex judicial balancing and has argued that federal courts should exert concurrent jurisdiction whenever the transaction has both a territorial link and substantial effects in the United States.[203]

Federal securities laws have received similar extraterritorial application by the federal courts. Two federal statutes provide the government and private litigants with strong antifraud provisions to block foreign transactions. First, rule 10b-5, promulgated pursuant to section 10(b) of the 1934 Securities Act, prohibits fraud or failure to disclose a material fact "in connection with the purchase or sale of any security."[204] Second, the Williams Act proscribes fraud in connection with tender offers.[205] Courts have construed both statutes to permit criminal prosecution by the Justice Department and civil suits by the SEC or private parties.

As mergers and acquisitions have grown international in scope, federal courts have given securities laws a transnational reach. They have applied a test similar to the one applied in the antitrust context: U.S. courts will take jurisdiction whenever a "predominantly foreign transaction has substantial effects within the United States."[206] The most striking aspect of these cases is how little is required to satisfy the substantial, direct, and foreseeable effects test in the securities context. In late 1988, for example, Minorco, a company controlled by South African gold interests, attempted to take over Consolidated Gold Fields, another foreign gold company. The Second Circuit found that U.S. securities laws could be applied extraterritorially simply because U.S. investors held 2.5 percent of Consolidated's stock.[207]

In so doing the federal courts again extended the possible overseas reach of U.S. economic regulation. In the antitrust context they found that U.S. law could

202. *Id.* at 614; U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 22 (1988); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD)].

203. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). The Supreme Court recently avoided a chance to settle the dispute by holding that in the case of Japanese television exporters, even if there was jurisdiction, no antitrust violation had occurred. *See also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

204. 17 C.F.R. § 240.10b-5 (1991), promulgated under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1990).

205. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1990)).

206. Consolidated Gold Fields PLC v. Minorco, 871 F.2d 252 (2d Cir. 1989); *see also* Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir.), *reh'g on other grounds,* 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied,* 423 U.S. 1018 (1975); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); RESTATEMENT (THIRD), *supra* note 202, § 402(1)(c).

207. Consolidated Gold Fields PLC v. Minorco, 871 F.2d 252 (2d Cir. 1989).

regulate foreign agreements in restraint of trade that had domestic repercussions, so long as they were substantial, direct, and foreseeable. In the securities context, the courts have extended jurisdiction of U.S. laws over foreign transactions where only a tiny fraction of the shareholders have been U.S. citizens. The assertion of jurisdiction over wholly foreign trade thus represents a far-reaching extension of U.S. regulatory authority in international economic affairs. This power could prove valuable for national security purposes should Congress or the President ever decide to enforce national security decisions upon wholly foreign trade.

In contrast to other regulatory areas, the courts have led this expansion, while the President and Congress have largely followed in the wake of judicial action. Congress has left securities, antitrust, and other important laws silent on extraterritorial application, leaving to the executive branch the decision whether to enforce the law extraterritorially, and to the courts whether to sustain the executive action.[208] Except for President Carter's brief 1980 effort to freeze foreign Eurodollar accounts during the Iranian hostage crisis and President Reagan's attempt to prevent construction of the Soviet-Western Europe pipeline, the executive branch has steered clear of aggressive extraterritorial economic regulation and has argued against it before the Supreme Court.[209] However, the courts have established the jurisdictional litmus test that now allows U.S. law to apply extraterritorially even to wholly foreign trade. If exercised, such jurisdiction would provide the political branches with ample regulatory precedents should they ever seek to regulate foreign trade aggressively for national security purposes.

IV. The Next Step: Toward a Public Interest Theory of Economics and National Security Statutes?

The foregoing discussion has demonstrated that the different areas involving economics and national security have generated very different types of legal regimes. The degrees of executive freedom or congressional oversight implicated in each regime have resulted from the confluence of many different factors, among them, the constitutional division of powers, each branch's historical role, the need for swiftness and secrecy in U.S. action, and the demand of domestic constituencies.

In the realm of domestic economic regulation Congress has granted the President broad powers in times of emergency to mobilize the economy. As embodied in the Defense Production Act, Congress has delegated much of its control over the domestic economy in peacetime to the executive without placing sig-

208. *See, e.g.*, EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (title VII does not apply to American corporations operating overseas).

209. In Lujan v. Defenders of Wildlife, 111 S. Ct. 1008 (1991), the executive is currently arguing against extraterritorial application of regulations issued under the Endangered Species Act after having argued unsuccessfully *for* extraterritorial application of title VII last year in *Aramco*. *See supra* note 208.

nificant checks on the use of that power. However, in normal times the budget process constrains longer-term decisions on defense expenditures and ensures a substantial level of congressional intervention into national security policymaking. In these situations national security and economic policy arise from an ongoing process of consultation and negotiation between the branches.

A second area of national security and economic policy, emergency powers, mirrors the DPA's broad delegation of power, but without meaningful constraints on executive discretion. Although Congress has tried to check presidential emergency power to control international economic relations through the IEEPA, the executive has successfully sidestepped most statutory controls with the aid of the courts. Much of the credit for executive freedom in using the IEEPA has resulted not just from congressional acquiescence, but from broad judicial deference to executive exercises of statutory powers.

Export controls also provide the executive branch with substantial authority to determine export policy, as well as substantial restraints. Under the EAA the President has the necessary discretion to stop almost any good or technology from leaving the country for national security, foreign policy, or short supply reasons. However, when President Reagan tried to extend U.S. export controls overseas, he met significant resistance from allies, as did President Carter when he sought to freeze foreign overseas assets. Hence, allied governments, rather than Congress, have acted to place checks and counterweights on executive authority in the export control field.

Import and trade law leave even less room for unchecked executive discretion. The significance of trade regulation for domestic industries and jobs guarantees that Congress will intervene deeply in trade policy making. Moreover, Congress's constitutionally assigned plenary power over foreign commerce and the Senate's traditional role in the international agreement-making process ensure that Congress will always have a significant voice in trade policy. Nonetheless, by use of executive agreements (and "nonagreement agreements") and the President's statutory powers under the Trade Expansion Act, the executive still has managed to carve out a substantial role in import trade policy.

Finally, the extraterritorial application of U.S. law over foreign nationals has the potential to be an area of growing significance for economics and national security policy, but one surprisingly subject to both executive and congressional neglect. As the global economy grows increasingly interdependent, expansive federal regulation of antitrust, securities, and other areas will create precedents for other potentially far-reaching extensions of U.S. power in international economic affairs. The full potential of this power has not yet been realized, however, since the courts, rather than the legislative or executive branches, have largely paved the way in applying federal law extraterritorially to foreign trade by foreign nationals.

Our *tour d'horizon* of economics and national security law bears significant lessons for both international law scholarship and national policy making. For the

last few years, the prevailing legal analysis of U.S. domestic policy making has focused on public choice theory, which posits that organized interest groups are the driving force behind legislation. Such interest groups support members of Congress in their single-minded pursuit of reelection and in exchange Congress passes legislation bestowing benefits on interest groups at the expense of the diffuse, unorganized body politic.[210]

Economics and national security law suggests that the "public choice model" of politics is far too simplistic and does little to explain the separation of powers. Most blatantly, public choice scholarship simply does not account for the crucial role of the executive in policy making. However, many of the legal regimes we have examined put the President in the primary, if not dominant, role of both setting and executing policy. Moreover, the executive branch wields significant influence over legislation through its veto power. In economics and national security affairs the President can use the veto to follow a broader national agenda that either filters out or selectively filters in interest-group desires pursued by Congress. While agencies can become "captured" by interest groups, the executive branch also provides mechanisms for internal consultation and debate that may encourage accountability in policy making or become equally subject to interest-group capture.

Our examination also shows that Congress itself operates at a far higher level of public consciousness than public choice scholars would have us believe. While individual congressmen may place reelection at the top of their agendas, when it comes time for making economics and national security decisions, congressional committees can reduce interest-group influence and cooperate with the executive in setting broad national policy. In fact, it appears that in many economics and national security areas Congress has attempted to establish an effective statutory scheme, such as the IEEPA or export law, that gives the executive sufficient discretion while also providing for substantial consultation with and reporting to Congress. Congress often tolerates the exercise of such broad executive power even when it causes economic loss to constituent interest groups. Indeed, it has not been Congress but the President, sometimes in cooperation with or with the dramatic support of the courts, who has evaded or upset these balanced statutory schemes at the expense of the public interest.

At a more abstract level public choice theory also fails to account for the striking evolution of separation of powers law that has occurred in the economics and national security arena. Public choice theory generally views policy making through a formal lens, focusing simply on the passage of legislation as the sole means of governmental action. What our review of economics and national

210. For two illuminating recent books surveying the relationship between public choice theory and public policy, *see* DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE (1992).

security law shows is that the passage of legislation is only part, and potentially only a tiny part, of a much richer, more complex story. Legislation provides only the framework for a subtle and dynamic network of ongoing power and trust among various executive and independent agencies, the President, Congress, committees, and members. Consultation, reporting, regulations, and executive orders are more often the means of making economics and national security policy than is formal legislation, which stands only as the tip of the iceberg.

Putting aside the scholarly implications of this examination, this discussion also has significant lessons for national and global policy making. This analysis of economics and national security law shows that in the future the executive branch will be far less able to rely on unilateral action than it has in the past, both at home and abroad. Domestically, longer-term problems demanding sustained government action, such as in trade policy, will force the President to seek the cooperation of Congress through innovative and evolving procedural devices, such as the fast-track mechanism. Simultaneously, presidential action overseas will require the assent and cooperation of U.S. allies as national and regional power quotients equalize, the world economy grows more interdependent, and international economic problems demand multilateral solutions. The Persian Gulf War provides perhaps the most graphic example of how U.S. policy must become more multilateral both at home and abroad. At home President Bush was ultimately driven to seek the cooperation of Congress in sending forces overseas, yet his failure to do the same on the DPA stripped him of commensurate statutory powers to mobilize the domestic economy. Overseas, President Bush's application of economic sanctions against Iraq and Iraqi-controlled Kuwait required the full cooperation of U.S. allies and the United Nations to be successful. However, in the future, such global cooperation may prove to be more elusive and fleeting.

This discussion thus closes not only with a criticism of current theoretical scholarship, but also with policy recommendations for the future use of economics and national security power. In order to be truly effective overseas, as well as to comply with the National Security Constitution's vision of balanced institutional participation at home, all three governmental branches must aggressively pursue multilateral consultation and cooperation in setting policy. This study has shown that a combination of executive initiative, congressional acquiescence, and judicial tolerance has led us to the current predicament. Persistent institutional habits that favor unilateral presidential action, together with congressional and judicial passivity, may fail to unite the U.S. electorate and U.S. allies to grapple with pressing global problems. By aggressively pursuing imaginative multilateral procedures, both at home and abroad, the various arms of the federal government will have far better odds of meeting the challenges posed by a more democratic, more interdependent, but perhaps more unstable, post-Cold War world.