NOTES

SEPARATION OF POWERS AND UNILATERAL EXECUTIVE ACTION: THE CONSTITUTIONALITY OF PRESIDENT CLINTON’S MEXICAN LOAN INITIATIVE

Kimberly D. Chapman*

I. INTRODUCTION

On January 31, 1995, President Clinton issued a “Statement with Congressional Leaders on Financial Assistance to Mexico,” stating that because of “emergency circumstances” in Mexico he intended to rely on the Exchange Stabilization Fund1 to provide billions of dollars in financial assistance to Mexico.2 The question of whether the President, acting within the authority of the Executive branch, has the power to act unilaterally in certain foreign affairs or whether he is required to seek authorization from Congress has often been debated by scholars and the Supreme Court alike.3

* J.D., University of Georgia, 1996; B.A., University of Georgia, 1991. Special thanks to Professor Harold G. Maier, Vanderbilt University School of Law, who provided tremendous advice, support, and suggestions regarding this paper topic during his visiting term at The University of Georgia in 1995, and who was the initial motivation for my pursuing this research. Thanks also for the administrative support of Karen Davis, and for her many hours spent on attention to every detail. Finally, thanks to my parents, Mark and Gail Chapman, for encouraging me to achieve all of my goals.

3 Although the Constitution does not specifically provide for the “separation of powers” between the Legislative, Executive, and Judicial branches of government, in effect it creates this structure by conferring exclusive and explicit powers on each branch in Articles I, II, and III respectively. See U.S. CONST. art. I, § 8 (enumerated powers of Legislative branch are to borrow money, regulate commerce, coin money, regulate value of U.S. and foreign coin, establish commerce, raise and support armies, suppress insurrections, and repel invasions; implied powers are to make all laws necessary and proper to carry into execution the enumerated powers); see also U.S. CONST. art. II, § 1 (President is only source of
While the Supreme Court has historically recognized the need for the President to act alone in many situations involving foreign affairs, the Court has also expressed the need to limit the President’s power as well. This issue has become even more complex in recent history, as Presidents have frequently acted unilaterally, claiming legislative authority when, in fact, the legislation relied upon was intended by Congress to be used for an entirely different purpose. As the Constitution does not specifically define the powers that it confers upon each branch of government, differences in interpretation create conflict, especially between the Executive and Legislative branches in the area of foreign affairs. The Judicial branch is often

Constitutional executive power and has power to enforce domestic laws made by Congress); see also U.S. CONST. art. II, § 2 (general enumerated powers of Executive include power to execute laws, make treaties, act as Commander-in-Chief, veto, pardon, suppress rebellions, and repel invasions); see also U.S. CONST. art. III, § 1 (judicial power shall be vested in one Supreme Court.).

4 See also United States v. Curtiss-Wright, 299 U.S. 304 (1936) (it is necessary that the President be allotted discretion to act in foreign affairs so that he may act quickly in emergencies); see also Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (President’s decision to suspend pending court claims without express Constitutional or Congressional authority is allowed where there is “systematic, unbroken, executive practice” known by Congress and never questioned); but see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President’s conduct unauthorized where no authorization from either Constitution or Congress exists.).

5 The most recent example, and the subject of this Note, is President Clinton’s reliance on the Exchange Stabilization Fund (which was intended for use in stabilizing the United States currency in economic emergencies), to provide more than $20 billion in loans to Mexico. See Exchange Stabilization Fund, supra note 1; see also Protocol of Provisional Application, 61 Stat., pt. 6 at A2051 (1947), 55 U.N.T.S. 308 (1950) within Reciprocal Trade Agreements Act, 59 Stat. 410 (1945) (Truman relied on this legislation which was intended to allow the U.S. to enter bilateral trade agreements, but which Truman used to enter multilateral GATT Agreement); see also War and National Defense, Trading with the Enemy Act of 1917, Ch. 106, at 5(b), 40 Stat. 411 (1917), current version at 12 U.S.C.S. Appx. § 5(b) (1994) (Roosevelt relied on this statute during the Great Depression to freeze all national banks in 1933 while the statute was intended to be used only in emergencies related to foreign affairs). Each of these acts is arguably a questionable use by the President of the legislation involved in a manner not intended by Congress.

6 The general purpose of the separation of powers doctrine is to create a system of checks and balances as safeguards against the abuse of power by any one branch of government. See Bruce Stein, Note, Presidential Foreign Policy Power (Part I): The Framers’ Intent and the Early Years of the Republic, 11 HOFSTRA L. REV. 413, 425 (1983); see also id. at 425 (“Others [at the Constitutional Convention] were just as fearful of legislative tyranny.”).
called upon to resolve these power struggles. The framers of the Constitution instituted this separation of powers framework in order to restrain the constant propensity of any one branch of government to enlarge its boundaries. "The delegates at the Convention, in developing the Constitution, acted with an acute awareness of the great risks to liberty posed by a too powerful Executive." Despite this Constitutional mandate, the Executive branch in recent years has accumulated powers in the area of foreign affairs that defies our founding fathers' intent and threatens to destroy the foundation upon which our government's decision-making process is based. This paper will provide a brief background discussion of the separation of powers doctrine, including the emergence of executive authority in foreign affairs, and the legislative checks and balances designed to limit that authority as expressed in three historical Supreme Court decisions. This paper will then discuss the constitutionality of President Clinton's recent loan initiative to Mexico in the context of several other cases where a President, acting on the premise of Congressional authority, used legislation for a purpose different from that which Congress had intended, and the acts were subsequently upheld as constitutional solely due to the passage of time.

7 The Supreme Court has the duty to "say what the law is," (see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); however, the Court may refuse to decide a particular case if it deems the issue to be a "political question" which is explicitly delegated to another branch of government. See Baker v. Carr, 369 U.S. 186, 209 (1962). Also, when forced to rule on a Constitutional issue, the Court will do so using a "narrow scope of judicial function." Youngstown, 343 U.S. at 594.

8 See Stein, supra note 6, at 423. Before the debates at the Constitutional Convention took place, "Americans believed that the Executive presented the greatest danger to the Union" as is evidenced by the subordinate role given to the Executive branch in eight state Constitutions between 1776 and 1778. See id. (citing A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 426 (1976)) ("The instructions of the town of Boston to its representatives in the General Court in May, 1776, expressed the view that it was 'essential to liberty' that the three powers should be 'as nearly as possible, independent of and separate from each other.'").

9 See Stein, supra note 6, at 426 (Madison "felt that a concentration of powers in the same hands 'may justly be pronounced the very definition of tyranny' " (quoting THE FEDERALIST No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961))); see also id. at 426 (John Jay believed it prudent to keep functions of the three branches separate, as numerous examples existed where governments in which the power was held by one body later plunged into tyrannies).

II. HISTORICAL BACKGROUND

In December, 1994, Mexico stunned global financial markets by devaluing the peso. Prior to this devaluation, several events occurred which should have provided a warning to foreign investors that the peso was over-valued; however, foreign financiers continued to make large investments in Mexico, causing greater reliance by the Mexican government on these funds, which ultimately led to a more devastating crisis in 1994. American investors owned about sixty percent of the short-term bonds in Mexico, known as tesbonos, which became a large source of financing for the Mexican government during Carlos Salinas' Presidency. Thus, Americans would

11 See Jeff A. Schneppe, Mexico is Draining the U.S. Treasury, USA TODAY (Magazine), May, 1995, at 15; see also Vince Golle, Mexico: Good Politics or Prudent Policy?, FUTURES, April, 1995, at 68 (ongoing liquidity problems in Mexico depressed the peso with likelihood of problems spreading to other markets).

"Prior to the devaluation in December, 1994, the inflation picture looked somewhat promising" as the government was planning more privatization of industry, former President Salinas was making Mexico more attractive to foreign investment, and the North American Free Trade Agreement was passed. See David E. McClean, Mixing Apples and Oranges in Mexico, THE ETHNIC NEWSWATCH, National Minority Politics, Apr. 30, 1995.

12 See McClean, supra note 11, at 2 (devaluation of peso was caused by everything from "assassinations to a too-high current accounts deficit").

When Carlos Salinas de Gortari was President, he attempted to help Mexico out of poverty by tying the Mexican peso to the United States dollar which increased foreign investment initially. However, those investments decreased after the passage of NAFTA, which caused Mexico's foreign exchange reserve to plummet as investors flocked to the U.S. market and its higher interest rates. See Jeff Schnepper, supra note 11, at 5. Finally, the December 1, 1994, announcement of the devaluation caused the peso to drop seventy percent and foreign investors began to dump their stocks and bonds, leaving the Mexican government with the real likelihood of defaulting on foreign bondholders. See id.; see also Golle, supra note 11 ("Throughout 1994, the peso was pressured as foreign capital outflows increased. Rebellion in the Mexican state of Chiapas only exacerbated the amount of foreign capital leaving Mexico."); see also Recession in Mexico Called Likely if Rescue Plan Fails, WASH. POST, Jan. 31, 1995, at D1 (reasons for collapse of peso include swollen trade deficit, excess of short-term borrowing from investors, and a "dearth of hard currency"); see also Ewell E. Murphy, Jr., Making the Most of NAFTA, MEXICO TRADE AND LAW REPORTER, June 1, 1995, Vol. 5, No. 6, p. 15 ("The Achilles' heel of Mexico's trade deficit was excessive reliance on speculative capital to finance the deficit.").

13 See Nancy Nusser, Mexican Protestors Fault U.S. Aid Plan, HOUS. CHRON., Jan. 29, 1992, at 1; see also Jeff Schneppe, supra note 11, at 15.

The Mexican government had hoped to pay back holders of tesbonos and other short-term loans by selling new bonds with longer maturities, but with the devaluation of the peso and
have been among the biggest losers had the Mexican government defaulted on these debts, and this was a key consideration in President Clinton’s decision to attempt to “bail out” the Mexican government. President Clinton first sought Congressional approval for $40 billion in United States loan guarantees to be joined with several billion dollars from the International Monetary Fund and the Bank for International Settlement. While no formal vote was taken, Congress made it clear to the President that it would refuse to provide him with the requisite approval for such appropriations. President Clinton then decided to take unilateral action and make approximately $20 billion in actual loans to Mexico taken from the United States treasury through the Exchange Stabilization Fund which was established in the 1930s to defend the value of the dollar in economic crises. Clinton’s use of this fund was questioned immediately by Congress and members of the public; government officials even commented publicly that a plan to use

the likelihood that the Mexican government might default on these short-term debts, foreign investors became very reluctant to buy the new, long-term bonds, generating the economic crisis. See Recession in Mexico Called Likely If Rescue Plan Fails, WASH. POST, Jan. 31, 1995, at D1.

14 See Schnepper, supra note 11, at 16 (“Clinton’s plan will protect the holders of short-term bonds and reward Wall Street banks that underwrite loans.”); see also Nancy Nusser, HOUS. CHRON., Jan. 29, 1995, at 1 (Mexico needs bailout because it may not have cash to pay $26.5 billion in tesbonos bonds, sixty percent of which are held by Americans); see also WASH. POST, Jan. 31, 1995, at D2 (“Without U.S. backing, Mexican government would have no ready means of repaying holders of almost $28 billion in short-term bonds that come due this year.”).

15 See MEXICO TRADE AND LAW JOURNAL, June 1, 1995, at 16 (citing Keith M. Rockwell, Still Far Too Much Politicizing of Mexico Bailout, HOUS. CHRON., Apr. 26, 1995, at 25A (“As the market railed, lawmakers dithered, investor panic spread and Congress passed the buck to the White House.”)); see also Dean Foust et al., Anatomy of a Rescue Mission, BUS. WK., Feb. 13, 1995, at 32 (with Clinton’s controversial loan guarantee plan dead on Capitol Hill, top Administrative officials “labored through the night to craft an alternative plan.”).

the Exchange Stabilization Fund in such a manner would be unauthorized.\textsuperscript{17}

It is this type of unilateral decision making by the Executive branch which threatens the continued existence of the separation of powers doctrine and the ability of the Legislative branch to participate in future foreign affairs matters. President Clinton's reinterpretation of the Exchange Stabilization Fund legislation clearly thwarts Congress' purpose in passing the statute (as the statute purports on its face to exist in order to defend the value of the U.S. dollar).\textsuperscript{18} Furthermore, it is directly contrary to Congressional will on the issue of loaning money to Mexico, since Congress would have voted to prevent such conduct.\textsuperscript{19} The effect of the President's action is even broader than its immediate economic consequences because the Supreme Court has demonstrated a willingness to accept such Presidential action as constitutionally valid in the face of Congressional silence (i.e., failure of Congress to bring suit against President).\textsuperscript{20}

\section*{III. LEGAL BACKGROUND: HISTORY OF SEPARATION OF POWERS}

The concept of separation of governmental powers is derived from the U.S. Constitution as it enumerates specific and exclusive powers for each branch of government.\textsuperscript{21} This explicit allocation of powers has been interpreted as the Framers' intent to provide for a system of "checks and balances" among the three branches, so that no one branch would be able to abuse its power at the expense of another branch, or more importantly, to the detriment of the American people.\textsuperscript{22}

While the Framers of the Constitution "did not make the judiciary the overseer of our government,"\textsuperscript{23} the Supreme Court is often called upon to

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\item \textsuperscript{17} See Dean Foust et al., The Mexican Crisis, Bus. Wk., Feb. 13, 1995, at 32 ("Federal Reserve Chairman Alan Greenspan told a Senate committee on January 26, 1995, that the [Federal Reserve Board] and [the] Treasury lack[ed] authority 'as we see it to take that sort of action.' ")
\item \textsuperscript{18} See supra note 14.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} See infra notes 54 and 73.
\item \textsuperscript{21} See sources cited supra at note 4.
\item \textsuperscript{22} See Youngstown, 343 U.S. at 594 (Frankfurter, J., concurring) ("The accretion of dangerous power does not come in a day, [it comes], however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.").
\item \textsuperscript{23} Youngstown, 343 U.S. at 594.
\end{itemize}
interpret the Constitution, and must often attempt to define clearly the powers of the coordinate branches of government.\textsuperscript{24} One issue which the Court has often been forced to decide is whether the President may act unilaterally and by-pass Congress in order to act in the immediate interests of the United States in a national emergency or in foreign affairs.\textsuperscript{25}

The express powers of the President are enumerated in Article II, sections 2 and 3 of the Constitution;\textsuperscript{26} however, the Supreme Court has on several occasions ruled that the President derives implied powers not specifically listed in the Constitution from the broad grant of all "executive powers" in Article II, Section 1 of the Constitution, and from "inherent" powers necessary to act in foreign affairs and national emergencies.\textsuperscript{27} It is often argued that it is necessary that the President be allowed to act alone in many areas concerning foreign policy so that he may act quickly in the face of a national emergency;\textsuperscript{28} the Supreme Court has recognized this broad,\

\textsuperscript{24} See supra note 5; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (it is the duty of the Court to "say what the law is"). The Court may refuse to rule on a particular case if it deems the issue to be a "political question" which is explicitly delegated to another branch of government. See Baker v. Carr, 369 U.S. 186 (1962). Also, the Court, when forced to rule on a Constitutional issue, will do so using a "narrow scope of the judicial function." See Youngstown, 343 U.S. at 594.

\textsuperscript{25} See Curtiss-Wright, 299 U.S. at 315; see also Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 582 (1952); see also Dames & Moore v. Regan, 453 U.S. 654, 661 (1981).

\textsuperscript{26} U.S. CONST. art. II, §§ 2 and 3: "The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States... He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties... [H]e shall nominate, and... appoint Ambassadors... and all other Officers of the United States, whose Appointments are not herein otherwise provided for. ..."

\textsuperscript{27} "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1; see also Curtiss-Wright, 299 U.S. at 320 (President has power which does not require an act of Congress as the basis of its exercise, but which is a "plenary and exclusive power of the President as sole organ of the federal government in the field of international relations."); see also Dames & Moore, 453 U.S. at 678-79 (citing Youngstown, 343 U.S. at 637 (when there is "no contrary indication of legislative intent and... [when] there is a history of congressional acquiescence" the President may be said to have broad discretion to act "on independent Presidential responsibility.").

\textsuperscript{28} See Elliot E. Cheatham and Harold G. Maier, Private International Law and Its Sources, 22 Vand. L. Rev. 27, 69 (1968) ("Burdened with international responsibility, the executive must have whatever... power he needs... to effectively support his activities in [foreign affairs]."); see also Harold G. Maier, Immigration Emergency Powers: Legislative and Executive Interaction and Refugee Policy of the Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess. 62 (1982) (citing A. Miller, Presidential Power (1977) at 205, 233-28 ("The President has power to act in emergency situations, at least as long as he does not
discretionary power in a line of cases beginning with *United States v. Curtiss-Wright Export Corporation.*

In *Curtiss-Wright,* certain defendants were indicted for conspiring in the United States to sell arms to Bolivia in violation of a Presidential Proclamation issued pursuant to authority conferred upon the President by a Congressional Joint Resolution. The Court was called upon to determine whether the Joint Resolution was, in fact, an unconstitutional delegation of legislative power to the President. In ruling against the defendant arms dealers, the *Curtiss-Wright* Court held that the President’s act and the Joint Resolution were each examples of constitutionally authorized conduct. The Court suggested that the President could act even without express legislative authority because the federal government, upon its formation, was vested with certain powers which were not dependent upon the Constitution, but rather were passed from the British Crown to the federal government by the Declaration of Independence as “necessary concomitants of nationality.”

According to the Court, the powers to “wage war, to conclude peace, to make treaties and to maintain diplomatic relations with other sovereignties” are special powers inherent to the United States as a sovereign, and certain of these inherent powers are given to the Executive branch regarding foreign affairs. Although not enumerated in the Constitution, these inherent powers are necessary, the Court reasoned, because the President is the “sole organ of the nation in its external relations.”

While Justice Sutherland was suspicious that the federal government inherited certain foreign affairs powers by the mere nature of sovereignty, he did assume that the Executive branch should be the exclusive means of executing these powers, should they exist. However, since the Constitution actually delegates certain exclusive, foreign affairs powers to both the Legislative and Executive branches, it is by no means clear which branch of government, if any, should be given such broad discretion to regulate in this area.

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29 299 U.S. 304 (1936).
30 *Curtiss-Wright,* 299 U.S. at 311-12.
31 *Id.*
32 *Id.* at 318.
33 *Id.* at 318-20.
34 *Id.* at 319.
35 *Id.*
36 See supra note 4.
Nevertheless, the result of the *Curtiss-Wright* decision gave the President essentially unfettered discretion concerning foreign relations by virtue of this inherent executive power. The Court also suggested that because Congress had enacted vaguely similar legislation in the past, this presented proof of implied Congressional authorization for the President’s present action.\(^\text{37}\) This argument (that silent acquiescence by Congress denotes Presidential acts as constitutional) was reiterated by the Supreme Court in *Dames & Moore v. Regan*\(^\text{38}\) fifty years later, and may, in fact, be the justification for most unilateral acts by a President being deemed constitutional thereafter.

Several Court decisions subsequent to *Curtiss-Wright* seem to have rejected Sutherland’s analysis regarding Presidential power in favor of more limiting language.\(^\text{39}\)

In *Youngstown Sheet and Tube Co. v. Sawyer*,\(^\text{40}\) the President acted unilaterally in authorizing the Secretary of Commerce to seize the majority of the steel mills in the United States in order to prevent them from shutting down due to a labor strike.\(^\text{41}\) The President claimed that a national emergency existed and that a strike would jeopardize the national defense during the Korean War.\(^\text{42}\)

The President claimed to have acted based on his constitutional powers as “Commander-in-Chief” and on the power conferred on him by the Legislature in the Defense Production Act of 1950.\(^\text{43}\) The Court rejected this argument, however, and found the President’s acts unconstitutional, reasoning that his power to act must derive from either an express grant in the Constitution or from an act of Congress, and that neither existed to provide the President with the authority to seize private property in the

\(^{37}\) *Curtiss-Wright*, 299 U.S. at 328.


\(^{39}\) See *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown*, 343 U.S. at 585: “The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”); see also David S. Eggert, *Executive Order 12, 333: An Assessment of the Validity of Warrantless National Security Systems*, 1983 DUKE L. J. 611, 614 (quoting United States v. Butenko, 494 F.2d 593, 630-33 (3d Cir. 1974) (Gibbons, J., dissenting), regarding Sutherland’s argument in *Youngstown*: “[I]t is one thing to say that the federal government succeeded to the foreign affairs prerogatives of George III. It is another to say that those prerogatives have passed from George III to George Washington and in unbroken succession to Richard Nixon.”).

\(^{40}\) 343 U.S. 579 (1952).

\(^{41}\) 343 U.S. at 582-84.

\(^{42}\) Id.

\(^{43}\) Id. at 582, 604.
The Court stated that no powers under the Constitution’s “Commander-in-Chief” allocation had been invoked, and that not only did no Congressional authority exist, but Congress had instead passed contrary legislation intended to prevent precisely this type of act.\(^4\)

Justice Black stated in his majority opinion that the President’s “Commander-in-Chief” power did not apply because the act of seizing mills was “too far removed from the theater of war” to invoke this Constitutional power.\(^5\) This reasoning serves to distinguish *Youngstown* from *Curtiss-Wright* in that the seizure of domestic steel mills was too far removed from “foreign affairs” to warrant the President’s exercise of sole discretion absent Congressional authority, especially since the President’s power, while concededly greater in an “emergency,” certainly does not extend so broadly in the face of a contrary intent by Congress.\(^6\)

In his concurring opinion, Justice Jackson stated that “presidential powers are not fixed but fluctuate,” depending upon their disjunction or conjunction with those of Congress.\(^7\) In *Youngstown*, Justice Jackson divided presidential powers into three classes: (1) the President’s authority is at its maximum when he acts pursuant to an express or implied authorization of Congress; if an act is deemed unconstitutional here it usually means that the Federal Government lacks the authority to act in this area; (2) when the President acts in the absence of either a Congressional grant or denial of authority the President can rely on his own independent powers; (3) when the President acts incompatibly with an express or implied will of Congress his power is at a minimum; the President’s acts here can only be sustained by disabling

\(^{44}\) Id. at 585.

\(^{45}\) Id. at 585.

\(^{46}\) Id. at 587.

\(^{47}\) Id. at 585. The Court refused to do here what it did in *Curtiss-Wright* when it granted the President broad discretion to act based on his inherent powers. Rather, the Court chose to limit the President’s authority to act to only those situations expressly authorized by the Constitution or those in which Congress expressly grants the President authority. Perhaps the Court silently determined that while seizing mills may have had an effect on foreign affairs, the actual result of seizing property within the U.S. fell into a situation which the Court refused to address in *Curtiss-Wright*; namely, whether the President’s conduct in a similar situation (but related only to internal affairs) would be constitutional. If such is the case, the Court in *Youngstown* impliedly determined that such conduct is unconstitutional.

\(^{48}\) Id. at 635.
Congress from acting on the subject. The only way the Court could have upheld the President's act, according to Justice Jackson, would have been to hold that such a seizure was solely within the President's domain and beyond the control of Congress, which clearly would have been erroneous.

Thus, the Court stated that the President's acts were unconstitutional as contrary to the will of Congress, and were beyond his executive power as they were essentially attempts to legislate which is a power granted exclusively to the Congress in Article I, § 8 of the Constitution. The Court in Youngstown furthermore refused to recognize or allow the President discretion to act in an "emergency," stating that while Congress may grant the President latitude to act in such a situation, the President must first go to Congress and seek authorization.

The concurring opinions of Justice Burton and Justice Clark are interesting, practical assessments of the constitutionality of presidential conduct. While Justice Burton emphasized that the President relied upon Congressional legislation that did not provide for seizure, he also suggested that had the President relied upon other legislation which provided for seizure (such as § 18 of the Selective Service Act of 1948 which authorized the President to seize plants failing to fill certain defense orders), he could have followed the applicable procedures and seized the mills with the full authority of Congress, thus rendering his acts constitutional.

Justice Clark, on the other hand, noted that had Congress subsequently ratified the President's acts, this would imply Congressional authority and

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49 Id. at 601-03 (regarding Labor Management Act of 1947 dealing with "national emergencies" arising out of a breakdown in peaceful, industrial relations; Congress chose not to lodge [seizure] power with the President, but rather expressly required the President to report to Congress). See also David S. Eggert, supra note 22, 1983 DUKE L. J. 611, 635-36 (citing Youngstown, 343 U.S. at 635-38). In Youngstown, the President's acts were undertaken with the least amount of authority because Congress had already expressed a contrary intent regarding the President's ability to seize property in the event of labor negotiations.

50 Youngstown, 343 U.S. at 640.

51 Id.

52 Id. at 652 (citing 39 Op. Atty. Gen. 348 (Congress may expand normal executive powers to meet an emergency during war)).

53 Id. at 658 (Defense Production Act of 1950 provided for negotiations by the President between the parties, but no seizure. However, when negotiations failed here, the President seized the mills contrary to his authority).

54 Id. at 659 (citing Selective Service Act of 1948, 50 U.S.C. App. § 468 (1948)).
thus no adjudication would have been necessary.\textsuperscript{55} Similarly, Justice Frankfurter suggested that had Congress merely acquiesced to similar acts over an extended period of time, the President may have relied on this silence as authorization as well.\textsuperscript{56}

Thus, while at first glance the \textit{Youngstown} Court seemed to limit the powers of the President to act unilaterally (as compared to the \textit{Curtiss-Wright} decision), the Court actually enforced the principals behind that case. The issue the Court faced in \textit{Youngstown} was not directly concerning foreign affairs, and the dictum in \textit{Youngstown} suggests (as does \textit{Curtiss-Wright}) that in practice acquiescence by Congress (including long-standing silence) creates constitutional power in the Executive to act alone. This principle became a key element in the Court's 1981 decision in \textit{Dames & Moore v. Regan}.\textsuperscript{57}

In \textit{Dames & Moore} President Carter, acting under the legislative authority of the International Emergency Economic Powers Act (IEEPA),\textsuperscript{58} declared a national emergency and blocked the removal or transfer of all seized property owned by the Iranian government in response to American citizens being held hostage.\textsuperscript{59} The President subsequently negotiated an agreement with the government of Iran to nullify any attachments on Iranian property in the United States and to dismiss all pending claims in the United States against the Iranian government in exchange for the hostages' release.\textsuperscript{60}

The plaintiffs in \textit{Dames & Moore} had outstanding attachments and pending suits against the Iranian government, and sued the Secretary of the Treasury in the United States for implementing the Presidential agreement, claiming that it was unconstitutional and beyond the President's executive powers.\textsuperscript{61} Two issues were presented to the Court: The first was whether

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\textsuperscript{55} Id. at 661. \\
\textsuperscript{56} Id. at 610-11. In concurring, Justice Frankfurter discussed a "gloss of life method" of interpreting the powers of each branch of government providing that: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power.''' Since only three isolated instances of prior Presidential seizures existed in \textit{Youngstown}, no continued acquiescence existed. \\
\textsuperscript{57} 453 U.S. 654 (1981). \\
\textsuperscript{58} 50 U.S.C. §§ 1701-06 (1978). \\
\textsuperscript{59} See \textit{Dames & Moore}, 453 U.S. at 662-63. \\
\textsuperscript{60} Id. at 664-65. \\
\textsuperscript{61} Id. at 666-67. 
\end{flushright}
the President had the power to nullify all attachments of Iranian property, and the second was whether the President had the power to suspend current claims pending in the United States courts against the Iranian government.  

The Dames & Moore Court borrowed language previously used in Youngstown regarding sources of Presidential power, stating that express authorizations from either the Constitution or from Congress were required in order for the President to act. The Court ultimately ruled that the President’s reliance on § 1702 of IEEPA provided “sweeping and unqualified” authorization to vacate the attachments. 

Although the Appellants in Dames & Moore raised a key issue central to several recent cases (namely that the legislation relied upon by the President was not intended to be used in such a way as to give the President such great authority), the Court rejected this argument and stated that the legislative history regarding the IEEPA statute and court cases interpreting it gave the President broad authority under the statute to vacate attachments during an emergency. Thus, since the President acted with what is considered the express authorization of Congress, the President had maximum authority to act, and the Court will almost always uphold such action as Constitutional.

The Court relied upon a different theory, however, in ruling that the President also had authority to suspend current United States court claims against the Iranian government, and conceded that neither the IEEPA statute nor 22 U.S.C. § 1731 (the Hostage Act) gave the President express authority

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62 Id. at 667.
63 Id. at 668.
64 Id. at 671 (quoting Sec. 1702 IEEPA(a)(1), “The Presidential revocation of the license he issued permitting prejudgment restraints upon Iranian assets ... falls within the plain language of the IEEPA. In vacating the attachments, he acted to ‘nullify [and] void ... any ... exercising [of] any right, power, or privilege with respect to ... any property in which any foreign country ... has any interest ... by any person ... subject to the jurisdiction of the United States.’ ”).
65 Id. at 672-73 (citing Orivis v. Brownell, 345 U.S. 183 (1953) (attachment obtained by American claimant subject to revocable license and obtained after entry of freeze order is subordinate to President’s power under IEEPA)).
66 Id. at 674 (citing Youngstown, 343 U.S. at 637 (Jackson, J., concurring) (President’s acts here are supported by the “strongest of presumptions and the widest latitude of judicial interpretation.”)).
to act on this issue. However, the Court held, "[s]uch failure of Congress specifically to delegate authority does not, 'especially . . . in the area of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." In fact, the Court goes so far as to state that legislation enacted which is closely related to the President's conduct, and which gives the President wide discretion, may be considered to invite a "measure of independent Presidential responsibility," especially where there is a history of Congressional acquiescence for the type of conduct engaged in by the President.

In *Dames & Moore*, the Court further stated that because there existed a long standing practice of settling claims between nations by the Executive, because previous Supreme Court decisions had upheld this type of Presidential authority, and because Congress had approved of this action, the President had authority to suspend pending United States court claims even without express Constitutional or Congressional authorization. The Court justified this result by stating that there had been a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned [which] may be treated as a gloss on Executive power vested in the President by virtue of § 1 of Article II." Just as it did in *Curtiss-Wright*, the Court provided the Executive branch with very broad, expansive powers beyond those specifically enumerated in the Constitution, justifying this result solely by Congressional silence. This has, in turn, created an atmosphere within the Executive branch whereby the President is able to act unilaterally on almost any issue if he is willing to wager that Congress will remain silent, impliedly consenting to his conduct, and thus conferring upon him authority to act.

This is arguably a far broader power than the founders of the Constitution intended to confer upon the President when they provided him with all of the

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67 *Id.* at 676 (Court says language of *Hostage Act* is broad, but does not conclusively give President express right to suspend court claims; legislative history for this statute refutes this proposition as well).

68 *Id.* at 678.

69 *Id.* at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

70 *Id.* at 682-83 (citing U.S. v. Pink, 315 U.S. 203 (1942)).

71 *Id.* at 682.

72 *Id.*

73 *Id.* at 686 (quoting *Youngstown*, 343 U.S. at 610-11). The Court relied on United States v. Midwest Oil, 236 U.S. 459, 474 (1915) stating that "[p]ast practice does not, by itself, create power but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent."
"executive powers." Nonetheless, the acquiescence theory is one of the strongest arguments today for allowing a President to act alone in the area of foreign affairs.

IV. ANALYSIS: ROOSEVELT, TRUMAN AND CLINTON COMPARED

Rather than solely relying upon a "history of Congressional Acquiescence" as authority for taking blatant unilateral action, many Presidents in recent history have decided to expand their power in a safer manner by relying on some form of legislation—perhaps even legislation that was intended for an entirely different purpose. President Roosevelt in 1933 relied upon §5(b) of the Trading With the Enemy Act as the legislative authority giving him the power to declare a domestic emergency and to close all of the national banks for what is now known as the 1933 Bank Holiday. The plain language of that statute suggests that it was never intended to be used in dealing with domestic

74 U.S. CONST., art. II, § 1 ("The executive power shall be vested in a President of the United States of America."); see also Youngstown, 343 U.S. at 640-41 (Jackson, J., concurring) (Art. II, § 1 does not grant to the President "all of the executive powers of which the government is capable [because] the example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of his evils in the Declaration of Independence leads . . . to doubt that they were creating their new Executive in his image.").

75 Examples exist where Presidents have reinterpreted treaty provisions, such as the Executive branch's reinterpretation of the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 756, T.I.A.S. No. 1676, 11 U.N.T.S. 11, which created an international obligation "to provide permanent residence rights for a permanent observer to the U.N." where such right did not previously exist upon Congress' approval of the agreement. See M.A. Thomas, Comment: When the Guests Move In: Permanent Observers to the United Nations Gain the Right to Establish Permanent Missions in the United States, 78 CALIF. L. REV. 197, 242 (1990), (this executive reinterpretation expanded U.S. obligations under the Headquarters Agreement without Congressional authorization and contrary to evidence of apparent Congressional intent).

Another example is seen in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), where the Supreme Court implicitly accepted the Executive usurpation of power in regulatory law even where Congress had asserted a contrary intent. See George R. Rogers, Comment: Legislative Intent vs. Executive Non-Enforcement: A New Bounty Statute as a Solution to Executive Usurpation of Congressional Power, 69 IND. L.J. 1257, 1260 (1994).

problems, but rather was drafted as war powers legislation following World War I and was intended to apply only to foreign transactions with no direct domestic impact.  

Yet, Roosevelt used the legislation as authority to act in response to a purely domestic economic concern. He was not acting under threat of war or due to fluctuations in foreign currency, but instead was acting in conjunction with his concerns in taking the dollar off of the Gold Standard. The reason that his conduct was not questioned or constitutionally challenged is because Congress subsequently agreed with the result. "By equating the economic debacle with war, FDR asked for and received from Congress the resources [commensurate with] a military commander battling a foreign invader."  

Roosevelt certainly misused this statute in order to authorize his conduct and was technically without any power to act since no other Constitutional or Congressional authority conferred this power on him. However, his action was rendered constitutional for the simple reason that Congress retroactively approved of it. Viewed in light of the Curtiss-Wright and Dames & Moore decisions, both of which allow the President to create Constitutional power based on the silent acquiescence of Congress, Roosevelt's action suggests that the Executive may shift the allocation of Constitutional power contrary

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77 See Harold G. Maier, Immigration Emergency Powers: Legislative and Executive Interaction and Refugee Policy on the Committee on the Judiciary, U.S. Senate hearing, 97th Cong., 2d Sess. 62 (1982) [hereinafter Maier Testimony]; see also Alexewicz v. General Aniline & Film Corp., 43 N.Y.S. 2d at 718 (1943) (court held that war powers legislation was only concerned with regulation of foreign exchange and obviously was primarily intended to be used as a method to prevent withdrawals of cash assets from banking institutions when public welfare so required); see also Propper v. Clark, 337 U.S. at 484 (1949) ("freezing order issued under authority of TWEA immobilizes assets . . . so that title to them might not shift . . . until the government can determine whether those assets are needed for prosecution of threatened war.").

78 See Michael E. Parrish, New Deal Symposium: the Great Depression, the New Deal, and the American Legal Order, 59 WASH. L. REV. 723, 736 (1984) ("acting under dubious authority of the [TWEA] from World War I, [President] Roosevelt banned gold exports and all foreign exchange transactions until Congress approved the administration's monetary schemes and devalued the dollar by almost twenty-five percent.").

79 Id.

80 Id. at 723, 725 (citing Leuchtenburg, The New Deal and the Analogue of War, in CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA, 81-143 (J. Breaman et al. eds., 1964)).
to the framers' intent and in clear violation of the separation of powers doctrine.\textsuperscript{81}

While the Constitution does not expressly grant any emergency executive authority, it is now a commonly accepted proposition that the President should have wide discretion to deal with both domestic and foreign emergencies.\textsuperscript{82} When such emergency powers are successively abused by Presidents who seek to by-pass the Constitution and act without Congressional approval, however, this abuse of power must be curbed so that Constitutional safeguards founded in a system of checks and balances are not obliterated.\textsuperscript{83}

Roosevelt's unilateral action remains constitutional because Congress subsequently approved of his actions. Such conduct will rarely be judicially reviewed because the Executive and Legislative branches are said to have acted together. However, more recent Presidents have become even bolder than Roosevelt, and not only have relied on tenuous legislation intended for another purpose, but have also acted without seeking or obtaining approval from Congress altogether. This makes any Presidential argument that he is acting with "Congressional authority" completely superficial, and certainly calls into question the continued existence of the traditional view of the separation of powers doctrine.

President Truman claimed legislative authority for engaging the United States in the multilateral General Agreement on Tariffs and Trade (GATT) via legislation enacted in the Protocol of Provisional Application (hereinafter "PPA") contained in the Reciprocal Trade Agreements Act of 1945.\textsuperscript{84} Yet the GATT agreement went far beyond the scope of legislative authority relied upon by Truman, as GATT at that time consisted of approximately 45,000 tariff concessions and thirty-four articles obligating the member states on such matters as most-favored nation treatment, nondiscrimination in internal taxation and import restrictions which the Reciprocal Trade Agreements Act never intended to address.\textsuperscript{85}

\textsuperscript{81} See supra notes 4, 6.


\textsuperscript{83} Such measures were taken when Congress enacted IEEPA to limit the President's authority in emergencies and are seen in Court decisions such as Youngstown.


\textsuperscript{85} Id. at 256, 257.
Several culminating factors regarding GATT demonstrate a blatant misuse of the legislation by Truman. First, GATT is a multilateral agreement, and the legislation authorized only bilateral agreements; second, many specific substantive clauses, such as those mentioned regarding import taxes and most-favored nation status, were clearly beyond the scope of the legislation’s authority; and third, GATT is actually an international organization into which the legislation relied upon does not authorize entry.86

The plain language of the legislation states that the President may engage in bilateral agreements regarding “foreign trade.”87 Yet, many clauses exist within the GATT which deal strictly with administrative matters such as consultation over disputes, waivers, and amendments, as well as with non-trade matters such as national treatment of imported goods and dumping, all of which are beyond the scope of the statute relied upon by Truman.88

Truman’s reliance upon this legislation to engage the United States in such a broad, multilateral agreement is tenuous at best, and probably unconstitutional. This is especially so since Truman could not have relied upon any inherent Constitutional powers to act alone to the extent that GATT relates directly to foreign commerce, the regulation of which is vested exclusively in Congress.89

Like Roosevelt before him, Truman relied upon legislation by claiming that it authorized him to act unilaterally, while in fact it was never intended to provide such authorization. In contrast to Roosevelt’s Bank Holiday action, Congress never formally approved of Truman’s Executive action and

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86 Id. at 257. The Legislative history of the Protocol of Provisional Application (“PPA”) statute provides neither the authority nor any suggestion of authority to enter into a multilateral rather than a bilateral agreement. Also, the Congressional hearings records show that members of Congress were shocked that the Executive had suggested that other countries join in this multilateral agreement when Congress had not previously considered that as a possibility when passing the PPA within the Trade Agreements Acts; see also Hearings on the Operation of the Trade Agreements Act and the Proposed International Trade Organization Before the House Foreign Affairs Comm., 80th Cong., 1st Sess., Pt. 1 at 6 (1947).

87 See supra note 82.

88 See Jackson, supra note 84, at 362.

89 See U.S. CONST., art. I, § 8 (Congress has power to regulate commerce with foreign nations); see also Jackson, supra note 84, at 275 (“The power to regulate foreign commerce is vested in Congress, not the Executive; the Executive may not exercise the power by entering executive agreements.”) (citing U.S. v. Guy W. Capps, Inc., 204 F.2d 655 at 658 (4th Cir. 1953)).
only recently approved of GATT itself in 1994. The only real argument in favor of GATT's constitutional validity today is historical recognition by Congress. The Executive branch, seeking to rely on this precedent as a source of power in the future, has always argued for the validity of GATT. The Judicial branch has assumed validity of GATT and relied upon its provisions in several decisions, while Congress has only recently recognized its validity in legislation authorizing the Kennedy Round of renegotiations for certain GATT provisions, and finally in the 1994 approval of GATT's obligations within the United States.

All of this approval has been retroactive out of necessity, and the result of this unauthorized Presidential action has been to create an even greater shift of power from the Legislative branch to the Executive in the areas of international trade and foreign relations, powers which are expressly delegated to Congress under the Constitution. This shift cannot practically be altered today because "to disown the GATT at this point would be a jolt to this nation's foreign policy, and, indeed, to the stability of international economic relations throughout most of the world."

While these specific acts by Roosevelt and Truman may, in fact, have proven beneficial to the United States in retrospect, Congress must demand a more active role in determining foreign affairs in the future or it risks being forced to abdicate its power in this area to the Executive, which may ultimately prove costly to the nation.

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90 See John H. Jackson, supra note 84, at 265 (citing 8 Dept. State Bull. 970 (1945)) (According to the State Department, GATT "was authorized by a combination of existing statutes and Presidential authority," and therefore there was no need to submit it to Congress). However, neither the applicable statute nor the Constitution granted this authority to the President, so he essentially acted unilaterally and completely without authority. The ramifications of allowing this to continue present a startling disregard for the Framers' intentions in creating the separation of powers.

91 Id. at 260.

92 Id. at 269-70 nn.108-09 (citing Baldwin-Lima-Hamilton v. Superior Court, 208 Cal. App. 2d 803 (1962), where California "Buy American Act" was held unenforceable because violative of GATT); see also Territory v. Ho, 41 Haw. 565 (1957) (court struck down territorial law as contrary to GATT and unconstitutional).

93 See Jackson, supra note 84, at 260.

94 Id. at 260. It is likely that if the Courts in the U.S. were to even hear a case regarding the validity of the GATT it would be upheld based on subsequent Congressional acquiescence, even though informal. Likewise, it would be virtually impossible to terminate § 5(b) of the TWEA because the government has come to rely upon this delegation of legislative power to the point that terminating this statute would "seriously injure the governmental process." See also Maier Testimony, supra note 77 (regarding § 5(b) of TWEA).
The most recent example of executive unilateral action justified superficially by unrelated legislation is President Clinton's direct $20 billion loan initiative to Mexico, which was proffered to stabilize the Mexican peso. This initiative was based on legislation intended only to stabilize the United States dollar.

On January 31, 1995, President Clinton issued a "Statement with Congressional Leaders on Financial Assistance to Mexico" stating that because of the "emergency circumstances" in Mexico he intended to rely on the Exchange Stabilization Fund\(^\text{95}\) (ESF) to provide billions of dollars in financial assistance to Mexico.\(^\text{96}\) The ESF was established in 1934 with $2 billion and was intended to be used to "defend the dollar after the United States abandoned the gold standard."\(^\text{97}\) Today, the fund has grown to an amount between $25 and $30 billion, and its function is still to make "short term adjustments" of currency.\(^\text{98}\)

The plain language of the statute states that the Department of the Treasury administers the fund, which is "available to carry out this section, . . . (22 U.S.C. § 286e-3), and § 3 of the Special Drawing Rights Act of the IMF, 22 U.S.C. § 286(o)."\(^\text{99}\) The words "this section" refer to the ability of the Secretary of the Treasury, with approval from the President, to "deal in gold, foreign exchange, and other instruments of credit and securities that the Secretary considers necessary" to effectuate an "orderly exchange arrangement and a stable system of exchange rates."\(^\text{100}\)

Unlike the IEEPA statute relied upon by President Carter in *Dames & Moore*, the legislative history behind the ESF does not grant the President broad authority to act in administering loans to support the value of foreign currency.\(^\text{101}\) The majority of members in Congress today interpret the ESF

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\(^{97}\) See Ducan Hunter, *Clinton’s Solo Bailout Spells Disaster*, L.A. TIMES, Feb. 6, 1995, at B7; see also *U.S. Treasury Chief Urges Support for Mexico Pact*, REUTERS FINANCIAL SERVICE, Mar. 7, 1995, available in LEXIS, NEWS Library, CURNEWS file (Senate Banking Comm. Chairman Alfonse D’Amato said, “This fund was intended to stabilize the dollar, not the peso.”).

\(^{98}\) 141 CONG. REC. S4046 (daily ed. Mar. 16, 1995); see also Hunter, supra note 97.


\(^{100}\) 31 U.S.C. § 5302(b) (1994).

\(^{101}\) See supra text accompanying notes 58-66.
as providing for "orderly exchange arrangements" needed to stabilize the U.S. dollar, which was not in need of stabilization at the time the loans were made to Mexico.\textsuperscript{102} The language of the statute also states that any action taken under the law must be "consistent with the U.S. government's obligations under the IMF, which expressly provides for the necessity of Congressional approval in most areas.\textsuperscript{103} The ESF is expressly reserved for the transfer of funds, in the form of United States purchases of currencies or gold from the IMF, to the ESF in order to stabilize the dollar.\textsuperscript{104} In addition, the ESF was designed to repay funds withdrawn from the IMF pursuant to §286(o) of the IMF.\textsuperscript{105}

The records of the Congressional hearings regarding this statute suggest that the President's use of the ESF is legally tenuous, and that the statute itself may be unconstitutional if it may be interpreted to allow the President to appropriate funds in this way.\textsuperscript{106}

\textsuperscript{102} See 141 CONG. REC. S4046, 4047, (Senator Brown, "If there is a purpose for the Exchange Stabilization Fund, it surely must be to defend the United States dollar."). Although a provision in § 5203(b) states that loans to a foreign government may be made for more than six months in an "emergency," these were intended to be made only in a U.S. emergency in an effort to stabilize the U.S. dollar against a foreign currency, and not vice versa.

\textsuperscript{103} See sources cited supra note 97; see also 22 U.S.C. § 286 (Congress authorized the President to accept membership in the Fund); see also 22 U.S.C. § 286(a) (President may appoint governor of the Fund with advice and consent of Senate); see also § 286(b)(1) (Providing for Annual Reports to Congress); see also § 286(c) (Congressional authorization needed for certain actions including (1) change in quota of the U.S. under the Fund, (2) proposing a par value for the U.S. dollar, (3) proposing a change in par value, (4) the U.S. subscribing to additional shares of stock, (5) accepting an Amendment to the Fund agreement, (6) making any loan to the fund, (7) making any approval of disposition of more than $25 million ounces of Fund gold for the benefit of the Trust Fund or establishing any additional trust fund, and (8) consent to any borrowing by the Fund).


\textsuperscript{105} Id.; see also 22 U.S.C. § 286(o) (1994); see also 22 U.S.C. § 286(o)(a) ("Special Drawing Rights allocated to the United States ... shall be deposited in the Exchange Stabilization Fund account"); see also 22 U.S.C. § 286(o)(b) ("currency payments by the U.S. in return for Special Drawing Rights ... shall be made from the resources of the ESF.").

\textsuperscript{106} See 141 CONG. REC. H 1298, 1299, 104th Cong. 1st Sess., Feb. 7, 1995 ("Obviously, 31 U.S.C. § 5302 is unconstitutional because it allows the Executive branch to exercise powers exclusively given to Congress in the Constitution."); see also U.S. CONST., art. I, § 9 ("No money shall be drawn from the Treasury but in consequence of appropriations made by law."); see also U.S. CONST., art. I, § 8 (gives Congress the exclusive authority to "coin money, regulate the value thereof, and of foreign coins").
Should Congress decide to bring suit, perhaps the Court may consider the question of whether the ESF statute, like the statute at issue in *Curtiss-Wright*, creates an unconstitutional delegation of legislative power to the President.\textsuperscript{107} If the Court were to consider this issue it would likely find that the delegation of power is, in fact, unconstitutional, and that the entire ESF must be abandoned or redrafted to require Congressional authorization regarding the valuation of either the United States dollar or foreign currency as is expressly stated in Article I, § 8 of the Constitution. However, even if the statute itself were to be deemed valid, the fundamental question remaining is whether the President’s conduct in this instance was authorized by Congress pursuant to the ESF, or whether Congress’ intent in enacting the statute was solely to provide for the stabilization of the dollar, thus making President Clinton’s act unauthorized and unconstitutional. Congress has recently taken steps to prevent the Executive from using the ESF for such foreign loans in the future.\textsuperscript{108}

If Congress does not seek judicial review of Clinton’s action, and even if it never formally approves of Clinton’s conduct, future Presidents will be able to rely on the same authority. Similar Executive action will then automatically be deemed constitutional based on the theory that a history of Congressional silence amounts to acquiescence as seen in *Curtiss-Wright*, in the dictum of *Youngstown Sheet & Tube*, and in *Dames & Moore*.\textsuperscript{109}

Thus, there seems to be no end to the unfettered discretion of the President to act unilaterally in foreign affairs so long as any legislation remotely related to his conduct exists and is relied upon. Perhaps then, the time is ripe for a new Court ruling defining more accurately the role of the Executive when acting alone in foreign affairs. An even more appropriate response would be for the Court to put an end to the “implied Congressional authority” theory based on a history of silent acquiescence, in order to ensure that the Framers’ intentions regarding the separation of powers are respected.

\textsuperscript{107} See sources cited supra note 27.

\textsuperscript{108} Senate OK’s Measure That Would Restrict White House Use of ESF, Banking Rep. (BNA), Vol. 65, No. 7, p. 318 (Aug. 14, 1995) (Measure approved that would restrict White House’s use of ESF to make loans to other countries in future without Congressional approval). However, without judicial intervention in the form of lawsuit and judgment, future Presidents will still be able to take similar action and rely on a statute which was not intended to be used in the specified way based on the silent acquiescence theory.

\textsuperscript{109} See sources cited, supra note 10.
These three examples of unilateral, executive action have been deemed valid and remain constitutional because their effects have become so entrenched in our nation’s political, economic and social affairs that to attempt to repeal them after the fact is almost impossible. It has been argued that what Justice Jackson meant when writing about the maximum authority of the President to act in light of Congressional authorization was that so long as the governmental branches agree that a specific act is valid (even if that agreement is procured retroactively) then the practice is “functionally constitutional” regardless of the Framers’ intent or the words of the document.\footnote{See Maier testimony, supra note 77.}

However, this argument only holds true if, in fact, all three branches actually agree that the act is valid. In the three examples presented here, the Legislative branch never intended to authorize the acts of the Executive beforehand, and actually refused to approve of the acts in two cases after the fact. The argument that the passage of time creates authorization should not be given enough credence to allow a constitutional shift in power never intended by the framers, and never actually consented to by the coordinate branches of government.

Although the definition of a “constitutional” act evolves over time, and is shaped by the historical practices of all three branches of government, conduct which is clearly contrary to the express words of the Constitution should not be deemed constitutionally valid simply because one branch of government has the means to exercise such conduct, and the others remain silent over a period of time. The system of checks and balances within the Constitution was intended to prevent the accumulation of excessive power in one branch of government, and Congress must assert its check now to prevent further loss of power in the area of foreign affairs in the future.