

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1959

December, 1959

Number 4

AMERICAN PARTICIPATION IN MULTINATIONAL
ECONOMIC INSTITUTIONS: A PROBLEM IN
CONSTITUTIONAL LAW AND POLICY

Arthur S. Miller†

I. INTRODUCTION

American participation in external economic arrangements during the past twenty-five years has displayed two broad and basically inconsistent trends. First, and perhaps more evident, has been the tendency to enter into formal multilateral institutions. This movement began in 1934 with adherence to the International Labor Organization. World War II lent great impetus to the trend; both the International Monetary Fund and the International Bank for Reconstruction and Development came into being in the immediate post-war years. In addition, the specialized agencies of the United Nations include the United States among their members; the General Agreement on Tariffs and Trade was negotiated in 1947; and the International Finance Corporation was created in 1956. There are, furthermore, a number of other cooperative agencies with American membership.¹ Not so evident, but nevertheless perceivable, is the second trend: that toward economic nationalism.² Beginning also in 1934 when President Franklin D. Roosevelt "torpedoed the World Economic Conference with a single sentence,"³ a steady progression toward a higher degree

† Professor of Law, Emory University. Acknowledgment is made to the John Simon Guggenheim Memorial Foundation for a grant which made this and other studies possible.

1. A partial listing may be found in Gardner, *Sterling-Dollar Diplomacy* (1956).

2. The movement toward greater protectionism has been traced at least as far back as the Civil War. See Taussig, *Tariff History of the United States* (8th ed. 1931).

3. Quoted in Webb, *The Future of International Trade*, 5 *World Politics* 423, 435 (1953).

of autarky is discernible in the foreign economic policy of the United States. The "Buy American" principle, the external effects of agricultural policy, the insistence on escape clauses and peril-point provisions in trade agreements, the strategic trade controls—all of these provide ample evidence of the trend toward economic parochialism. In short, a fundamental ambivalence between aim and actuality has characterized American foreign economic relations during the past quarter-century.⁴

What direction future policy will take of course cannot be forecast with absolute certainty. At the moment, either trend could be extrapolated so as to project a possible shape of things to come. Nevertheless, one thing seems sure—the gap between aim and operational fact cannot last indefinitely. Some resolution of the conflict will be made. For a number of reasons, a persuasive case can be made for the belief that the more likely path to be followed will be that of greater participation in multinational economic institutions. Principal support for this conclusion comes from the proposition that foreign economic policy must eventually fall into the same patterns as politico-strategic policy. Now firmly, perhaps irrevocably, multinational in scope, American external political and strategic policies are creating the imperatives leading to increased multinationalism in economic relations. The problems this raises for American constitutional law and practice make up the burden of this article. The development of the theme will take two directions. First, in the context of the current controversy over GATT-OTC,⁵ discussion will be made of the constitutional aspects of present-day American participation in multinational economic institutions. Since in this, as in all constitutional problems, "is" and "ought"—law and policy—are inextricably intertwined, some attention will also be paid to the politics of such foreign trading arrangements. Second, an inquiry will be made into the concept of the "national" or "public" interest, again reflected against the background of GATT-OTC, and into the possible availability of a "constitutional reason of state" doctrine in foreign economic relations.

A brief account of developments since 1945 will serve to set the background. During World War II American policy-makers foresaw that extraordinary measures would have to be taken in the post-war

4. For a comprehensive development, see Miller, *Foreign Trade and the "Security State": A Study in Conflicting National Policies*, 7 *J. Pub. L.* 37 (1958).

In constitutional terms, this antinomy between hope and reality reflects the operational impact of the separation of powers in the national government, the Constitution being an invitation to conflict so far as foreign affairs are concerned. See Dahl, *Congress and Foreign Policy* (1950).

5. This abbreviation will be used to denote the General Agreement on Tariffs and Trade and the Organization for Trade Cooperation.

period in order to return the international economy to what was considered to be normalcy. Never clearly spelled out in detail, what apparently was thought of as normalcy was the renaissance of the trading system in the nineteenth century.⁶ (More precisely, it might better be termed the *image* of the nineteenth century system as conceived by American officials. It is by no means certain that that image was an accurate reflection of what in fact took place in the last century.) That belief grew into fruition with the establishment of the International Monetary Fund and the International Bank. It also led to the abortive attempt to create an International Trade Organization (ITO).⁷ When ITO failed to get congressional approval and was jettisoned, the trading arrangement it was supposed to administer—the General Agreement on Tariffs and Trade (GATT)—continued in being, administered by a “temporary” administrative staff in Geneva (the Interim Commission for the International Trade Organization; this body is now usually called the GATT⁸). The next move was the negotiation of the Organization for Trade Cooperation (OTC) in 1955. Signed ad referendum by the American representative, OTC is now poised in the wings awaiting congressional approval without which it cannot make its entry into the group of international economic organizations.⁹ In this post-war activity can be seen American groping, for the first time in history, toward a larger than national resolution of its economic problems. The contrary trend toward economic nationalism, which was noted above, may be thought of as part of the price that has had to be paid thus far for even minimal participation in economic multinationalism.

The pattern of economic relations in the post-war period has displayed several noteworthy facets which require brief mention. First, the world economy has not been truly international in scope, but has tended to be more regional than world-wide. The Sino-Soviet bloc of nations makes up one huge regional agglomeration, balanced on the other side by the grouping of nations centered about the United States. In between, and a “peaceful” battleground for the two major antago-

6. Most statements of foreign economic policy issued by American leaders since the Second World War seem to be predicated on the view that free world trade is more than an idea; it is considered to be attainable, as well as desirable. See Gardner, *op. cit. supra* note 1, for a development of Anglo-American collaboration in the regeneration of multilateral trade.

7. For discussion, see, e.g., Diebold, *The End of the ITO* (Princeton Essay in International Finance No. 16, 1952); Bronz, *The International Trade Organization Charter*, 62 *Harv. L. Rev.* 1089 (1949).

8. The term GATT thus can stand for either the Agreement or the temporary administrative body. As used herein, it will refer to the Agreement only.

9. By its terms American participation is indispensable, since OTC will only come into being when approved by nations with at least 85% of world trade.

nists, is the so-called Afro-Asian group of countries making up the "uncommitted" part of the world situated in the "less developed" areas. Economic relations have tended to be a resultant of the political and strategic movements of the two super-powers, the USA and the USSR.¹⁰ Second, within the American-dominated regional grouping of nations a persistent "dollar gap" has existed, brought about by an excess of American exports over imports. This gap has been filled, in large part, by "artificial" means—economic and military aid programs, off-shore procurement, loans, and other measures.¹¹ Next, transnational commercial relations have been characterized by important governmental interventions through such techniques as exchange controls, embargoes, and import quotas in addition to tariffs. This fact marks a significant change from nineteenth century conditions, one that has apparently not been sufficiently recognized by many who are concerned with trade relations.¹² Fourth, external trade has become, both in and out of the United States, an avowed instrument of national policy designed to further certain national goals.¹³ Whereas the original trade-agreements statute was enacted for the purpose of furthering domestic economic well-being, today American foreign economic policy and trading relations are expected to further the attainment of certain political and strategic goals.¹⁴ Finally, develop-

10. For example, GATT itself has tended to be Western rather than world-wide, even though Czechoslovakia, of the Soviet bloc, is a member. "GATT (and the International Monetary Fund) has become, in a sense, an instrument of the 'free world' rather than of the 'one world' envisaged at Bretton Woods. . . ." Goodwin, GATT and the Organization for Trade Cooperation, 10 Yearbook of World Affairs 229, 254 (1956).

11. Statistics on the dollar gap may be found in the UN Statistical Yearbooks, which are issued annually. See Commission on Foreign Economic Policy, Staff Papers (1954) for an account of American programs to counteract the gap. See also MacDougall, *The World's Dollar Problem* (1957).

Increasing disquietude about at least a temporary deficit in the United States balance of international payments was expressed during the summer of 1959. An outflow of gold took place during that time. It was reported in September 1959 that the Eisenhower administration was "seriously considering a plan to require that more foreign aid funds be spent on American goods" to overcome this adverse balance. *N.Y. Times*, Sept. 20, 1959, p. 1, col. 5. Such a plan was announced on October 19, 1959 by the Development Loan Fund. *N.Y. Times*, Oct. 20, p. 1, col. 5. Possibly, therefore, the dollar gap may be a passing phenomenon.

12. Compare, in this regard, Webb, *supra* note 3, with Elliott, *The Political Economy of American Foreign Policy* (1955) and Miller, *supra* note 4.

13. Now it is avowedly so, even though it can be posited that in the days of the laissez-faire state, trade also furthered national ends. Cf. Neumann, *The Democratic and the Authoritarian State* ch. 1, esp. at 8 (1957).

14. Staff of Subcomm. on Foreign Trade Policy, House Comm. on Ways and Means, 85th Cong., 1st Sess., *Compendium of Papers on United States Foreign Trade Policy* ch. 7 (1957).

ments in the poorer nations of the world have included, on the one hand, an adverse balance in the terms of trade which has had the result of widening the disparity in wealth between those nations and the countries of the American bloc, and on the other hand, uncertainty about legal and political stability which has resulted in a relatively small flow of private capital to the less developed areas.¹⁵

The principal premises on which the ensuing development will be predicated include: (a) The *over-all* well-being of the American people is, and should be, the main preoccupation of American decision-makers. This means, first, that true "national" or "public" interest considerations are to be sought in the resolution of external economic problems, as distinguished from the parochial interests of domestic societal groups;¹⁶ and second, it means that American responsibility in other parts of the world is limited by the requirements of the national interest; there is, in other words, no requirement for internationalism for reasons other than the national self-interest of the United States. (b) The United States is irrevocably immersed in world affairs, and, accordingly, will find it increasingly desirable to participate in multinational, if not supranational or truly international (world-wide), economic arrangements. (c) The well-being of the American people is dependent to a major extent on the well-being of peoples everywhere. "Fortress America" is not a tenable economic theory to follow, whatever its merits may be strategically or politically. (d) Security considerations, both individual and national, will continue to influence the course of American foreign economic policy.¹⁷

II. PARTICIPATION IN MULTINATIONAL ECONOMIC INSTITUTIONS

A. *Constitutional and Other Legal Problems*

Historically, the United States avoided entry into international economic relations beyond those basically essential to carrying on private business activity. To the end of the nineteenth century, America was an "underdeveloped" area, the recipient of large sums of capital from Great Britain and the rest of Europe and, perhaps of equal importance, of millions of immigrants who provided the labor force necessary to subdue and exploit a virgin continent. After the First

15. Among other studies, see Mikesell, *Promoting United States Foreign Investment Abroad* (1957). For a discussion of this general problem area, See Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 *Am. J. Int'l L.* 371 (1959) and Myrdal, *Rich Lands and Poor* (1958).

16. The problem mentioned here is discussed in Miller, *The Constitutional Law of the "Security State,"* 10 *Stan. L. Rev.* 620 (1958).

17. Recent evidence to this effect was shown by the imposition of mandatory controls on petroleum imports in March 1959, under the term of the *Trade Agreements Act of 1954*, 72 *Stat.* 678 (1954), 19 *U.S.C.* 1352a (*Supp. V*, 1958).

World War, refusal to join the League of Nations included a like refusal to become part of the International Labor Organization (ILO). Aside from the ILO, which was joined eventually in 1934, it was not until the mid-1940's that the United States became a member of any international economic institution of any consequence. Thus, it has only been in recent American history that the constitutional question of membership in multinational institutions has arisen; and it has only been in the last two or three years that any serious reaction against the concept of multinationalism has been raised. This challenge has taken two principal avenues—constitutional and policy—and it is to these matters that we now turn. In order to avoid a wholly abstract discussion of the issues, the GATT and OTC will be used to provide a factual background.

GATT is a multilateral convention, negotiated in 1947, which went into effect on January 1, 1948. The basic charter of trading relations in the free world, it consists of schedules of tariff concessions for the individual contracting nations and a set of general provisions designed to protect those concessions from nullification and to aid the relaxation of other barriers to trade. There are, in addition, provisions for the administration of the agreement. As of January 1, 1958, thirty-seven countries were participating in GATT. The original plan was to have GATT administered by an International Trade Organization, but that idea was shelved when it became evident that Congress would not approve the entry of the United States into the ITO. The OTC was negotiated in 1955 as a toned-down substitute.¹⁸ Tailored largely with an eye to the exigencies of American politics, OTC will come into being as the GATT's administrative body when accepted by governments controlling at least 85 percent of the trade among GATT members. This means that the United States must participate or else OTC will slide into oblivion.

A number of legal problems are raised by GATT-OTC: (1) the constitutionality of the Trade Agreements Act of 1934; (2) the legality of GATT under the delegation of authority in the Trade Agreements Act; (3) the constitutionality of American participation in OTC; and

18. No comprehensive discussions of either GATT or OTC exist. See, however, U.S. Council of the International Chamber of Commerce: *An Analysis and Appraisal of the General Agreement on Tariffs and Trade* (1955), and *The Organization for Trade Cooperation and the New G.A.T.T.* (1955); Bronz, *An International Trade Organization; The Second Attempt*, 69 *Harv. L. Rev.* 440 (1956); Gardner, *Organizing World Trade—A Challenge for American Lawyers*, 12 *Record* 202 (1957); Mitchell, *The Idea of the General Agreement on Tariffs and Trade and of the Organization for Trade Cooperation*, 34 *Texas L. Rev.* 926 (1956); House Comm. on Ways and Means, *The Agreement on the Organization for Trade Cooperation*, H. R. Rep. No. 2007, 84th Cong., 2d Sess. (1956).

(4) procedurally, the question of whether a challenge to either GATT or OTC presents a justiciable question.

Opposing viewpoints on the legal validity of GATT-OTC have been announced by the American Bar Association (ABA) and the Association of the Bar of the City of New York (ABCNY). In 1955 the ABA approved the following resolution:

"5. RESOLVED, that the bill, H.R. 5550 authorizing the President to accept membership in the Organization for Trade Co-operation is hereby disapproved on the grounds (a) that the Reciprocal Trade Agreements Act of 1934 . . . confers no such power on the President, and (b) that neither the President, nor Congress has the legal authority under the Constitution, to delegate the regulation of our commerce with foreign nations to a foreign controlled group"19

A more elaborate statement was issued in 1956 by the ABCNY, in which it was concluded:

"I. The President had the necessary authority to agree to United States adherence to and participation in GATT under the authority delegated to him in the Reciprocal Trade Agreements Act. . . .

"Congress may constitutionally authorize United States participation in OTC by H.R. 5550"20

Both of these statements seem to be more partisan than objective, that is to say, the conclusions reached appear to reflect the attitudes of their proponents on the desirability of GATT-OTC (although the ABCNY carefully denies any such intention). The ABA statement was apparently established through parliamentary maneuver²¹ by a strong-minded opponent of GATT. On the other side, the ABCNY position is set out in what appears to be more of an advocate's brief than a dispassionate assessment of the problem area.

Legal literature is almost devoid of other comment on GATT-OTC.²² The need, thus, is evident for an objective appraisal²³ of the legal

19. 1955 Annual Meeting: Proceedings of the House of Delegates, 41 A.B.A.J. 1068, 1078 (1955). This remains the policy of the ABA, despite a later attempt to get it changed. Letter from Executive Secretary of the ABA to present writer, March 20, 1959.

20. Ass'n of the Bar of the City of New York, *The Constitutionality of American Participation in the Proposed Organization for Trade Cooperation and in the General Agreement for Tariffs and Trade* (1956).

21. An account of what took place at the meeting of the House of Delegates of the ABA may be found in *Hearings before the House Comm. on Ways and Means, 84th Cong., 2d Sess., on H.R. 5550 at 448-50* (1956).

22. See *supra* note 18 for the list of available discussions.

23. Of course, it must be recognized that complete objectivity is impossible. See Myrdal, *Value in Social Theory* (Streeten ed. 1958). What is attempted here is, however, nonpartisan.

validity of GATT-OTC. The issues involved in such a survey include the following: (a) Is the President's authority to negotiate reciprocal trade agreements under the Trade Agreements Act of 1934 an unconstitutional delegation of legislative power? (b) Is GATT within the scope of the President's delegated power under the Trade Agreements Act? (c) If not, is there any other statutory source of power under which the President could effect entry into GATT (and other multinational economic institutions)? (d) Would American participation in OTC entail an unconstitutional delegation of congressional power? (e) Could United States participation in OTC be authorized by a majority vote of both houses of Congress?

1. The Delegation Question

The first issue is whether the Trade Agreements Act is a valid delegation of legislative power. Although apparently seriously raised by protectionists, it requires only summary treatment despite the fact that the Supreme Court has yet to rule on the question.²⁴ Unless the Court would be willing to overthrow a development of almost uninterrupted case law since the beginning of constitutional history, an attack on reciprocal trade using a delegation theory would more than likely founder. The statutory language reads as follows:

For the purpose of expanding foreign markets for the products of the United States . . . the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States . . . is authorized from time to time . . . to enter into foreign trade agreements with foreign governments . . . [and to] proclaim such modifications of existing duties and other import restrictions . . . as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.²⁵

The familiar history of judicial treatment of delegation questions need not be retraced now. Most informed commentators today tend

24. The first decision on the constitutionality of the Trade Agreements Act of 1934 came 25 years after its enactment in *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (Customs Ct. N.Y. 1958), appealed to the U.S. Court of Customs and Patent Appeals in March 1959.

Much of the reason for the delay in judicial determination of constitutionality lies in the fact that until 1951 no way to test the validity of trade-agreements action existed. However, in 1951 Congress provided a procedure for such a test. 65 Stat. 72, 75 (1951). See *Morgantown Glassware Guild v. Humphrey*, 236 F.2d 670 (D.C. Cir.), cert. denied, 352 U.S. 896 (1956).

25. Section 350 (a) of the Tariff Act of 1930, as amended, 48 Stat. 943 (1934), 69 Stat. 163 (1955); extended in 1958, 72 Stat. 673 (1958), for another 4 years. See H.R. Rep. No. 1000, S. Rep. No. 871, 73d Cong., 2d Sess. (1934) for the legislative history.

to look upon the only two delegations to the executive branch ever invalidated—in *Panama Refining Co. v. Ryan*²⁶ and *Schechter Poultry Corp. v. United States*²⁷—as aberrations in the flow of doctrine. Certainly the *Panama Refining* case has been greatly watered down, if not overruled, albeit implicitly, by such subsequent decisions as *Yakus v. United States*,²⁸ *Lichter v. United States*²⁹ and *Fahey v. Mallonee*.³⁰ So far as *Schechter* is concerned, its principles are still viable, but the trade-agreements delegation seems to fit within its confines without trouble. In black-letter statement, delegations are valid if Congress canalizes the granted authority by establishing an “intelligible principle” to guide the delegate. As Mr. Justice Cardozo put it in *Schechter*, delegation cannot “run riot.”³¹ The American governmental system requires that the elected representatives of the people set basic policy; it is considered to be undemocratic for the truly fundamental decisions to be made by reference to inherent powers of the executive branch. Even so, the decided cases of the past twenty years clearly indicate that the intelligible principle can be so abstract as to be incapable of precise delineation.³² In net result, the delegation doctrine can be said to have evolved into a situation where almost any statement of guiding principle, however vague or ambiguous, will suffice.³³ Against such a background, the trade-agreements cession of power seems clearly to fit within the ambit of permissive delegations.

Ample judicial precedent exists within the field of foreign economic relations to buttress that conclusion. In *Field v. Clark*,³⁴ for example, the Supreme Court upheld a delegation to the President to suspend the duty-free status of foreign products whenever he found that the countries exporting those products maintained “reciprocally unequal and unreasonable”³⁵ duties on American products. And in *J. W. Hampton, Jr. & Co. v. United States*,³⁶ an authorization to the President to alter

26. 293 U.S. 388 (1935).

27. 295 U.S. 495 (1935). See Davis, *Administrative Law* ch. 2 (1951).

28. 321 U.S. 414 (1944).

29. 334 U.S. 742 (1948).

30. 332 U.S. 245 (1947).

31. 295 U.S. at 553 (concurring opinion).

32. For a recent and thorough discussion of the deterioration of the delegation principle, see Davis, 1 *Administrative Law Treatise* ch. 2 (1958).

33. A pertinent example is Section 7(b) of the Trade Agreements Act of 1955, 69 Stat. 166, 19 U.S.C. § 1352a(b) (1958), in which the following standard is set up: “the President . . . shall take such action as he deems necessary . . .”

It has been suggested that this delegation is constitutionally invalid. See Note, *Right of Importers under Section 7B of the Trade Agreements Extension Act of 1955*, 25 *Geo. Wash. L. Rev.* 427, 440 (1957).

34. 143 U.S. 649 (1892).

35. *Id.* at 692.

36. 276 U.S. 394 (1928).

tariff rates so as to "equalize the difference in the costs of production" between domestic and foreign goods was judicially approved. To those cases, which are certainly no more extreme than delegations in domestic affairs, may be added *United States v. Curtiss-Wright Export Corp.*³⁷ There the Court asserted that a distinction should be made between internal and external affairs when considering the constitutionality of legislative grants of power. In the words of Mr. Justice Sutherland:

It is important to bear in mind that we 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, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, 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.³⁸

Even the ABA seems to concede that the trade-agreements delegation is valid—by not mentioning the question in its resolution condemning GATT-OTC. However, the ABA's representative before a congressional committee testified that he, at least, had doubts of the validity of the delegation.³⁹ Such a position is incomprehensible at this late date, if one makes the assumption that those doubts were established in an attempt to make an objective appraisal of GATT-OTC. But that is apparently not what took place; the ABA resolution was sponsored, and defended before Congress, by a New York attorney who appears to have protectionist preferences.⁴⁰ (Unwittingly or not, the American Bar Association was, in this controversy, a mouthpiece for protection. This, it should be noted, is not to say that protection per se is an invalid or improper attitude; there may be sound grounds for it.⁴¹ But it is to question the desirability of an organization representing the majority of American lawyers taking an obviously partisan viewpoint when making recommendations to Congress, particularly

37. 299 U.S. 304 (1936).

38. *Id.* at 319-20.

39. See Hearings, *supra* note 21, at 374-83.

40. Mr. Albert Mac C. Barnes of the New York bar. His testimony is set out in Hearings, *supra* note 21, at 374-83.

41. See Miller, *supra* note 4, at 82-83.

when a great many of its members are not in agreement with those recommendations.⁴²)

But it is not only on strict doctrinal grounds that the trade-agreements delegation can be upheld. Compelling policy reasons also point to the same conclusion. Once American government changed from its negative "watchguard" role in a laissez-faire state to affirmative concern in societal affairs, the very complexity of the problems of government pointed to the need for administrative handling of the details of legislation. "Delegation of power to administration is the dynamo of the modern social service state."⁴³ Tariffs cover a vast number and a bewildering variety of items. The GATT negotiations in 1947 dealt with more than 45,000 separate articles. Congress has neither the time nor—often, at least—the ability to make the complex studies necessary to set tariff schedules. The late Senator Arthur Vandenberg stated after enactment of the Smoot-Hawley Bill⁴⁴ in 1930: "Tariff rate-making in Congress is an atrocity. It lacks any element of economic science or validity."⁴⁵ In sum, all of the time-honored reasons for delegating legislative power are present in the trade-agreements field: greater knowledge of what will work in particular cases, increased speed, more flexibility, greater permanence and continuity among personnel dealing with the questions, and the saving of legislative time. As Professor Louis Jaffe has observed: "Power should be delegated where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business."⁴⁶ Under such a criterion, the Trade Agreements Act of 1934 would appear to fill the bill precisely. On both legal and policy grounds, accordingly, the conclusion seems clear: That the 1934 statute is a valid delegation of legislative power.

2. Is GATT Ultra Vires?

Considerably more complex and difficult is the question of whether GATT is constitutionally invalid as beyond the scope of the President's delegated authority. In broadest terms, the issue is whether the President can enter into a multilateral agreement involving foreign com-

42. It should be noted that Mr. Barnes, although the official spokesman for the ABA, apparently does not speak for many of its members. See Hearings, *supra* note 21, at 445-53.

43. Jaffe, *An Essay on Delegation of Legislative Power*, 47 *Colum. L. Rev.* 359, 561, 592 (1947).

44. 46 Stat. 590 (1930), 19 U.S.C. §§ 1001-1654 (1958).

45. Quoted in Vernon, *America's Foreign Trade Policy and the GATT* 21 *Princeton Essay in International Finance* 2 (1954).

46. Jaffe, *supra* note 43, at 361.

merce without the express consent of Congress. More specifically, does the delegated presidential authority to conclude "foreign trade agreements" include power to enter into agreements of a more general nature than the usual bilateral reciprocal trade arrangement? The statutory language is not defined in the Trade Agreements Act; and the legislative history of the original enactment is also silent on the content to be given the term "foreign trade agreements."⁴⁷ It seems likely that Congress never thought of the question. What, then, should be decided about the validity of GATT?

Three preliminary observations may be made. First, the proponents and opponents of trade reciprocity have no difficulty coming to directly opposite conclusions about GATT being within the President's delegated power. Second, the question is illustrative of the guerrilla warfare often carried on over foreign trade policy between the executive and legislative branches. Finally, a judicial decision on the precise question, if adverse, could have a major impact on American foreign economic policy. Each of these matters will be discussed.

Statutory interpretation, eminent judges tell us, is an art rather than a science.⁴⁸ No table of logarithms exists to provide a shortcut for the decision-maker. Canons of interpretation provide little help, for often they are in conflict. A search for legislative intent is bootless, even if legitimate, for questions arise only when that intent is obscure or nonexistent. One can view the judicial job, as Holmes did, as being that of looking only to the words used and making the decision based on that scrutiny.⁴⁹ But again, words are imprecise tools at best; being susceptible of varying interpretations, they provide the judge with no guiding standards on which to base his judgment. Objective criteria, in short, do not exist by which the precise question can be answered. The judge has delegated power to make the decision—to choose among the conflicting alternatives—but is given no help in making it. There being no commonly accepted theory of statutory interpretation, he is perforce thrust into a position of having to use subjective standards to guide the result. Accordingly, the ultimate answer must often reflect what the decision-maker considers to be good social policy at the moment of decision. His reasoning process, although normally clothed in language of certainty, appears to begin with a major premise (usually not articulated) from which it can easily be logically deduced that a particular result should be reached.

If that is true of the judge in questions of statutory interpretation,

47. See H.R. Rep. No. 1000, S. Rep. No. 871, 73d Cong., 2d Sess. (1934).

48. See, e.g., Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947).

49. *Id.* at 538. See *United States v. Johnson*, 221 U.S. 488, 496 (1911) ("the meaning of a sentence is to be felt rather than to be proved").

it certainly seems to be a valid characterization of the proponents and the opponents of GATT. Thus the Legal Adviser of the State Department, reflecting the views of the President and the Secretary of State that GATT represents a desirable economic policy, had no difficulty concluding that GATT was not *ultra vires*. "The legislative history of the Trade Agreements Act, both in 1934 and since, shows that the appropriateness of including general provisions in trade agreements was recognized by the Congress. . . . The broad authority to 'enter into foreign trade agreements' which was set forth in the Act must be read in the light of this legislative history."⁵⁰ Similarly, the Association of the Bar of the City of New York maintains that since Congress failed to specify that "foreign trade agreements" meant only bilateral agreements, it "must be considered . . . that the Congress wished to leave the Executive free to conclude either bilateral or multilateral agreements. . . ."⁵¹ Further, since the system of bilateral agreements "revealed serious limitations," it was decided to abandon that method in favor of a multilateral approach. "The General Agreement on Tariffs and Trade was nothing more than the name for the agreement which embodied this new approach. Considering both the unqualified authorization of the Reciprocal Trade Agreements Act to make 'foreign trade agreements' and the proven shortcomings of the bilateral approach as a means of achieving the Act's objective, it is only reasonable to conclude that the authorization included the making of a multilateral agreement."⁵²

Maybe. But equally: Maybe not. The contrary conclusion reached by GATT opponents would seem to be as logically tenable as that of the State Department and ABCNY. Furthermore, both of the named proponents either ignore entirely or minimize mention of the language inserted in re-enactments of the Trade Agreements Act since 1951: "The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."⁵³ This is not to say that the proponents have reached an erroneous conclusion. Theirs is certainly as correct as their adversaries'. But it is to say that so far as orthodox legal reasoning is concerned, there is no "correct" answer to the question at this time. Until an official body, whether legislative or judicial, makes an authoritative pronouncement, either position is equally tenable; or to put it another way, both are

50. The memorandum of the Legal Adviser may be found in H.R. Rep. No. 2007, *supra* note 18, at 122.

51. See Ass'n of the Bar of the City of New York, *supra* note 20, at p. 10.

52. *Id.* at p. 11.

53. Trade Agreements Extension Act of 1951 § 10, 65 Stat. 72. For legislative history, see U.S. Code Cong. & Ad. Serv. 1472 (1951).

equally untenable. The point is that reaching a conclusion either way appears to involve a prior decision on the merits of GATT as a desirable foreign economic policy of the United States. It involves also a decision, if officially made, which could have enormous impact on the external policy of the nation. Hence it is possible that the judiciary would be extremely reluctant to make that decision. However, before probing into that question, the second feature of the controversy requires mention.

Were this a more rational society, the obvious way to resolve the problem would be for the President to refer GATT to Congress and ask for its approval. This would be in accord with the expressly granted constitutional power over foreign commerce and would jibe with the schoolboy version of government. Apparently, however, that is precisely what the executive branch wishes to avoid. It has carefully refrained from referring the executive agreement known as GATT either to the Senate for approval as a treaty or to the Congress for approval under joint resolution.⁵⁴ The reason for this seems to be a fear that Congress would not consent, thus severely damaging the international position of the United States. In broader perspective, this arms-length sparring between Executive and Congress is part of a running battle over foreign trading policy that has been carried on since the end of World War II. The contest takes several forms in addition to the controversy over GATT. There is the disquietude expressed by some Congressmen over the administration of the strategic trade controls contained in the Battle Act.⁵⁵ There are the so-called "voluntary" agreements under which certain nations impose quotas on the flow of goods to the United States.⁵⁶ And there are the numerous examples where the President has vetoed the recommendations of the Tariff Commission to invoke escape clauses or peril-point provisions; this has led some Congressmen to call for laws making the Tariff Commission the final decision-maker in such matters.⁵⁷ Much of this may

54. Just what legal effect, if any, the congressional statement of neutrality toward GATT (see *supra* note 53) would have, should GATT ever be judicially contested, is an interesting speculation. At most, it would appear to lend support to the notion that Congress had no intention to authorize multilateral trade agreements when it enacted the reciprocal trade legislation in 1934.

55. 65 Stat. 644 (1951), 22 U.S.C. §§ 1611-1613 (1958). See *The Strategic Trade Control System 1948-1956* (1957) (Ninth Report under the Battle Act, prepared by the International Cooperation Administration).

56. See Miller, *Japanese Textiles: Some Legal Problems in the Area where Constitutional Law Meets International Law*, 35 N.C.L. Rev. 457 (1957); Landsberg, *Tariff and Non-Tariff Obstacles to United States Imports*, Banca Nazionale del Lavoro Q. Rev. 80 (March 1957). Compare the "voluntary" system, now made mandatory, to limit imports of petroleum into the United States.

57. See, e.g., H.R. Rep. No. 1761, S. Rep. No. 1838, 85th Cong., 2d Sess. (1958) which led to the extension of the trade agreement statute in 1958.

reflect the growing power of the President in foreign economic matters and the consequent discomfiture of Congressmen who see traditional prerogatives slipping away. Whatever may be the reason, the division of power between the two branches has been, in recent years at least, an invitation to conflict.

Whether such intramural brawling within the national government serves the national interest is a question well worth pondering. To put it another way, the inevitable frictions of the separation of powers which Mr. Justice Brandeis once extolled as aiding the preservation of personal freedoms⁵⁸ may be more suited to policy-making for domestic matters than for external affairs. The normal pull-and-tug of politics in the United States allows for the representation of all important societal groups; in the governmental decision-making process, no one group of any importance need go unheard.⁵⁹ Policies thus made tend to reflect the consensus of the affected group interests.⁶⁰ That works tolerably well in domestic matters, but the rub comes when the issue is "foreign" or external in application, as, for example, the trade-agreements legislation. For the usual foreign affairs issue, there is no important group interested in pursuing the over-all "national" interest. Each domestic group, attempting to further its own interests, is often able to enlist the support of individual Congressmen; Congress thus becomes the object of pressures brought, and policies tend to represent a parallelogram of opposing forces. When it comes to tariffs and the concept of protectionism, the pressures on Congress tend to be largely from organizations wishing to avoid the impact of foreign competition.⁶¹ Against this array of power the executive branch is usually the sole exponent of a tariff or trade policy in the "national" interest. Hence the continuing bickering between the two branches, an activity which makes the executive reluctance to refer GATT to Congress comprehensible. Ameliorating this intra-family controversy is one of the important constitutional problems of the day.⁶²

The concept of separation of powers, with the inevitable conflicts between Congress and President, may have been wholly suited to an

58. For a thorough discussion of this idea, see Swisher, *The Growth of Constitutional Power in the United States* ch. 3 (1946).

59. Compare Riesman, *The Lonely Crowd* (1950) with Latham, *The Group Basis of Politics* (1952) and Truman, *The Governmental Process* (1951). See Miller, *The Constitutional Law of the "Security State,"* 10 *Stan. L. Rev.* 620 (1958). See also Dahl, *A Preface to Democratic Theory* (1956).

60. This has been discussed in Miller, *supra* note 59.

61. See, e.g., Schattschneider, *Politics, Pressure Groups, and the Tariff* (1935); *Hearings before the House Comm. on Ways and Means, 84th Cong., 2d Sess., on H. R. 5550* (1956).

62. See Cheever & Haviland, *American Foreign Policy and the Separation of Powers* (1952); Section III *infra*.

era when government was negative in thrust and had few affirmative duties outside of the housekeeping functions of internal order. But the history of the United States has witnessed a steady trend toward the accretion of more and more powers of an affirmative nature in the State for both domestic and external matters. With that development the notion of a tripartite division of power has had to give way to a lessening of judicial power over socio-economic questions,⁶³ a transfer of much power from Congress to the administrative "fourth branch of government," and an aggrandizement of power in the presidency. This, however, has taken place as a latter-day gloss on the Constitution, rather than a development planned for by the founding fathers. The felt necessities of the times have brought changes in constitutional practice as well as constitutional law.⁶⁴ Still not worked out, in practice or law, is a method by which "national interest" foreign policy decisions can be made within the framework of a democratic system. This is the fundamental constitutional problem raised by the question whether GATT is *ultra vires*. Fuller discussion of the question is undertaken below.

Under the foregoing analysis of the validity of GATT it would seem that the controversy is at heart more political than legal. But a challenge could be made in the courts by an action brought by an American producer affected by a tariff reduction or other change in import restrictions. In 1951 Congress provided a procedure to test the constitutionality of the Trade Agreements Act.⁶⁵ The final question to be considered in this subsection is the over-all desirability of a judicial decision on the question, whatever it might be. Should basic foreign policy of the United States be subjected to the accident of litigation and its affirmation or rejection turn on its impact on a single American producer? For even though this is a question of statutory interpretation and Congress of course retains ultimate control over the situation, nevertheless protracted litigation over the validity of GATT could cast doubt on the cornerstone of American post-war trading policy. A judicial decision on GATT could, of course, take any one of three forms: it could uphold GATT as constitutional and within the scope of presidential delegated power; or it could reject it as being either unconstitutional or *ultra vires*; or the judiciary could use one

63. The power of the judiciary today is more concerned with problems of statutory interpretation than with those of constitutional interpretation. While this does not mean that judicial power has entirely disappeared, it does mean that Congress has the ultimate power and can overrule a Court decision. Cf. Kurland, *The Supreme Court and the Attrition of State Power*, 10 *Stan. L. Rev.* 274 (1958).

64. These are discussed in Miller, *supra* note 59.

65. See 65 Stat. 72, 75 (1951).

of the several techniques in its arsenal to avoid a decision on the merits. The contention made here is that the third alternative is to be preferred.

Viewed narrowly, GATT poses merely a routine question in statutory construction; but seen in its true context, against the background of American political and strategic policy in the Cold War era, it raises problems of major importance. The Supreme Court could not avoid making an impact on those policies if it ruled on the merits of GATT. Furthermore, a judicial decision could wreak havoc with the delicately balanced adjustments which have been worked out between the legislative and executive branches in the administration of trade policy. In sum, the problem area is one particularly unsuited to judicial intervention, even though the trade-agreements program could—even does—have an adverse effect on private individuals. The situation seems to call for exercise of one of the techniques of judicial evasion of decision-making.

With one exception, the few cases which have been brought thus far tend to indicate a judicial acceptance of this view. Thus, in the 1930's, the Court of Customs and Patent Appeals refused to consider the constitutionality of the Trade Agreements Act.⁶⁶ Lack of jurisdiction was the main reason,⁶⁷ a situation Congress modified in 1951 to provide a procedure for constitutional challenge of the Act.⁶⁸ In the first two cases brought since 1951—*Morgantown Glassware Guild, Inc. v. Humphrey*⁶⁹ and *Star-Kist Foods, Inc. v. United States*⁷⁰—it was held that the litigant had failed to exhaust his administrative remedies in *Morgantown*, and that the petitioner in *Star-Kist* had not come within the terms of the statute. It was not until November 1958 that a court ruled directly on the validity of the Trade Agreements Act; the United States Customs Court, in a new *Star-Kist* case, at that time had no trouble in upholding the Act against arguments that it involved an unconstitutional delegation of power and that it provided for agreements other than treaties.⁷¹ “[W]e are of opinion and hold that the Reciprocal Trade Agreements Act of 1934 does not violate the treaty

66. See, e.g., *Fletcher v. United States*, 25 C.C.P.A. (Customs) 195, 92 F.2d 713 (1937).

67. For discussion of these early cases, see Hackworth, *Legal Aspects of the Trade Agreements Act of 1934*, 21 A.B.A.J. 570 (1935); Sayre, *Constitutionality of the Trade Agreements Act*, 39 Colum. L. Rev. 751 (1939); Comment, *The Trade Agreements Act of 1934*, 46 Yale L.J. 647 (1937).

68. See *supra* note 65.

69. 236 F.2d 670 D.C. Cir., cert. denied, 352 U.S. 896 (1956).

70. 37 Cust. Ct. 171, 150 F. Supp. 737 (1956).

71. *Star-Kist Foods, Inc. v. United States*, 169 F. Supp. 268 (Cust. Ct. 1958). The decision has been appealed.

clause of the Constitution . . . [and] further hold that . . . [it] is not an unconstitutional delegation of legislative power. . . ."⁷²

Even with this decision, which may yet reach the Supreme Court, there is no certainty that the Court would rule on the merits. Available for use would be the amorphous "political question" device, a technique often used in cases involving the exercise of the foreign relations power. The major decisions of the Supreme Court dealing with the balance of power between Congress and President are almost entirely domestic in content. Illustrative are *Myers v. United States*,⁷³ *Humphrey v. United States*,⁷⁴ *Schechter Poultry Corp. v. United States*,⁷⁵ and *Youngstown Sheet & Tube Co. v. Sawyer*.⁷⁶ When it comes to external matters, the Court is much more reluctant to intervene into the relationship between the other two branches; and it is chary of authoritative pronouncement which could have a major impact on foreign relations. Apt illustration may be derived from *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,⁷⁷ where the Court held that there could be no judicial review of presidential orders under the Civil Aeronautics Act granting or denying to American air carriers certificates of convenience and necessity for overseas air transportation. In Mr. Justice Jackson's opinion the following language appears:

The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from presidential direction. The President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reporters are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full disclosure, *the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility* and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry.⁷⁸

72. Id. at 280.

73. 272 U.S. 52 (1926).

74. 295 U.S. 602 (1935).

75. 295 U.S. 495 (1935).

76. 343 U.S. 579 (1952).

77. 333 U.S. 103 (1948).

78. Id. at 111. (Emphasis added.)

The generalities of that statement would seem to be applicable to the GATT situation. There being no clearcut legislative statement on the scope of the presidential power to conclude "foreign trade agreements," and since the problem area is one which involves the balance of power between Congress and President as well as being in the delicate field of foreign affairs, the desirability of judicial self-restraint would seem to be self-evident. However, if the Supreme Court should decide to rule on the merits of GATT, another source of presidential power is available to uphold the agreement. It is to this matter that we now turn.

3. Inherent Presidential Power

One venturing into the area of "inherent" presidential power is struck at the outset by the absence of precise doctrinal guidelines. Little "law" of any real consequence exists; neither constitutional prescription nor legislative enactment nor judicial pronouncement can be seized for use in constructing a body of black-letter legal propositions. Resort must, therefore, be made to practice—to what chief executives in the past have actually done—for an adequate picture of presidential power. Evidence is available sufficient to substantiate the following propositions: (a) Even if the national government, as Mr. Justice Sutherland maintained in the *Curtiss-Wright* case, has "inherent" power in the field of foreign relations, that assertion does nothing to solve the problem of relative power between President and Congress; (b) the President has an independent agreement-making power, the legal problem being not whether it exists but its scope; (c) pinpointing the location of legal power over the agreement-making process does not come to grips with the basic governmental problem: that of insuring the making of "national interest" decisions, as distinguished from those which further the interests of parochial groups; and (d) whatever the extent of the President's legal power in making executive agreements, the exigencies of the situation require that it be exercised in general cooperation with Congress, rather than presenting the legislature with a series of *faits accomplis*.

A blunt statement of Mr. Justice Sutherland in his *Curtiss-Wright* opinion sets out in unmistakable terms the nature of the foreign relations power of the national government. According to Sutherland, "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers . . . [are the] necessary concomitants of nationality. . . ."⁷⁹ Thus the national government possesses powers

79. 299 U.S. at 318. Even though Mr. Justice Sutherland's statement is technically a dictum, his exposition of the foreign relations power is still the best, and certainly the shortest, existing in the cases. Nothing that has happened since 1936 serves to gainsay his position; on the contrary, it has been buttressed.

adequate to meet the imperatives of international relations.⁸⁰ The nature of permissible governmental activity in external affairs is not a concept frozen to one period of history or to one theory of constitutional interpretation. "[W]hatever the rationale used, it is perfectly clear that in the conduct of our international relations, the powers of the federal government are ample to deal with any problem, because they derive not only from the Constitution, but 'from the necessities of the case.'"⁸¹ There are few who would dissent from that proposition, although some might wish that it had been stated less categorically.⁸² But saying that the national government has power to deal comprehensively with external affairs does not resolve the question of where that power rests within the governmental structure. If GATT is not considered to be within the scope of the President's delegated power in the Trade Agreements Act, is there any other source of power for its existence? Can the President draw on a theory of inherent power as a supplement to the congressional power over foreign commerce? Could the United States have joined GATT *without* the Trade Agreements Act?

The constitutional prescription of the power over foreign relations is an exact counterpart of the power over domestic affairs: It exemplifies the notion that the separation of powers will redound to the benefit of the American people. The prescription, in other words, is for *shared* power. Although it is clear that the President alone has control over the actual negotiations with other nations, still unclear is what, if any, are the inhibitions on the content of those negotiations. As Mr. Justice Sutherland also said in *Curtiss-Wright*, "the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."⁸³ Or, as Secretary of State Thomas Jefferson once advised President Washington, "the transaction of business with foreign nations is executive altogether."⁸⁴ Accordingly, it is valid to say that the main problem of the foreign relations power of the national government is not *whether* it exists but *where*; and that, further, the power is shared, there being

80. As will be developed below, the problem is not whether the national government *has* the power but the politics of its exercise. See Section III, *infra*.

81. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 *Yale L.J.* 181, 260 (1945).

82. E.g., Borchard's disagreement with McDougal & Lans, *supra* note 81, in Borchard, *Treaties and Executive Agreements—A Reply*, 54 *Yale L.J.* 616 (1945).

83. 299 U.S. at 319.

84. Quoted in Cheever & Haviland, *American Foreign Policy and the Separation of Powers* 18-19 (1952).

little question that the President does have an independent agreement-making power.⁸⁵ The over-all scope of the executive power has only been vaguely defined—never by authoritative judicial pronouncement⁸⁶—but by the practice of the past.

The essential question here, so far as the scope of the President's agreement-making power is concerned, is whether he can conclude an agreement in an area of the constitutional competence of Congress. In other words, does the express provision for legislative power over foreign commerce preclude any exercise of executive power without congressional approval? Or can the President act to the extent that his actions do not contravene an act of Congress? Can he act even in the face of express congressional disapproval? The practices of the past, plus the probable unlikelihood of there being any final judicial decision on the merits, would tend to uphold the existence of presidential power even in an area of congressional competence. In the field of trade policy there are no judicial pronouncements directly on point. But in a somewhat analogous case—the power of the President to deal with the disposal of government property—there is the famous “destroyers for bases” transaction concluded by executive agreement with Great Britain. The President there was able, of course, to draw on an Attorney General's opinion for the validity of the transfer of property, and was thus able to transcend what seems to be the clear constitutional command.⁸⁷ Here is an outstanding example of “the necessities of the case” providing constitutional warrant for an executive action.

Few Presidents have, however, ever gone so far as to act in direct opposition to an unambiguous legislative command.⁸⁸ Nor are they likely to. Some chief executives have presented Congress with a *fait accompli* and have given that branch little real choice but to go along with the presidential action.⁸⁹ However, the practicalities of the situa-

85. Compare McDougal & Lans, *supra* note 81, with Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 *Yale L.J.* 345 (1955).

86. The Supreme Court has thus far resolutely refused to place any judicial barrier in the way of conduct of American foreign relations, even though it has had a number of opportunities to make pronouncements in this area. See Schubert, *The Presidency in the Courts* (1957).

87. For an account, see McClure, *International Executive Agreements* 391-93 (1941).

88. See the Memorandum of Law—Cases involving Attempts to Contravene, Modify or Amend Statutes by Executive Action, in H.R. Rep. No. 234, 86th Cong., 1st Sess. 109 (1959).

89. See Schaffter & Mathews, *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, H.R. Doc. No. 443, 84th Cong., 2d Sess. *passim* (1956).

tion, and the desirability of preserving the constitutional framework of government, would lead to the conclusion that while the President could constitutionally conclude the GATT agreement without reference to a delegation of power from Congress, nevertheless ultimate power would rest in Congress and the President's action would be subject to being overruled by subsequent legislation. It is well-known doctrine that as between a treaty and a statute, the one subsequent in time prevails internally; the same would hold true in any case of conflict between an executive agreement and a statute, at least to the extent that the statute would prevail over the executive agreement if enacted later in time.⁹⁰ Thus, should Congress ever express an opinion on the merits of GATT, it would seem that that opinion would operate to set national policy.⁹¹ The international obligation would still remain, but it would be meaningless so far as remedy against the United States is concerned.⁹²

B. The Proposed Organization for Trade Cooperation

We turn now to the proposed Organization for Trade Cooperation (OTC).⁹³ Although tied closely to a revision of the General Agreement, the negotiations for both taking place simultaneously in 1955, the decision was made by the State Department to handle OTC differently from GATT. OTC was submitted to Congress for approval; extensive hearings on it were held in 1955 and early in 1956. As yet no final action has been taken by either house of Congress. The constitutional question is not whether the Executive had authority to conclude the agreement to establish the OTC, but whether OTC itself is valid. A second question is whether, if it is valid, the agreement to establish it can be validly approved by a majority vote of both houses of Congress rather than by a two-thirds vote of the Senate as is constitutionally required for a treaty.

The constitutional validity of OTC is, of course, dependent on what powers it would have. These can be briefly summarized. In effect, OTC would institutionalize and somewhat expand an *ad hoc* arrangement which has existed since GATT was first negotiated: "In addition to administering the General Agreement, it would provide a mecha-

90. See, among many discussions, Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 Harv. L. Rev. 281 (1953). There is no Supreme Court decision on the point.

91. The present expression of aloofness from GATT (see *supra* note 53) would seem to have no legal effect in and of itself.

92. This country cannot, of course, unilaterally free itself from an international obligation by passing an Act of Congress.

93. The text of the OTC may be found in H.R. Rep. No. 2007, 84th Cong., 2d Sess. at 93-107 (1956).

nism through which arrangements for trade negotiations could be facilitated. It would also serve as a forum for the discussion of trade matters and for the amicable adjustment of problems involving the trade rules.”⁹⁴ More specifically, the agreement calls for the following:

(a) Article 2: Members would be the contracting parties to the General Agreement on Tariffs and Trade.⁹⁵

(b) Article 3: The Organization would administer the General Agreement and “generally facilitate the operation of that agreement”; in addition, the OTC would function so as to “(i) facilitate inter-governmental consultations on questions relating to international trade; (ii) . . . sponsor international trade negotiations; (iii) . . . study questions of international trade and commercial policy and . . . make recommendations thereon; [and] (iv) . . . collect, analyze and publish information and statistical data relating to international trade and commercial policy. . . .”⁹⁶

This article also contains language expressly denying authority to OTC to amend the General Agreement, or to impose on any member “any new obligation which the Member has not specifically agreed to undertake.”⁹⁷

(c) Articles 4, 5 and 6 would establish an Assembly (of all the Members of the Organization), an Executive Committee (of seventeen members, including the five of chief economic importance), and a Secretariat (the permanent administrative staff, headed by a Director-General).

(d) Article 8 relates to voting and would establish the principle of one vote for each Member and the majority principle in Assembly decision-making.

(e) Article 9 deals with the budget and contributions.

(f) Article 10 relates to status and states that the OTC “shall have legal personality” and further, that its representatives shall enjoy the usual diplomatic privileges and immunities.

(g) Article 13 provides for waivers to GATT obligations to be granted by the Assembly.

The remaining sections (through 21) are of lesser importance or are of a temporary nature.

An objective scrutiny of OTC and the political pull-and-tug which has taken place over its approval must conclude at the outset that con-

94. *Id.* at 58.

95. A detailed analysis of OTC is set out in H.R. Rep. No. 2007, *supra* note 93, at 93-107.

96. *Id.* at 95.

97. *Id.* at 95. GATT itself “may be amended only if proposed amendments are accepted by individual contracting parties, acting under Article XXX of the General Agreement.” *Ibid.*

siderable cant and an apparent lack of candor have characterized much of the testimony on both sides of the controversy.⁹⁸ The basic problem appears to be one of economics and divergent views on the desirability of greater freedom in the ability of foreign manufacturers and producers to sell goods in the American market. Only incidentally is the problem legal in nature, although the arena in which the battle is fought and the language used often has law as a central characteristic. Thus it is that the constitutional problem of OTC membership is couched in terms of whether it would be a proper delegation of legislative power, or, as it is more colorfully put by some of the antagonists, whether this would amount to a "cession of American sovereignty." Proponents of OTC carefully point out that not only would there be no *improper* delegation of power, but that no delegation in fact is involved. On the other hand, opponents are equally quick to find that the power of Congress to regulate American foreign commerce is being "given away" to a "foreign-dominated" body in which the United States will have but one vote.

The nature of this alleged disagreement on law may be shown by quotations from several sources:

1. The Legal Adviser to the State Department:

It has been argued that the provisions authorizing the Organization to release members from obligations would constitute an unconstitutional delegation to the Organization of the authority of the United States. Neither when the Organization is releasing another member nor when it is releasing the United States is there any delegation to the Organization involved, since in neither case is it exercising any function which could have been exercised by an agency or official of the United States. In the case of the release of another member, that other country is obtaining a right to take certain action which it could have taken if there had been no agreement, but which it had given up, or limited, its right to take in becoming a party of the General Agreement. The question of whether or not such action should nevertheless be taken by such other country is not a matter within the competence of the Congress of the United States (*American Banana Co. v. United Fruit Co.*, 213 U.S. 347) but it is within the sovereign jurisdiction of that country. Likewise it is not within the President's control except to the extent that he is able, by negotiation, to persuade that country to undertake an obligation, with or without qualification, not to take the action. There can thus be no question as to the validity, from the standpoint of delegation, of an agreement in which the President obtains an undertaking that certain action will not be taken by another country except under specified circumstances.⁹⁹

98. See Hearings, *supra* note 61.

99. Set out in H.R. Rep. No. 2007, *supra* note 93, at 113, 129.

2. The American Bar Association: "neither the President, nor Congress has the legal authority under the Constitution, to delegate the regulation of our commerce with foreign nations to a foreign controlled group. . . ." ¹⁰⁰

3. Mr. Lennox P. McLendon of Greensboro, North Carolina, representing Southern industrial concerns: "Both houses of Congress plus the President cannot lawfully commit the United States to GATT-OTC." ¹⁰¹

4. Association of the Bar of the City of New York: "There is no valid constitutional objection to congressional enactment of H.R. 6630 authorizing United States participation in the Organization for Trade Cooperation or any substantially similar bill designed to achieve the same purpose." ¹⁰²

If, as its proponents assert, OTC will make no basic change in the legal status quo in so far as our international trade is concerned (in which event a question may be asked as to the reason for the great importance that is placed on OTC), then it would seem to be entirely clear that American adherence thereto would be legally valid. Not only is it technically accurate to say that no delegation of actual control over foreign commerce would take place, it is possible to point to other similar arrangements which have been entered into in recent years and which are accepted without question. Included in this category are the International Monetary Fund and the International Wheat Agreement, the Narcotics Protocol and the International Civil Aviation Convention. ¹⁰³ The International Monetary Fund's articles of agreement furnish illustration: In Article VIII, section 2, it is provided that, with certain exceptions, "no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for international transactions." ¹⁰⁴ Another example is the 1953 International Wheat Agreement which authorizes the International Wheat Council to relieve importing countries which are parties to the Wheat Agreement from certain of their obligations because of balance of payments difficulties, or, in the case of exporting countries like the United States, because of a short crop. ¹⁰⁵

Thus, on the basis of practice, it is apparent that American adherence to the OTC would not entail a unique undertaking; precedent for it does exist. In addition, even if OTC is considered to include a

100. Hearings, *supra* note 61, at 374. The position of the ABA is found at *id.* 373-96.

101. *Id.* at 1194.

102. See the 1957 supplement to the document cited in *supra* note 20.

103. See Report, *supra* note 93, at 130 for a brief discussion.

104. 60 Stat. 1401, 1411 (1946).

105. April 13, 1953, art. X, para. 5, [1953] 4 U.S.T. & O.I.A. 974.

delegation to an international administrative body, that agency would deal directly with the United States government only, and not with individuals. Therefore, no question would arise in so far as possible OTC action which directly affected an American citizen adversely. No problem of being allowed to sue the international body would arise, for the remedies, whatever they might be, would be against the United States government. Professor Louis M. Henkin makes this point effectively, albeit in another context, in his recently published *Arms Control and Inspection in American Law*¹⁰⁶ (a "memorandum of law" in the analogous area of disarmament and the problems it would raise under the Constitution). It is of course true, as Henkin points out, that there are "no confident answers"¹⁰⁷ to such questions, for the problem areas are legally unexplored. Even so, it is scarcely conceivable that the Supreme Court would invalidate a move by the American government to join the OTC.

Much the same can be said with regard to the second basic question involved in American participation in the Organization: Congress, through majority action by both houses, has in the past approved, either before or after, obligations undertaken following negotiation by the Executive.¹⁰⁸ Although the Constitution speaks only in terms of treaties, it has long been recognized that the national government (i.e., the Chief Executive and the Secretary of State) is not bound to that sole type of international agreement. It is familiar learning that legal authority exists for all forms of purely executive-type agreements, which may be concluded as viable international obligations by executive action only, without referral to the Senate (required by the Constitution in the case of treaties) or even to the Congress. Since the *Curtiss-Wright* and subsequent decisions in the 1940's, few seriously question the lawfulness of such procedure. An exhaustive study by McDougal and Lans, published in 1946, provides ample documentation for that, even though it did draw some dissent from the late Professor Borchard.¹⁰⁹ The difficulties, that is to say, about international agreement-making are not *legal* but *political*; only in so far as they pose problems of the *effective working* of the constitutional system of federalism and of separation of powers can they be said to deal with a legal problem—and then not on a doctrinal level, but on the plane of theory.

106. Henkin, *Arms Control and Inspection In American Law* (1958).

107. See *id.* ch. 7.

108. See McDougal & Lans, *supra* note 81.

109. See *supra* notes 81 and 82.

III. AN INQUIRY INTO THE CONCEPT OF THE NATIONAL INTEREST

From the foregoing analysis, it is apparent that technical legal problems present no really difficult barriers to American participation in the Organization for Trade Cooperation. Even if some elements of supranationalism are considered to be inherent in OTC, it can still be said that current doctrine seems ample to substantiate adherence to this multinational economic organ. But on an entirely different level, more serious constitutional (and thus, broadly legal) obstacles do exist. These have been adumbrated several times both above and in other articles. For example, it has been averred that the constitutional challenge of today is that of providing "the legal (i.e., constitutional) basis for a decision-making process which would be reasonably calculated to further the national interest."¹¹⁰ In the controversy over the OTC, and for that matter over American foreign economic policy since World War II, a finding by the President that OTC was necessary "in the national interest" has been ignored, even flouted, thus far by Congress. In April 1955, in a message to Congress, President Eisenhower said:

I believe the reasons for United States membership in the proposed Organization are overwhelming. We would thus demonstrate to the free world our active interest in the promotion of trade among the free nations. We would demonstrate our desire to deal with matters of trade in the same cooperative way we do with military matters in such regional pacts as the North Atlantic Treaty Organization, and with financial matters in the International Monetary Fund and in the International Bank for Reconstruction and Development. We would thus cooperate further with the free world, in the struggle against Communist domination, to the greater security and the greater prosperity of all.

Such action would serve the enlightened self-interest of the United States. . . .

Failure to assume membership in the Organization for Trade Cooperation would be interpreted throughout the free world as a lack of genuine interest on the part of this country in the efforts to expand trade. It would constitute a serious setback to the momentum which has been generated toward that objective. . . . It could result in regional realignments of nations. Such developments, needless to say, would play directly into the hands of the Communists.

I believe *the national interest requires* that we join with other countries of the free world in dealing with our trade problems on a cooperative basis.¹¹¹

In this statement, the Chief Executive found a national interest in the security and survival of the United States and found further that

110. Miller, *supra* note 59, at 670.

111. Report, *supra* note 93, at 59. (Emphasis added.)

adherence to the OTC would enhance the likelihood of attainment of that national interest. My purpose in this section is to inquire into the concept of the national interest as it relates to constitutional law and practice, in the context of the battle over OTC.

Now it can be said that OTC is either in the national interest or it is not. If the latter, then it should be dropped; but if the former, then it should be joined without delay. Under the American constitutional system, how can it be determined which is the correct view? That question cannot be answered categorically; in fact, no definitive answer exists which would meet with substantial agreement. Even so, posing the problem in this manner points up the concern of this political problem for the lawyer; the problem is inescapably legal as well as political.

Totalitarian movements today represent a unique, i.e., unprecedented, threat to the American people. Having had to go to war to eliminate one such menace in German Naziism, the United States in recent years has been confronted with the even more formidable Soviet Communism. This threat to American institutions has been dealt with internally through changes in statutory and administrative law, as well as by some alteration in constitutional doctrine. But the Soviet menace, in addition to the threat of total war and total destruction through A-bombs, H-bombs, and bacteriological warfare, has created additional external imperatives. These have been met by changes in American foreign policy, but other important measures have had to be discarded because of the exigencies of the American political system and the constitutional division of powers between executive and legislature. Thus far "little has been done or even proposed to prepare existing constitutional states for . . . [the] ordeal"¹¹² of ensuring the security and survival of the nation while simultaneously protecting individual freedoms. The discussion here is directed toward inquiring into the problem from the standpoint of external affairs.

It will be desirable to refine the question of the national interest and its enforcement into segments on a lower level of abstraction. The following queries raise the principal problems involved:

1. What is the nature of the concept of the national interest? Does it have a different connotation than that given to the term, "the public interest"? Who is qualified to judge it? By what standards should it be determined? How is it to be applied? How *should* it be determined and applied, and by whom?

2. What is the nature of the decision-making process in the United States?

112. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* 109 (1957).

3. To what extent does a constitutional "reason of state" doctrine exist?

Questions such as these raise fundamental problems of American constitutionalism, problems which cannot be more than outlined at this time. What is set out in the remainder of this article, accordingly, is an over-view of the entire problem area.

A. The State of Public/National Interest Theory

At the outset, it can be posited that the term "the national interest" has essentially the same meaning as "the public interest" with one exception: the former version applies to external policies, the latter to domestic affairs.¹¹³ It is usual, for example, for a decision-maker such as the President to speak of the *national* interest in, say, joining the Organization for Trade Cooperation and of the *public* interest while, say, denying information to the press or to Congress.¹¹⁴ But the same questions are present in an analysis of either concept, so for present purposes the terms will be used interchangeably.¹¹⁵

Only if it can be assumed that the national or public interest differs from what in fact takes place within the American governmental structure is there any point to undertaking this discussion. For if we adopt the frequently-held view that the end-products of the various official policy-making bodies, whether legislative or administrative or executive or judicial, are the very stuff making up the public interest,¹¹⁶ then whatever is, is right; and, for that matter, whatever is not, is also right in the sense that if the official policy-makers reject any proposal, that rejection must also be considered to be in the public interest. So it is with the Organization for Trade Cooperation: non-action by Congress, and consequent lack of affirmative policy with respect to OTC, has by this view to be thought of as being in the public interest, even though the Chief Executive has determined exactly the contrary. But is it valid to say that any resolution of a given governmental problem is, ipso facto, in the public interest? It seems obvious that the answer must be: Perhaps, but not necessarily. Other criteria must be applied. What those are make up the inquiry into the concept of the national/public interest.

Legal literature is almost devoid of commentary on the public interest, even though the term appears quite frequently in statutes and in judicial and administrative decisions, and is often invoked as a basis

113. See Schubert, *The Public Interest* (typescript in Professor Schubert's possession, 1958).

114. See "Availability of Information from Federal Departments and Agencies," H. Rep. No. 234, 86th Cong. 1st Sess. (1959).

115. See Leys & Perry, *Philosophy and the Public Interest* (1959).

116. *Id.* at 17-22.

for executive action.¹¹⁷ It is, of course, true that an "affectation with a public interest" concept was long used by the Supreme Court to justify—and to limit—governmental regulation of business enterprise; nevertheless, though this development stimulated an enormous literature, it was never precisely defined and its legal meaning was never finally fixed. "Among the considerations that did, at various times, enter into assertions of public interest were:

1. the presence of a monopoly,
2. the existence of a public grant or franchise,
3. the indispensable nature of a commodity or service,
4. the traditional acceptance of regulation,
5. the likelihood of injury to consumer interests (transferees),
6. the mere will of a legislative body,
7. the maximization of benefits to a community."¹¹⁸

However, other branches of knowledge may profitably be studied for possible insight, although certainly incomplete, into the concept of the public interest. Again, however, one is met with the fact that there is no commonly accepted definition of the term; in fact, some observers even doubt the possibility and utility of attempting such a definition.¹¹⁹ But since governmental officials, up to and including the President, use the term, the inquiry is desirable. President Eisenhower, as noted above, has used it in connection with the OTC; he has asserted that adherence to OTC would be in the national interest. How, then, has the concept been used? In answering that question, reference will be made to three recent statements, one by Professor Frank Sorauf, the second by Professor Glendon Schubert, and the third by Dean Wayne A. R. Leys and Professor Charner M. Perry.

Sorauf, in an article in the *Journal of Politics*,¹²⁰ enumerates several "definitions" of the public interest as that phrase is used in the literature: (1) The Public Interest as Commonly-held Interest or Values;¹²¹ (2) The Public Interest as the Wise or Superior Interest;¹²² (3) The

117. Leys & Perry, *op. cit. supra* note 115, have collected the relevant citations.

118. *Id.* at 49.

119. *Id.* at ch. 10.

120. Sorauf, *The Public Interest Reconsidered*, 19 *J. Politics* 616 (1957).

121. Example: "It [a decision] is said to be in the *public interest* if it serves the ends of the whole public rather than those of some sector of the public." Meyerson & Banfield, *Politics, Planning and Public Interest* 322 (1955).

122. Examples are found in discussions of the conservation of natural resources, the control of traffic in alcoholic beverages, in slum clearance, and the construction of new schools; and often in judgments concerning the protection of consumer interests. See Leys & Perry, *op. cit. supra* note 115, at 7. See also Piquet, *The Trade Agreements Act and the National Interest* (1958).

Public Interest as Moral Imperative;¹²³ (4) The Public Interest as a Balance of Interests;¹²⁴ and (5) The Public Interest Undefined.

Schubert, in two articles¹²⁵ and in an unpublished book,¹²⁶ makes a tripartite characterization of the public interest, tied in with a theory of the governmental decision-making process. He adopts a classification made by Dean Leys concerning the exercise of discretionary power by administrators and identifies contemporary images of the public interest with each. Leys, writing in 1943, distinguished three classes of discretionary powers:

(1) technical discretion, which is freedom in prescribing the rule but not the criterion or end of action;

(2) discretion in prescribing the rule of action and also in clarifying a *vague* criterion—this is the authorization of social planning;

(3) discretion in prescribing the rule of action where the criterion of action is *ambiguous* because it is in dispute—this amounts to an instruction to the official to use his ingenuity in political mediation.¹²⁷

Schubert finds three chief types of conceptions used by commentators and decision-makers:

I shall divide contemporary theorists of the public interest in governmental decision-making into three groups: Rationalists, Idealists, and Realists. The Rationalists, who correspond to Leys' first category, envisage a political system in which the norms are all given, in so far as public officials are concerned; and the function of political and bureaucratic officials alike is to translate the given norms into specific rules of governmental action. The Idealists conceive of the decision-making situation as requiring the exercise of authority to engage in social planning by clarifying a *vague* criterion, which corresponds with Dean Leys' second category. The Realists are the counterpart of Leys' third category, and these theorists state the function of public officials (both political and bureaucratic) is to engage in the political mediation of disputes; the goals of public policy are specific, but in conflict.¹²⁸

123. Example: "[T]he public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently." Lippmann, *The Public Philosophy* 42 (1955).

124. Example: "The public good . . . rarely consists in yielding completely to the demands of one class or group in society. It more often consists in the elaboration of compromise between conflicting groups." Key, *Politics, Parties and Pressure Groups* 174 (3d ed. 1952).

125. Schubert, *The Public Interest in Administrative Decision-Making*, 51 *Am. Pol. Sci. Rev.* 346 (1957); Schubert, *The Theory of the Public Interest in Judicial Decision-Making*, 2 *Midwest J. Pol. Sci.* 1 (1958).

126. Schubert, *The Public Interest* (typescript, 1958).

127. Leys, *Ethics and Administrative Discretion*, 3 *Pub. Admin. Rev.* 10, 18 (1943).

128. Schubert, *op. cit.* supra note 126, at 28-29.

Finally, Dean Leys and Professor Perry, in an outline of a preliminary inquiry into the philosophical bases of the concept, summarize their findings as follows:

The "public interest" can have several radically different meanings, as follows:

1. Formal meaning: whatever is the object of duly authorized, governmental action.

A. Simple conception: the intention of king or parliament.

B. Pluralistic conception: the objectives that are sanctioned by any legal or political process, it being assumed that, as a matter of fact, decisions are made in various ways and various places.

2. Substantive meaning: the object that *should* be sought in governmental action (or in non-governmental action that is a delegation of governmental power or accepted in lieu of governmental action).

A. Utilitarian or aggregationist conception: the maximization of particular interests.

B. The decision which results when proper *procedures* are used.

(i) Simple conceptions: due process of law, majority rule, etc.

(ii) Pluralistic conceptions: observance of the procedural rules of whatever legal or political process happens to become the decision-maker for a given issue.

C. A normative conception of public order (De Jouvenel, F. Knight, Lippmann, etc.). It is difficult to give a fair characterization of this conception that will make sense to those who do not share it.

. . . .

As between the three normative conceptions of "public interest" (2-A, 2-B, and 2-C), we suggest that a great deal of further reflection is needed. It is doubtful whether many theorists can claim to be politically mature in the sense that they are neither hypnotized by optimistic Utopianism nor emotionally blinded by experiencing political opposition in a world that divides endlessly. Further reflection on these normative alternatives should not be confused by the false opposition of norm and description.¹²⁹

From the foregoing it can be seen that public interest theory is in an unsatisfactory state, particularly from the viewpoint of the lawyer. The following statements seem appropriate regarding that situation:

1. Definitive content has never been put into the term by governmental spokesmen, legislative, executive, judicial, or administrative.¹³⁰

2. It is an expression used to justify choices among alternative decisions.

129. Leys & Perry, *op. cit. supra* note 115, at 44-45.

130. Schubert, *supra* notes 125 and 126.

3. It is a symbol for a belief that a particular choice will further one or more goals of the American people (as seen by the person using the term).

4. The public/national interest often seems to be something more than or different from the consensus reached through operation of the political process.

5. Exponents of views that the public interest should serve as a guide for policy formulation, such as Walter Lippmann and Bertrand de Jouvenel,¹³¹ have great difficulty in articulating their view of the public interest sufficiently to make it such a guide.

6. Ascertainment of the public interest requires more than adherence to prescribed procedural forms, whether legislative, executive, or judicial.

7. The concept does not have a single substantive meaning, but relates to choices among alternatives of policy to meet given situations.

That being the state of contemporary thought about public/national interest theory and practice, it seems appropriate to conclude the development of the first question posed above by setting out a tentative hypothesis of the national interest adapted to the present inquiry. The other two questions can then be tested, and can be used to test the hypothesis. It can be stated in this manner: *So far as external relations are concerned, an official policy choice is in the national interest when it is reasonably calculated by the responsible decision-makers to enhance the security and survival of the constitutional order.* So stating the proposition of course leaves a number of questions dangling; principally: Who are the "responsible decision-makers"? What is meant by "the constitutional order"? These and other questions will be taken up below.

Before doing so, it should be mentioned again that some observers strenuously maintain that there can be no national interest apart from the consensus of the private interests making up the State. To them, it is heresy to maintain otherwise, for in a democracy the two are equivalent; and to think in terms of a separate and transcendent national interest is dangerous as well as repugnant to democratic theory. But this view is based on a too limited view of the problems of government. For as Sir Henry Maine observed in 1886, "there can be no grosser mistake" than the notion that "Democracy differs from Monarchy in essence. . . . The tests of success in the performance of the necessary and natural duties of a government are precisely the same in both cases."¹³² Included in these necessary and natural duties are the defense and survival of the constitutional order. The problem

131. See Lippmann, *The Public Philosophy* (1955); De Jouvenel, *Sovereignty* (1957).

132. Maine, *Popular Government* 60-61 (1886).

is not, therefore, whether such a view is or is not repugnant to democratic theory, but how theories of survival and of freedom can be reconciled. As Carl J. Friedrich has recently observed, "little has been done . . . to prepare existing constitutional states . . ." ¹³³ for the ordeal of survival in an era of totalitarianism, the threat of thermonuclear war, and the rising demands of the former colonial peoples. Survival alone may not be enough, but survival of the benefits of a democratic system in turn is dependent upon the continuing existence of a milieu in which that system can operate. The failure of democratic theorists to face this problem may be understandable when seen against the halcyon days of the nineteenth century, but it is a problem which no longer can be ignored by the constitutional lawyer or the political theorist. Friedrich puts it this way:

It is customary to consider the doctrine of the "reason of state" largely in connection with those writers who in the course of the seventeenth, eighteenth, and nineteenth centuries have been proponents of power, of aristocracy and absolutism, Machiavelli and Bodin, Hobbes, Richelieu, Frederick the Great and Hegel.

But the problem of security and survival faces the constitutional order, faces the government of law, just as much as it does an autocratic government. Hence the deeper thinkers who have developed the political thought of constitutionalism have had to address themselves to this issue. But for them it is a much more perplexing issue. They were caught in . . . [this] paradox. . . . Can you justify the violation of the law, when the survival of the legal order is at stake? ¹³⁴

B. The Nature of the Decision-making Process

This second question of our inquiry into the concept of the national interest has been discussed in detail in another article. ¹³⁵ No need exists, accordingly, for extensive reiteration of what was said there. However, a brief summary may be in order before turning to the third question on "the constitutional reason of state."

In that article, the analysis of the exercise of power in the United States dealt with a modernized view of both the federal system and of the separation of powers, and concluded that policies, when made, tend to represent a consensus among affected interest groups. Policies are the resultant of a group-bargaining process, in which the State usually plays the part of another group. Often, it appears, the function of the State is to place the imprimatur of official approval on decisions made through the group struggle. Policies so made often coincide with the image of the national interest as stated by the Presi-

133. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* 109 (1957).

134. *Id.* at 14.

135. See Miller, *supra* note 59.

dent and other members of the executive branch, but this is not necessarily true. In important instances, such as, for example, the question of whether the United States should join the Organization for Trade Cooperation, articulated policies differ markedly from the executive assertion of national interest.

If we assume, as we must, that a presidential statement regarding the national interest is not lightly made, then it can be posited that a crisis exists in the constitutional order. A system of checks and balances, deliberately established to limit power, seems to be faulty so far as external relations are concerned. It was put in this manner by Robert Dahl a decade ago:

Like father like son. Relations between executive and Congress bear a striking resemblance to those between Crown and Parliament in the eighteenth century. The ever present threat of conflict between executive and legislature; the perpetual problem of getting things done in the midst of this conflict; . . . of making and administering public policies; the attempt of the executive to reduce conflict and allow government to go forward, by manipulating the legislature through "influence," patronage, and local machines—these aspects of the British constitution were unwittingly copied by the founding fathers into the American political system, at a time when a new and more harmonious relationship was already rendering the old model obsolete in England.

Simply in order to get the work of governing done, the Crown was discovering, it needed ministers who had the confidence of Parliament. By the time the founding fathers assembled in Philadelphia, the practice, if not the theory, of cabinet government based upon the confidence of the legislature had virtually replaced separation of powers in England.

The problem, if not necessarily the solution, of American government in the twentieth century is substantially that of England in the eighteenth. *The great weapon of free government has misfired. Separation of powers between President and Congress has proved to be less productive of freedom than of conflict, patronage, inefficiency, and irresponsibility.*¹³⁶

"The Constitution," Professor Corwin has observed, "is an invitation to struggle for the privilege of directing American foreign policy."¹³⁷ What may have been an attempt to remedy this was made in the *Curtiss-Wright* decision announced in 1936 by the Supreme Court; in the course of Mr. Justice Sutherland's opinion it was maintained that the President has "exclusive power . . . 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, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the

136. Dahl, *Congress and Foreign Policy* 169 (1950). (Emphasis added.)

137. Corwin, *The President: Office and Powers, 1787-1948* 208 (3d ed. 1948).

Constitution."¹³⁸ But even so, even if the foreign-relations power is considered to be an executive function, nevertheless it can only be meaningfully exercised through cooperation with Congress: "both the Constitution and actual practice make it clear that the President does not have sufficient authority to control foreign policy without regard to the wishes of the legislative branch."¹³⁹ As has been noted elsewhere, an external policy which has a direct effect on important domestic interest groups cannot be enunciated, during times of peace at least, without paying obeisance to those interest groups.¹⁴⁰ The constitutional provision for shared power between executive and legislature, furthermore, exists without a concomitant institutional means of compelling the necessary close coordination of policy at the top of the political hierarchy, since the President and Congress are separately responsible to the electorate and are frequently elected to office at different times and in different climates of opinion. The organizational structure of government, both as between executive and legislature and within Congress itself, is an additional factor making it impossible for the United States to speak with one voice externally and also to get true national-interest decisions.

George Kennan has reminded us that: "A nation which excuses its own failures by the sacred untouchableness of its own habits can excuse itself into complete disaster."¹⁴¹ The disaster may be nothing less than the loss of the constitutional order itself, and with it the islands of freedom which yet exist.

C. Survival Under A Constitutional Order

The problem, then, must be faced: How can survival of the constitutional order be reasonably assured? How can the favorable milieu which personal freedoms must have in order to be able to flourish be preserved without violating those very freedoms? These questions will be discussed in this subsection through the development of the following questions: To what extent, if any, does a doctrine of "constitutional *raison d'état*" exist? Is such a doctrine available for use in the context of foreign economic relations, so as to permit the furtherance of the national interest as founded by the Chief Executive even without congressional action?

138. 299 U.S. at 320.

139. Cheever & Haviland, *American Foreign Policy and the Separation of Powers* 11 (1952). See Corwin, *The President: Office and Powers, 1787-1957*, ch. 5 (4th ed. 1957).

140. See Miller, *supra* notes 4 and 59.

141. Kennan, *American Diplomacy* 73 (1951).

1. The Constitutional Reason of State

In a perceptive article recently published in the *Columbia Law Review*,¹⁴² Professor Wolfgang Friedmann maintained that, even though private groups do exercise power as indicated above, still the State does possess what he terms "a reserve function" and is thus able to make appropriate accommodation to the demands of security and survival. However, with deference, this view seems to be oversimplified. It is true that the State does have some sort of "reserve function," but it would seem to be able to exercise it only during times of emergency widely recognized as such by all segments of the American people. If by "reserve function" Friedmann is referring to "reason of state" (as it appears he is), a more tenable proposition would be: a constitutional *raison d'état* exists in direct relation to the degree of emergency which is so considered by the consensus of the American political process. The State, accordingly, can exercise a reserve function in times of war or deep economic depression, and can then take action which in other times would be considered contrary to the Constitution. In other words, a constitutional *raison d'état* doctrine exists, exercised by the President, to the extent that a national emergency exists. A brief survey of some constitutional history will serve to buttress that statement. Although the present inquiry is directed toward external policy, the precedents include those from the Civil War as well as the two world wars and the great depression.

What, first, is the general nature of this doctrine? "Raison d'état," Friedrich Meinecke tells us, "is the fundamental principle of national conduct, the State's first Law of Motion. It tells the statesman what he must do to preserve the health and strength of the State."¹⁴³ That definition may be compared to another, recently enunciated by Carl J. Friedrich:

142. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 *Colum. L. Rev.* 155 (1957). Friedmann has this to say:

We should think of the State not in the Hegelian sense, but as something more than a mere computing machine of conflicting social forces, a "cash register, ringing up the additions and withdrawals of strength, a mindless balance pointing and marking the weight and distribution of power among the contending groups." Clearly, there is a "reserve function" in the State. Acting through the main branches of government—legislative, executive, judicial—it expresses and articulates, especially in times of crisis, national policies and sentiments which do not normally express themselves in organized pressure groups. It is regrettable that such direct impact of the unorganized public on State action should seldom occur except under the pressure or threat of war. *Id.* at 167-68.

143. Meinecke, *Machiavellism: The Doctrine of Raison d'état and Its Place in Modern History* 1 (Scott transl. 1957). See Friedrich, *Authority, Reason, and Discretion*, in *NOMOS I: Authority* 28 (1958).

For reason of state is nothing but the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.¹⁴⁴

So stated, it relates to the survival, in the case of the United States, of the constitutional order and the steps which must be taken to accomplish that end. It is the paradox that action must at times be taken to preserve constitutionalism which would, in the absence of need, itself be anti-constitutionalism. Ten years ago Clinton Rossiter said that "if the crisis history of the modern democracies teaches us anything, it teaches us that power can be responsible, that strong government can be democratic government, that dictatorship can be constitutional."¹⁴⁵ Who, then, is to exercise this power? And what are the limits? Here reference may be made to John Locke and his concept of the "prerogative"—the power to act in the national interest. According to Locke, "this power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called 'prerogative'. . . ." And further: "prerogative is nothing but the power of doing public good without a rule."¹⁴⁶ To what extent has the Lockean notion of prerogative become a part of American constitutional doctrine? Put another way, to what extent can the President exercise a doctrine of *raison d'état*? And another: When can the President act so as to enforce his conception of the national interest? For it appears to be true that prerogative and reason of state are identical concepts, and that action in the national interest is directly related thereto.

As promulgated, the Constitution establishes a system of shared power for both domestic and external affairs. Nevertheless, the President has since at least as far back as the Civil War taken action to preserve the security and insure the survival of the nation without resort to Congress, and sometimes even in actual contravention of the legislature. This proposition can be illustrated with the following examples:

1. *The Civil War Practice by President Lincoln*.—Under the Constitution, the "Executive Power" is vested "in a President" who is also designated as the "Commander in Chief of the Army and Navy" and who shall "take care that the laws be faithfully executed." The remainder of Article II is of comparatively less importance than these

144. Friedrich, *op. cit.* supra note 133, at 4-5.

145. Rossiter, *Constitutional Dictatorship in the Atomic Age*, 11 *Rev. of Politics* 395, 418 (1949).

146. Locke, *Two Treatises on Government*, Second Treatise of Civil Government §§ 160, 166 (Cook ed. 1947).

clauses. The entire constitutional prescription of presidential power is vague—apparently deliberately so—and it was not until the Civil War that real content, mostly by way of practice rather than statute or judge-made law, was put into them. Early, Alexander Hamilton had argued that the Commander in Chief grant of power was not to be compared to the superficially similar prerogative of Great Britain's monarch;¹⁴⁷ a view that received judicial underscoring as late as 1850 by Mr. Chief Justice Taney in *Fleming v. Page*.¹⁴⁸ Then came the Civil War, and the forthright President Lincoln immediately took action to preserve the Union, action which was taken without approval of Congress. (Lincoln called Congress into session on July 4, 1861, almost three months after Fort Sumter fell.) Included were the blockade of Southern ports, an increase in the size of the regular Army and Navy, a call for 300,000 volunteers, seizure of the rail and telegraph lines between Washington and Baltimore, and suspension of the writ of habeas corpus along those lines.¹⁴⁹ Subsequently, Congress ratified all of these actions; but, for present purposes, it is noteworthy that the President took the action first and asked for approval afterwards. Then, too, the Supreme Court, in its decision in the *Prize Cases*,¹⁵⁰ upheld the exercise of presidential prerogative. The later decision in *Ex parte Milligan*,¹⁵¹ limiting Presidential power to suspend habeas corpus outside combat zones, was not rendered until 1866, and is hardly to be considered a limiting factor on the exercise of power by Mr. Lincoln; and the same, of course, can be said for Mr. Chief Justice Taney's effort in *Ex parte Merryman*.¹⁵²

2. *World War I*.—The next important accretion to the power of the President to act at his discretion in the national interest came in the First World War. The first external American war of real magnitude brought with it a rapid development of military technology and the consequent necessity of harnessing the industrial machinery of the country to the war effort. Congress delegated great power to President Wilson to control business, but even more significant was the fact that Mr. Wilson set up both the War Industries Board to govern industrial relations and the Committee of Public Information to screen information—both without prior congressional approval.¹⁵³ A pattern

147. The Federalist No. 69, at 513 (Hamilton ed. 1888) (Hamilton). Cf. Finletter, *Can Representative Government Do the Job?* (1945).

148. 50 U.S. (9 How.) 603, 615, 618 (1850).

149. See the account in Corwin, *op. cit. supra* note 139, at ch. 6.

150. 67 U.S. (2 Bl.) 635 (1862).

151. 71 U.S. (4 Wall.) 2 (1866).

152. 17 Fed. Cas. 144 (No. 9487) (C.C. Md. 1861). In this case, Chief Justice Taney stated a conception of executive power as subject to judicial supervision. It was ignored.

153. See Corwin, *op. cit. supra* note 139, at ch. 6, for an account.

set in a civil conflict was available for use, and was used, in an external war.

3. *World War II.*—The experience of Woodrow Wilson in the First World War was multiplied by Franklin D. Roosevelt in the Second. Even before the United States formally entered into hostilities, F.D.R. took action to trade fifty allegedly over-age destroyers to Great Britain. Although he had Robert H. Jackson's Attorney General's opinion to justify the action, the President in fact exercised Congress' constitutional power over property (in Article IV) without the approval of Congress.¹⁵⁴ Later, of course, the national legislature enacted the Lend-Lease Bill which, *inter alia*, extended to the President the express power to dispose of government-owned property. The destroyers-for-bases transaction was only the forerunner of numerous other presidential actions taken by Mr. Roosevelt after American entry into the war in December 1941. Corwin has put it this way:

In April 1942 the writer [Corwin] requested the Executive Office of the President to furnish a list of all the war agencies and to specify the supposed legal warrant by which they had been brought into existence. A detailed answer was returned that listed forty-three executive agencies, of which thirty-five were admitted to be of purely executive provenience. Six of these raised no question, for all they amounted to was an assignment by the President of additional duties to already existing officers and to officers most of whose appointments had been ratified by the Senate. Thus our participation in the Combined Chiefs of Staff became an additional duty of certain military and naval commanders, and the combined Raw Materials Board was a similar creation. Nobody was assigned to such duties who was not already in an office to which the duties were properly referable. But the Board of Economic Warfare, the National Housing Agency, the National War Labor Board, the Office of Censorship, the Office of Civilian Defense, the Office of Defense Transportation, the Office of Facts and Figures and the Office of War Information, the War Production Board (which superseded the earlier Office of Production Management), the War Manpower Commission, and later on the Economic Stabilization Board—all of these were created by the President by virtue of the "aggregate of powers" vested in him "by the Constitution and the statutes"—a quite baffling formula, . . . the invention of Mr. Jackson.¹⁵⁵

Nor was that all. Such other examples of presidential prerogative as seizure of strike-bound plants, one of which took place before the war (in June 1941), an action again justified by Attorney General Jackson as emanating from the "duty constitutionally and inherently resting upon the President to exert his civil and military as well as

154. See Herring, *Presidential Leadership* (1940) for an account of the relations of President Roosevelt with Congress.

155. Corwin & Koenig, *The Presidency Today* 36 (1956).

his moral authority to keep the defense efforts of the United States a going concern" and "to obtain supplies for which Congress has appropriated money, and which it has directed the President to obtain."¹⁵⁶ Added to that, and other similar instances of control over labor relations, was the action taken to remove and intern Japanese-Americans. A clear illustration of the presidential point-of-view, so far as prosecution of the war effort was concerned, came in 1942 with the following statement; issued in connection with a request to Congress to amend some provisions of the Price Control Act:

I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by the threat of economic chaos.

In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.

At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do.

The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.

I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress.

. . . .

The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our safety demands such defeat.

When the war is won, the powers under which I act automatically revert to the people—to whom they belong.¹⁵⁷

This attitude, which Mr. Roosevelt ascribed to his powers as "Commander in Chief in wartime," of course received congressional and judicial approbation. The *Japanese Exclusion Cases*¹⁵⁸ are illustrative of the reaction of the Supreme Court; in them, severe personal deprivations imposed on American citizens—originally by executive order but later approved by Congress—were upheld in decisions which have since been called a national "disaster."¹⁵⁹

156. Quoted in *id.* at 37.

157. The statement may be found in the *N.Y. Times*, Sept. 8, 1942, p. 14, cols. 6-7. This is an excellent illustration of FDR's "stewardship" theory of office.

158. *Koremetsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1942).

159. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489 (1945).

The foregoing brief outline provides evidence sufficient to substantiate the existence of presidential prerogative in wartime. Other examples exist, one of which often travels under the banner of "executive privilege" and deals with withholding of information from the Congress and from the people.¹⁶⁰ In essence, this so-called "privilege" may be considered to be another form of prerogative. Again, an opinion rendered by Attorney General Robert H. Jackson in 1941 provides the justification for this type of action.¹⁶¹ Thus far the Supreme Court has not ruled on the question, a question which relates to the power of the President to withhold information "in the public interest" and as he determines the public interest.

Little judicial precedent is available to contradict the foregoing array of examples of presidential prerogative. Neither of the only two cases—*Ex parte Milligan*¹⁶² and the *Steel Seizure Case*¹⁶³—that ever invalidated presidential prerogative is a particularly strong bulwark against future exercises of unilateral executive action during times of emergency. In fact, the *Steel* decision provides testimony to the proposition that presidential prerogative action is possible only in times of complete emergency, recognized as such by Americans generally. This point was put effectively by John Roche:

[T]he Court accepted the view which is characteristic of the American people and the Congress today that the Korean crisis and the "Cold War" are not full-scale emergencies justifying the full invocation and exercise of Presidential war-powers. In time of "all-out" crisis, the boundary between domestic and foreign emergencies disappears, but in the *Steel Seizure* case, the Court—over the vigorous protests of the minority—insisted on maintaining the line of division between the two. Whether this interpretation of the reality of the emergency is correct or not only time will reveal, but in the contemporary context the Court insisted that the view of the American community prevail over the views of government experts. In so doing, the Court insisted on the primacy of discussion, of pragmatic blunderings and successes, over *expertise* and autonomous insight.¹⁶⁴

Neither the *Steel* nor the *Milligan* case will pose a significant barrier to executive action during future *emergencies*.¹⁶⁵ "Our quadrennially

160. See the symposium, Executive Privilege: Public's Right to Know and Public Interest, 19 Fed. B.J. 1 (1959). See also Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477 (1957).

161. 40 Ops. Att'y Gen. 45 (1941).

162. 71 U.S. (4 Wall.) 2 (1866).

163. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

164. Roche, Executive Power and Domestic Emergency: The Quest for Prerogative, 5 West. Pol. Q. 592, 618 (1952).

165. See Rossiter, *The Supreme Court and the Commander in Chief* (1951); Schubert, *The Presidency in the Courts* (1957).

elected monarch still carries, in the foreign-military field, much of the prerogative, and the corresponding burden, which attached to George III."¹⁶⁶ And it is to be noted that the assertions of "executive privilege" is alleged to operate in times of peace as well as war, and in areas other than national security or foreign affairs.¹⁶⁷

With that background, it is clear that a constitutional doctrine of *raison d'état* does exist to the extent that it may be exercised during times of emergency, recognized as such. This doctrine may be considered to be policy choices made "in the national interest." As usually practiced, these choices are made through joint presidential-congressional action. However, ample precedent is available to uphold unilateral executive action, even in the absence of prior congressional approval. As the doctrine has thus far worked out, the remainder of the hypothesis stated above appears also to be valid: with Lincoln and Wilson and Roosevelt the main idea was to preserve the nation-state as an entity within which the constitutional order could flourish. Survival alone was not considered to be enough by any of those Chief Executives; but all of them recognized that survival was the indispensable prerequisite to the maintenance of the conditions of freedom.¹⁶⁸

If, then, action in the national interest is equated with presidential prerogative and also with constitutional *raison d'état*, the conclusion is inescapable that, however stated, that doctrine is not available for use by the President in connection with the controversy over OTC. A presidential finding that joining OTC would be in the national interest, because of the constitutional frame of government, does not have the impact that a finding that information should be withheld in the national interest does. The reason is obvious: in the former, the President must share power with Congress, while in the latter the President is the sole power-wielder. We have seen that the President does have power, in times of emergency, to take unilateral action to further "the common defense." Should he have a similar power to further what might be called "the economic common defense"?

As stated, the question presents a paradox. The problem of security and survival of the constitutional order faces the responsible governmental decision-makers of the American republic, just as it does those in any other system. In effect, the requirement during times of dire emergency is for action without the restraint of law—perhaps even at times action contrary to law—so as to preserve the nation and with

166. Millis, *The Constitution and the Common Defense* 27 (1959). See Corwin, *op. cit. supra* note 137, at ch. 7.

167. See Wiggins, *Government Operations and the Public's Right to Know*, 19 *Fed. B.J.* 62 (1959). There is no Supreme Court decision in point.

168. See Rossiter, *Constitutional Dictatorship* (1948).

it the rule of law. Can violation of the law be justified, when survival of the legal order is at stake? That question has been answered affirmatively, by presidential practice abetted by legislative and judicial ratification, during times of war (although not during a time of "limited" war). Is the same answer to be sought during a period of "cold war" when the threat is not overt and is as much economic as political or military? The extent of the threat to American institutions may be as great during a cold war, over the long run, as it would be, over the short run, with overt aggression. But the judiciary, as shown by the *Steel Seizure Case*, and the legislature, as with its refusal to authorize participation in the OTC, can block executive action during these equally dangerous times. Priority is thereby accorded the *form* of preservation of the constitutional order, with lesser emphasis given to measures calculated to preserve the milieu in which it will operate.

If the alternative of according the President a greater degree of unfettered discretion in the conduct of foreign policy, particularly foreign economic policy, is one to be avoided, do alternatives exist which would provide a workable synthesis between the two extremes? Need the choice be between exercise of presidential prerogative—however labelled, whether as "inherent" powers, or reason of state, or action in the national interest—and the present system which is not adequately conducting the "common defense" of the nation? How can this paradox be resolved? Can means be devised whereby the protections of the rule of law are retained, while according a greater degree of discretion and flexibility to the person constitutionally charged with the protection of the constitutional order? The need is evident, the crisis real, and the challenge to the lawyer the most important of this era—for he must attempt to escape from this position: "In matters of foreign policy and war, those who govern, in a democracy as in any other political system, are condemned to be dictators."¹⁶⁹

IV. SOME CONCLUSIONS

In this article, the Organization for Trade Cooperation has been discussed as one of the important questions of law and policy existing today. Posed in it are the fundamental problems of any government, problems which today are particularly acute for the American constitutional order. A number of conclusions have been set out above; others are now listed.

1. The problem in law and policy involved in the OTC is illustrative of the burgeoning requirement for further study in the as yet unexplored area where international and constitutional law meet and merge. A Constitution largely designed for the resolution of internal

169. Millis, *op. cit.* supra note 166, at 32.

affairs must now be adapted to the growing demands of America's external commitments. Several of these already press for resolution, including:

(a) *The United States and the International Labor Office.*—A member since 1934, during which time 111 conventions have been negotiated, this country has adhered to less than ten. The remainder, so far as the United States is concerned, have been cast into the limbo of forgotten and ignored facts.¹⁷⁰ In large part this situation is a resultant of the exigencies of the American system of federalism, since a great many ILO conventions deal with matters traditionally, if not presently, local in nature. Whatever the reason for failure to live up to the spirit, if not the letter, of an international obligation, the question may seriously be raised if this is in consonance with the true national interest.

(b) *The United States and Multinational Security Arrangements.*—Since 1948 this country has been a member of the North Atlantic Treaty Organization and other multinational security arrangements. The Constitutional problems involved are not yet worked out. For example, in 1957 the Supreme Court, in *Reid v. Covert*,¹⁷¹ invalidated a part of the Uniform Code of Military Justice permitting court-martial of dependents of military personnel in overseas areas. Other cases on civilian personnel attached to the armed forces overseas are now in the courts. As yet, the legal hiatus left by the decision in *Reid v. Covert* has not been filled. Another facet of this is the situation exemplified by *Girard v. Wilson*,¹⁷² a case in which the Supreme Court upheld trial for homicide in a Japanese court of an American soldier stationed in Japan. The need is evident for a comprehensive study of the constitutional problems involved in stationing military personnel abroad.

(c) *The United States and Disarmament.*—Major problems in law and policy will arise should a disarmament agreement be negotiated, particularly with the need for inspection within the United States. In this area, Professor Louis Henkin has recently published a thorough analysis of the ramifications of such an agreement.¹⁷³

(d) *The United States and Japanese Textiles.*—In 1956 the state legislatures of Alabama and South Carolina enacted statutes requiring merchants selling Japanese-made articles to post signs stating, in letters four inches high, "Japanese Textiles Sold Here." This action appears to be in direct contravention of the terms of a commercial

170. See Miller & Lefkoff, *The United States and the International Labor Office: A Study in Frustration* (to be published).

171. 354 U.S. 1 (1957).

172. 354 U.S. 524 (1957).

173. Henkin, *Arms Control and Inspection in American Law* (1958).

treaty concluded with Japan in 1953. But even though the Japanese government protested, nothing was done (possibly nothing could be done) to eliminate the treaty violations.¹⁷⁴

Other problems are just beginning to emerge, such as:

(a) A possible even greater participation in multinational economic organizations than is contained in the OTC.¹⁷⁵

(b) The legal problems of outer space.¹⁷⁶

(c) The application of antitrust principles to international commercial transactions.¹⁷⁷

(d) The elimination of the Connally Reservation to the jurisdiction of the International Court of Justice.¹⁷⁸

(e) Legal and policy considerations involved in "state trading," including barter transactions and the activities carried out under the International Wheat Agreement and the International Sugar Agreement.¹⁷⁹

(f) The peaceful uses of atomic energy.¹⁸⁰

2. The Organization for Trade Cooperation presents a problem only incidentally legal; it is more a matter of politics, both on the level of the routine pull-and-tug between the President and Congress for control of American foreign economic policy and on the plans of political theory, particularly as it relates to the constitutional reason of state. What David Riesman concluded in 1941 with respect to the United States Constitution and the International Labor Organization, seems to be true today of the OTC: "None of these [constitutional] divisions of power, as enforced by the judiciary, cramp the ability of

174. See Miller, *Japanese Textiles: Some Legal Problems In the Area Where Constitutional Law Meets International Law*, 35 N.C.L. Rev. 457 (1957).

175. See text at notes 215-22 and 238-51, in Miller, *supra* note 4. Query whether it would be possible to attain multinationalism without a constitutional amendment. See Freund, *Law and the Future: Constitutional Law*, 51 Nw. U.L. Rev. 187, 194-95 (1956): "[A]ny really thoroughgoing commitment to supranational authority would be brought about by constitutional amendment, necessarily so if the measures of the world union were to be established as the supreme law of the land secured against change brought about by subsequent national legislation."

176. See the discussion by the Legal Adviser to the State Department, Loftus Becker, *United States Foreign Policy and the Development of Law for Outer Space*, JAG J., Feb. 1959, p. 4; McDougal and Lipson, *Perspectives for a Law of Outer Space*, 52 Am.J.Int'l L. 407 (1958).

177. See Brewster: *Antitrust and American Business Abroad* (1958).

178. See Rhyne, *The Case of the Empty Courtroom: The Effect of the Connally Reservation on the International Court of Justice* (1959) (pamphlet); *Christian Science Monitor*, April 13, 1959, p. 1.

179. See Miller, *supra* note 4, at 89-92.

180. See *Progress in Nuclear Energy: Law and Administration* (Marks ed. 1959).

the federal government to play a full part in the post-war work of the International Labor Organization: the federal jurisdiction is ample for its foreseeable tasks. The political obstacles imposed by the constitutional framework are more serious."¹⁸¹

3. The problem of discretion in government is an unresolved one. The challenges to the American constitutional order in the past have been both comparatively temporary and of lesser magnitude than the present challenge to the American people. The doctrine of separation of powers of the national government works admirably so far as domestic affairs are concerned, but "it is widely felt that the United States is making a perilously inadequate response to the appalling problems of foreign and military policy presented by the modern world,"¹⁸²—a situation in part attributable to the breakdown of separation of powers in external affairs. The conclusion seems inescapable that the President—rather, the Presidency, since the office has largely been institutionalized—must have a greater degree of discretion and autonomy if the pressing demands of the present era are to be met adequately. That would seem to be necessary for both foreign and military affairs. This, in turn, would of course mean greater discretion over domestic affairs, in so far as they related to foreign and military matters.

4. When the Chief Executive acts—as Lincoln and Wilson and Roosevelt have acted—to protect the constitutional order, he can be said to be acting in the national interest or to protect the common good. In these instances, the President speaks for the general will—the *volonté générale*, to use Rousseau's term¹⁸³—and he acts for the common good. And he finds that "national interest" or *volonté générale*, not in any democratic process—although that process has its influence on the end-products—and not in an arbitrary manner—although, as Walter Millis has recently pointed out, "one is virtually forced back to the position that the general will, or the common good, is what the [President] says it is. The conclusion is as inescapable as the very similar one that 'the Constitution is what the Supreme Court says that it is.'"¹⁸⁴ (But, as we have seen, the executive determination must at times, including much of our foreign economic policy, give way to the demands of the political system.) In this view, joining OTC is in the national interest simply because the President has so determined it to be.

181. Riesman, *The American Constitution and International Labor Legislation*, 44 *Int'l Lab. Rev.* 123, 192 (1941).

182. Millis, *op. cit.* supra note 166, at 33.

183. For a discussion, see Schubert, *The Public Interest* (typescript, 1958).

184. Millis, *op. cit.* supra note 166, at 31.

5. But what safeguards, if any, exist to protect against arbitrary executive action, either in times of emergency and consequent exercise of presidential prerogative or in the (unlikely) event that the President is given greater discretion over foreign economic policy? It has been stated that "the public interest requires doing today the things that men of intelligence and good will would wish, five or ten years hence, had been done."¹⁸⁵ How can this be done without falling into the pit of despotism? The need is to retain the benefits of full discussion and thorough ventilation of the issues and conflicting considerations which is obtained through a legislative-executive system, but at the same time according more discretion to the Presidency and a lesser need to rely on the exigencies of politics before foreign economic policy can be promulgated. Can this be done through institutional change? Or are we ineluctably forced to the conclusion reached by Harold D. Lasswell that "we must depend on men of good will to solve these problems"?¹⁸⁶ These are questions which have not been thought through, or even met, by the American people or by students of the Constitution. They are questions which must be thought through if the American constitutional order is to survive.

185. John A. Veig, in Leys and Perry, *op. cit.* supra note 115, at 21.

186. Lasswell, *Political Power and Democratic Values*, in *Problems of Power in American Democracy* 57, 91 (Kornhauser ed. 1957). It should be noted, however, that Lasswell was not speaking of the need for greater executive discretion, but in the entirely different context of a broader base for power in the United States. Nevertheless, the notion seems as applicable here as in Lasswell's discussion.