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ENCOURAGING FOREIGN INVESTMENT IN THE UNITED STATES BY LIMITING THE PRESIDENT'S EMERGENCY AUTHORITY UNDER THE TRADING WITH THE ENEMY ACT

By Michael T. Sawyier*

I. The National Emergencies Act

Recently the House passed, in slightly amended form, the National Emergencies Act, first passed by the Senate in 1974, under which most of the vast emergency powers delegated to the President by Congress during the past sixty years are to be restricted or eliminated and the various states of emergency now in effect terminated except in certain respects.1 One of the areas in which emergency power will still prevail, at least in potential,

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1. See H.R. 3884, 94th Cong., 1st Sess. (1975); S. 977, 94th Cong., 1st Sess. (1975). Section 602(a) of the Senate bill states that the rest of the Act's provisions are inapplicable to the following provisions of law, the powers and authorities conferred thereby, and actions taken . . . thereunder:

[a] Section 5(b) of the Act of October 6, 1917, as amended (12 U.S.C. 95a; 50 U.S.C. App. 5(b)) [the Trading with the Enemy Act];
[b] Section 673 of [T]itle 10, United States Code;
[c] Act of April 28, 1942 (40 U.S.C. 278b);
[d] Act of June 30, 1949 (41 U.S.C. 252);
[e] . . . (31 U.S.C. 203) [1940]; [and]
[f] . . . (41 U.S.C. 15) [1940].

The latter five exemptions, pertaining respectively to the National Guard, military leases, public contracts, and, inter alia, assignments and setoffs of claims against the United States Government, are of primarily domestic significance. The first, however, which pertains to banking and/or the conduct of foreign trade during national emergencies, has long been of the utmost importance to international relations and is therefore the subject of this study.

Given the blanket nature of these exemptions, it would appear that each of the four presidentially proclaimed states of national emergency remains in effect with respect to each of the aforementioned grants of emergency power. The national emergencies declared in 1933 (Exec. Proc. No. 2039, 48 Stat. 1691 (1933)), and 1950 (Exec. Proc. No. 2914, 3 C.F.R. 99 (1950)), and the ones declared in March, 1970, and August, 1971 (Exec. Proc. No. 3972, 3 C.F.R. 473 (1970); Exec. Proc. No. 4074, 36 Fed. Reg. 15724 (1971)) have not ended. The grants had been exercised so long and so often that Congress was unable to devise an immediate, nondisruptive substitute. Because of this, Senator Church's observation concerning the entire spectrum of emergency powers prior to the National Emergencies Act continues to hold true in a number of critical areas, especially foreign affairs: "This means that a majority of the American people have lived all their lives under emergency rule." Church, Ending Emergency Government, 8 U. Akron L. Rev. 193,205 (1975).
is that of the regulation of foreign investment in the United States. While popular and legislative attention has been focused on the alleged threat of a “petrodollar” invasion, and the supposed inability of the United States Government adequately to meet such danger, little notice has been given the opposite problem that foreign investment may already have been deterred by the spectre of “freezing” or “vesting” of foreign assets subject to U.S. jurisdiction.

2. During the fall of 1973 and the following year, numerous scare stories appeared in newspapers and magazines predicting dire consequences for the member nations of the Organization for Economic Cooperation and Development (OECD) if the Organization of Petroleum Exporting Countries (OPEC) pricing structure were not broken. Even if most of the wealth drained from the advanced industrial economies could be “recycled,” as some of the more sophisticated observers urged, the United States, Japan, and Europe were considered to be vulnerable to the same, though less intense, “outside pressures” through investment of foreign capital, as through resumption of the oil embargo that followed the 1973 Arab-Israeli war. The possibility that a huge influx of oil dollars into capital-starved sectors of the domestic economy might yield benefits outweighing the increased cost of fuel (if suitable controls against political manipulation could be devised and agreed upon by the concerned governments) was largely ignored amidst the frenzied warnings of disaster and contrary official assurances that the United States was already “protected” by statutes such as the Trading with the Enemy Act, 50 U.S.C.A.App. §1 et seq. (Rev. 1968). But see “The Invasion of the Petrodollar,” SATURDAY REVIEW, Jan. 11, 1975, at 11-13; “How Can the World Afford OPEC Oil?” FOREIGN AFFAIRS, Jan., 1975, at 201.

3. Despite Secretary of the Treasury Simon’s agreement with the government of Saudi Arabia, whereby the latter invested billions of dollars in a special issue of United States Government securities and undertook to “consult” with the United States Government prior to making massive direct investments, and despite consistent assurances by federal officials that domestic law provided safeguards against investment abuse, Congress responded quickly to the public’s apprehension of politically motivated takeovers of corporations. The Foreign Investment Study Act of 1974, 15 U.S.C.A. §78b (Supp. 1975), sought to enhance the government’s ability to cope with whatever problems had already developed by expanding the informational function available to it.

However, this informational function, more recently promoted by the establishment of a Foreign Investment Review Committee and the promulgation of new SEC reporting requirements respecting beneficial ownership, may yet be found an insufficient deterrent of the so far unspecified abuses feared on capitol hill. Legislation has been proposed that would almost certainly violate existing international obligations, at least if applied to countries with which the United States has FCN treaties, by prohibiting foreign acquisitions of large domestic corporations. See Note, U.S. Regulation of Foreign Direct Investment: Current Developments and the Congressional Response, 15 VA. J. INT’L L. 3 (1975). Its popularity in spite of this fact suggests at the least a decided reason for caution in limiting those powers which the President now wields and can point to as a defense against hostile control of industries vital to the national security.

4. Rigorous statistical proof of this hypothesis is impossible. Nevertheless, one of the striking phenomena of international finance over the last two years has been the diminutive reverse flow of oil payments into long-term domestic U.S. investments as opposed to Eurocurrency deposits and, more recently, certificates of deposit issued by the largest money-center banks. Many explanations might be offered for this odd failure of capital-rich nations to make fuller use of the deepest capital market and widest array of investment opportunities in the world; but rational concern about the security of potential investments from politically in-
If, for example, the Arab states had reason to fear that their acquisitions of controlling interests in the respective national oil concessions in return for compensation set by net book value might be regarded as expropriations in violation of international law, might they not also fear that the United States Government would deal with them as it has with several confiscating governments in the past, namely, by freezing them and their citizens' U.S. assets? If they were concerned about an executive branch inspired restrictions is surely, for the Arabs anyway, as likely an explanation as lack of familiarity with arcane financial matters.

5. Net book value bears little intrinsic relationship to the present discounted worth of future earnings, which is the accepted economic test of value of a going concern in the absence of a competitive market. See D. Weigel and B. Weston, Valuation upon the Deprivation of Foreign Enterprise: A Policy Oriented Approach to the Problem of Compensation under International Law, in R. Lillich, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 3-39 (1972). Recognition of net book value as "adequate" within the meaning of the "prompt, adequate, and effective" compensation requirement the United States Government formally maintains as the international legal rule governing expropriations would entail the absurd result (under this standard) that an enterprise earning $10 million annually might be worth less than that amount for purposes of expropriation even though its prospects were, immediately beforehand, exceedingly favorable.

While most of the recent buy-outs by host governments have been "voluntary" in some sense in that the concessionaires agreed to accept net book value as compensation in full for their tangible and intangible property, such narrow choices as the companies were offered could hardly have defeated the United States Government's independent right to demand additional compensation in the most egregious cases by way of espousal of its nationals' claims prior to the respective concession-liquidating agreements. This conclusion seems inescapable given the validity of the market-value or discounted-earnings test of "adequacy," continued official insistence on the limited effect of Calvo Clauses, and the tremendous scope of the government's own power of espousal. See 8 M. Whiteman, DIGEST OF INTERNATIONAL LAW §37, at 1216 (1967).

It is debatable whether, absent espousal and formal protest, the United States would be within its international legal rights if it engaged in retaliation for an already completed buy-out. On the one hand, as the article makes clear below, retaliation against wholesale confiscations has often occurred long before and/or apart from formal assumption of claims, an event typically observed at present only in the context of reciprocal lump-sum settlements between states. On the other hand, the waiver aspect of most executed private settlements between foreign investors and host governments—the explicit retroactive quitting of international legal as well as municipal claims—might at the least necessitate full-fledged espousal by the home government before resort to retaliation, even on the doubtful assumption that any claims would survive an arguably voluntary waiver that accompanied a completed transfer of rights. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §203 (1965). In any event, the threat of severe United States Government countermeasures following espousal could not be dismissed lightly were the concerned foreign state or states unable to retaliate devastatingly in their turn.

Of course, the standard of compensation formally maintained by the United States Government might be stricter than the present actual international legal rule. The difference, if any, would only be of operative domestic significance if the executive's actions based on insufficient international legal ground were vulnerable for that same reason in Congress or the courts.

6. Pursuant to §5(b) of the Trading with the Enemy Act, 50 U.S.C.A.App. §5(b) (Rev. 1968). That is the only section of the Act which confers peacetime regulatory authority over
determination of the international illegality of any future oil embargo, might the same fear not arise? Indeed, even if the only injurious action conceivable were a modest increase in the price of oil, might they not feel alarm at the precedent established by President Franklin Roosevelt in blocking the assets of Norway and Denmark after those countries had been overrun by German forces in April 1940?

The above illustrations are not intended to suggest that such foreign direct or portfolio investment as has occurred poses no risks for this country. Nor is there any implication that foreign investment could be or should be risk-free, least of all in the event of hostilities. Rather, the point is that

foreign commerce—an authority broad enough, however, by its literal terms to include virtual economic acts of war. The total economic embargo imposed against Cuba after the Castro government's seizures is a case in point, as are the sanctions, now mostly removed, against communist regimes in eastern Europe subsequent to their postwar nationalizations of foreign property. See generally Lillich, *The United States-Hungarian Claims Agreement of 1975*, 69 Am. J. Int'l L. 534-559 (1975). Even Egypt was subjected to such treatment upon her nationalization of the Suez Canal, notwithstanding the relative paucity of direct U.S. claimants. See M. Reisman, *Nullity and Revision* 792 (1972).

7. This is not to adopt either side of the issue of whether the previous embargo was illegal. But see Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 Am. J. Int'l L. 591 (1974) (emphasizing the similarity to U.S. boycotts and embargoes under the Trading with the Enemy Act and the Export Administration Act of 1969), 50 U.S.C.A. App. §2401 et seq. (Supp. 1975). Merely to suggest that the impartiality of the executive in assaying the international legality of such an action (or, indeed, of expropriations or buy-outs of the sort just described) and of the proposed responses thereto might be especially suspect where the courts were unwilling or unable to make the latter conform to their own conceptions of international legal obligation. Further, the example illustrates the present theoretical possibility of drastic sanctions against unfriendly actions not necessarily wrongful under international law—unless the executive is somehow forced to confine freezing and vesting as well as other extreme measures under the Trading with the Enemy Act (including counter-embargoes) to the bounds set by international law.

8. Exec. Order No. 8389, 3 C.F.R. 645 (1940). This was the first peacetime "freezing" action, taken without justification of any prior injury to the United States. As will be discussed, this particular response was then justified in terms of its "protective" character. Absent such a mitigating quality, the blocking action would likely have violated the fifth amendment of the United States Constitution apart from the international legal prohibition of uncompensated takings. The degree of overlap between the latter two principles is also discussed below.

9. The difference being that direct investment aims at control; portfolio investment, passive income (typically insured by diversification). The holdings of offshore mutual funds afford perhaps the most conspicuous example of foreign portfolio investment. Compare the international trust arrangement proposed by Roosa in *Foreign Affairs*, supra note 2. At the same time, even if all the securities purchased by these entities were bonds, control of a sort would indubitably be exercised through, e.g., indenture agreements. See M. Douglas-Hamilton, *Creditor Liabilities Resulting from Improper Interference with the Management of a Financially Troubled Debtor*, 31 Bus. L.A. 343 (1975).

10. Political risk insurance, such as that offered by the Overseas Private Investors Corporation, merely shifts the risk to the home government and has no effect on the underlying international legal merits of the claim. The very possibility of a successful international legal claim indicates one sense in which foreign investment is theoretically less risky than domestic
Congress may have ignored an opportunity to attract foreign capital to the United States by curbing some of the most far-reaching emergency executive authority—an authority to wage economic warfare that may now, in the wake of the War Powers Resolution, carry greater hazard of unilateral presidential involvement of the United States in foreign disputes than any other. Moreover, as foreign investment in the United States continues to grow (despite the inhibition just mentioned), and as global economic interdependence burgeons, the danger of allowing de facto economic suzerainty in times and contexts of “emergency” can but do likewise. Far from declining or deferring to take action to reduce the potential for abuse of the investment, of course, since the former must be accorded at least “the international standard of justice.” Restatement, supra note 5, at §165. On the other hand, foreign investments may also be “punished” for various international delinquencies of their owners’ governments. The ultimate economic question is simply whether it is efficient to enlarge this risk to the point of holding foreign investments hostage for unfriendly as well as unlawful foreign governmental action.


12. Unlike the neutrality legislation passed between World Wars I and II, e.g., 22 U.S.C.A. §§441-56 (Rev. 1964), which largely confines the President’s discretionary power to that of “proclamation” under §441 of a state of war between foreign nations, the Trading with the Enemy Act was originally passed while the United States was at war, with the object of insuring victory through economic means. See Reeves, The Control of Foreign Funds by the United States Treasury, 11 LAW & CONTEMP. PROB. 17 (1945). Despite the undeniable importance of the threat or application of such drastic economic sanctions in protecting United States strategic interests without resort to armed hostilities, the reach of this statute at present extends far beyond what are ordinarily thought to be defensive measures. Thus, freezing of foreign-owned assets may or may not be essential to assure that they do not fall into the hands of governments inimical to the national security or else to induce conduct consonant with national security goals. However, if some restraint such as international law is not applied to the President’s freedom of action under the Act, there can be no assurance that the result will not be as great a provocation as, say, the impromptu dispatch of a military expedition.

To be sure, Congress and the political process in general constrain presidentially imposed freezes and/or trade embargoes just as they would presidentially ordered military intervention in the absence of the War Powers Resolution. However, the greater feasibility of quick legislative action to remove an inflammatory, unjustified economic sanction than to recall and nullify the effect of an ill-judged dispatch of military units to a foreign combat zone, should not obscure the danger of allowing the chief executive vast initial discretion in responding in either manner to foreign crises. His ability to command, without explicit legislative consent, the very sort of measures recently referred to by Secretary of State Kissinger as “economic strangulation,” is “unilateral” in the dangerous sense that it could force upon Congress the difficult choice of obstructing or supporting a popular fait accompli.

One solution might lie in requiring congressional preapproval of drastic international economic measures under the Trading with the Enemy Act or, indeed, other acts of comparable scope such as the Export Administration Act of 1969. In view of the importance of flexibility in this area, perhaps a more cautious approach is indicated, however, consisting of some general minimum substantive requirement of validity of presidential applications of the Act, subject to further restriction in particular cases as deemed appropriate by Congress.
Trading with the Enemy Act (hereinafter referred to as the Act), Congress should have seen to its prompt clarification and delimitation.

II. THE SCOPE OF EXAMINATION

This article does not attempt a detailed legislative history of the Act in general of section 5(b), the basic "freezing" and "vesting" provision, in particular. Although it discusses a number of cases that concern the legitimacy of these measures, its aim is not a drastic reassessment of statutory purpose or judicial and administrative interpretation, but merely a complete development of the policy argument for the suggested legislative solution. This is that the Act (and, perhaps, statutes of comparable scope and discretionary applicability in the area of foreign trade) be amended to withdraw any delegated power to impose special conditions or disabilities on foreign investment here, or import or export restrictions of any sort (irrespective of any immediate impact on such foreign investment), in a manner contrary to international law. Ordinarily, freezes and embargoes, the two principal subjects of concern, can be justified by reference to the international legal principles of reprisal and retorsion or by the absence of clearly opposing international legal norms. Where they can not, however, Congress has the power and the responsibility to ensure that some relief is available to injured parties outside of the executive processes that produced the offense. Only by asserting its constitutional authority to override judicial predilections to defer to the international legal opinions and/or presume the international legality of the actions of the executive branch, can Congress effectively exercise its ultimate prerogative to allow those international legal violations, and no more, which it approves in the interests of the nation.

In theory, the strongest constitutional argument for such an approach could be avoided by the simple expedient of assuring restitution to aliens whose property rights had been taken or "deprived." However, as the author will urge in reply, any comprehensive answer to the general problem

14. Id. See also M. Domke, Trading with the Enemy in World War Two (1943).
15. See notes 2, 6 and 8 supra. Section 5(b) is the basic authority for nonmilitary sanctions operating directly upon foreign states and their nationals, complemented by such closely related statutes as the Export Administration Act, supra note 12. See also notes 79 and 110 infra, and accompanying text. Section 5(b) is, as previously remarked, the one section of the Act that applies in peacetime.

Section 5(b) is nonetheless a war power within a war power, having been converted into an almost independent statute by the First War Power Act of 1941, ch. 593, §301, 55 Stat. 838, 839. Although this article focuses principally upon the peacetime application of this single "peacetime" provision, the martial origin and bellicose potentialities of the vesting and freezing provisions, as well as the associated embargo authority, should be constantly remembered.
of arbitrary executive conduct in this field must begin with a substantive limitation on the offending actions that can be taken, not a mere palliation of the ruinousness of individual results.

III. THE SETTING

A. Statutory and Case Law

Substantial arguments can and have been raised that the "national emergency" criterion of the Trading with the Enemy Act is, in fact, no standard at all. When Congress ratified President Roosevelt's initial, startling declaration of a bank holiday under the Act by passing the Emergency Banking Act of 1933, and likewise retroactively affirmed the validity of his order blocking Danish and Norwegian assets in early 1940, few legislators could have anticipated that the same statute would later be invoked by President Johnson to curtail the export of American capital in the prosperous circumstances of 1968, or thereafter by President Nixon to control the export of all American goods. Less foreseeable still would have been President Nixon's supplemental declaration of emergency in August of 1971 in conjunction with the imposition of an across-the-board import surcharge.

16. Application of the Act in the absence of a formal declaration of war is permitted, in the case of section 5(b), by the following language: "During the time of war or during any other period of national emergency declared by the President . . . ." (emphasis added)


On the other hand, broad constructions of the applicable substantive powers themselves could scarcely be deemed beyond legislative contemplation. Since the amendments to the Trading with the Enemy Act made by the First War Powers Act of 1941, section 5(b) has read, in part:

During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting or earmarking of gold or silver coin or bullion, currency or securities, and,

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or persons as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

(3) Whoever wilfully violates any of the provisions of this section or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both.

In the face of such deliberately conferred discretion extending to every aspect of administration, arguments from an allegedly contrary original intent regarding the circumstances wherein emergency power could be invoked also seem quite untenable.  

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24. Although, logically, an intention to narrowly circumscribe the conditions in which emergency power operates is in no way inconsistent with a capacious grant of substantive emergency powers, this provision manifestly avoided any such restrictive approach. The only condition precedent acknowledged, after the Emergency Banking Act of 1933, 12 U.S.C.A. §95(b) (Rev. 1970), was the existence of a presidentially declared "period of national emergency," and the possibility that this might be limited to domestic crises was permanently...
The courts have shunned close review of executive findings of emergency. Just as in wartime the United States Supreme Court refused to second-guess President Roosevelt's judgment of the military necessity of interning hundreds of thousands of United States citizens of Japanese ancestry, so in peacetime no court has doubted the "strategic" necessity or appropriateness of a presidential determination that an emergency exists. Yoshida International, Inc. v. United States, like Youngstown Sheet and Tube Co. v. Sawyer, did attack the substance or content of that power which the President possesses during periods of self-proclaimed crisis, but in neither case was the exigency itself debated. Rather, the exercise of "inherent" emergency authority was rejected insofar as opposed to congressional legislation.

26. Or even a state governor's declaration of martial law. See 54 AM. JuR. 2d Martial Law §§200-06. But see Chastleton Corp. v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 405 (1924), wherein the possibility of judicial determination of the lapse of an emergency was asserted.
29. In view of the national defense justification urged by the Truman administration in Youngstown, supra note 28, this case in particular would seem to be of direct relevance to the argument that the legislative solution here proposed, while nominally a restriction on use of the Trading with the Enemy Act, is actually an unconstitutional infringement of the President's independent powers. See section IV infra.

The question of inherent executive emergency powers has ordinarily arisen in the context of the President's or a state governor's declaring martial law and/or taking other extraordinary protective measures not specifically authorized by the federal or state constitution or legislation on the general subject, though not specifically or implicitly forbidden by either. As Justice Jackson observed in Youngstown, where Congress has considered the propriety of the very sort of action taken, and has seen fit to allow such executive action only in narrowly defined circumstances, inherent presidential authority is at its nadir. 343 U.S. at 635, 72 S.Ct. at 870, 96 L.Ed. at 1199. "Separation of powers" does not, in other words, obviate the President's primary constitutional duty faithfully to execute the (constitutional) laws of Congress; and "necessity" cannot create in the executive power to perform that which the Congress was able and disposed to forbid.

Apparent exceptions, such as the independent presidential power to recognize foreign governments or to negotiate international agreements, can be explained in terms of the constitutional commitment of those functions to the executive branch. Likewise, the judicial allowance of uncompensated seizure and destruction of private property in wartime can be attributed to both the doctrine that enemy alien property is outside the protection of the fifth amendment and the express constitutional designation of the President as commander-in-chief. Even so, the scope of any inherent "taking" power is limited, like that of the power of mass arrest and detention, by the requirement that the measures adopted be "necessary" for wartime defense.
Even if Congress had intended to vest plenary economic regulatory discretion in the President, both as to the incidents and predeterminants of emergency power, and even if the courts were reluctant to substitute their own conceptions of emergency for another branch's, still some reservations could be entertained on the score of separation of powers. *Improper delegation*, along with uncompensated taking, was in fact the crux of plaintiffs' arguments in *Sardino v. Federal Reserve Bank of New York*30 and *Nielsen v. Secretary of Treasury*,31 the two major cases on the validity of the Cuban Assets Control Regulations.32

*Sardino* concerned the claim of a Cuban national, residing in Havana, to funds in his account at a New York City bank. After being denied a license from the Federal Reserve Bank of New York, acting as agent for the Secretary of the Treasury, to permit the remittance of the funds in question to Cuba, plaintiff Sardino brought suit against both parties to obtain a judicial order compelling the issuance of such license. The district court granted defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted.33 In an opinion by Judge Friendly, the Second Circuit Court of Appeals upheld the lower court ruling.

First easily rejecting plaintiff's contention that the regulations were unauthorized by the statute,34 Judge Friendly then addressed the powerful "delegation" point, never before directly raised with respect to section 5(b).35 In brief, while Congress indubitably possessed and could confer emergency economic powers, it could not add such powers to those which the President already had (of "necessity") unless it stipulated minimal criteria for their invocation and use. "National emergency" was, by this analysis, an ill-defined term and the test of mere "appropriateness" of including a given person or transaction within innumerable possible regulatory schemes, without guidelines, only a euphemism for a virtual cession

In sum, while the courts have been willing to defer to executive findings of "emergency" and "necessity" sufficient to invoke statutory emergency powers, they have also recognized that only a convincing showing of the latter element could ever justify prima facie violations of constitutional rights or of constitutionally valid legislative restrictions. The President enjoys such broad peacetime emergency authority under the Trading with the Enemy Act because Congress has given it to him, not demanding any intimate relationship between the nature of the emergency and the selected responses. What Congress has not granted (such as, according to *Yoshida, supra* note 27, the power to impose a general import surtax) is not within the President's power to compel unless there is a convincing showing of strict necessity—least of all when the failure to grant amounted to an intentional refusal.

30. 361 F.2d 106 (2d Cir. 1966).
32. 31 C.F.R. §515 (Supp. 1975).
33. See Note, supra note 18, at 145.
34. 361 F.2d at 109-10.
35. See Note, supra note 18, at 150. "In all prior cases the delegation question was rendered moot because of subsequent ratification of the President's action." Id.
of legislative responsibility. 36

He treated the issue as foreclosed by the precedent of United States v. Curtiss-Wright Export Corp. 37 which had held that congressional legislation 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

Justice Sutherland's extravagant dicta seeming to recognize an inherent, extra-constitutional authority in the President to conduct all aspects of foreign affairs, have, of course, been assailed. 39 Indeed, Judge Friendly's assumption that the cases were analogous on their facts was sharply criticized in a casenote on the subject. 40 Nevertheless, inasmuch as "negotiation and inquiry," as opposed to semi-automatic protective or punitive measures, were the aim of the Trading with the Enemy Act, the basic conclusion that the statute need not speak with particularity concerning either the circumstances or the individual incidents of its operation is justifiable. 41

36. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed 1570 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). It should be emphasized that in neither of these cases was any issue of presidential departure from the command of Congress presented; rather, the issue was whether Congress' "command" or authorization was so open-ended as to be of no constitutionally permissible effect at all. President Roosevelt did not presume to justify, say, production quotas or price floors by reference to their "necessity" (much less, "appropriateness") during the state of national emergency apart from the emergency authority contained in the National Industrial Recovery Act, ch. 90, §201, 48 Stat. 195, 200.


38. 299 U.S. at 320, 57 S.Ct. at 221, 81 L.Ed. at 263.


40. Note, supra note 18, at 149-50.

41. Whether or not the Act was originally so intended, it has become very much of a negotiating tool in seeking compensation for United States nationals victimized by wholesale confiscations. As such, its present operation would seem to fall within Justice Sutherland's category of "legislation which is to be made effective through negotiation and inquiry in the international field." 299 U.S. at 320, 57 S.Ct. at 221, 81 L.Ed. at 263. Constriction of this sort of legislation would, of course, hamper negotiations, with possible "embarrassment" to the conduct of foreign affairs. Id. But see discussion in note 101 infra.

Moreover, once again insofar as "negotiation and inquiry" are concerned, the case does support some inherent authority in the President to speak and act as the single voice of the United States Government. See note 29 supra. As Justice Sutherland explained:

Not only ... is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates ... ...

It is important [thus] to bear in mind that we are here dealing not alone with
A more “substantial” contention, in the court’s view, was that plaintiff had been deprived of his property without due process of law in contravention of the fifth amendment. Judge Friendly disparaged the defendants’ answer that the Constitution conferred no rights on non-resident aliens, but ultimately agreed with the proposition that whatever “deprivation” had occurred was proper. He found a deprivation, but no taking, of property in a situation where a “man [was] prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which [might] outrun his life.”

Employing the same reasoning subsequently adopted in Nielsen, a case involving the interests of persons who had fled Cuba after the Castro
takeover, he emphasized that greater restrictions than those here at issue had readily been approved in a wartime context. Thus, in *Clark v. Uebersee Finanz-Korporation* and *Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, S.A.*, the Supreme Court had construed the 1941 amendments to section 5(b) as authorizing the alien property custodian "to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations." Designated "nationals" had been understood throughout the war to encompass not only, for example, Dutch or Belgian corporations, but enterprises in any way controlled by these, no matter how unoffending. Lest there remain any doubts regarding the meaning of such seizures,

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44. 424 F.2d at 835-36. This case differed in that persons no longer owing allegiance to Cuba sought to "pierce the corporate veil" of a Cuban corporation to withdraw their share of its U.S. assets. In this connection Judge Leventhal also had occasion to consider the more favorable treatment of *American* stockholders of corporations (such as the one there concerned) wholly or substantially owned by American stockholders on July 8, 1963. While he did address the issue of discrimination on the basis of alienage, he found it foreclosed in those circumstances by an "historic enclave of the law establish[ing] that a state or country may marshal local assets for the benefit of local creditors before claims of creditors outside the state or nation are realized." *Id.* at 846.

The overall tendency of assets control regulations and/or trade embargoes to penalize alien ownership of assets subject to U.S. jurisdiction has never, apparently, been thought to give rise to equal protection problems even where one international delinquent's assets are frozen because of an uncompensated expropriation while another's, equally vulnerable to justifiable retaliation, are not. Far from being treated as a "suspect classification," presidential determinations to "designate" nationals of certain countries for extremely harsh regulation of their property and contract rights have evidently enjoyed the presumption of constitutionality (apart from the "taking" issue) embodied in the "rational basis" test for merely "economic" legislation.

Thus, the issue of discrimination has been essentially one of international law: blocking without good cause of the assets of nationals of a country with which the United States had an FCN treaty would, for example, presumably offend the "national treatment" guarantees commonly contained therein. See section IV infra, and discussion thereunder. Such potential international illegality would probably not influence a domestic court to strike down a given exercise of delegated authority under the Trading with the Enemy Act as presently written. However, it would become of critical importance if the amendment urged by the author were passed.

46. 343 U.S. 156, 72 S.Ct. 611, 96 L.Ed. 853 (1952).
47. Switzerland v. United States, [1959] I.C.J. 6 (involving the issue of exhaustion of local remedies for an alleged confiscation some nine years beforehand).
48. 343 U.S. at 159, 72 S.Ct. at 612, 96 L.Ed. at 857. See also *Silesian-American Corp. v. Clark*, 332 U.S. 469, 68 S.Ct. 179, 92 L.Ed. 81 (1947).
49. *See McNulty, Constitutionality of Alien Property Controls, 11 LAW & CONTEMP. PROB. 135 (1945).* No criteria for "designation" were ever specified, either legislatively, administratively, or judicially, although theoretically, but for the special deference accorded executive actions during wartime, minimal due process considerations would have precluded wholly arbitrary "designations" having no relationship to the circumstances or requirements of the emergency. Even the aforementioned principle of strict necessity of emergency measures
the former Chief of the Justice Department's Alien Property Unit had written:

The term "vest" ordinarily connotes a transfer of title. This usual meaning is buttressed here by legislative history which plainly shows that the powers conferred on the President... were not granted for conservatory purposes. Mere conservatory powers might not serve the interests of the United States, and the Congressional debates show Congress was intent not upon safeguarding the interests of the persons whose property was to be vested, but the interests of the United States in using such property. They show Congress intended that the property might be completely expended if the President or his delegate deemed that would serve the war effort of the country... The point is, the validity of the title taken (or the validity of a subsequent sale by the Alien Property Custodian) is to be distinguished from the property owner's rights, if any, against the United States.\footnote{50.} 51.

While no formal vesting was involved in Sardino or Nielsen, nor even a "taking," according to either court, neither was the United States at war with Cuba. Judge Friendly's enigmatic observation, "[w]e are not formally at war with Cuba but only in a technical sense are we at peace,"\footnote{51.} and his citation of one of the wartime seizure cases as authority for the "reasonable deprivation" caused Sardino,\footnote{52.} can fairly be described as an evasion of the fundamental issue of whether the confiscation of friendly nationals' property not in time of war could ever be legitimate.\footnote{53.} 54.
B. The Issue of Constitutionality

His other reason for finding the deprivation to be consonant with due process did not rely on abstruse emanations from the war power, however, much less a superficial analysis of the property restrictions as "mere regulations." Instead, he referred to the established international legal principle that states may, as it were, realize the worth of an alien state's or its nationals' assets subject to their control in compensation for the wrongful harm done them by the government of the offending alien state. That such a principle is recognized in international law would by no means assure its domestic constitutionality, but United States v. Belmont and United States v. Pink in addition to post-war United States statutes and diplomatic practice, strongly suggest this conclusion, at least in the context of a mutual claims settlement agreement.

Belmont and Pink involved actions by the United States Government to reduce to its possession and ownership certain American-branch assets of Russian corporations whose property had been confiscated by Soviet decree. Notwithstanding that extraterritorial confiscations do not consti-
tute "acts of state," and that confiscations of any sort, at least during peacetime, offend domestic canons of "public policy," the Supreme Court overrode the conflict of laws rules of the state of New York to give effect to the assignment of Soviet claims to the aforesaid assets in favor of the United States pursuant to the so-called Litvinov Assignment. Thus, this government was held to have acquired title to confiscated property located in New York, and to have a claim superior even to that of foreign creditors, by virtue of an executive agreement. The fifth amendment was not violated because the destruction of the former owners' and present creditors' rights was accomplished by a foreign government albeit with the retroactive sanction of the government of the United States.

Although, ominously for the security of foreign investments in this country, the Court refused to base its holdings on the existence of an antecedent international legal liability on the part of the expropriating, and transferring, government toward U.S. nationals whose property had also been seized, neither case supports a unilateral peacetime "vesting" power of the federal government divorced from the just compensation requirement. As the Soviet government had, presumably, not violated either Soviet or international law by its actions against its own nationals, all that the cases surely stand for in this regard is the constitutional ability of the federal government to profit from other countries' confiscations, even if the latter are not in the nature of an atonement for earlier confiscations or other injuries affecting the United States or its citizens.


59. The repugnance of confiscations abroad is ordinarily overridden by the act of state doctrine; in the instance cases, however, the attempted confiscations took place from abroad in the state of New York.

60. "On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the de jure government of Russia and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims." 315 U.S. at 211, 62 S.Ct. at 556, 86 L.Ed. at 807.

61. Both cases are perhaps most famous for their having allowed to executive agreements the same internal affect as treaties, except in the situation of direct conflict with congressional legislation. See United States v. Capps, supra note 41.

62. Theoretically, therefore, foreign governments otherwise unable to make sheerly punitive or racially motivated confiscations effective could do so through sale or gift of their asserted rights to the United States Government. Whatever the constitutionality of such knowing cooperation in a result (acquisition of title to property without the consent of or payment to the original owner) that it could not have accomplished directly, the federal government would not thereby violate international law. So long as only the assets of nationals of the confiscating country were involved, there could be no international legal issue, despite the obvious "hot ore" analogy. If, on the other hand, the United States compelled such an assignment (through, for example, blocking measures affecting the same assets) without good cause (such as a prior confiscation of U.S. nationals' property by the foreign government concerned), both international law and domestic constitutional law would presumably be violated.
This ability is evidently enough to sustain blocking measures in anticipation of international claims settlement agreements, however, at least in some circumstances. This is the ultimate teaching of both Sardino and Nielsen and part of the final response to the argument of unconstitutionality. Judge Friendly correctly implied that most of the wartime vestings could be analyzed as attempts to secure international legal claims of American citizens against the enemy, however else the Supreme Court had chosen to explain them. Precisely because private claims could not be executed directly upon enemy governments' property (much less, enemy nationals' simply in respect of their governments' misdeeds), freezing measures eventually (or then, for military reasons, immediately) followed by vesting were essential to effective redress.

Likewise, he stressed that the comprehensive vesting of Bulgarian, Hungarian, and Rumanian property at the end of World War II occurred in connection with the peace treaties between the United States and those respective countries, whereby the latter agreed to make all their and their nationals' U.S. assets available for the satisfaction of private claims.

None of the war-related vestings proves the unconstitutionality of peacetime takings in the absence of expectation of foreign governmental compensatory assignments, of course. Indeed, Friendly noted that rigid blocking regulations had been promulgated with respect to German allies (and, for that matter, occupied nations) "long before" United States entry into the war. These could not reasonably be justified as anticipatory security interests for international legal injuries yet to be suffered.

63. "It would seem that the only justification for the freezing of Sardino's assets rests on its providing a basis for negotiation of a similar [cross-assignment] agreement with Cuba." Note, supra note 18, at 154. Conceivably, no such assignment need be in view in order to allow the United States Government to offset its own citizens' expropriation losses against the value of the expropriating foreign government's assets already within its control. In other words, much as any injured private party could set off the value of his claim for damages against the alleged tortfeasor's claim to payment or property rightfully in the former's possession as security, so the Government, as an injured party (in international law) in respect of the foreign expropriations of its own citizens' property, could seize and retain property of the wrongdoing government. See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed 2d 466 (1972). Although international law would permit a further "set-off" against property of foreign nationals, the fifth amendment almost certainly would not (except for enemy nationals) where, to repeat, no claims settlement agreement was in view. Even then, it may be doubted whether the federal government could physically seize and use, or allow expropriated investors to levy against, individual aliens' U.S. property, until such time as the intergovernmental assignment was effected.

In any event, where there were no prior offsetting delicts, "anticipatory" freezes or even perhaps actual assumption of asserted claims of the foreign government to the same assets, would be extremely difficult to reconcile with either the Constitution or international law.

64. 361 F.2d at 112-13.

65. Sovereign immunity would, of course, have defeated private suits to recover against assets still in the enemy governments' constructive possession.

66. 361 F.2d at 113.

67. Id.
C. Constitutional Limitations Upon Peacetime Controls

But the latter reference, wholly unnecessary to the court's decision in light of Cuba's "revolutionary" plundering of foreign investments, does lead to consideration of two possible constitutional limitations upon peacetime controls. Whereas in the circumstances of 1940, protective freezing or even vesting was or would have been consonant with the fifth amendment, in the circumstance of today either would be suspect as applied to Cuba. Moreover, the Cuban Assets Control Regulations were never intended to serve a protective function in the limited sense of that term as here employed, and therefore would probably amount to an uncompensated taking, as opposed to a "reasonable deprivation," but for the aggrandizement attributed to the Cuban people on account of their government's depredations.

"Protection," as the legal rationale of the blocking measures instituted against Denmark and Norway in 1940, obviously meant something more than expansive motions of self-defense. Neither country was thought or alleged to have threatened United States security in violation of any recognized duty, or otherwise to have given cause for offense except through its occupation by Germany, then bent on avoiding war with the United States. Although in those perilous straits temporary regulation to prevent use of Danish or Norwegian assets in this country by the Nazis was almost certainly not violative of international law, nothing more drastic than prevention of new transactions in respect of such assets could have been internationally legally, much less, constitutionally, warranted. In particular, since the war power had not yet been called into play, only the most restricted "deprivation" consistent with national security imperatives could have been effected.

68. The Department of State formally denounced the expropriations as discriminatory, retaliatory (though not on adequate international legal grounds), and confiscatory as early as 1960, a characterization that doubtless influenced subsequent court decisions including Sardino v. Fed. Reserve Bank of N.Y. (which did not even discuss the point), supra note 30.

69. Any such attribution of responsibility can only be described as a primitive principle of collective guilt, at odds with the erstwhile international legal attempt to distinguish between enemy governments' and enemy nationals' property. Nonetheless, the rule is by now seemingly permanently entrenched in international law, both as to wartime and peacetime actions of the government whose nationals' property is held subject to the international legal "debt." (Note that a mere default in payment of a foreign governmental loan obligation might not, however, entail the same kind of derivative liability of the borrower's nationals.)

70. See generally C. Beard, PRESIDENT ROOSEVELT AND THE COMING OF WAR, 1941 (1948).

71. Instead, the police power, Restatement, supra note 5, at §197, would legitimize any such actions so long as not a patent subterfuge for discriminating against nationals of the countries "designated" or for coercing without good cause (including bona fide security concerns) the behavior of those or other countries.

72. Despite the essential accuracy of the distinction, note 50 supra, between the constitutional validity of outright vesting of even friendly aliens' property in wartime and the consti-
In ratifying President Roosevelt's application of assets controls to Denmark and Norway, Congress repeatedly acknowledged the importance of conservancy accomplished by restraints upon alienability of the property. Thus, in the Senate debates on the joint resolution of May 7, 1940, approving the first freezing order, Senator Barkley remarked:

It should also be stated . . . that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interests in stocks, securities and other property in the United States, but it is also intended to protect American citizens in the event they have any claims growing out of these transactions . . . .

As the general counsel of the Treasury Department subsequently observed, the United States had become safekeeper of the patrimony of endangered European nations, which it would have been the grossest breach of duty not to preserve. Protection, in short, meant imposition of fiduciary obligations on the protector, and was even allowed to extend to such lengths in impairing the property rights of persons and nations that had not offended against us only because of the compelling self defense interest involved.

In utter contrast to this pattern, the Cuban Assets Control Regulations have never been claimed to benefit Cubans living in Cuba. They may or may not be linked to the international legal or domestic constitutional "self defense" power, but their qualification as permissible regulatory measures in pursuit of such power could not stand unless a supportive compensatory justification were adduced. That failing, the United States constitutional obligation, "if any," to pay immediate compensation therefor, it could not be seriously contended that formal vesting and/or beneficial use by the federal government would be proper in peacetime without such immediate, i.e., "prompt," compensation or at least the ready availability of a compensatory or reclamation remedy, such as section 9(a) of the Act affords to a[n]y person not an enemy or an ally of an enemy" whose property has been "vested," 50 U.S.C.A.App. §9(a) (Rev. 1968). The issue is, instead, whether actions not quite amounting to a formal taking can nevertheless give rise to an immediate obligation of compensation—because, to borrow Judge Friendly's term, they represent unreasonable "deprivations." With respect to the overlap between internationally illegal and domestically unconstitutional abuses of the protective principle, see note 87 infra, and accompanying text.

73. 86 Cong. Rec. 506 (1940) (emphasis added).
74. Reeves, supra note 13, at 21 n.20.
75. John Foster Dulles concluded that vesting itself, as contemplated by section 5(b), was supposed to be "a sort of conservation receivership or trusteeship, although coupled . . . with power to hold, use, administer, liquidate or sell, just as often is the case with other holders of beneficial title." McNulty, supra note 49, at 141.
76. They preceded the Cuban missile crisis, however. No explanation of any ostensible self-defense justification has ever been offered. Indeed, typically, no explanation at all was offered for the recent "designation" of Cambodia and South Vietnam under the Act, although presumably such international legal wrongs as the successor governments had inflicted on the United States Government and/or U.S. nationals supplied an implied justification for "equivalent" retaliatory steps. See the discussion of the proportionality requirement, infra note 88.
Government and its subjects would be unjustly enriched at Cubans' expense, somewhat as when innocent third parties' property is destroyed by private persons in the exercise of their own right of self defense or claimed necessity.\footnote{77} 

If the above analysis is correct, a major international legal question underlies the issue of constitutionality of peacetime freezes and vestings—though not, in all likelihood, import or export curbs per se—under the Trading with the Enemy Act.\footnote{78} For, only where some prior wrongful aggrandizement or injury by the affected foreign state can be shown, can extreme, \textit{nonprotective} interference with ownership rights have any basis beyond that of strict and absolute public necessity. Furthermore, both the wrongfulness of the foreign government's action and the attribution of responsibility to individual alien investors can only be determined by reference to international law, apart from domestic regulatory statutes of extraterritorial applicability, whose violation has never been deemed punishable by means of the Trading with the Enemy Act.\footnote{79}

\footnote{77} Cuban nationals are not usually "third parties" in international law with respect to the Cuban government. \textit{See} note 68 \textit{supra}. But still one must ask why they should be made to pay (even in the form of an incomplete taking, a "deprivation") for international legal harm not yet caused. The qualified privilege of private necessity in tort would not justify an \textit{uncompensated} invasion of their property rights, though admittedly the more absolute privilege of "public necessity" conceivably could. \textit{See} notes 29 and 41 \textit{supra}, and note 110 \textit{infra}.

\footnote{78} Theoretically, international legality would be relevant to the issue of constitutionality of all such measures in wartime as well as peacetime, but for the long line of decisions holding that the war power modifies the "just compensation" clause of the fifth amendment. \textit{See} McNulty, \textit{supra} note 49.

With respect to neutral or friendly aliens, as we have seen, a program of complete vesting is allowed in wartime, but only if compensation or reclamation is available through reasonably expeditious avenues of administrative or judicial relief. "Deprivations" of use, on the other hand, are permissible without reference to preceding international delicts of the respective foreign government provided that a "protective" function is served. The existence of a state of war between the United States and a third country would likely obviate objections that the "protective" blocking order was in fact detrimental to the rightful owner, as where the frozen assets were in a non-interest bearing account, and would surely blur the distinction between Dulles' fancied "trusteeship" of \textit{vested} assets and the already diffuse "fiduciary" duties impressed on the United States Government as self-appointed "protector" of neutral property. In particular, it would seem that, during the war emergency, some use of frozen assets could be made by the United States without changing the overall character of the interference from that of deprivation to taking.

International law might well not be \textit{violated} by wartime confiscations of enemy property or wartime "deprivations" of the rights of neutral owners (even if not fastidiously protective), but any necessary relationship between international legality and constitutionality under the fifth amendment stems from the constitutional requirement of "protective" treatment where no preceding international delict warranted the deprivation. This single "question" or relationship persists, however, whether or not the asserted right of self-defense arises in the context of war.

\footnote{79} In a sense, a state trading corporation's violations of, say, the securities or antitrust laws might be regarded as an injury to the United States Government, warranting the imposi-
With respect to "protective" measures alone, defined above principally in terms of the manner in which blocked assets are held, i.e., under an unequivocal declaration or understanding of fiduciary duty, in some residual sense for the benefit of private owners, international law would not have this same intimate relationship to the requirements of the fifth amendment. Of course, just as the due process clause and/or the "compensation clause" would not permit lengthy, uncompensated freezing of friendly aliens' assets, no matter how procedurally protective, if no genuine danger to the national security existed, so international law would probably not allow such discriminatory interference. Conversely, where a definite threat did exist, international law, like constitutional law, would defer to a large extent to the good-faith judgment of the responding ultimate official, while allowing perhaps somewhat greater leeway in the manner of protection than would the Constitution itself. In no event, however, would the issue of international legality of protection control the issue of constitutionality. Rather, constitutionally proper protection could immunize what would otherwise represent an unreasonable deprivation because of the absence of preceding international legal excuse.

Neither Friendly nor Leventhal explicitly acknowledged either of these related constitutional limitations—the second, as much a limitation as the first on government actions where only protection, not provocation, could reasonably be claimed as justification. But the importance they attached to the offset/retribution idea may permissibly be inferred from their allusions to the War Claims Settlement Act, the International Claims Settlement Act of 1949, and the Supreme Court's advertence in Banco Nacional.
de Cuba v. Sabbatino to the Cuban Assets Controls as exemplifying "the capacity of the political branches to assure, through a variety of techniques . . . that the national interest is protected against a country which is thought to be improperly denying the rights of United States citizens." 83

IV. A New Approach To The Act

A. Preliminary Policy Considerations Favoring Limitations: Effect of Change

Aside from the argument that foreign governmental actions not wrongful under international law can not, consistently with the fifth amendment, become the basis for singling out alien property for nonprotective freezing, a number of policy arguments favor Congress' limitation of its entire delegation under section 5(b) of the Act to the power to take counteractions in conformity with international law. First, congressional legislation and presidential implementation thereof prevails in the state and federal courts over contrary customary international legal norms, such as the formal requirement of "prompt, adequate, and effective" compensation for a taking as defined by international law or the general prohibition of discriminatory treatment. Even treaty provisions, such as those calling for "national treatment" of aliens, that antecede the relevant legislation, prevail under the theory that international law has been "received" into the U.S. legal system. If self-executing, as are, in some sense, all of the above-named principles, it will supply a "rule of decision" where cases depend on rights claimed thereunder. It should, at the very least, guide courts' interpretations of statutory delegations unless Congress has unmistakably renounced such an intention.

82. 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804.
83. Id. at 412, 84 S.Ct. at 932, 11 L.Ed.2d at 814 (emphasis added).
84. FCN treaties are the major example.
85. A later treaty alters the effect of inconsistent legislation if applicable domestically of its own accord. This principle could itself invalidate many hypothetical nonprotective "designations" of friendly countries under the Trading with the Enemy Act, as most of the FCN treaties to which the United States is a party were signed after 1917 and are, unquestionably, self-executing. See 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §2, at 352 (1967). However, it may be doubted whether any of these national-treatment clauses was intended to inhibit the President's discretion in exercising emergency powers. In any event, the absence of such treaties between the United States and many of the newly emerged capital-exporting nations of the world makes reliance on vague equal-treatment provisions unsatisfactory as a sole protection against arbitrary freezes or embargoes. Consider the discussion of constitutional equal protection restraints in note 44 supra.
86. See 45 AM. JUR. 2d International Law §§8, 9 (1969). As the United States Supreme Court said in The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed 320 (1900), "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Id. at 700, 20 S.Ct. at 299, 44 L.Ed. at 328-29.
Second, customary international law recognizes a broad exception for "reprisals" and/or self-help in many situations where the "protective" justification for extraordinary restrictions upon foreigners' use of domestic assets remains unavailable.

"Reprisals," says Vattel, are resorted to between nation and nation in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused [to accord] ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated and the reprisals are accomplished.\footnote{Reprisals,} 87

Ordinarily, the demands of the United States Constitution greatly surpass those of international law with respect to the protection of the individual against administrative highhandedness. Only in an isolated recess of the constitutional system could a doctrine so authoritarian and anti-individualist as the reprisal doctrine conceivably be perceived as unduly confining of \textit{executive} action. As with wartime restrictions on individual rights, the "punishment" of alien investors for alleged sins of their home government, must, as a matter of policy, include an examination of the potential for completely arbitrary and excessive responses at odds with the systemic concern for individual justice.

Although international law reaches no farther than constitutional law in most cases, there are others where the Constitution imposes lesser restraints. Thus, even though constitutional, a retaliatory deprivation might be squarely in conflict with various investment assurances by the host government and hence intrinsically internationally illegal. Likewise, a constitutionally valid exercise of "protection" might nonetheless offend international law by "coercing" the country whose nationals' assets were blocked or yet another country \textit{against} which such measures were needed.\footnote{Some authorities have suggested that the reprisal principle is conditioned by an implied requirement of rough proportionality. Thus, according to the arbitral opinion concerning the Nautilus incident, "[t]he majority consider a certain proportion between offence and reprisal a necessary condition of the legitimacy of the latter." [Translation] 2 U.N. R.I.A.A. 1012. See also H. BRIGGS, THE LAW OF NATIONS 951 (2d ed. 1952). Even so, in view of the Supreme Court's emphasis on assets controls as an \textit{offset}, the international legal principle could hardly be significantly more restrictive than its fifth amendment corollary. See Sardino v. First Nat'l Bank of N.Y., \textit{supra} note 30, and Nielsen v. Sec. of State, \textit{supra} note 31. Of course, severe retaliation may be intrinsically wrongful, whatever the provocation, as} 88

\footnote{45 Am. Jur. 2d \textit{International Law} §90 (1969).}
But perhaps the clearest example of the impact of the proposed statutory amendment, beyond forcing the courts to apply constitutional rights already theoretically enjoyed by foreign investors (though impeded by considerations of nonjusticiability), is that of trade restrictions per se—embargoes or curtailments of exports and/or imports.

B. The Use of Trade Restrictions

Given the foregoing definition of protective measures under the Trading with the Enemy Act, trade disruption would either constitute retaliation or a third category of unprovoked "national interest" measures. Interference with export or import contracts or relationships in the absence of a general freeze could not readily be regarded as a form of "protection" for the alien persons affected,89 the less so since procedural protection (in the manner of taking property not the United States Government's to take) is extraneous to the issue of constitutionality or international legality of mere trade restriction. This type of interference is, quite simply, neither a taking nor a deprivation, but conventional regulation. No one owns the right to export or import, and even total prohibition of such activities could not, except in the most unusual cases, be thought analogous to zoning restrictions that deprive real property of all reasonable use value. Even in such an unusual case, there would be no ground for a finding of taking or deprivation, owing to the plenary constitutional right of Congress to regulate foreign commerce.

Customary international law likewise recognized no right of alien persons to continue exporting to or importing from their home state in the face the result of treaty commitments to refrain from the unilateral use of "coercive measures," O.A.S. Charter art. 15, and/or to settle disputes by "peaceful means," U.N. Charter art. 1, para. 1. Here, clearly, the proposed legislative solution would reach beyond what is already in theory constitutionally required to prevent, e.g., crippling freezes or embargoes if their intrinsic international illegality could be shown in a court of law.

89. Except in the unlikely event that the United States Government appointed itself umpire and protector of the substantive fairness of the terms of individual export or import contracts. Note, however, that protection against any and all transfers of property, i.e., freezes, would lead to the same result, and be of benefit to the affected foreign property owners only on essentially this same rationale. Moreover, the protection thus afforded to U.S. citizens owning interests in, say, a wealthy corporation of the foreign country designated would scarcely benefit them more than a cessation of trade. In all, the entire "protective" rationale is highly ambiguous so far as it means anything more than protection of the United States.

Rather than conceptualizing restraints on trade per se as a form of deprivation of property justified by the prior delicts of the relevant foreign state or by the combination of self defense and procedurally protective interference on behalf of the very persons forbidden to trade, it seems sensible to view such restraints as non-deprivations whose constitutionality and international legality does not turn on whose interests are "protected" (albeit the existence of a valid self-defense justification would be highly pertinent to the international legality of the limited "police power" regulations imposed).
of contrary regulation by the host government. However, in this area in particular, developing principles of treaty law may rapidly produce a marked disparity between domestic constitutional and international legal requirements. Thus in contrast to lesser, properly discretionary actions still generally classified as "retorsion," such as aid reductions or suspensions,\textsuperscript{90} export or import controls may now raise serious international legal problems. For example, controls on U.S. exports to Cuba through third countries, either in the form of "re-export" restrictions on goods shipped from the United States, under the Export Administration Act of 1969, or of restrictions on the direct exports of foreign subsidiaries of U.S. corporations, under the Trading with the Enemy Act, were recently curbed by the administration, apparently out of concern regarding their continued international legality as well as general policy considerations.\textsuperscript{91} Again, there could be little dispute that an abrupt withholding of, say, vital agricultural exports would be devastating in its international repercussions and flatly in violation of international law if a currently effective trade agreement covering such commodities forbade unilateral curtailment below a certain level.\textsuperscript{92} Nonetheless, the bare constitutionality of the President's doing precisely this—whether for alleged self defense, retaliatory, or simply economic reasons—could not likely be challenged unless his delegated authority did not extend to actions of that general nature or were clearly restricted to those trade-curtailing actions which did not violate international law.

90. 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §§9, 10 (1967). Note that even these, even when carried out in response to an outright confiscation, have often been attacked by Latin American spokesmen as a violation of the prohibition of unilateral "coercion" in the charter of the Organization of American States (O.A.S.).

91. The O.A.S. had just voted in July of 1975 to lift the requirement that each member state cooperate in collective sanctions against Cuba.

92. The recent U.S.-Soviet grain shipment accord is but one example. Use of the so-called "food weapon" to assure overall foreign policy cooperation by a state already linked to this country by a concessional-rate food purchase agreement would likewise give international legal offense, since, when the United States Government signs such an agreement with a foreign trade or agricultural ministry, the obligations flowing therefrom are international legal as well as contractual in character. In a different but analogous context, certain forms of export assistance or import "relief" could violate the General Agreement on Tariffs and Trade (G.A.T.T.), reproduced in C. WILSON, A CHARTER FOR WORLD TRADE at 231-327 (1949).

Conceivably, retaliatory measures by the foreign country in such case would not permit further reactions, in a manner ordinarily violative of international law in the absence of recognized "excuse," by the United States Government. Whether U.S. courts would have to inquire into the ultimate origins of an investment dispute if they sought to apply the proposed statutory condition of international legality is debatable, but the policy of commanding respect for international law by the executive branch of Government (respect even for those international obligations that were solely the result of executive agreements) would indicate an affirmative answer.
C. Preliminary Policy Objections: Additional Reasons for Limitations

Having identified various respects in which the legislative solution here proposed would lead to different results than those now theoretically required by the Constitution, much less, those now actually required, in view of the courts' near-total deference to executive determinations that adequate grounds for reprisals exist, we must turn to two preliminary objections to the supposed "solution."

Some effective method of enforcing United States citizens' international legal rights must exist apart from private lawsuits\(^3\) and diplomatic remonstrations.\(^4\) Also, if other nations' governments are free to violate international law, and often do, why should the United States Government tie its own hands and hobble its own flexibility in time of emergency?

With respect to the first of these general policy objections, it suffices to observe that the primary issue in most cases is whether any international legal rights have indeed been violated. Only where the remedy is grossly disproportionate, \(e.g.,\) the freezing of all Mexican assets because of a denial of justice to one or two Americans imprisoned on drug charges, or, while proportionate, intrinsically improper because of its severity and coercive purpose, \(e.g.,\) military reprisals or economic "blockades" adjudged to be in direct conflict with multilateral conventions, or the flouting of recent bilateral engagements, would the proposed restriction of presidential options comprise a limitation on remedies. As regards this rather minimal concession to international justice and stability, one might note that not only is international law theoretically a constituent element of our own legal system, but perhaps no nation has so large a stake as ours in maintaining respect for international order and in unifying the productive capabilities of the world. Hence, Reisman, one of the foremost exponents of the "self-help" rule of relief, stresses the necessity that every such action be taken from the "perspective of," as agent for, the world community.\(^5\)

The second objection is either a denial of the obligatory character of international law or a slightly confused version of the argument from "necessity." Assuming that international legal obligations can arise and continue, the remaining question is whether it could ever be desirable so completely to submerge the "sovereignty" of the United States as to preclude the possibility of repudiating, in any respect, the collective authority of nations. Whatever the desirability of this far-fetched scenario, in no sense could Congress' limitation of its delegation be construed as a perma-

\(^3\) Which confront jurisdictional and act-of-state obstacles apart from the doctrine of sovereign immunity.

\(^4\) As previously observed, the major role of espousal at present is the limitation of claims against foreign governments, in connection with lump-sum settlements.

\(^5\) Reisman, supra note 6, at 842. Also see chapter 18 of Reisman entitled "Self-Help: The Relativity of Lawful Coercion."
nent renunciation of its power to abrogate treaties or other obligations deemed oppressive. Congress can and has authorized, for domestic legal purposes, patent violations of international law; if it so chooses, it could effectively authorize a presidential violation under the Act, merely by repealing the proposed statutory condition or waiving it as to one specific matter.

Other nations would, of course, be well aware of the possibility of repeal. They would doubtless continue to regard their surest protection against internationally illegal government action, or, in truth, severely detrimental government action of any sort, as the presence within their borders of huge United States investments or the ability to cut off vital resources from the American market. But a demonstration of willingness on the part of this country to confine its basic emergency legislation concerning foreign affairs to the outermost limits of accepted international law would at least tend to promote the very interdependence that will eventually make massive confiscations on either side excessively costly. How much sooner and more productively the immediate problem of regulating foreign governments' investments could be solved by amicable international agreements where both parties were confident of treatment of such investments in complete accordance with international law as applied by independent American courts, can only be guessed.

96. For example, the notorious Byrd Amendment, authorizing imports of chrome from Rhodesia despite collective trade sanctions approved by the U.N. and the U.S. prohibiting such transactions.

97. Whereas Congress could not authorize an internationally illegal, nonprotective "deprivation" without just compensation (at least according to the constitutional analysis set forth above), it could probably achieve the same effect by failing to remove the barriers to justiciability that have heretofore dissuaded courts from engaging in any searching consideration of the international legality of assets controls.

The specific "suspension" of certain features of the National Environmental Policy Act, 42 U.S.C.A. §4321 et seq. (Rev. 1973), pertaining to the Alaska pipeline illustrates by analogy the possibility of preserving the general requirement of international legality while declining to forbid the commission of an internationally illegal act in one specific case or class of cases. Even while following the general outlines of the proposed amendment to section 5(b), Congress might thus make a special exception for wartime applications of that provision—not forbidding them because of international illegality, or conceivably even expressly approving them in spite of same. The point is that, if nothing else, Congress should not be construed as implicitly endorsing internationally delictual applications of the Trading with the Enemy Act simply by having passed singularly open-ended legislation in 1917. Yet, in the absence of some new evidence of congressional will, that conclusion could be drawn by the courts even if the obstacle of nonjusticiability were removed.

98. See note 3 supra. While the fifth amendment protects foreign individuals, not governments, established principles of international law would ordinarily afford ample protection for both foreign governmental and private investors if these traditional rules were only assured of impartial application. Such assurance might also derive from provisions calling for arbitration by the International Center for the Settlement of Investment Disputes (ICSID); the United States, as a party to the ICSID Convention, 4 Int'l Leg. Mat'l's 524 (1965), could
While the executive branch might be content to accept international legal limitations, in the abstract, on its authority under the Trading with the Enemy Act, it might be expected to resist the idea of proving the international legality of, *inter alia*, assets control regulations in court. The courts, in turn, have long shown their reluctance to decide issues of public international law usually left to the State Department.99 Objections based on efficiency, nonjusticiability, and separation of powers could all be mitigated through appropriate legislation, however.

**D. Effect on the Remaining Objections of a General International Legal Limitation Requiring Judicial Enforcement**

Since the Act as a whole comprises a penal statute, enforced by forfeitures and fines as well as the threat of incarceration, no undue hindrance to administrative efficiency would result from a requirement that the Government suffer a dismissal wherever the prosecuted party put in issue the international legality of the pertinent regulations, and the government failed to meet even the civil burden of proof. Beyond that, as regards the elements of an offense, the proposed amendment need only state that any delegated authority stops short of violations of international law. In a civil suit between a bank, for example, and Cuban depositors, wherein the bank pleaded the assets controls as a defense to nonpayment, the court would then typically have to pass on the validity of the regulations in question. If a body of case law upholding their international legality had developed, it would presumably prove decisive. On the other hand, if the issue were one of first impression, and the Government were not otherwise joined, it might seek to intervene to protect the administration’s interest in a favorable ruling. In any event the case, being one which presented a federal question, would be controlled on that point by uniform federal common law.100

The justiciability problem is composed primarily of two interrelated

99. The Department has always given some attention to the international legality of major foreign policy decision. If a political decision were reached to freeze a certain country’s assets, for example, the Department would at least have to be prepared to defend that decision in international fora. However, as remarked in the first part of this article, a situation in which the international legality of a drastic response to another nation’s policies is determined at a subordinate level within the administration initiating the response, with no assurance that an unfavorable finding would affect the outcome anyhow, could hardly inspire confidence in potential investors from countries with which the United States has uneasy relations.

100. Divergent views among the several states concerning the international law bearing on this federal question would be equally intolerable as conflicting understandings of sovereign immunity or the act of state doctrine.
elements: the doctrine of abstention, chiefly as expressed in the act of state doctrine, and the doctrine of political questions. The former relates to the danger of "embarrassment" of the executive in the conduct of foreign policy that was apprehended and articulated in Curtiss-Wright and subsequently, with specific reference to judicial determinations of the international legality of foreign governments' "sovereign acts" in Sabbatino. Indeed, the act of state doctrine on its face opposes the proposed judicial function of deciding the international legal justification for most retaliatory "deprivations" under the Trading with the Enemy Act.\footnote{Prior to the Supreme Court decision in that case, the idea that United States courts were incompetent to ascertain and apply international law, as opposed to local foreign law, to any "sovereign act" committed by a host government within its territory to the detriment of U.S. nationals, was, to say the least, not widely accepted. As Monroe Leigh has written: "It is not too much to say that the Supreme Court opinion in the Sabbatino case created consternation among international lawyers, business executives, and banking interests throughout the country." M. Leigh, Expropriation of Foreign-Owned Investment—Recent Trends, in \textsc{Private Investors Abroad} 197, 238 (1972). However, the concerns there articulated about complicating the role of the executive branch in negotiating compromise diplomatic solutions are at odds with the proposed requirement that, e.g., assets controls be employed only in demonstrable conformity to international law, since often though not always (as in the case of intrinsically illegal unilateral "sanctions"), such conformity must depend on the legality of the actions to which the controls were a response.

Negotiation is not, at the same time, an end in itself. While both Banco Nacional de Cuba v. Sabbatino, \textit{supra} note 58, and United States v. Curtiss-Wright Export Corp., \textit{supra} note 37, emphasized the disutility of hemming in negotiations by narrow standards (in the former, seemingly including those of the international legality of expropriations), it may be doubted whether either Court regarded the hypothetical international illegality of our own actions as irrelevant. The most serious analytical weakness of Sabbatino, apart from its departure from the maxim that "international law is part of our law," The Paquete Habana, \textit{supra} note 86, may have been its passing approval of the Cuban Assets Control Regulations, 31 C.F.R. §515 (1975), without discussion of the determinants of their international legality. The ultimate deficiency of Sardino v. Fed. Reserve Bank of N.Y., \textit{supra} note 30, and Nielsen v. Sec. of Treasury, \textit{supra} note 31, in turn, may have been a reluctance to confront the contradiction of approving a vague "retaliation" principle while supposedly deferring to foreign acts of state admitted to be the cause of retaliation.

In any event, the entire doctrine is presently under reconsideration by the Supreme Court in Alfred Dunhill of London, Inc. v. Republic of Cuba, Doc. No. 73-1288, which was reargued January 19, 1976, 44 U.S.L.W. 3427 (U.S. Jan. 27, 1976). Surely, a more flexible "public policy" test, of the general sort common elsewhere in the world, would permit limited review of other governments' "sovereign acts" for the purpose of discovering whether ours are acceptable. A negative finding would assuredly be "embarrassing"—much as, in a different way, a positive finding would be—but such embarrassment must perhaps be endured in a system of limited government and extensive judicial review.}
partment was still the prevailing international legal rule. Yet, when the lower courts did have occasion to pass on the international legal merits of the Cuban confiscations, they never hinted that the State Department’s early denunciation of those takings might have been in error. Again, for many years the courts have deferred to State Department “suggestions” respecting sovereign immunity, even when these directly contradicted previously announced official standards. While judges can in theory look to other sources of public international law for the resolution of such issues, for another instance, that of the effectiveness of a Calvo Clause in waiving international legal rights, they have tended, for prudential as well as policy reasons, to follow closely the State Department’s latest official pronouncements.

Apart from the danger of executive “embarrassment” at being confined to internationally lawful actions, the appearance of judicial intrusion into a dispute between co-ordinate branches of government, especially in the realm of foreign affairs, might possibly persuade courts to hold the contemplated statutory condition unenforceable, as an attempt to pose “political questions.” As the United States Tax Court said recently, in a case where the petitioners had refused to pay income taxes because of the alleged unconstitutionality and international illegality of the Vietnam war,

there is no doubt that the doctrine of justiciability has been substantially extended by Baker v. Carr, . . . and its progeny . . . . But, whatever the scope of the standards enunciated in Baker v. Carr, . . . the courts have sought to draw a distinction between justiciability as to a case involving the respective roles of the three branches of our Federal Government, where an issue of internal domestic affairs is involved, and a case, such as this, where the issue involves foreign affairs (including the conduct of a foreign war) and have refused to find justiciability in the latter situation, at least where both the executive and the legislature have acted in the premises.

No facile reply can be made to these somewhat overlapping objections, e.g., “intrusion” of the judiciary into foreign policy matters textually committed by the Constitution to the executive branch—matters such as diplomatic negotiation or the recognition of foreign governments, being not only “embarrassing” but automatically productive of “political questions.” However, the combination of other countries’ willingness to assign

102. 376 U.S. at 433, 84 S.Ct. at 943, 11 L.Ed.2d at 826.
104. See the discussion of Spacial v. Crowe, 489 F.2d 614 (5th Cir. 1974), in Digest of United States Practice in International Law 268-72 (A. Rovine ed. 1974).
a major role in applying international law to their courts, with the State Department’s insistence that sovereign immunity not constitute an absolute bar to judgments against foreign countries, and the ultimate policy desirability of promoting resort to judicial fora for clarification, at least, of international controversies, militates against a reticent judicial attitude. Congress possessed ample authority to mandate a change in such attitude in one respect by means of the so-called Sabbatino amendment, and it

106. While, absent a special condition of the exact sort proposed, few if any courts would be empowered to overthrow executive action simply on account of its international illegality, a majority are at least able to inquire into the legality of “sovereign acts” adversely affecting their nationals abroad. As Justice White stated in his dissent in Banco Nacional de Cuba v. Sabbatino: “No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts . . . .” 376 U.S. at 439, 84 S.Ct. at 946, 11 L.Ed.2d at 830.

107. And that the courts, not an administrative agency, attend to the essentially judicial business of applying legal principles to individual fact situations. See Message of the Secretary of State to the President of the Senate, January 22, 1973, and the sectional analysis accompanying S.566, 93d Cong., 1st Sess. (1973) (the “sovereign immunity bill”). See also Sklaver, Sovereign Immunity in the United States: An Analysis of S.566, 8 INT’L L. 408 (1974). One of the more surprising features of the draft legislation prepared by the Department is the wide scope given the concept of “implied waivers” of sovereign immunity as well as jurisdictional objections. Why, it might be asked, should a country which can thus be haled into court for failing to carry out its commercial obligations, yet be able to interpose an act of state defense with respect to international legal claims arising from its expropriation and subsequent operation of a commercial enterprise? Why, above all, should the act of state doctrine prevent consideration of the international legal merits of a foreign state’s action when not that but the federal government’s response is attacked, and liability of the foreign state or its citizens is not immediately (except by reference to the aforesaid “reprisal” principle) at issue?

One rationale could be that, while the courts are or can be made competent to determine international legal issues formerly determined by the executive, the act of state doctrine is not international legal at all, but political in a broad sense (subject to ad hoc modification by either of the political branches).

108. 22 U.S.C.A. §2370(e)(2) (Supp. 1975), which provides:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in the subsection: Provided, That this subparagraph shall not be applicable . . . (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

This provision suggests one of the few respects in which “punishment” of private foreign investors here for activities of their home government or governments not manifestly wrongful under international law might be constitutional during time of peace. If, as has often been
could certainly overcome the abstention aspect of the justiciability problem with respect to determinations under the Trading with the Enemy Act in like fashion.\textsuperscript{109} Congress could not, to be sure, compel the courts to decide a purely political question; but the inevitable danger of their acquiescing in an unconstitutional result if they do not look behind executive pretensions of international legal justification for "deprivations," the non-exclusive nature of the constitutional "commitment," if any at all, of most international legal questions to the executive branch and the existence of ascertainable legal standards in this area, to wit, international law, cast doubt on an immutable "political" classification. Lastly, since the proposed approach is merely one of limitation of delegated authority, the "political question" label seems less appropriate than it would otherwise be. Surely Congress is the master of its own delegation and can properly expect the courts to hold its agent to the terms of its grant.

Perhaps, though, the President has just as much right in the area of "inherent powers" to violate international law as Congress has within its overlapping jurisdiction over, \textit{inter alia}, foreign commerce and foreign affairs. If Congress chooses, subject to change by repeal, to restrict such drastic exercises of the Trading with the Enemy Act as embargoes or freezes to the bounds of international law, that choice might be thought irrelevant to the power of the President, under the Constitution itself, especially in wartime, to take action he believed to be essential to the national interest. Indeed, if such separate power clearly extended to, \textit{e.g.}, assets controls, the international legality of their imposition might be non-justiciable for a reason having nothing to do with either the act of state doctrine, "political questions" in the field of foreign affairs, or mere judicial reluctance to contradict presumptively correct international legal determinations of the Department of State. Rather, the executive action in question would be beyond courts' ability to remedy, and the international legal issue therefore quite moot.

\textsuperscript{109} The very limited reach of the Sabbatino amendment, which is operatively confined to "hot ore" shipments of goods whose title is suspect under \textit{international} law, should not obscure the fundamental principle of congressional power to incorporate international law into the matrix of legal/factual issues that domestic courts must decide, even against their (and the executive's) preferences.
This ultimate "separation of powers" objection would, where justified, entail the conclusion that Congress, not the President, was acting unconstitutionally in attempting to forbid the United States Government's violation of international law. However, the approach here urged is instead, to repeat, one of minor qualification of an existing delegation. If the President possessed sufficient "inherent" authority to incarcerate alien individuals and confiscate their property for violation of draconian economic regulations conceived and authorized without reference to acts of Congress, his policies would stand, insofar as consistent with the fifth amendment and other pertinent provisions of the Constitution. The sole effect of the proposed statutory amendment, together with others of the same kind not necessarily confined to emergency economic legislation, would be to make inherent authority stand or fall on its own, as it did in the steel seizure case.110

110. Youngstown Sheet and Tube Co. v. Sawyer, supra note 28, might, arguably, be viewed as turning on the lack of strict necessity for the President's actions. Thus, in a graver and more acute emergency, the President might have been able to requisition the output of the mills without benefit of statutory authority, such as that conferred by the Defense Production Act of 1950, 50 U.S.C.A.App. §2081 (Rev. 1951). Certainly, given the aforementioned example of the forcible relocation of United States citizens of Japanese ancestry during World War II, a mere temporary "deprivation" of aliens' use of local property could not be regarded as automatically prohibited. Even outside of a war context, total destruction without compensation of U.S. nationals' property has been allowed in circumstances of "public necessity." See, e.g., Nat'l Bd. of Young Men's Christian Ass'ns v. United States, 396 F.2d 467 (Ct. Cl. 1968). See also notes 29 and 41 supra. While "takings" in such situations can also be viewed as presumptively consensual, as part of the social contract among U.S. nationals for their collective benefit, aliens holding property here have likewise presumably acceded to that part of the social contract subjecting their property to "necessary" burdens along with everyone else's.

The chief difficulty with this analysis is that, if the national emergency prompting President Truman's seizure of steel did not "necessitate" his action—in the face of directly contrary congressional intent—it is not clear what greater degree of necessity would ever justify the seizure of all designated nationals' assets in a nonprotective manner, given the statutory amendment here urged. The "necessity" for the recent "designation" of Cambodia, for instance, is extremely hard to find, even by use of the looser criteria that obtain in the absence of contrary legislation.

But most constitutional doubts concerning congressional limitation of delegated power under the Trading with the Enemy Act are weakened by the proposed Bingham amendment (to an unrelated statute), H.R. 6382, 94th Cong., 1st Sess. (1975), which would conditionally terminate the embargo against Cuba. The amendment would override the present trade restrictions under the Export Administration Act of 1969 and the Trading with the Enemy Act itself, but leave in force the freezing regulations under the latter with respect to property blocked before the effective date of the change.

V. Conclusion

Why, in conclusion, if the President could accomplish the same violations of international law under other statutes as under the Trading with the Enemy Act, except for freezes and vestings, should the endeavor to reduce arbitrary authority go beyond elimination of that exception? The weakness of pretensions to "inherent authority" in the face of congressional limitation of the freezing power could easily be exposed by an amendment to the single relevant statute. No additional amendments, e.g., to the Export Administration Act of 1969, would be necessary to make inherent authority "stand or fall on its own" in this particular area. Such a gradual approach would not only avoid disruption of long-held expectations of presidential power to break purely commercial international engagements, especially those made by the executive alone in the first place, and permit continued flexibility of response to trade disputes, but simultaneously cope with one of the foremost problems peculiar to foreign investment in the United States. Import or export restrictions can result from freezes but otherwise have no deliberate differential impact on foreign investment per se. Freezes, on the other hand, always apply particularly and sometimes exclusively to foreign investments.

Indeed, in the interest of preserving as much administrative flexibility as possible, an amendment to section 5(b) might be designed to afford assurance of compensation to the occasional victims of improper "deprivations," without more. This assurance, implemented by an extension and modification of the Sabbatino amendment, empowering domestic courts to inquire generally into the international legality of sovereign acts of foreign states, so far as to determine whether those states had engaged in a "taking" or other delict or whether, per contra, the United States Government was engaged in an ongoing unconstitutional "deprivation," would itself represent a significant advance in international relations.

However, by definition, compensation to the victims of unwarranted deprivations would stop short of preventing the most likely and inflammatory foreseeable abuses, which are not, in truth, freezes but peremptory curtailments of imports or exports in defiance of international commitments. Thus, Congress might someday decide that sales of military or nuclear equipment to particular foreign countries were so opposed to prevailing policy objectives as to require stringent limitation regardless of agreements (secret or not) that the President had previously concluded on the matter. Until then, nonetheless, the question would remain whether the President should be able to invoke the Trading with the Enemy Act, or other relevant legislation, to impose restrictions contrary to official national undertakings before Congress had specifically indicated its consent to violations of international law in those circumstances.

If control of the potential for executive disregard of international law is intrinsically important, any presumption of congressional consent arising
from silence is doubtful whether an action is alleged to constitute an internationally wrongful "taking," an internationally wrongful "sanction," or both. In legal logic, if not so surely political or diplomatic expediency, there are no grounds for reversing this mischievous presumption as to the former category but not the latter, apart from the tendency of such a distinction to parallel the aforesaid theoretical constitutional requirement of compensation for unprovoked deprivations but not mere regulations. Certainly, there can be little argument in favor of a general international legal restriction of section 5(b), one which does more than prevent unconstitutional deprivations, in conjunction with open toleration of the continued possibility of an internationally wrongful embargo by resort to another statute left unchanged; for example, with respect to nuclear technology, the Export Administration Act, the Mutual Defense Assistance Control Act of 1951,\(^{111}\) or the Mutual Security Act of 1954.\(^{112}\)

Either individual compensation is the primary concern, in which case a retaliatory freeze would lie within the executive's delegated authority despite the clearest violation of an international agreement not to take action of that sort, or else stability of reciprocal international expectations, whatever the implications for vestings, freezes, or other forms of restriction of trade itself under the Trading with the Enemy Act or other statutes. Ultimately, the latter policy must be preferred, in the author's opinion, because it appears increasingly essential to national and international safety and prosperity while in no way conflicting with justice in individual cases. In the last analysis, the treatment of individual foreign investors can no more be separated from that of their home countries (impeccable in one case, through ample compensation for takings, reprehensible in the other, through collective incommensurable injury) than the effects of presidential transgressions abroad can forever be confined overseas.

