Panel III: Roles of the President and Congress

PROFESSOR KOH: Our first speaker, Professor Andreas Lowenfeld, is a law professor at the New York University School of Law where he specializes in public and private international law and international economic transactions. A graduate of Harvard College and Harvard Law School, Professor Lowenfeld served in various posts in the Office of Legal Adviser of the U.S. Department of State from 1961 to 1966. He has written numerous books on international economic law, including a case book on international trade. Perhaps he is most famous for his role as an associate reporter of the Restatement (Third) of Foreign Relations Law, which some call the "Prestatement of Foreign Relations Law." He is particularly well qualified to speak to these issues, not only because of his work in the State Department, but also because, as we shall see, this is an area in which many cases are nonjusticiable, and therefore many of the rules end up being the result of constitutional custom. A source book like the Restatement (Third) of Foreign Relations Law, which sets forth black-letter principles, ends up having enormous influence, not only when cases do get to court, but when Executive branch officials and Congresspeople try to determine the correct allocation of power.

PROFESSOR ANDREAS F. LOWENFELD: The conflict between the legislative and executive branches in the United States is an old story—part substantive, part institutional, and often one cause is disguised as the other. The conflict cuts across the full range of governmental activity—legislation, appropriations, investigations, appointments, and conduct of foreign affairs. In connection with foreign affairs, however, there has been a special kind of tension, a mixture of political and technical questions that seem worth recalling together—and at a certain remove from the latest conflict to hit the nightly newscasts. These brief remarks are far from comprehensive; the hope is that the four or five episodes on which I focus here may shed light both on the continuing efforts to understand our own Constitution, and on devices that will emerge as the United States contemplates trade negotiations with Canada, with Mexico, with other developing countries, and eventually within the GATT as a whole through the Uruguay Round.

I.

When I was Assistant Legal Adviser for Economic Affairs in the State Department in 1963, I suddenly had to learn in a great hurry about Section 303 of the Tariff Act of 1930—the countervailing duty statute. Not only was that statute one paragraph long—in contrast to the almost 50 pages now shared by the countervailing duty and antidumping law—but I had gone for more than a year in my job as lawyer to the Bureau of Economic Affairs in the State Department without being more than vaguely aware that the statute existed, let alone that it might figure importantly in the international economic policy of the United States. What had brought Section 303 to the fore was a Canadian Order in Council, which took great effort to understand, but when we did understand, seemed to offer inducements to the major automobile companies—GM, Ford, and Chrysler—to do more procurement and more production in Canada, by forgiving or rebating import duties on the basis of increased exports of automobiles and parts in comparison with the base year. The rebate scheme was complicated, and one could argue (as I in fact did) that forgiveness of a tax that did not have to be imposed in the first place was not a subsidy, or at least not a “bounty or grant upon... any article...” But clearly the rebate scheme was an attempt by the newly elected government of Canada to shift the movement of U.S.-Canada trade in autos and auto parts.

The United States government did not like the plan, and neither did American suppliers of parts to the major automobile companies. (The majors themselves did not seem to mind the plan, and remained non-committal.) My impression is that the Administration basically thought it got along well with Prime Minister Pearson, and thought that over time it could work out the problem, probably by

5. The original countervailing duty statute, adopted in 1897 and modified (with minor changes) in 1930, read “Whenever any country... shall pay or bestow, directly or indirectly any bounty or grant upon the manufacture or production or export of any article... manufactured or produced in such country... then upon the importation of any such article... into the United States... there shall be levied and paid... an additional duty equal to the net amount of such bounty or grant...”. Tariff Act of 1930, § 303, 46 Stat. 687. The 1897 statute had been construed in two early Supreme Court decisions, Downs v. United States, 187 U.S. 496 (1903), and G.S. Nicholas & Co. v. United States, 249 U.S. 34 (1919).
persuading the Canadian government that the plan was unwise, and looking for a way for that government to revise the plan gracefully. But then came resort to law. A car radiator maker from Paducah, Kentucky—Modine Mfg. Co.—supported by a trade association of auto parts manufacturers, filed a countervailing duty petition with the Commissioner of Customs against imports of radiators from Canada. The Treasury Department, which was then in charge of countervailing duties, did not reply. It was hoping that the problem would go away. After nine months, Modine brought suit in the District Court for the District of Columbia for a writ of mandamus.

Did the Secretary of the Treasury have to decide? I am not sure. No time schedule was provided in the statute, and some years later, the Court of Customs and Patent Appeals, by a divided vote, held in a different case that there was no jurisdiction to review a negative determination by the Secretary. At all events, Secretary Dillon thought he could delay but could not, in good conscience, find against Modine. My client, the Secretary of State, had asked if within the discretion given to the Executive, there wasn’t room for a finding that would not be perceived in Canada as a punch in the nose. I prepared a memorandum in favor of such a conclusion, based essentially on the argument that non-collection of a tax was not a subsidy, and certainly not on a product. The Secretary of the Treasury did not accept the legal argument, but understood that there ought to be a way out. Today, of course, there is a precise timetable for countervailing duty cases, a much more precise definition of what constitutes a subsidy (though still not free from doubt), and judicial review from negative as well as positive, and in some cases even from provisional determinations. But there is no question that a curb on discretion, as perceived by the Executive branch, put the United States government in a bind.

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II.

The first episode led directly to the second. The two governments started negotiating. Canada said it could not repeal the Rebate Plan without a free trade plan for automotive products, and the United States on the whole was willing to go along; then Canada insisted on assurances of increased investment and production in Canada. That in turn involved the major automobile companies, as well as a variety of connected issues not pertinent to the focus here. The point relevant to the present discussion is that the negotiations went forward without any participation by Congress. Eventually, Prime Minister Pearson came to the LBJ Ranch in Johnson City, Texas, where the two leaders personally signed the U.S.-Canada Automotive Products Agreement of 1965.12

End of story? Not quite, because Congress had to change the law to accommodate the agreement. The President had some authority to reduce duties, but only on a most-favored-nation basis, not to Canada alone, and also not to zero.13 For its part, Congress had its doubts, both on substance and on process.

The process took eight months more, following the signing ceremony in Johnson City.14 The Senate wanted to know why the Automotive Products Agreement was being submitted to both Houses of Congress for implementing legislation, rather than to the Senate for approval as a treaty.15 The reply came from the State Department that legislation would be required in any event, because tariffs were in issue, and that under Article I, § 7 of the Constitution such legislation would have to originate in the House of Representatives. Why then put Congress to the task of acting twice on the same subject?16 Hardly a convincing argument, except in terms of practical politics.


15. Letter from Chairman Fulbright of Sen. Foreign Relations Comm. to Secretary of State Rusk, Jan. 28, 1965. This and the following correspondence, infra notes 16-19 and accompanying text, appears in the House Hearings on H.R. 6960, supra note 4 at 222-30.

16. Letter from Acting Assistant Secretary of State for Congressional Relations Lee to Chairman Fulbright (Feb. 9, 1965), House Hearings on H.R. 6960, supra note 4 at 222.
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Chairman Fulbright of the Senate Foreign Relations Committee—not yet as bitter as he later became but already anxious about the excessive use of executive power—replied: "The issue is constitutional and the Department's position should rest on constitutional grounds, not on the procedural convenience of the Senate. . ."17

This time the Legal Adviser of the Department answered—with a disquisition on self-executing and non-self-executing agreements.18 If an agreement was not self-executing, i.e.,—if it required implementing legislation—the Legal Adviser wrote, it could be done either as an executive agreement or as a treaty and there was no sharp distinction between them. "The question," he wrote, "rests in the judgment of the President. . ."19

Congress also wanted to know why it was being asked to approve an agreement already signed, instead of following the route commonly used for trade agreements—i.e., negotiations pursuant to authorizing legislation. The answer rested, essentially on the need to negotiate quickly—the pressure of the Modine suit,20 and the pressure from Ottawa made it impractical to seek authorizing legislation first.

Eventually the Automotive Products Trade Act of 1965 was passed,21 substantially as introduced by the Administration. But the question arose whether the pattern could be repeated. Next time, why not proceed from authorizing legislation, contained in the same bill that contained the implementing legislation for the U.S.-Canada Agreement? Thus if the President had in mind making a similar agreement, he would know the limits of his authority, and Congress

17. Letter from Chairman Fulbright to Secretary of State Rusk (Feb. 15, 1965), supra note 4 at 225.
19. A "critical appraisal" of the Legal Adviser's opinion was subsequently submitted by the Legislative Reference Service of the Library of Congress. The memorandum conceded that "tolerance of the President's choice of procedure on the part of the Senate, coupled with its willingness to join with the House in the adoption of the required implementing legislation, would achieve the President's objective by an approach that would be entirely feasible." But it added that:
   the President may be said to enjoy a choice of means only insofar as the Congress is disposed to sustain him in his election. . . . [A] President who elects to negotiate, via Executive agreement rather than by treaty, an understanding which is in excess of the statutory authority which Congress has hitherto accorded him, may be said to have embarked upon a gamble that the Congress would prove content to extricate him from his dilemma by adoption of the necessary legislation.
House Hearings on H.R. 6960, supra note 4 at 227-230.
20. See supra note 7.
would not be faced again with the choice between swallowing what it had not ordered and repudiating an important commitment of the United States.

The House of Representatives accepted the idea;\(^2\) the Senate, however, said the President could carry out such an agreement, but “only if the Congress has adopted a concurrent resolution stating in substance that the Senate and the House of Representatives approve the implementation of the agreement.”\(^2\) That, in turn, was too much of a limitation on the Administration; quite apart from the doubts—present even then, though not confirmed by the Supreme Court—about the validity of the concurrent resolutions,\(^2\) couldn’t the presumption at least be turned around, i.e., let the President submit an agreement to Congress, and then put it into effect unless within \(x\) days (60 as it turned out) Congress had passed a concurrent resolution of disapproval?

That was the compromise adopted,\(^2\) but Congress then added a provision stating, “This section shall cease to be in effect on the day after the date of the enactment of this Act.”\(^2\) The outcome of the debate shows, I think, dissatisfaction of Congress with both pre- and post-negotiation legislation, a theme that runs throughout the field of trade law, both in respect of international negotiations and in respect of import relief.\(^2\)

\(^2\)27. For the import relief, or “escape clause” legislation, see § 203(c) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2015 (codified at 19 U.S.C. § 2253(c) (1982 & Supp. III 1985)), providing that if the President takes import relief action different from that recommended by the International Trade Commission, Congress may by concurrent resolution require that the Commission’s recommendation be implemented notwithstanding the President’s disapproval. Following the decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), which held all concurrent resolutions unconstitutional, Congress amended § 203(c)(2) to provide for congressional disapproval by joint resolution, i.e., a resolution subject to approval or veto by the President. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 248(a).
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III.

The major trade negotiation of the 1960s, the Kennedy Round, proceeded for the most part pursuant to authorizing legislation—the Trade Expansion Act of 1962.28 Indeed the whole world seemed ready to accept the deadlines set by the U.S. Congress—a five-year authorization due to expire on July 1, 1967.29 But for the so-called non-tariff issues, the authority was unclear. The GATT Conference adopted an International Antidumping Code that the Johnson Administration believed could be implemented without new legislation.30 The Code, according to the Administration, had been agreed to by the United States neither pursuant to existing legislation, nor subject to implementing legislation, but pursuant to the President's inherent powers to conduct foreign affairs.31 Congress was not convinced, however, and the industries that most looked to antidumping procedures for protection—steel and cement—launched an attack on the Code. The Senate attached an amendment to an unrelated bill that would have simply prohibited both the Treasury and the Tariff Commission from implementing the Antidumping Code;32 for the House, this was too strong. The compromise worked out in Conference said that nothing in the Code “shall be construed to restrict the discretion... of the Tariff Commission,” and that both the Commission and the Treasury shall resolve any conflict between the Code and the Antidumping Act “in favor of the Act as applied by the agency administering the Act.”33 In other words, the agencies could take the Code into account in performing their duties under the Act—and in fact they did so—but they could not use the Code to change the prior law.

Another agreement negotiated in the Kennedy Round proved even more problematic. This was an agreement designed to eliminate, by negotiation, one of the United States’ most objectionable

import barriers, the so-called American Selling Price or ASP.\textsuperscript{34} Could the Executive branch agree to convert ASP duties to ad valorem duties and then negotiate them downward in return for reciprocal concessions? As a legal matter, it was a close question;\textsuperscript{35} as a political question, because the legal issue was borderline, it was not worth the risk. Accordingly, the U.S. delegation accepted the agreement on ASP only at referendum, and the sectoral negotiations on chemical products were split in two—one package to be implemented immediately, the other, including elimination of ASP, to be implemented by January 1, 1969—18 months after the close of the Kennedy Round—if Congress in the interim passed legislation to repeal ASP. That never happened, and the United States, in turn, lost out on a number of concessions tied to elimination of ASP.\textsuperscript{36}

\textit{IV.}

What became the Trade Act of 1974,\textsuperscript{37} would have been the Trade Act of 1973, but for an interesting strategic decision by the Nixon Administration which turned out to be a miscalculation, concerning the relation between authorizing legislation and implementing legislation, and what would, and what would not, work on Capitol Hill.

In the mid 1960s, the sentiment began to grow in the United States that we ought to increase trade with the Soviet Union and with other communist countries, both because this might lead to better relations all around, and because otherwise all that trade would be taken up by Western Europe and Japan. President Johnson introduced an East-West Trade Relations Bill in 1965 and 1966 which would have authorized him (or a successor President) to negotiate a trade agreement with the USSR, subject to stated conditions designed to secure reciprocity.\textsuperscript{38} The intensification of the

\textsuperscript{34} American Selling Price customs valuation, enacted as § 315 of the Fordney-McCumber Tariff Act of 1922, Pub. L. No. 318, ch. 356, 42 Stat. 858, 941-2, and retained until 1979 as 19 U.S.C. §§ 1401a(e) and 1402(g), provided for tariffs being imposed not on the basis of export prices of specified chemical products, but on the price charged for comparable products made by producers in the United States. Converted to normal valuation, some ASP duties came to more than 100% ad valorem, and their arithmetic average was 52%. ASP was ultimately repealed by § 223 of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 204-35.


\textsuperscript{37} Trade Act of 1974, 19 U.S.C. § 2101 et seq.

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Vietnam War, and subsequently the march by Soviet tanks into Prague, killed that initiative. When President Nixon went to Moscow in May 1972, he agreed in principle with General Secretary Brezhnev that there should be a trade agreement between their two countries, and high-level committees were appointed to negotiate such an agreement, plus selected agreements on lend-lease, shipping, etc., subject to implementing legislation—i.e., the reverse technique from that contemplated by President Johnson. The trade agreement was signed in October 1972, and implementing legislation was prepared. Congress reacted somewhat as it had in response to the United States-Canada Automotive Products Agreement, with resentment (if that is the right term) that it was being asked to approve a fait accompli. On the merits, however, the concerns were more serious: whether the advantages from the agreement were mutual, whether it was right to trade with Communists at all, and about human rights in the USSR, especially regarding emigration.

The Nixon Administration thought that a proposal for a separate East-West Trade Relations Act, or a U.S.-Soviet Trade Agreement Act, would present too big a target for opponents. Therefore, it included the required legislation as Title IV of the comprehensive Trade Reform Act that it thought would get through because it had to get through to support the next round of the GATT negotiations, which was once briefly known as the Nixon Round but later became known as the Tokyo Round.

It turned out that the Administration was half right—the traditional trade subjects of the bill, though not free from controversy, got through fairly easily. But instead of a ground-swell for these provisions sweeping the title on East-West trade along, opposition to the United States-Soviet Trade Agreement held up the whole trade bill until the final days of the 93rd Congress in December 1974. Even then, Congress adopted the Act only with the famous

39. See Joint Communiqué of the Summit Conference, reprinted in 66 Dep't. State Bull. 899 at 900; and Basic Principles of Relations between the United States and the USSR, Seventh, reprinted in 66 Dep't State Bull. 898 (1972).


42. For a more detailed account by the present author, see A. Lowenfeld, Trade Controls for Political Ends 166-75 (2d ed. 1983).
Jackson-Vanik amendment\(^4\) which, notwithstanding a mini-shuttle between the Soviet Embassy and the Senate Finance Committee by Secretary of State Kissinger, ultimately led to collapse of the whole Agreement.\(^4\)

\(\text{V.}\)

The experience with the United States-Soviet agreement, as well as the Kennedy Round episodes on antidumping and American Selling Price, illustrates the perils of negotiating first, coming to Congress afterwards. However, the opposite tactic—first securing authorizing legislation, then beginning negotiations—has perils as well. On the one hand, too broad a delegation is not likely to be accepted by the Congress; on the other, too strict negotiating instructions may well result in no negotiations, or no agreement.

In preparing the legislation for the Tokyo Round, which was not only supposed to reduce duties but to create or revise rules on a variety of non-tariff issues that would probably require changes in United States law, the Administration came up with a novel idea. The way out of the dilemma between excessive delegation and uncertain negotiation would be to give Congress a chance to scrutinize any nontariff agreement before it became effective, but only in toto, and within a limited period of time. Within that period the agreement could be rejected by an absolute majority of either House, but it could not be amended.\(^4\)

The House of Representatives essentially accepted the Administration’s plan, and added a provision for expedited and privileged consideration, to prevent a filibuster.\(^4\)

The Senate, however, insisted that if domestic statutes—for instance the countervailing duty statute—were to be changed, Congress should take affirmative action.\(^4\)


\(^4\) Formally, the Trade Agreement came apart in a communication from the Soviet Union on Jan. 10, 1975, announced by Secretary of State Kissinger in a press conference on January 14, 1975, reprinted in 72 Dep’t State Bull. 139 (1975). For the background, but not the dénouement, see H. Kissinger, Years of Upheaval 985-98 (1982).

\(^4\) H.R. 6767, 93d Cong., 1st Sess. § 103(d), (e) (1973), as introduced by request of the President, April 10, 1973.

\(^4\) H.R. 10710, 93d Cong., 1st Sess. § 151, as passed by the House of Representatives on Dec. 11, 1973.

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The final version—Section 151 of the Trade Act of 1974—provided for advance notice of the intention to conclude a trade agreement, and subsequent submission by the President of an implementing bill, not subject to amendment, and subject to a rigid schedule of consideration—45 legislative days in committee and 15 days for floor vote, plus an extra 30 days for "implementing revenue bills" which under Article I, Section 7 of the Constitution were required to originate in the House.

As it turned out, in the spring of 1979 there was a strange three-way negotiation about legislation not yet introduced, and about agreements not yet signed, with a great deal of telephoning between Geneva, the Executive branch in Washington, and the House and Senate Committees, with Ambassador Robert Strauss, the President's Special Trade Representative, acting as a kind of croupier. On the whole, the process seemed to work satisfactorily, and the fast-track scheme was extended to cover additional negotiations, including the United States-Canada free trade negotiations, which were supposed to meet a deadline of January 3, 1988 minus 90 days or October 3, 1987. If that deadline was not met, there would be nothing to prevent the parties from continuing to talk. The perception has grown up, however, that a trade agreement subject to amendment by Congress would not be viable; or, putting it another way, that another party, such as Canada, would not be prepared to make concessions or commitments subject to counter-concessions or commitments that were the beginning only of debate in Congress.

VI.

Of course, the dilemma between too much and too little authority for negotiators of agreements applies to other international agreements as well, from arms control to air services, from military alliances to child abduction. Somehow, however, the twin urges to

48. Trade Act of 1974, § 151, 19 U.S.C. § 2191 (1982). An interesting feature of this provision is that it purports to be an exercise of the rulemaking power of the House and Senate, under Art. I, § 5, cl. 2 of the Constitution, and thus, at least in theory, could be changed without approval of the President.


50. For a detailed account, see Drew, "Profiles (Robert S. Strauss)," The New Yorker, May 7, 1979, at 50.

51. Trade Act of 1974, § 102(b), 19 U.S.C. § 2112(b)(1); (b)(4); (c); (d); (e), as amended by Trade and Tariff Act of 1984 (codified at 19 U.S.C. § 2112(b)), authorizing negotiations "during the 13-year period beginning on January 3, 1975." For President Reagan's notification pursuant to this section concerning his intent to conclude a Trade Agreement with Canada, see 133 Cong. Rec. H8090 (daily ed. Oct. 5, 1987).
keep the President on a tight tether and to pass on specific amendments to existing laws seem to have been strongest in the trade field. More and more the grant of discretion to the executive has been balanced—and I think in recent years over-balanced—by the perception that the discretion must be controlled, either by the Congress, or in ever more comprehensive judicial control over executive determination.\(^{52}\)

In a history lesson, which this talk has turned out to be, one never knows how far back to start, or how far forward to speculate. I want to make a final point, however, as a kind of reverse twist on the subject. One common feature in trade legislation, as in legislation about foreign aid, for example, is to order the President to do something—to cut off foreign assistance,\(^{53}\) to deny credits,\(^{54}\) to impose retaliatory import restraints\(^{55}\)—but then to give the President a way out—a waiver on the basis of national interest, or national security, or some similar term.

Relations between the executive and legislative branches thus are reversed. Congress passes a statute, such as the Gephardt Amendment, requiring unilateral action by the United States against a foreign country in specified circumstances, and then the President is given an out.\(^{56}\) That is better than not giving him an out, but it is

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52. At this writing (fall 1987) negative as well as affirmative determinations by the Department of Commerce and the International Trade Commission in antidumping and countervailing duty cases, as well as a variety of interlocutory decisions, are subject to judicial review in the Court of International Trade, with appeal to the Court of Appeals for the federal circuit. See note 11 supra. Only escape clause determinations of the International Trade Commission appear to be excluded from judicial review, because they result in recommendations to the President, subject thereafter to some control by the Congress. See note 27 supra.


54. See, e.g., Export-Import Bank Amendments of 1974, § 3-5, 8, 12, Pub. L. No. 93-646, 88 Stat. 2333, 2333-2337, limiting overall credits to the Soviet Union to an aggregate of $300 million, and imposing specific lower ceilings on credits associated with fossil fuel projects.

55. See, e.g., the well-known Gephardt Amendment as adopted by the House of Representatives, H.R. 3, 100th Cong., 1st Sess., § 126, 133 Cong. Rec. 2, 755-57 (1987) as adopted by the House of Representatives, proposing a new § 311 of the Trade Act of 1974. The presidential waiver authority is contained in proposed subsection (f)(2). The final outcome of this proposal was not known as these lines were written.

56. See, e.g., the famous Hickenlooper Amendment to the Foreign Assistance Act, § 620(c)(1), 22 U.S.C. § 2370c(e) (1) which in its original version said, “The President shall suspend assistance to the government of any country [that has expropriated property owned by United States citizens or corporations and has not offered compensation]...and no other provision of this Act shall be construed to authorize the President to waive the provisions of this subsection.” In 1973, the italicized words were replaced by the following: “...the provisions of this subsection shall not be waived with respect to any country unless the President determines and certifies that such a waiver is important to the na-
not, in my view, the right way to go about legislating foreign economic policy. If Congress wants to authorize but not direct, that is the normal and usually proper way to enable the executive branch to conduct negotiations; if it wants to require the President to do something, it ought to have the courage to say so, as it did, for instance, with respect to apartheid. But if a critical mass of members of Congress cannot bring themselves to require a certain action that they suspect is wrong or unwise, the “instruction cum waiver” authority seems to me a poor compromise, a cowardly shifting of the burden, and a most confusing signal to those—in this country or abroad—who must guide their conduct by the trade legislation of the United States.

Panel III: Respondents

PROFESSOR KOH: Our next speaker is one of the members of the cowardly Congress. Congressman Bruce Morrison, our Congressman here from the Third District of Connecticut. He is a graduate of MIT and the University of Illinois, as well as the Yale Law School. He has served as the Executive Director of the New Haven Legal Assistance Association, and in 1982 was elected to Congress where he has been active in international affairs, particularly with regard to curbing military spending, opposition to the regime in Chile—the Pinochet regime—and also most recently as a plaintiff in the case of Lowry v. Reagan,58 which is a suit by Congressmembers to force the President to invoke the War Powers Resolution with respect to the Persian Gulf. He can respond to some of what Professor Lowenfeld just had to say.

REPRESENTATIVE BRUCE MORRISON: It seems to be in vogue to correct the introduction. I do oppose the Pinochet regime, but it does somehow suggest that I think that's the business of the United States. I have been active in trying to change United States policy with respect to supporting the Pinochet regime, which I think is an important distinction in terms of our role in the world.

It is hard to know where to start with my assigned topic, and since time limits are somewhat strictly enforced, I will try to be brief and hit some high points, or low points, as the case may be, and hope that comments and questions and answers may fill out this discussion.

The behavior of Congress, which was called “cowardly” but perhaps might be better called “indecisive,” is certainly a daily experience of mine. Sometimes it may reflect lack of courage or lack of conviction. Perhaps another explanation that was suggested is more appropriate—a lack of real consensus. The lack of agreement when seeking a majority of a large body often requires the making of some noises in one direction, qualified by some deferential noises in another direction, in order to assemble a majority. I think that this criticism of legislative products certainly is not limited to the area of international trade. But I am not sure there is a solution to that problem. It may be inherent in the kind of democratic decisionmaking that we have.

58. Subsequent to this Symposium, the District Court of the District of Columbia dismissed the suit. Lowry v. Reagan, No. 87-2196 (D.C. Cir. Dec. 18, 1987) (LEXIS, Genfed Library, Dist. file).
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Separation of powers in the area of trade may best be approached first generally in terms of separation of powers in other areas. As a member of Congress, the impression one most strongly gets from the members of the executive branch is that they really believe that Congress ought not to do anything at all in most areas, and that the only satisfactory behavior by the legislature is to implement executive recommendations by legislation. And I don't say that out of some kind of pique against the executive branch, and I don't think that's true only of executives of one particular political party. But it does seem that the executive branch always thinks it would be better if there just weren't a Congress muddying up the waters and getting in the way of implementing policy. So when we talk about trade, I think it is against that kind of background.

I think the problem is even more pronounced in matters of international affairs. It has been claimed a constitutional principle that the President makes foreign policy, and, therefore, congressional action in the area of foreign policy is somehow beyond the scope of its responsibility. It is further claimed that whether or not such action is beyond the scope of Congress' responsibility, it is beyond the scope of our competence. While the product can be judged on its own merit and perhaps that complaint is sometimes true, I think the same complaint would probably lie against the executive branch.

I'd like to illustrate this point with an example concerning Third World debt, an area not generally characterized as trade although, in fact, it is a major source of our trade deficit. I think everyone would concede that this is a serious problem. The debt of developing countries is over a trillion dollars and in most of the debtor countries the scheduled payments can't be made. In the U.S., major banks are taking reserves against what I think one might call the inevitable losses in these transactions. The executive branch, acting primarily through the Secretary of the Treasury, has been promoting a certain response to this problem, called the Baker Plan by some. I think it would be fair to say this plan has been largely unsuccessful in correcting the fundamental problems, while it certainly has prevented a collapse of the system.

A number of us in Congress have been of the view that there are more constructive approaches to this problem than the Baker Plan, and that more flexible arrangements are required. The trade bill

59. At a speech before the annual joint meeting of the IMF and the World Bank in Seoul, South Korea in October, 1985, Treasury Secretary James A. Baker III proposed cooperative public and private re-finance of Third World debt by the World Bank and private commercial banks. See N.Y. Times, Oct. 9, 1985, at D1, col. 1.
that is currently in conference having been passed by both the House and the Senate includes an alternative. It would establish an international facility to create an effective secondary market in Third World debt that would provide debt relief, by writing down the obligations in accordance with the market discounts that currently exist on the value of this debt. The details, however, are not important to the point of this example. That point is this: In order to try to pursue this kind of initiative, Congress finds itself powerless with an Administration that is not interested in even considering this kind of initiative.

Congress is very effective if a majority can agree to say "no" to a particular executive branch initiative. Congress can say "no" and cut off money, although the Boland Amendment experience suggests that even that can be done rather inartfully. But we can say "no." Saying "yes," is much more problematic and in the trade area what is required is saying "yes" to a certain set of policies.

The Third World debt initiative I mentioned again provides an instructive example. The executive branch has fought against empowering Congress to negotiate the proposed new mechanism to attack the problem of Third World debt. They find that intrusion into their claimed area of responsibility unacceptable. I think that attitude is a large part of the problem. In other words, the attitude which is hostile to any kind of role for Congress in these areas creates circumstances in which Congress writes more and more restrictive rules, trying very hard to influence an executive branch that views congressional involvement as inappropriate. I don't think we will solve this problem without some change in that attitude.

Another relevant example from a different area of foreign policy is presented by the lawsuit on the War Powers Resolution mentioned in my introduction. It seems to be constitutionally clear that

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involving the United States in war-like circumstances is something that has to be done with the approval of Congress. But, it has become routine for Presidents to use military power willy-nilly, here and there, and not be subject to congressional review until he has so committed the country and its prestige that meaningful review is no longer possible.

Let me make one final point with respect to the regulation of trade. The problem that we face now in our trade deficit and in generally charting a course in trade policy is made far more difficult by something that is much more complicated and much more important than the separation of powers and the roles of Congress, the executive branch, the independent agencies, and the judiciary. That is the mismatch of an international economy and national governments. And that is a problem that besets every major nation's government, and will—if it hasn't already—dwarf the debate about who in the U.S. decides foreign policy and trade questions. To what extent will there be normative judgments about economic relationships and to what extent will market forces drive economic relationships because the normative decisionmakers at a governmental level are just unequal to the task of controlling multinational corporations, markets, and financial institutions, like the IMF and the World Bank? The larger question is whether we will proceed to be governed simply by an economic model and economic forces that outstrip our political ability to impose value judgments on the results.

PROFESSOR KOH: Our next speaker is from the Senate side, Josh Bolten, a graduate of Princeton University and of Stanford Law School, where he was an editor of the Stanford Law Journal and a former law clerk to Judge Thelton Henderson. Mr. Bolten worked at the Legal Adviser’s Office, and then in the practice of trade law at O'Melveny & Myers. He has been the International Trade Counsel at the Senate Finance Committee, and most recently the Minority International Trade Counsel there.

MR. JOSHUA BOL TEN: From the perspective of a congressional staffer who spends his life on the minutiae of trade legislation, I will try to give you just a brief overview sketch of what I see as the foci of current congressional activism on trade legislation. The short version is this: The majority of our members want to show constituents they are active on the trade issue, and want to force the President to be more activist—but most do not want the Congress to take over trade policymaking and action itself.
Traditionally, congressional activism in the trade area has been largely parochial. You’ve got an industry you want to protect; you’ve got some particular industry you want to promote in its export markets in your district, and you go after it. That has been the mundane, routine interest of most Senators and Congressmen who have involved themselves in trade legislation.

Parochialism, of course, persists. However, there has been a significant change in the political landscape over the last few years: Trade has become a major political issue in ways it has rarely been in the past. The $160 billion trade deficit is a feature of the political landscape that no member can escape; it is an element in every Senator and Congressman’s overall platform that would probably not have been there just a few years ago.

The members are frustrated at the intractability of the problems reflected in the trade deficit. They are shocked to find even many “sunrise” industries coming in to complain about unfair foreign trade practices. And they sense a political imperative to take some kind of action on trade.

Most of the members recognize that trade legislation doesn’t have a lot to do with solving trade problems. Nevertheless, with a big trade problem out there, a lot of them feel they have got to do something; and it does not look like you are doing something unless you can call it trade legislation. Never mind that you are working on budget legislation, which may really have a lot more to do with the trade picture. You want to be able to say, “I’m working on trade legislation”—legislation of broad trade scope and effect. The fact that the central battleground in trade legislation has moved away from parochial interests is reflected in what have been the biggest issues for the Finance Committee in the pending trade legislation. They are amendments to Section 201, the escape clause provisions that you heard about earlier; Section 301, the statute that the President uses to attack unfair foreign trade practices, typically market access barriers abroad; and the provision about which Judy Bello spoke extensively, the President’s negotiating authority to enter into multilateral trade agreements.

Those were the three big political issues considered by the Finance Committee. The principal objective of most of the proposals was to try to hem in the President’s discretion, to try to limit the President’s leeway in some way, and to exert congressional leverage through that limitation on leeway.
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Does that mean Congress really wants to take control over trade policy? I think the answer to that is no. I go back to and agree with what Dick Rivers said, which is that the principal thrust of most trade legislation has been to try to get the Congress out of the business of dealing with trade problems. Congressman Morrison doesn't want to have to deal personally with the problems of the New Haven steel maker injured by dumped imports; Congressman Morrison wants to be able to say, "I worked on this statute and set up this system whereby you can go to the ITC and the Department of Commerce for neutral adjudication of this dispute. It's all fair, the rules are all set out. Go through that process. Maybe if you don't win a good case, we will have to tinker with the rules to make sure you do win; but in the first instance go over there."

What then does Congress really want out of this process? I think what most of our members would say is that they want to pressure the Administration to be more activist on trade. They want the complaints of industries being clobbered by imports to be handled more often through the Section 201 process (not in the Congress). They want the Administration to be aggressive in the use of its 301 powers, so they can legitimately say to constituents that the U.S. is doing practically everything it can to beat down unfair barriers to U.S. exports. In general, the members want the Administration to pay attention to the Congress when the Congress lets out its primordial scream that constituents out there are really worried about this trade problem. But they want the Administration to take care of the problem.

How does Congress get that sort of leverage over the Administration? There is one principal source in trade legislation: It is the pony to which Judy Bello referred. And the pony is a hostage.

Most members recognize that there is only one major thing the Administration wants in the 1,000-plus pages in the different House and Senate trade bills: the authority to enter into trade agreements and authority to have legislation implementing those agreements considered on a fast track. The fast track authority means that the President may bring back trade agreements for consideration by Congress on a basis of no amendments and time-limited debate. This is a mildly big deal on the House side. What I want to stress here is that this is a very big deal on the Senate side, because each Senator views him or herself as a powerful source of obstruction.

At any moment, any Senator from any state can bring the legislative process to a grinding halt, because that one Senator has the
authority to introduce as many amendments as he or she wants on the floor of the Senate; and that one Senator has the right to speak for as long as he or she wants (subject, of course, to the cumbersome rules of cloture). A minority of one has tremendous power and authority in the United States Senate. It is remarkable that Senators are willing to give up that power in the context of the fast-track authority. And here again, the Congress is basically moving itself somewhat out of the business of controlling the details of trade policy.

So the Congress—and particularly the Senate—makes a significant and very valuable concession to the Administration in granting fast-track authority. Proponents of trade legislation use this authority as a hostage to get as much as possible out of the Administration on trade legislation and to force it to pay attention to the Congress. But the truly remarkable thing in this story is that Congress is still willing to do that; that a Senator is willing to say, "Stop me before I protect again. You bring a trade agreement up and I will give up my authority to amend it for the benefit of my constituents."

There have been recent attacks on the fast track and maybe even some erosion of its integrity. When we considered the trade bill on the floor of the Senate, Senator Peter Wilson raised an amendment that would have undercut the fast-track authority. He was beaten badly (but he also made the mistake of raising his amendment on a Friday evening). There was a more significant threat of erosion just this past week when, as Judy Bello mentioned, the maritime industry went to the Rules Committee and got them to report out a rule saying that maritime amendments would be acceptable on a U.S.-Canada free-trade agreement. With Finance Committee opposition, the proposal will probably not succeed; the consensus probably remains for the Congress to stick with the fast track, but this will be an interesting area to watch in the next year.

In closing, I want to revert briefly to what I said at the outset about the political imperative for the members to take some action on trade legislation. A lot of Senators who want to do something constructive are looking around for other areas that can be called trade legislation that are in fact not trade legislation in the traditional sense. Several are doing so under the rubric of "competitiveness." This is an amorphous term—no one knows what it means, no one knows exactly what to do about "competitiveness," and it has become such a pain in the neck for staffers who have to write speeches about competitiveness that it's become known as the "c-word."
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have an international symbol of a little "c" with a line through it whenever our members start talking about it.

But the competitiveness movement has nevertheless been a hopeful sign. Senator John Chafee, who will be here later on, has been one of the leaders in the movement. A number of the members who strongly support an open and free trading system see the competitiveness legislative proposals as a good outlet for the best instincts of Congress.

PROFESSOR KOH: Our final speaker is Judge Jane Restani of the U.S. Court of International Trade. She's a graduate of the University of California at Berkeley and U.C. Davis Law School, where she was an Articles Editor of the law review. She then worked at the Civil Division of the Justice Department and rose to the position of Director of the Commercial Litigation Branch. She was appointed about four years ago to the Court of International Trade.

THE HONORABLE JANE A. RESTANI: My assignment today was to say something about the role of the judiciary in the struggle between Congress and the President over trade issues. From what I've heard from others today, however, perhaps Congress is trying to absent itself from the ring. In such a case, there would be no need for a referee. Anyway, let me say something about some areas in trade where the role of the judiciary is clear. First, where there are tariff disputes among individual parties, the judiciary is faced with specific cases that must be decided, and those do get resolved. There may be debate as to the substance of the dispute, but there is no debate as to the function of the court. Second, after the arguments about authorization and implementation of international agreements have been resolved, as discussed here today, in a world of voluntary restraint agreements, problems of enforcement arise. The parties come to the courts to settle such disputes.

There is a third area where it is clear that the judiciary has a role. That is in deciding whether the mechanisms that affect some of the controls between Congress and the President are proper under the laws. I am referring to cases such as INS v. Chadha, which struck down legislative vetoes. (By way of an aside, I was just talking to Professor Koh, and he noted that in Section 201 cases, Congress responded to the problem of such a veto by replacing it with a joint resolution provision.) These are the areas in trade matters where the judiciary has played a role and there is no great dispute about the function of the judiciary as to these cases.

Next, we come to the area of unfair trade laws, the antidumping and countervailing duty laws. This brings to mind some rather succinct descriptions of the legal regimes in three types of countries. It is said that in a democratic country, anything which is not forbidden is allowed. It is said that in a country without a puritanical background, what is forbidden is allowed. And, it is said that in a totalitarian regime what is allowed is forbidden. Back in what I hope is the democratic model, I think what exists in the world of enforcement of the trade laws is a situation where almost anything that is not forbidden is allowed. The way the courts seem to look at the international trade laws is: If Congress hasn’t told the Executive it can’t do something in a particular way, it is likely that the Executive may do it that way. The cases have reflected that kind of view.

It seems that if Congress really wants the courts to play some kind of role in reining in the Executive in these areas, it has to be clear about what it wants the courts to do. There are two basic reasons for this view of the judicial role: (1) The courts have no basis for making trade policy decisions; they don’t have the information; and (2) it would not be a legitimate use of judicial power for the courts to formulate trade policy. One might ask how this concept is reflected in the decisions of the court. It is reflected in the decisions that give great weight to the decisions of the agency in the administration of the antidumping laws and the countervailing duty laws. This occurs in two areas: (1) in the interpretation of the governing statutes, and (2) in the making of factual determinations under those laws. This analysis may seem to blur some distinctions in administrative law, but it is fairly clear that both areas are similarly affected.

As to statutory construction, if the administrative agency’s interpretation of the controlling statute is reasonable, the interpretation is probably going to be upheld by the court even if, looking at the statute for the first time, a court might not so interpret the statute. The same thing is true with regard to factual determinations. Deference is given to the agency’s decision, and the court may not substitute its judgment for that of the agency. The court applies the substantial evidence rule which is familiar from other areas of administrative law, but I think in international trade, the court is much more reluctant to substitute its own judgment than it is in some other areas of administrative law. Although in other areas, courts sometimes appear to weigh evidence in a manner approaching de novo review, in this area, the courts are at the more stringent end of the substantial evidence test.
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I think there is support for this deference. If one looks at the question of how much deference the judiciary should give to an interpretation of the agency in deciding what a statute means, there is support in various Supreme Court decisions for leaving the basically judicial function of statutory interpretation, in the first instance, to the administering agency. The judiciary then assesses that interpretation. There are also decisions of the Supreme Court going somewhat in the other direction which indicate that before one gives deference to an agency’s interpretation, the interpretation is examined for consistency and an assessment is made as to how long-standing the interpretation is and how persuasive the reasoning is. The latter cases do not seem to be cited as often in this area. Apparently, there is a more direct reliance on the interpretation of the agency, and the interpretation is rejected only where it is unreasonable.

I have not had the occasion to decide what degree of deference to agency views Congress might have intended originally. The law on these points has developed in the courts and is not in great flux. If Congress does not want this type of judicial review, at this point it has to change the law.

Next, one might ask, how did the courts get to this point? It is often said that Congress entrusted the decisionmaking in this area to agencies with great expertise. I have thought that by this rationale was meant that there is some generally applicable expertise in the agency, whether it is economic expertise or perhaps expertise in the procedural intricacies of the determination of duties. I did not understand the rationale to mean that there is a right of the executive agency to vary results in specific cases because of some notion of varying requirements of trade policy. Furthermore, I don’t think that the courts have said that that is the case. If Congress wishes to allow leeway in the administration of the antidumping and countervailing duty laws for those kinds of considerations, it has to do something more than it has done. At least on that face, the statutes appear neutral. They have specific standards that have to be applied fairly uniformly.

Congress knows how to leave a matter to the discretion of an administrative agency if it wishes to do so. It delegates the function to that agency and it does not give it standards to apply in making its decision. It leaves the decision totally up to the agency. If Congress enacts standards, the courts are in the position of having to see that those standards are applied in a nonarbitrary manner. Thus, I lis-
tended with interest to the earlier discussion which indicated that there may be something along those lines in the proposed trade bills. One bill supposedly would allow for more policy decisionmaking by the executive agency in some areas.

A final area where the courts may come to play a role in the balance between Congress and the Executive is in the privatization of some of the trade remedies. I do not know exactly how the proposals would work as I have not been examining the various bills now before Congress. I do think that if neutral treatment is desired, along with the kind of piecemeal decisionmaking that occurs when decisions are made between individual parties in particular cases, then private rights of action are a good idea. Certainly, private rights of action could provide for more direct compensation to entities that claim they are injured. I am not certain that such bills could contribute to any kind of overall coherence in trade policy matters.
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Panel III: Questions & Answers

PROFESSOR KOH: We have time for questions now, and I would like to ask the first. The fast-track procedure, which first entered the trade field in the 1974 Act is an expedited congressional consideration procedure which prevents a trade agreement from being bottled up in committee, being amended and being filibustered, so that the President is "guaranteed" an up or down vote within 90 days on an agreement that he brings back from negotiation. Having assurance of fast-track consideration boosts the President’s negotiating strength and credibility.

My question about the fast-track procedure is that of illusion versus reality. As Judy Bello mentioned this morning, these are provisions that are embodied in House rules. Thus, the President can’t really force the Congress to give him the fast track if it decides to change the rules on its own. On the other hand, Congress can’t actually promise the fast track because it isn’t legally bound to promise it. So, although there is this premise that if the President doesn’t get a Canadian free trade agreement by next Saturday, he won’t get an agreement, he could do exactly what he did during the U.S.-Canadian auto pact—that is, deliver up an agreement and say, “It’s a fait accompli, so why don’t you go ahead and give it to me?”

The point is that the fast-track procedure really exists in few areas. In the Intermediate Nuclear Forces treaty which is about to be signed, there is no discussion about putting it on the fast track; in the War Powers Resolution there is something like it; but it seems most prevalent in the trade area. The question is: Do we really need the fast track so much in the trade area? If we were to do away with it or if it were to be undercut, would Congress and the President really lose anything?

PROFESSOR LOWENFELD: One of the interesting things that happened in early 1979, just as the Tokyo Round was coming to a conclusion, was that President Carter sent up an enormous volume of proposed agreements, some of which never made it to the end—for example, the safeguard code which at the time had a lot of square brackets and numbers left blank. Others were just about done; they were initialed, but not signed.

Then in this 90-day period, two things happened. First, there was a three-way negotiation between Brussels, Tokyo, and London. Major outlines were set, and there were long debates. At one point, in
the midst of the negotiations, the Embassy of the European Community in Washington issued a communique advising caution on the part of the negotiators so as not to unravel the web of commitments that had already been established. So negotiations during the fast-track period aren’t quite “take it or leave it.”

Second, countries were less likely to make commitments if they weren’t sure that they had a real commitment from the other side. We’ve seen this in other areas. Several years ago, the Senate introduced a reservation on a double taxation treaty with Britain which unraveled, for a number of years, the U.S.-U.K. income tax treaty. We don’t necessarily need a fast track, but if we don’t have it, then we get into the dilemma to which I referred earlier. The fast-track procedure worked in the U.S.-Canadian auto agreement, but didn’t work in the U.S.-Soviet agreement.

**REPRESENTATIVE MORRISON:** From a congressional perspective, the advantage of the fast-track procedure can be understood in terms of what Congress buys with its agreement to have such a procedure. You are absolutely right that all of those pledges, in terms of the rules, can, as a constitutional matter, be withdrawn by the rulemaking process. So those pledges in some sense are illusory; however, I think there is a certain level of moral commitment during the course of any particular set of negotiations that effectively prevents Congress from reneging on those pledges.

What Congress buys with its agreement to the fast-track procedure is the possibility of being involved in the formulation of what underlies the trade agreement prior to its becoming an agreement. Having pledged to have to make the up or down decision, one finds it much harder—the commitment being what it is—to make the kinds of adjustments one would have wished for once it is an international agreement, and the stakes are further elevated. So I think from that perspective, it is a benefit to Congress. With respect to the executive branch, I don’t really know to what extent the fast-track procedure is viewed as being of benefit.

**MR. BOLTEN:** I think it is largely an illusion, a matter of perception, but it’s a very important one, and one that I think needs to be sustained if the Congress is going to expect to be dealing with multilateral trade agreements. What’s different about trade is hard to say, but you can identify a couple of things. First, trade agreements are usually multilateral and that makes it all the more difficult to reshape the deal once Congress wants to try to shake it up. Second, trade agreements typically involve a fairly broad range of issues.
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When you look at the Panama Canal treaty, it was possible for the Congress to say, "Well, we want this reservation and that piece and this piece," because the Panama Canal treaty was a fairly confined piece of work and it was possible to go back and sit down with the Panamanians at the last minute and rework the deal. Ninety members of the GATT, this on the subsidy code, that on cantaloupes, this on watermelons—it just isn't going to work to try to restrict the whole deal if Congressman X wants cantaloupes taken out of the deal. So it is very important for the trade agreement process that we keep this illusion in place that trade agreements are on a fast track, and I think it is an illusion that most Congressmen and Senators want to participate in.

The illusion, as Judy Bello mentioned earlier today, was shattered slightly this week by a very little noticed event in the Rules Committee, in which the Rules Committee as an exercise of its rulemaking authority—Professor Lowenfeld and I were just talking about whether they can override a statute with their rulemaking authority—said that as a matter of the rules of the Senate, the Canada Agreement, should it ever come before the Congress, may be amended with a maritime agreement. One of the Senators from Louisiana had persuaded over 50 Senators to sign a resolution supporting the maritime industry on this issue. He got such support because the maritime industry is a very strong lobby, very widespread throughout the country. But most of those Senators also don't want to be messing up trade agreements, and they know that the diffuse interest of the whole is, in the grand scheme of things, probably more important than the parochial interest of the maritime industry, and they would rather have supported the diffuse interest of the whole. Unfortunately, the maritime industry got to those Senators, putting them on the spot. I bet a lot of those Senators who signed the resolution would rather not have signed. But they didn't have a choice. The diffuse whole, isn't going to go out there and support a Senator in the next election by saying, "We, the diffuse whole, were ably represented by Senator X." The maritime industry, on the other hand, will say, "This Senator voted to kill the maritime industry in your state, thus costing 1,000 jobs."

By the way, Professor Lowenfeld still does not believe that the Rules Committee has the rulemaking authority.

PROFESSOR LOWENFELD: May I just read this section? We've been talking all along about Section 151 of the Trade Act of '74. It says this section and Sections 152 and 153 are enacted by the
Congress as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively. And as such, they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of implementing bills described in subsection so and so. And they supersede other rules only to the extent that they are consistent therewith and with full recognition of the constitutional right of either House to change the rules at any time in the same manner, and to the same extent, as in the case of any other rule of that House.

Well, I think that's gobbledygook because it is a statute enacted by both Houses and signed by the President. I understand the wrinkle, but I don't know how a court could ever rule on that.

PROFESSOR KOH: Well, if I can give an answer to that, it's just like Gramm-Rudman-Hollings. It's an attempt by Congress to bind future Congresses. They can override it whenever they want. The fast track, like Gramm-Rudman-Hollings, is an agreement about procedure in a case where there's an inability to agree about substance. When they have a change of view about substance, then they change the procedure. One of my colleagues at Yale has argued that Gramm-Rudman-Hollings is unconstitutional because it is an effort to bind future Congresses. I'm not sure I agree with that but I don't have any doubt that they could change the rule.

MR. BOLten: Just two comments for Professor Lowenfeld. One is, from our perspective, it would be great if you strenuously promoted that position on Capitol Hill; the other is that you not take any seafaring traffic for a while. We spent a lot of time in the Finance Committee trying—I spoke about the pony being a hostage—trying to tie down the hostage to get as much consultation from the Executive at the front end as possible. We came up with a kind of a Rube Goldberg mechanism in the Senate bill which says that the President gets the fast track, but first he's got to bring up a statement of trade policy. That's what gets the fast track rolling. That's step number one. The President has got to make a statement of trade policy. That gets the Congress a little involved because it's going to read the statement. Step number two is that in 1991, for a six-month period, either House of Congress may, by resolution, vote to disapprove because the negotiations are not going adequately, and the Congress is not being adequately consulted. On that basis, the fast track disappears in the middle of 1991.

PROFESSOR LOWENFELD: That's unconstitutional.
MR. BOLTEN: No, it’s not unconstitutional, once again, because this is part of the rulemaking authority of each individual House, or so the argument goes. Then at any time during the six-year period of this fast track, the fast track can be yanked by joint resolution of both Houses, not signed by the President, but both Houses.

PROFESSOR LOWENFELD: Then it’s a concurrent resolution, which is unlawful.

MR. BOLTEN: No, once again it’s the rulemaking powers of the House and the Senate. But in any event, it’s this very complicated mechanism that tries to ensure that the Congress gets consulted every possible step along the way. So the President is constantly in jeopardy of losing the fast track if the Congress is dissatisfied with what’s going on in the negotiations. Whether that works or not I don’t know. It’s pretty complicated.

AUDIENCE MEMBER: I am a government employee. I was going to premise my question with strong support for the fast track until I heard the last question as to whether there were Congressmen and Senators standing outside the negotiating room in Geneva. That seems to be exactly what we don’t need. It seems to me that what’s good about the fast track is the paradigm of the principle in Curtiss-Wright,63 where the Supreme Court held that the President would be the sole negotiating figure for the United States.

Professor Koh mentioned that a wise trade policy differs from other areas where there isn’t a fast-track authority for bringing treaties before Congress. It seems to me that the important distinction is that in trade policies there are myriad domestic ramifications that don’t necessarily have a national focus, so the President’s national constituency and his responsibility for foreign affairs are not quite as clear. Nonetheless, trade policy does invoke consideration for international economic policy, foreign affairs, real political considerations, and military considerations. So my question for Professor Lowenfeld is, in your remarks, you left open whether or not Congress should provide discretion to the President. I’d like to ask you to resolve this question that you demurred on before.

PROFESSOR LOWENFELD: Well, I’m not sure that’s a favorite. You’ll give me back a couple of minutes that Professor Koh took away. On the other hand, you’re asking me to resolve something that we haven’t been able to do in 200 years.

While I have the floor I should remind Mr. Bolten, who says international trade is now high politics, that in the early part of American history it was also high politics. We fought the War of 1812 over trade law, the first great constitutional crisis in the United States. International trade used to be a great, big political and constitutional crisis and was until the 1930s when we did more delegation and we said, “Let Franklin do it.”

I prefer an authorization from Congress to the President without a direction, especially on issues such as retaliation. I didn’t mind, for example, in the Trade Act of 1974 when Congress began to realize that maybe the balance of payments had something to do with trade and said the President normally takes import relief measures under Section 201 on a most-favored-nation basis, but he may, in certain cases, do it on a particular basis, having in mind the international obligations of the United States. That, I take it, means having in mind the GATT and the obligations to give compensation. Well, that was not too cowardly. Congress said, basically, “We believe in the GATT. We believe in most-favored-nation treatment. We have some doubt about the value of retaliation altogether, but Mr. President, if you want to do it, make the findings, make the report, then it’s okay.”

I think directing the President to do something such as cut off foreign aid because some gas stations are nationalized in an intersection in Taiwan is very foolish, and then to say, “Okay, it’s mandatory,” and then give a waiver, I find sort of hypocritical. I think it’s a way to get the Senate or the Congress as a whole to pass something that they couldn’t really pass. It’s a way to enable log-rolling—“All right, I’ll go for this if you go for my maritime protection legislation, as long as you promise me it’s won’t really mean anything”—and I find that unattractive.

REPRESENTATIVE MORRISON: As a matter of personal privilege, I’d like to note that the Curtiss-Wright64 case does not say the executive branch sets the policy; it says the executive branch speaks for the nation, negotiates for the nation. But, in fact, the way in which you jumped in your comment from that position to “where does it say” is exactly what the executive branch always does in international matters and why it gets itself in such god-awful trouble, as now in the Persian Gulf.

Most of the Congress agrees that the U.S. ought to have some presence, but Congress is forced to have a public kissing match with

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64. 299 U.S. 304 (1936).
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the President, all because the President didn't have the good sense to go to Congress back in late May or June when he made the policy. So I really do think that it is exactly the leap that was suggested by your comment that gets us in so much trouble.

PROFESSOR LOWENFELD: It's quite interesting if you look at both the international, say the international negotiations since World War II, and to some extent, U.S. trade legislation, which is of course the engine of the various trade rounds. What we tried to do for the most part was to put restraints on intervention by governments and to provide for compensation when they failed to live up to those restraints. We tried to then say, "All right, let's try to reduce the trade barriers, keep market forces working, and let the chips fall where they may." We seem to be changing that now. We seem to be negotiating about outcomes more and more, as the voluntary restraint arrangements go, as negotiated international exchange rates go, as a secondary market for debt goes. All of those seem to be negotiations about outcome, so there is really quite a change. Whether we can manage it, I have my doubts. Fortunately, we have two feet.

I think it's true that the provision in the Constitution, Article I, Section 7, which provides that bills concerning the rate and the revenue must originate in the House, often doesn't have application. Many trade legislation provisions don't have much to do with raising of revenue and, therefore, whether it's the House or the Senate doesn't make a lot of difference for the most part. We still, of course, do have the foreign commerce power in the Commerce Clause and that is for Congress. There was, at one point, some suggestion in the 19th century that you might perhaps by treaty make it a self-executing treaty. In general, the perception is, "No, you don't do that; you need Congress to act on quotas, trade legislation, and so on." I don't think that turns out to be the major issue.

REPRESENTATIVE MORRISON: I don't have much to add. Obviously, the specific answer as to where the power comes from is the Commerce Clause in the Constitution. But more than that, I don't see why you should be any more surprised about a congressional role in international trade or international economics than in domestic economics. Whether or not what we do is good economics, there is a fundamental policymaking role for the legislative branch. A congressional role in policymaking is the essence of how we've chosen to run this democracy and, even in the treaty example, senatorial consent is required. Even if you're going to deal with
these questions as matters of treaty and try to leave legislation out, it really is not the essence of the system that the executive branch is set out there to decide questions of policy for the nation and basically to implement those policies without having to defer to the legislative branch. It just isn’t so, although sometimes listening to Presidents, you might think otherwise.

**PROFESSOR KOH:** Despite the draconian time constraints that have been imposed upon our panel, they’ve managed to make it a very provocative session. Let me just conclude by saying that what we end up with here is again this tension between law and policy. I think that everyone would concede as a matter of policy that the Congress and the President should work together in this area because there is a dispute about the President’s sole legal authority to act in the area of foreign commerce. The question of whether he is legally compelled to include Congress remains up in the air.