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CONSTITUTIONAL LAW—DELEGATION TO PRESIDENT OF POWER TO DECLARE EMBARGO ON EXPORTATION OF ARMS. *UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION*<sup>1</sup>

Defendants were indicted for conspiring to sell arms in the United States to a foreign government in violation of the Joint Resolution of Congress of May 28, 1934<sup>2</sup>. In the lower court, a demurrer to the indictment had been sustained, on the ground that the joint resolution constituted an improper delegation of power by Congress to the President.<sup>3</sup> On appeal, *held* (one justice dissenting):—Reversed and cause remanded; the powers of the Federal Government in respect of foreign affairs differ fundamentally in origin and nature from its powers in respect of domestic affairs; even assuming that the challenged legislation would have constituted an improper delegation of power as to

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<sup>1</sup> Examination of the briefs in the principal case discloses that Art. 23, Sec. 103 was not cited to the Court.

<sup>2</sup> Prentice-Hall Corp. Service, Pars. 7120-7122.

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<sup>3</sup> — U. S. —, 81 L. Ed. 166, 57 S. Ct. 216 (1936).

<sup>4</sup> 48 Stat. 811 (1934).

<sup>5</sup> *United States v. Curtiss-Wright Export Corporation*, 14 F. Supp. 230 (S. D. N. Y. 1936).

the conduct of internal affairs, it is nevertheless valid in the field of external affairs, particularly in the light of prior legislative practice.

The Joint Resolution in question provided that "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect," it should be unlawful "except under such limitations and exceptions as the President prescribes" to sell arms or munitions of war in the United States to the countries then at war or to those requesting them, "until otherwise ordered by the President or by Congress." It was followed by the President's proclamation,<sup>4</sup> which, after reciting the terms of the Joint Resolution, declared that the President had found that the prohibition of the sale of arms and munitions of war "may contribute to the re-establishment of peace," and that he had consulted with the governments of other American Republics and had been assured of the co-operation of such governments as he had deemed necessary.

The lower court, in holding the Joint Resolution unconstitutional, proceeded on the theory that it gave the President power to make the embargo on the exportation of arms effective, conditioned, not upon his finding the existence of a specified condition of facts, but upon his opinion merely as to the efficacy of the embargo to accomplish certain desired ends; it consequently regarded the holding in the *Schechter* case<sup>5</sup> as controlling, and was able to distinguish such prior cases as *The Brig Aurora v. United States*<sup>6</sup> and *United States v. Chavez*,<sup>7</sup> in which embargo statutes quite similar to that in the instant case had been upheld.<sup>8</sup>

It would not have been difficult to have assigned satisfactory reasons for reversal, without departure from the

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<sup>4</sup> 48 Stat. 1744 (1934).

<sup>5</sup> *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935).

<sup>6</sup> 7 Cr. 382, 3 L. Ed. 378 (1813).

<sup>7</sup> 228 U. S. 525, 57 L. Ed. 950, 33 S. Ct. 595 (1913).

<sup>8</sup> In the *Brig Aurora* case, the statute, providing for the suspension of trade with Great Britain and France, authorized the President, in case either country should so revoke or modify certain edicts "as that they shall cease to violate the neutral commerce of the United States," to proclaim that fact, when the suspended trade might be renewed; the question of invalid delegation was argued but received only slight considera-

general principles heretofore laid down with respect to the delegation of legislative power.<sup>9</sup> The grounds assigned by the Supreme Court, however, are so novel as to afford room for much speculation as to the precise effect and possible future importance of the decision.<sup>10</sup>

The Court, assuming without deciding that, if the Joint Resolution had related solely to internal affairs, it would have constituted an unlawful delegation of legislative power, points out that the whole aim of the Joint Resolution was to affect a situation entirely external to the United States. It declares that there are fundamental differences between the powers of the Federal government in the field of foreign affairs and its powers in the field of domestic affairs; that in the latter field, the primary purpose of the Constitution was to take from the general mass of legislative powers theretofore possessed by the States certain powers of government and confer these upon the Federal government, but that in the former field, the States never possessed any powers and such international powers were transmitted to the Federal government from other sources; that, in consequence, the doctrine, that the Federal government may exercise no powers except those specifically enumerated in the Constitution and such implied powers as are necessary to carry those enumerated into execution, is true only in the field of domestic affairs and does not apply to the Federal government in respect of its international powers.<sup>11</sup> The Court then continues by stating that, in its dealings with other nations, the United States is represented only by the President, so that the case presented a question, not only of an authority delegated to the President by Congress, but of such an authority plus the plenary and exclusive power of the President to represent the government in its international relations. It would be unwise, says the Court, to require the laying down of "narrowly definite" standards to govern the action of the President in this field, and might result in serious embarrassment because of the delicacy of the subject-matter; and this conclusion is strengthened and supported by a long and unbroken legis-

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tion in the opinion. In the *Chavez* case, the joint resolution prohibited the exportation of arms and munitions to any American country, whenever the President should find that in such country "conditions of domestic violence exist which are promoted by the use of" such arms or munitions procured from the United States, and should so proclaim; the decision did not consider the question of improper delegation of power.

<sup>9</sup> See note (1936) 36 Columbia L. R. 1162.

<sup>10</sup> Cf. Baltimore Daily Record, January 14, 1937.

<sup>11</sup> Cf. Corwin, *The Commerce Power Versus States Rights* (1936), Chap. 3.

lative practice of authorizing action by the President as to subjects affecting foreign relations and either leaving the exercise of such power to his unrestricted judgment or providing a far more general standard for his guidance than required in dealing with domestic affairs.

Since there was no issue involved as to the respective fields of power of the States and the Federal government, nor of the exclusive power of the Federal government in respect of foreign relations, it is difficult to see the relevancy of so much of the opinion as deals with the origin of the Federal government's power in this field. Possibly the thought is, that since its foreign powers, due to a difference in nature and origin, are not subject to the usual limitation expressed in and imposed by the 10th Amendment, they are also not subject to the usual limitation with respect to delegation of power imposed by the principle of the separation of powers. But this hardly seems to follow.

The question directly presented was whether Congress, in exercising the power, granted to it in the Constitution, to regulate foreign commerce, could make a regulation conditional upon a finding by the President that its enactment would contribute to a desired result. Whether this constituted an abdication of the legislative function or not is at least arguable; the long prior unbroken practice would, under accepted principles of constitutional construction, have operated strongly in favor of its validity. The Court, however, seems to have chosen to answer the question by stating that, in the field of international relations, an abdication of the legislative function is permissible.

The "unwisdom" of requiring Congress, in the field of foreign affairs, to lay down "narrowly definite" standards for the guidance of the President may be conceded. But it has never been suggested that such standards are required in the field of domestic affairs; on the contrary, it has been frequently recognized that the practical necessities of government would make their imposition unwise here as well.<sup>12</sup> Nor is there any indication, in any prior decision, that a different rule as to the necessity of some recognizable legislative standard applies in the two fields. True, there is the passing remark, in *Panama Refining Co. v. Ryan*,<sup>13</sup> that

<sup>12</sup> See, e.g., *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421, 79 L. Ed. 446, 459, 55 S. Ct. 241, 248 (1935). And compare the standards upheld as sufficient in such cases as *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367 (1907); *Avent v. United States*, 266 U. S. 127, 69 L. Ed. 202, 45 S. Ct. 34 (1924); *United States v. Chemical Foundation*, 272 U. S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926); *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627 (1933).

<sup>13</sup> 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935).

certain early acts of Congress authorizing the President, in stated circumstances, to lay and revoke embargoes, and to remit and discontinue restraints imposed by acts suspending commercial intercourse with certain countries, "confided to the President, for the purposes and under the conditions stated, an authority which was cognate to the conduct by him of the foreign relations of the government." The remark is seized upon by the Court in the instant case; but it seems clear from the context that there was no thought, in the *Panama* case, of sanctioning an unlimited power of delegation in the regulation of foreign commerce, and no intimation that the general rule restricting the right of Congress to delegate legislative authority was other than a uniform limitation upon the power of Congress in all its activities.<sup>14</sup> In holding that a different rule applies where there is a question of delegation of Congressional power in the field of international affairs, the decision offers many interesting and obvious possibilities.

The case is also of interest with respect to the sufficiency of the finding of fact embodied in the Presidential proclamation. In *Panama Refining Co. v. Ryan*,<sup>15</sup> it was held that, even as to a valid delegation to the President to make a legislative policy effective by proclamation, there must be a "finding, a statement of the grounds of the President's action;" that otherwise the case would still be one of an "unfettered discretion." In the instant case, this is done simply by a formal recital of the existence of the conditions imposed by the Joint Resolution. Both the lower court and the Supreme Court regard this as sufficient, the lower court saying that the mere statement that the prescribed things had been done was conclusive on the Court. This would seem to make a somewhat empty and meaningless thing of the rule enunciated in the *Panama* case, and lends point to Justice Cardozo's dissenting opinion therein, to the effect that no such requirement is necessary since the Court should presume an exercise, by the President, of the authority confided to him pursuant to the conditions under which confided. It would seem that, in substance, such a presumption is actually here indulged.

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<sup>14</sup> Foreign relations may indeed be said to have been directly involved in such leading cases in establishing the general principles limiting delegation of legislative power as *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294, 12 S. Ct. 495 (1892) and *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348 (1928).

<sup>15</sup> 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935).