

# NOTES

## GUNS, BUTTER, AND JUDGES: JUDICIAL FRAMEWORKS FOR CASES IMPLICATING SECURITY-WEALTH TRADEOFFS

L. RUSH ATKINSON\*

*Many policies in foreign affairs law increase national security at the expense of national wealth and vice versa. Courts have struggled to find a suitable framework for adjudicating cases arising out of these policy decisions. In the recent case United States v. Eurodif S.A., the Supreme Court seemingly abandoned previous assumptions about security-wealth cases, relying instead on the Chevron framework commonly used in administrative law. This Note outlines the potential shift to Chevron and its merits vis-à-vis older frameworks for security-wealth cases. It concludes that Eurodif may well represent a profound change in the Court's treatment of international relations and predicts that continued application of the Chevron framework will improve foreign policymaking.*

### INTRODUCTION

Security is not free. To be marginally safer from any external threat, a state often must be willing to pay billions of dollars.<sup>1</sup> The full cost of security goes beyond military budgets: When military action is taken—for example, through a campaign or an embargo—national wealth is often sacrificed in opportunity costs for investment, trade, and other wealth-creating enterprises.<sup>2</sup> Conversely, policies that may stimulate economic growth often do so at the expense of the nation's

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\* Copyright © 2010 by L. Rush Atkinson. J.D., 2010, New York University School of Law; M.Phil., 2007, University of Cambridge; B.A., 2005, The University of Chicago. For helpful suggestions and guidance, I am incredibly grateful to Samuel Rascoff, Stephen Holmes, and David Golove. I also am greatly indebted to the *Law Review*, particularly the work of Seth Harp, Kristen Richer, Nicole Peles, and Jessica Collins. This Note is dedicated to Carol Cerfo, a small sign of my eternal gratitude.

<sup>1</sup> The Department of Defense, for instance, requested a budget of \$534 billion for fiscal year 2010. U.S. DEP'T OF DEF., FISCAL YEAR 2010 BUDGET REQUEST: SUMMARY JUSTIFICATION (2009), available at [http://comptroller.defense.gov/defbudget/fy2010/fy2010\\_SSJ.pdf](http://comptroller.defense.gov/defbudget/fy2010/fy2010_SSJ.pdf).

<sup>2</sup> One study calculated that the United States loses \$15 to \$19 billion in potential export revenue as a result of its sanctions on twenty-six countries. *Economic Sanctions and U.S. Policy Interests: Hearing Before the H. Comm. on Int'l Relations*, 105th Cong. 49 app. at 150 (1998) (prepared statement of Jeffrey J. Schott, Senior Fellow, Institute for International Economics), available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=314>. Similarly, oil import quotas imposed on Middle Eastern countries for national security reasons in the 1970s increased the U.S. cost of petroleum products by

ability to defend itself. Consequently, difficult policy decisions arise in the context of what this Note calls the security-wealth tradeoff, also known as “guns-versus-butter”<sup>3</sup> decisions or the “power/plenty struggle.”<sup>4</sup>

This Note examines how certain judicial doctrines influence executive decisionmaking about security-wealth questions, including the doctrine used in the recent Supreme Court case *United States v. Eurodif S.A.*<sup>5</sup> Eurodif represents the first instance of the Court employing the *Chevron*<sup>6</sup> administrative law framework in a security-wealth case. The use of *Chevron* here represents both a break from judicial approaches in previous security-wealth cases and a fundamental change in the Court’s assumptions about foreign affairs.<sup>7</sup> Specifically, the *Chevron* framework reintroduces the possibility of an independent congressional role in foreign affairs that might restrain the executive branch on certain issues. This doctrinal possibility departs from decades of previous Court opinions in security-wealth cases—dating back to the 1936 case *United States v. Curtiss-Wright Export Corp.*<sup>8</sup>—which presumed the legislative and executive branches to be always in accord regarding foreign affairs.<sup>9</sup>

The goal of this Note is threefold: (1) to draw the legal academy’s attention to the security-wealth tradeoff; (2) to emphasize that *Eurodif*’s framework may represent a new paradigm for security-wealth jurisprudence; and (3) to argue that, at least in the context of security-wealth cases, *Eurodif*’s embrace of *Chevron* offers a fruitful new framework.<sup>10</sup> Part I provides a basic explanation of the security-wealth tradeoff, and Part II lays out a brief history of the Court’s juris-

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over \$5 billion per year. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

<sup>3</sup> Robert Powell, *Guns, Butter, and Anarchy*, 87 AM. POL. SCI. REV. 115, 115 (1993).

<sup>4</sup> Theodore H. Moran, *Grand Strategy: The Pursuit of Power and the Pursuit of Plenty*, 50 INT’L ORG. 175, 192 (1996) (book review); see also Jacob Viner, *Power Versus Plenty as Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries*, 1 WORLD POL. 1, 11 (1948) (introducing terms “pursuit of power” and “pursuit of plenty”).

<sup>5</sup> 129 S. Ct. 878 (2009).

<sup>6</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For a brief discussion of the *Chevron* standard, see *infra* note 88.

<sup>7</sup> See *infra* Part III.B (explaining significance of adoption of *Chevron* framework in foreign affairs law).

<sup>8</sup> 299 U.S. 304 (1936).

<sup>9</sup> See *infra* notes 59–62 and accompanying text.

<sup>10</sup> While many of the observations in this Note are easily translatable to other areas of foreign affairs law, the present inquiry avoids such speculation to allow for special focus on the peculiarities of security-wealth cases as well as some empirical analysis. In addition, this Note agrees that the optimal theory or framework for foreign affairs law “is likely to vary, at least in detail, according to the substantive values at stake.” Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 YALE J. INT’L L. 310, 310 (2000).

prudence on security-wealth matters. Part III then discusses the changes in judicial assumptions about foreign policy that *Eurodif* might signal. It argues, contrary to what some other scholarship suggests, that the respective assumptions of *Curtiss-Wright* and *Chevron* are largely irreconcilable. Part IV looks at the relative merits of *Curtiss-Wright* and *Chevron* and concludes that, for the majority of security-wealth cases, *Chevron* offers courts a better framework.<sup>11</sup> Specifically, Part IV finds that the arguments scholars commonly make to defend extensive deference to the executive have little relevance in the context of the average security-wealth case. In contrast, the two-branch decisionmaking permitted by *Chevron* has unique advantages in the security-wealth context.

## I

### THE SECURITY-WEALTH TRADEOFF

Current scholarship on foreign affairs law has focused on the “tradeoff between liberty and security.”<sup>12</sup> This single-minded focus is fruitful but incomplete because a state pursues many different goals (security, wealth, freedom, autonomy, etc.), which are all “substitutable at the margin.”<sup>13</sup> By ignoring the substitutability of wealth and

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<sup>11</sup> This Note routinely refers to the “*Curtiss-Wright* framework” as shorthand for the logic underlying extensive deference to the executive in security-wealth cases. As Part II.B explains, the logic of judicial deference to the executive rests on two fundamental assumptions held by Justice Sutherland, *Curtiss-Wright*’s author. *Curtiss-Wright* is, however, admittedly less of a “framework” than *Chevron*’s two-step analysis and is better described as a general readiness to defer to the executive in foreign affairs.

<sup>12</sup> E.g., ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 12 (2007); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (“This case brings into conflict the competing demands of national security and our citizens’ constitutional right to personal liberty.”); POSNER & VERMEULE, *supra*, at 15–57 (articulating tradeoff thesis about security and liberty); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161, 162 (Mark Tushnet ed., 2005) (describing “trade-offs between liberty and security”).

<sup>13</sup> Cf. Harold Demsetz, *Professor Michelman’s Unnecessary and Futile Search for the Philosopher’s Touchstone*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 41, 44 (J. Roland Pennock & John W. Chapman eds., 1982) (“[E]conomics . . . envisages rational man as seeking many goals, all substitutable at the margin. On the margin, economic man is prepared to trade off some freedom for some security, some privacy for some wealth, some freedom for some paternalism, and vice versa . . .”). Rather than dealing with multivariate models, legal scholars have treated all but two variables (liberty and security) as constant. See, e.g., POSNER & VERMEULE, *supra* note 12, at 35–36 (treating wealth as constant). Similarly, for the sake of parsimony, this Note will not focus on national goals other than wealth and security.

security, scholars have overlooked a significant and unique set of difficult policy choices that leaders consistently face.<sup>14</sup>

In this context in particular, it is important that we begin with a clear definition of the relevant terms. Here, security retains its conventional meaning—namely, the ability of a state to withstand aggression from abroad,<sup>15</sup> from both foreign states and foreign nonstate actors.<sup>16</sup> National wealth refers to the nation's non-financial assets and net claims on the rest of the world.<sup>17</sup> Wealth is an objective measure and does not include the higher personal value a person might place on assets he or she possesses. Similarly, wealth does not include non-tangible assets such as liberty and security.

Security and wealth intermingle in a variety of contexts, ranging “from the trade in basic commodities to the development and exchange of existing and new weapons and technology, . . . to the imposition of sanctions and other barriers to trade, to the freezing and/or expropriation of [foreign] assets . . . .”<sup>18</sup> Often, both ends overlap and can be pursued without sacrificing one for the other.<sup>19</sup>

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<sup>14</sup> While one can see wealth and liberty as overlapping, such a “*Lochnerian*” concept of liberty has been discarded in many legal circles. See *Lochner v. New York*, 198 U.S. 45 (1905) (finding liberty of contract implicit in Due Process Clause of Fourteenth Amendment), *abrogated by* *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (permitting regulation of contract under police power). Moreover, this paper focuses on *national* wealth, and talking about wealth in terms of individual liberty risks confusion. Consequently, throughout this Note “wealth” and “liberty” are treated as distinct.

<sup>15</sup> JOHN NORTON MOORE, FREDERICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 5 (1990) (referring to “defensive conception of national security” as limited to security from “foreign dictation or assault”); see also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 3–4 (2006) (treating foreign state actors and international terrorists as traditional national security concerns).

<sup>16</sup> Federal courts primarily treat “national security” as amounting to protection from foreign threats. See, e.g., *Hamdi*, 542 U.S. at 520 (plurality opinion) (discussing “national security underpinnings” of “war on terror”).

<sup>17</sup> ORG. FOR ECON. CO-OPERATION & DEV., GLOSSARY OF STATISTICAL TERMS, <http://stats.oecd.org/glossary/detail.asp?ID=1743> (last visited Mar. 24, 2010).

<sup>18</sup> Dominic Kelly, *Trade, Security and Globalization*, in THE POLITICS OF INTERNATIONAL TRADE IN THE TWENTY-FIRST CENTURY: ACTORS, ISSUES AND REGIONAL DYNAMICS 71, 73 (Dominic Kelly & Wyn Grant eds., 2005).

<sup>19</sup> Scholars as early as David Hume and Adam Smith noted the positive correlation between economic and military strength. David Hume, *Of Commerce*, in 2 ESSAYS, MORAL, POLITICAL, AND LITERARY (1752), reprinted in 3 THE PHILOSOPHICAL WORKS OF DAVID HUME 285, 287 (1826) (“[A]s private men receive greater security, in the possession of their trade and riches, from the power of the public, so the public becomes powerful in proportion to the opulence and extensive commerce of private men.”); see Giacomo Luciani, *The Economic Content of Security*, 8 J. PUB. POL’Y 151, 153 (1988) (discussing and critiquing Smith’s correlation of wealth and security). Smith, however, recognized that wealth and security could not always be pursued simultaneously. For instance, he applauded the English Navigation Acts (restricting trade between England and its colonies) as a legitimate sacrifice of wealth for security. See Robert L. Schuyler, *The Rise of*

Wealth is, after all, a necessary ingredient for modern militaries<sup>20</sup> and serves as the leverage behind embargoes and sanctions against belligerent states.<sup>21</sup> In general, increasing wealth increases military might. Conversely, military spending can stimulate economic growth, the most common example being the domestic effect of military spending during World War II.

The security-wealth relationship, however, varies.<sup>22</sup> This Note focuses on a subset of cases where policies that increase wealth are ineluctably obtained at the expense of security, and vice versa. The international sale of firearms, for instance, increases national wealth but also endangers national security because the weapons may be funneled to enemies and used against U.S. citizens or military forces.<sup>23</sup> Even in the realm of domestic policy, states must decide between allocating resources to the military or to other sectors that might better stimulate the national economy.<sup>24</sup> Similarly, foreign ownership of critical commercial sectors might improve the national economy by spurring investment and encouraging better management, but it can raise concerns about the nation's ability to mobilize for war.<sup>25</sup>

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*Anti-imperialism in England*, 37 POL. SCI. Q. 440, 454 n.1 (1922) (describing Smith's support of the Navigation Acts).

<sup>20</sup> JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 61 (2003) ("Wealth is important because a state cannot build a powerful military if it does not have the money and technology to equip, train, and continually modernize its fighting forces.").

<sup>21</sup> Kelly, *supra* note 18, at 75; see also RAPHAEL F. PERL, CONG. RESEARCH SERV., *TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY* 9 (2003), available at <http://www.fas.org/irp/crs/IB95112.pdf> (noting six different types of coercive economic sanctions).

<sup>22</sup> For example, the nonmonotonic relationship is apparent from the fact that "total economic size [and] GDP per capita are very poor predictors of military potential." Luciani, *supra* note 19, at 153–54 (1988) (reviewing evidence and noting that countries can devote different percentages of GDP to military; efficiencies of militaries can vary; factors other than weaponry, such as resolve, have significant impact in conflicts; and economically weak countries may receive support from other nations).

<sup>23</sup> Exports do not even have to be fully weaponized to raise security concerns. After World War II, for instance, members of Congress noted that U.S. steel had been used to create the Japanese bombs that destroyed Pearl Harbor. Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 731 (1992).

<sup>24</sup> See Powell, *supra* note 3, at 115 ("[E]ach state must allocate its limited resources between satisfying its intrinsically valued, domestic ends—whether those ends be to promote the economic and social well-being of the citizenry or to suppress domestic opposition—and the means of military power.").

<sup>25</sup> The Exon-Florio Amendment, for instance, empowers the President to halt an acquisition of a U.S. firm "by or with foreign persons" if he finds that such acquisition "threaten[s] to impair the national security." 50 U.S.C. § 2170(a)–(d) (2006). Another recent example involving security implications of foreign ownership was the proposed acquisition of U.S. port operations by the United Arab Emirates company Dubai Ports World. See Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779, 789–90 (2009) (summarizing proposal and political back-

In the subset of cases where security and wealth stand at loggerheads, the two variables form what economists call a Pareto frontier, or contract curve. Along this frontier lies a “range of points at which no win-win improvements are possible,”<sup>26</sup> such that an increase in security requires a decrease in wealth, and vice versa. This Note focuses both on the conditions where a political decisionmaker must select a policy from the points along this frontier and on the manner in which courts influence (1) how policymakers choose to sacrifice one good for the sake of another and (2) which policymakers get to make that choice.<sup>27</sup>

## II

### COURTS AND THE SECURITY-WEALTH TRADEOFF

Having outlined the general relationship between national wealth and national security and described a subset of conditions where the two goals stand at odds, this Part reviews the judiciary’s varied approaches to security-wealth cases. Because policies concerning foreign commerce and national security are made at the federal level, federal courts typically have decided such cases.<sup>28</sup> Before looking at how courts have actually adjudicated security-wealth cases, this Part begins by discussing how judges affect decisions along the security-wealth Pareto frontier.

This Note assumes that the goal of all political leaders is to select the socially optimal position on this Pareto frontier.<sup>29</sup> To do so, policymakers must identify the relative values of different options through investigation and inquiry. Depending on which political actor holds the ultimate responsibility for selecting a policy, the outcome will vary, since different leaders will follow different procedures, consult with different experts, and bring different expertise to the situation.<sup>30</sup>

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lash). In this case, the executive championed a more pro-wealth position, while most congressional leaders championed more pro-security positions. *Id.*

<sup>26</sup> POSNER & VERMEULE, *supra* note 12, at 26 (discussing similar liberty-security Pareto frontier).

<sup>27</sup> For concrete examples of security-wealth tradeoffs, see *infra* notes 34, 46, 50, 97 and accompanying text.

<sup>28</sup> See, e.g., *infra* note 73 and accompanying text (discussing federal preemption of state statutes that affect security-wealth tradeoffs).

<sup>29</sup> Cf. POSNER & VERMEULE, *supra* note 12, at 30 (arguing that “well-motivated” governments choose policies according to what they believe will “maximize the welfare of all persons properly included in the social welfare function”).

<sup>30</sup> This Note makes no assertion about whether any given political branch exhibits a preference for wealth or security relative to another branch. For instance, it makes no claim that increased deference to the executive inevitably leads to more security at the expense of wealth; some executives might prefer national wealth to national security. See, e.g., Travalini, *supra* note 25, at 789–90 (describing George W. Bush Administration’s

Though judges are not tasked with setting the nation's equilibrium between wealth and security—in the U.S. system, those decisions are left to the political branches—judges indirectly influence the result by imposing procedural rules that allocate decisionmaking responsibility among the political branches. The most common example of this influence comes from cases that affect the level of authority the executive branch enjoys. In some cases, the judiciary's strict adherence to procedural rules and narrow interpretation of statutes can confine the executive branch by placing more decisionmaking authority in the hands of Congress. In others, loose readings of statutes leave the executive less fettered, often by simultaneously marginalizing Congress's role in decisionmaking.

This Part identifies three different approaches that the federal courts have taken in security-wealth cases: (1) traditional formalism, (2) conclusive deference to the executive as exemplified in *Curtiss-Wright*, and (3) the *Chevron* administrative law approach used in *Eurodif*. Each approach affects the relative roles of the political branches in balancing security and wealth, which in turn influences the security-wealth equilibrium selected.

#### A. Traditional Formalism

For more than a century after the nation's founding, the judiciary's approach to most foreign affairs cases was based on an orthodox conception of separated powers.<sup>31</sup> Typical of this period was *Little v. Barreme*,<sup>32</sup> which dealt with commercial regulations imposed during the "Quasi-War" with France. In *Little*, the Navy had seized the *Flying Fish*, a skiff returning from France, under an executive directive to seize all U.S. ships traveling to or from France.<sup>33</sup> Congress, however, had only authorized the executive to seize ships bound for a French port, not those returning from one.<sup>34</sup> Reading the congressional statute to "obviously . . . limit[ ] that authority to the

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approval of, and Congress's rejection of, transaction that would have placed Dubai-based company in charge of operating six U.S. ports).

<sup>31</sup> G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 2, 3 (1999); see also Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 118 (2009) (discussing early formalist jurisprudence in foreign affairs law).

<sup>32</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>33</sup> *Id.* at 178.

<sup>34</sup> *Id.* at 177–78. The facts of *Little* nicely illustrate the types of policy choices the decisionmaker faces in the context of the security-wealth tradeoff. The executive order subjugated wealth to security by shutting down U.S.-French trade on the belief that it would give the United States the upper hand in the conflict. Congress offered an intermediate policy, electing only to eliminate French imports but not U.S. exports to France.

seizure of vessels bound or sailing to a French port,” Chief Justice Marshall concluded that the Navy was liable for the seizure.<sup>35</sup> Marshall’s reasoning adhered to the formal structure of congressional authorization followed by presidential execution, noting that the “executive could not give a right” to officers without congressional authorization.<sup>36</sup>

Similar formalism dominated the first half of the twentieth century, extending to one of the Court’s most famous decisions, *Youngstown Steel and Tube Co. v. Sawyer*.<sup>37</sup> While *Youngstown* is often discussed as a case of national security versus *individual* wealth (property rights),<sup>38</sup> many of the opinions relied on a formal division between congressional control over the *national* purse and the executive’s responsibility for national security.<sup>39</sup> Justice Douglas’s opinion, for instance, noted, “The Congress, as well as the President, is trustee of the national welfare. . . . We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution.”<sup>40</sup>

Douglas’s words clearly rebuffed calls to loosen traditional formalism. By maintaining strict rules about congressional authorization for executive action—action usually undertaken in the name of national security—both the *Little* and *Youngstown* Courts drove the security-wealth equilibrium away from security and towards wealth.<sup>41</sup> Such formalism, however, was eventually questioned.

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<sup>35</sup> *Id.* at 177. Marshall elided the issue of whether the executive could have acted unilaterally without congressional authorization. *Id.*

<sup>36</sup> *Id.* at 179.

<sup>37</sup> 343 U.S. 579 (1952); see also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953) (discussing *Youngstown*), *aff’d on other grounds*, 348 U.S. 296 (1955).

<sup>38</sup> See, e.g., Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 953 n.51 (2004) (“[*Youngstown*] focused . . . on the fact that the seizure violated individual property rights.”); Wedgwood, *supra* note 10, at 315 (“The real lesson of [*Youngstown*] is . . . that citizens are off-limits.”).

<sup>39</sup> See, e.g., *Youngstown*, 343 U.S. at 588 (“The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.”).

<sup>40</sup> *Id.* at 629–30 (Douglas, J., concurring). Seizing the steel mill, Douglas argued, required revenue to compensate those whose property was seized; therefore, “[t]he branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected.” *Id.* at 631–32. Douglas found no such authorization for President Truman’s seizure. *Id.* at 632.

<sup>41</sup> Another example of a court using judicial formalism to rebuff the executive is *United States v. Guy W. Capps, Inc.*, in which the Fourth Circuit invalidated an executive agreement with Canada to import seed potatoes to feed U.S. troops. 204 F.2d at 655. Separation of powers trumped the war effort, and the court concluded that “[e]ven though the regulation prescribed by the executive agreement [might] be more desirable than that prescribed

### B. Curtiss-Wright and Deference to the Executive

Even while formalism remained the determinant doctrine of the *Youngstown* Court, real-world events eventually prompted several Justices to reconsider their underlying assumptions about judicial doctrine in security-wealth cases and to question whether the strictures of formalism were workable in a new era.<sup>42</sup> *United States v. Curtiss-Wright Export Corp.*<sup>43</sup> suggested that formalism was not always desirable in security-wealth cases.<sup>44</sup>

In 1933, the Curtiss-Wright Corporation, an arms exporter, began to sell weapons to Bolivian forces engaged in an armed conflict against Paraguay over the Chaco region lying between the two nations.<sup>45</sup> In May 1934, Congress passed a joint resolution permitting the President to halt arms sales in an effort to reestablish peace.<sup>46</sup> Acting on the resolution, President Franklin Roosevelt banned weapons sales to Bolivia and Paraguay.<sup>47</sup> Soon after, the State Department discovered that Curtiss-Wright was smuggling machine guns to Bolivia and brought charges against the company for violating the embargo.<sup>48</sup> At trial, Curtiss-Wright successfully argued that the congressional resolution, which allowed the President to apply an embargo selectively, amounted to an unconstitutional delegation of legislative authority.<sup>49</sup> The government appealed, fearing the decision

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by Congressional action, it is the latter which must be accepted as the expression of national policy." *Id.* at 659–60.

<sup>42</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 100–03 (2004). Some authors have argued that the Court's doctrinal shift from formalism dates back to the Civil War, starting with the famous *Prize Cases*. Koh & Yoo, *supra* note 23, at 724. While the Court's decision in the *Prize Cases* amounted to de facto deference to the executive, the Court treated the case not as one implicating foreign affairs but rather as a case of domestic rebellion. *The Brig Army Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 642 (1862). These cases, therefore, stem from a different doctrine.

<sup>43</sup> 299 U.S. 304 (1936).

<sup>44</sup> See Robert A. Divine, *The Case of the Smuggled Bombers*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 253, 258–61 (John A. Garraty ed., 1987) (recounting facts of *Curtiss-Wright*).

<sup>45</sup> *Id.* at 256–61. Curtiss-Wright also tried to sell arms to the Paraguayans but was unsuccessful. *Id.* at 256.

<sup>46</sup> Joint Resolution of May 28, 1934, ch. 365, 48 Stat. 811 (1934) (granting President authority to cease arms sales to countries "now engaged in armed conflict in the Chaco"); see also *Curtiss-Wright*, 299 U.S. at 311–13 (reciting resolution and President's enacting proclamation).

<sup>47</sup> Divine, *supra* note 44, at 258.

<sup>48</sup> *Id.* at 261; Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 2 (1973).

<sup>49</sup> *United States v. Curtiss-Wright Exp. Corp.*, 14 F. Supp. 230, 235 (S.D.N.Y. 1936) (finding resolution to be "an attempted abdication of legislative responsibility"); see also Arthur Schlesinger, Jr., *Congress and the Making of American Foreign Policy*, *FOREIGN AFF.*, Oct. 1972, at 78, 78–79 (describing district court's decision in *Curtiss-Wright*).

would inhibit its efforts to halt weapons sales to belligerent states, particularly fascist Italy.<sup>50</sup>

On appeal, the government found somewhat unexpected allies on a Supreme Court that championed a new executive power in foreign affairs.<sup>51</sup> Justice George Sutherland, the majority's author, had previously been a hawkish member of the Senate Foreign Relations Committee and condemned formalism in foreign affairs law as a dangerous antiquation.<sup>52</sup> In *Curtiss-Wright*, Sutherland drew heavily from his previous writings in reversing the lower court's finding of an improper delegation.<sup>53</sup> Circumstances, he argued, required that the executive have flexibility to deal with the "vast external realm, with its important, complicated, delicate and manifold problems . . . ."<sup>54</sup> This often required bestowing extraordinary powers on the President, given his unique "power to speak or listen as a representative of the nation."<sup>55</sup>

This functionalist theory of foreign affairs law included a corollary: Courts should not place themselves in a position that might interfere with the executive's role.<sup>56</sup> The executive acting in foreign affairs, Sutherland declared in *Curtiss-Wright*, enjoys "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>57</sup> This argument drew directly from Sutherland's earlier writings, in which he claimed:

There is . . . little, if any occasion to employ those niceties of logical analysis which have been crystalized [sic] into canons of statutory and constitutional construction . . . . We are dealing with those vital

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<sup>50</sup> Roosevelt had invoked an embargo after Italy invaded Ethiopia in 1935. Divine, *supra* note 44, at 262. The facts of *Curtiss-Wright* fit nicely in the framework outlined in Part I. Continuing trade would have increased national wealth (the profits realized by Curtiss-Wright) but allegedly risked national security.

<sup>51</sup> SCHLESINGER, *supra* note 42, at 100–01 (calling *Curtiss-Wright* decision "ironic[ ]" and unexpected given Court's then-hostility to New Deal legislation).

<sup>52</sup> See generally GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 20–21 (1919) (proclaiming dangers of unwarranted constitutional limits on national government's powers in foreign affairs).

<sup>53</sup> As one commentator noted, Sutherland found himself "in the happy position of being able to give [his] writings and speeches the status of the law." David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 476 (1946).

<sup>54</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

<sup>55</sup> *Id.*

<sup>56</sup> White, *supra* note 31, at 47 ("[Sutherland's doctrine] included the sharply reduced role not only of the states and the Senate, but also of the courts, as significant actors in the constitutional regime of foreign relations."); see also Hamdi v. Rumsfeld, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) ("With respect to foreign affairs as well, the Court has recognized the President's independent authority and need to be free from interference." (citing *Curtiss-Wright*, 299 U.S. at 320)).

<sup>57</sup> *Curtiss-Wright*, 299 U.S. at 320.

powers, the employment of which may become essential to our continued existence as a people. . . . [I]n determining the extent of such powers as these, we shall be justified in making assumptions and indulging in constructions which could not be tolerated in respect of normal matters.<sup>58</sup>

Sutherland's permissible "assumptions" and "constructions" break down into two different tenets that pervade *Curtiss-Wright*. First, a conclusive presumption of constitutionality arises when the political branches jointly take action abroad. In other words, Sutherland rejected the notion of a constitutional ceiling on the federal government's power when engaged in foreign affairs.<sup>59</sup>

Second, the judiciary should avoid searching inquiries into contested governmental actions by presuming accord between the political branches. While the executive and legislature were expected to be at odds on many domestic issues, Sutherland conceived of a Congress that automatically deferred to the executive on foreign affairs. For instance, he gave significant weight in *Curtiss-Wright* to an 1816 report by the Senate Committee on Foreign Relations that, as a general rule, urged Congress to lay confidence in the executive and not interfere in executive decisionmaking on foreign policy.<sup>60</sup> Sutherland also noted, "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which . . . leave the exercise of the power to his unrestricted judgment . . ." <sup>61</sup>

Sutherland concluded that this record and other evidence of "overwhelming support" by Congress<sup>62</sup> indicated that serious inquiry

<sup>58</sup> SUTHERLAND, *supra* note 52, at 94–95.

<sup>59</sup> "To hold that men may be called upon to die for these ends, but that the general government lacks any conceivable power to attain them by means which will entail other and lesser sacrifices, would . . . convert the Constitution from a charter of human liberty into a deadly ambush," Sutherland wrote. *Id.* at 95. Sutherland's point foreshadows the famous triptych of executive power set forth in Justice Jackson's *Youngstown* concurrence. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (arguing that unified action receives "strongest of presumptions" of constitutionality).

<sup>60</sup> *Curtiss-Wright*, 299 U.S. at 319. The Committee Report read in part:

The President is the constitutional representative of the United States with regard to foreign nations. . . . The committee consider[s] this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.

S. COMM. ON FOREIGN RELATIONS, 14TH CONG., 1ST SESS., REPORT OF FEB. 15, 1816, reprinted in S. DOC. NO. 56-231, pt. 6, at 21 (1901).

<sup>61</sup> *Curtiss-Wright*, 299 U.S. at 324.

<sup>62</sup> *Id.* at 322; see also White, *supra* note 31, at 106 (discussing Sutherland's view of Congress's diminished role under *Curtiss-Wright*).

into congressional authorization was unnecessary when foreign policy decisions were contested in court.<sup>63</sup> Believing the Court should honor congressional deference, Sutherland argued for a near-conclusive presumption of legislative authorization for the executive's actions whenever the President acts abroad.<sup>64</sup> Consequently, Sutherland called for a mode of interpretation where the "mere recital" of foreign affairs law would be sufficient evidence that "Congress has invested the President with virtual dictatorship over an exceedingly wide range of subjects and activities" in foreign affairs.<sup>65</sup>

Sutherland's model of foreign affairs law, a radical departure from the strictures of formalism, has had a lasting effect on foreign affairs jurisprudence. Over time, the "*Curtiss-Wright* brand of special foreign affairs deference" spread in the Court's writings involving security-wealth matters, thus increasing executive autonomy.<sup>66</sup>

*Curtiss-Wright's* mindset of deference to the executive became an increasingly dominant sentiment on the Court as the United States became more involved in European geopolitics.<sup>67</sup> Shortly after *Curtiss-Wright*, the Court wrote two opinions that upheld executive seizures of Soviet assets in the United States without congressional approval.<sup>68</sup> The seizures were part of an agreement settling disputes with Russia in the aftermath of the Soviet overthrow of the Tsarists.<sup>69</sup> Over the course of the twentieth century, the executive gained increasing deference in security-wealth cases.<sup>70</sup> In *Kolovrat v. Oregon*<sup>71</sup> and *Crosby v. National Foreign Trade Council*,<sup>72</sup> the Court implicitly drew on *Curtiss-Wright* in presuming that actions of indi-

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<sup>63</sup> *Curtiss-Wright*, 299 U.S. at 327.

<sup>64</sup> Again, Sutherland's second assumption also dovetails with Jackson's framework of executive power. Assuming the President and Congress are always in accord means, in practice, that the executive may unilaterally employ all of the power that the federal government can exercise. See *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring) (noting that executive branch's power is at its apex when it acts under legislative authorization).

<sup>65</sup> SUTHERLAND, *supra* note 52, at 115.

<sup>66</sup> Knowles, *supra* note 31, at 125.

<sup>67</sup> See Koh & Yoo, *supra* note 23, at 725 (discussing impact of *Curtiss-Wright* on acceptance of presidential assertions of power over foreign affairs policy).

<sup>68</sup> *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Pink*, 315 U.S. 203, 219–20 (1942).

<sup>69</sup> *Belmont*, 301 U.S. at 326; *Pink*, 315 U.S. at 211.

<sup>70</sup> Koh & Yoo, *supra* note 23, at 730–31.

<sup>71</sup> 366 U.S. 187, 198 (1961) (invalidating Oregon statute limiting inheritance rights of non-resident aliens as applied to Yugoslavian heirs).

<sup>72</sup> 530 U.S. 363 (2000) (invalidating Massachusetts statute barring state entities from doing business with companies in Burma).

vidual state governments affecting security-wealth matters were preempted by the federal executive.<sup>73</sup>

Later Courts likewise affirmed executive decisions in security-wealth cases even when doing so required creative and sympathetic interpretations of federal statutes to fulfill Justice Sutherland's second assumption, the presumption of congressional-executive accord.<sup>74</sup> In *Dames & Moore v. Regan*,<sup>75</sup> the Court upheld President Reagan's nullification of all claims against Iran in the wake of the hostage release agreement, purporting to find such authority in the International Emergency Economic Powers Act.<sup>76</sup> This finding, however, required the Court to throw "a set of largely inapposite statutes into a blender and mix[ ] up an authorization for the president to suspend claims pending in the U.S. courts against a foreign nation."<sup>77</sup> The Court engaged in similar judicial gymnastics in *Regan v. Wald*, finding congressional authorization for the presidential ban on travel to Cuba.<sup>78</sup> And in *Crosby v. National Foreign Trade Council*, the Court held that a federal statute regarding trade with Burma, which made no reference to preemption, "clearly intended" to preempt all state action.<sup>79</sup>

<sup>73</sup> See Sarah H. Cleveland, *Crosby and the 'One-Voice' Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 977 (2001) (examining judicial doctrine of preemption of state statutes involving foreign affairs law). In these cases, the Court assumed that political accord existed between the legislative and executive branches. See *Crosby*, 530 U.S. at 376 ("It is simply implausible that Congress would . . . empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute . . . that might, if enforced, blunt the consequences of discretionary Presidential action.").

<sup>74</sup> See Koh & Yoo, *supra* note 23, at 735 ("The Burger and Rehnquist Court[s'] statutory interpretation techniques have eliminated the various limitations in congressional delegations, thereby granting the President unrestrained access to broad delegated powers over the economy and national security.").

<sup>75</sup> 453 U.S. 654 (1981).

<sup>76</sup> *Id.* at 672-74.

<sup>77</sup> POSNER & VERMEULE, *supra* note 12, at 48.

<sup>78</sup> 468 U.S. 222 (1984). Professor Tribe summarized the opinion as one in which "five Justices purported to find, in a factual situation that should probably have been deemed at best ambiguous, clear congressional authorization for the Reagan Administration's summary ban on travel to Cuba." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 677 n.30 (3d ed. 2000). The *Wald* Court connected *Curtiss-Wright* with a need for executive control over security-wealth cases:

Given the traditional deference to executive judgment "[i]n this vast external realm," . . . we think there is an adequate basis under the Due Process Clause . . . to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.

*Wald*, 468 U.S. at 243 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (alteration in original)).

<sup>79</sup> 530 U.S. 363, 374 (2000). The *Crosby* Court argued preemption was implicit because the statute's goal was to "provide the President with flexible and effective authority over economic sanctions against Burma." *Id.*

Over the fifty years following Sutherland's decision, *Curtiss-Wright* became a talisman for a judicial mindset that discarded formal inquiries into congressional intent due to concerns about the danger of stalling foreign policy and instead presumptively honored executive decisions in security-wealth cases.<sup>80</sup> Consequently, *Curtiss-Wright* "tilted the field in favor of the president" and created an executive branch "with preeminent powers in the field of national security affairs."<sup>81</sup> When *Curtiss-Wright* is cited, the executive branch's position is almost guaranteed to be upheld—one empirical study found that until 2008, the government prevailed in every Supreme Court decision citing *Curtiss-Wright*.<sup>82</sup> Even when *Curtiss-Wright* is not cited directly, Sutherland's underlying theory provides "a common thread in a pattern of cases that has exalted presidential power" and marginalized the role of Congress in foreign affairs.<sup>83</sup> Though not a monolithic regime, *Curtiss-Wright* announced a rationale for deference to the executive in security-wealth cases that has been reiterated by Justices for decades.

### C. Chevron and Security-Wealth Cases

The Court's willingness to defer to the executive in security-wealth cases has drawn the ire of many in the legal academy.<sup>84</sup>

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<sup>80</sup> See Lofgren, *supra* note 48, at 29 ("By being available as authoritative precedent, [*Curtiss-Wright*] decreases the need to confront directly certain basic constitutional issues."); see also, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 718–19 (2006) (Thomas, J., dissenting) (citing *Curtiss-Wright* for Court's duty of "heightened" deference to executive in foreign affairs).

<sup>81</sup> Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 411–12 (1996); see also Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 555 (2d Cir. 1988) ("The Executive Branch must therefore have broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships.").

<sup>82</sup> William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099–1100 (2008) (finding *Curtiss-Wright* "the strongest form of deference" used by Supreme Court). Eskridge and Baer think this perfect record is inflated due to "selection bias" as to when the Court cites *Curtiss-Wright*. *Id.* at 1101–02. Subsequent to their study, the Supreme Court handed down *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which cited *Curtiss-Wright* but ultimately struck down the executive action. *Id.* at 2276–77; see *infra* notes 114–16 and accompanying text (explaining Court's citation to, but implicit departure from, *Curtiss-Wright* in *Boumediene*). Still, Eskridge and Baer's findings indicate the heightened deference associated with *Curtiss-Wright*.

<sup>83</sup> David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 25 (David Gray Adler & Larry N. George eds., 1996). In Eskridge and Baer's study, the executive's interpretation of a contested statute prevailed in 78.5% of foreign affairs law cases "even when the Justices [did] not explicitly invoke *Curtiss-Wright*." Eskridge & Baer, *supra* note 82, at 1102.

<sup>84</sup> See, e.g., Knowles, *supra* note 31, at 117 ("*Curtiss-Wright* has not fared well among scholars. Its broad pronouncements about foreign affairs and its theory of extra-constitutional powers have been repeatedly savaged."); Koh & Yoo, *supra* note 23, at 762 ("Persis-

Despite the extensive theory spun out in *Curtiss-Wright*, Professor Charles Lofgren argued, “Sutherland uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations.”<sup>85</sup> Other critics called *Curtiss-Wright*’s “sole organ” rationale—the functional need for deference to the executive, picked up by later courts—“the sheerest of dicta.”<sup>86</sup> These and other academics have called for the Court to abandon the *Curtiss-Wright* doctrine altogether.<sup>87</sup>

A second group of legal scholars has proposed a new framework for foreign affairs law—the *Chevron* inquiry used in administrative law.<sup>88</sup> Professor Bradley first formally proposed extending *Chevron* to foreign affairs law, seeing it as a natural step given that “[t]he global economy, proliferation of multilateral treaties, and increasing overlap between domestic and international law have meant that our administrative state . . . is becoming to some extent an international administrative state.”<sup>89</sup> Other scholars have supported Bradley’s proposition, particularly in light of the sharpened focus on foreign affairs law in the wake of the 2001 terrorist attacks.<sup>90</sup> A few lower courts have experi-

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tent institutional habits that favor unilateral presidential action . . . may fail to unite the U.S. electorate and U.S. allies to grapple with pressing global problems.”).

<sup>85</sup> Lofgren, *supra* note 48, at 30. *See also id.* (“[Sutherland had] no basis . . . for concluding that the Constitution’s allocation of foreign relations power between the branches may be constitutionally ignored.”).

<sup>86</sup> Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT’L L. 5, 12 (1988) (emphasis omitted).

<sup>87</sup> *See, e.g.*, Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 45–46 (1972) (criticizing historical precedent relied on by Sutherland in *Curtiss-Wright* and subsequent cases).

<sup>88</sup> Because *Chevron* has received so much attention in the academy, this Note will not rehash much of the opinion, framework, or rationale. *See generally* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990) (summarizing *Chevron* and subsequent influence in administrative law). In short, *Chevron* argues that “[c]ourts must defer to agency interpretations if and when Congress has told them to do so.” *Id.* at 2084 (emphasis omitted). *Chevron* assumes that ambiguity should be read as an implicit delegation to the executive to be honored by the judiciary. *Id.* at 2086–87.

<sup>89</sup> Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 652 (2000) (emphasis omitted).

<sup>90</sup> *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1173–78, 1204–07 (2007) (proposing to replace foreign affairs canons with *Chevron* framework); Oren Eisner, Note, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 412–13 (2001) (proposing to extend *Chevron* to executive statements that interpret foreign affairs laws). *But see* Evan Criddle, Scholarship Comment, *Chevron Deference and Treaty Interpretations*, 112 YALE L.J. 1927, 1927–28 (2003) (advocating for lesser *Skidmore* standard of deference in foreign affairs law). *See generally* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005) (advocating extending *Chevron* to interpret executive action taken under 2001 Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006))).

mented with extending the *Chevron* framework abroad, particularly with prosecutions under antiterrorism laws.<sup>91</sup>

The first Supreme Court endorsement of “*Chevronizing*” security-wealth cases came recently in *United States v. Eurodif S.A.*<sup>92</sup> The *Eurodif* case concerned tariff rates on the import of uranium but, given the uniqueness of the uranium industry, implicated global deproliferation and U.S. nuclear capabilities.

Commercial uranium—used to produce approximately twenty percent of the United States’ electricity supply<sup>93</sup>—comes from two sources. Some commercial uranium comes straight from ore, which is mined and then shipped to one of six countries for refinement before delivery to reactor sites.<sup>94</sup> Since 1994, however, the United States has obtained about half of its commercial uranium from Russian warheads dismantled as part of deproliferation.<sup>95</sup> The warhead-derived uranium is delivered through a Russian-U.S. agreement (the “Megatons to Megawatts” program);<sup>96</sup> imports are handled by the United States Enrichment Corporation (USEC), a privatized government agency.<sup>97</sup>

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<sup>91</sup> See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 556 (E.D. Va. 2002) (analogizing deference to President’s interpretation of treaty to *Chevron* deference); see also Criddle, *supra* note 90, at 1929 (discussing influence of Bradley’s article on *Lindh* court).

<sup>92</sup> 129 S. Ct. 878, 886 (2009).

<sup>93</sup> Nuclear Energy Inst., *Resources and Stats: U.S. Nuclear Power Plants*, [http://www.nei.org/resourcesandstats/nuclear\\_statistics/usnuclearpowerplants](http://www.nei.org/resourcesandstats/nuclear_statistics/usnuclearpowerplants) (last visited Mar. 10, 2010).

<sup>94</sup> Commercial grade uranium is also known as low-enriched uranium (LEU). Erwann O. Michel-Kerjan & Debra K. Decker, *The Economics of Nuclear Energy Markets and the Future of International Security* 12 (Risk Mgmt. & Decision Processes Ctr. at the Wharton Sch., Univ. of Pa., Working Paper No. 2007-10-23, 2007). The countries that currently process LEU are France, Germany, the Netherlands, Russia, the United Kingdom, and the United States. *Id.* at 7.

<sup>95</sup> Donald Kennedy, *Good Prediction, Bad News*, 295 Sci. 765, 765 (2002).

<sup>96</sup> The agreement is also known as the “HEU-LEU deal.” Pavel Podvig, *The Fallacy of the Megatons to Megawatts Program*, BULL. ATOMIC SCIENTISTS, July 23, 2008, <http://www.thebulletin.org/web-edition/columnists/pavel-podvig/the-fallacy-of-the-megatons-to-megawatts-program>.

<sup>97</sup> Kennedy, *supra* note 95, at 765. The two sources of uranium imports present a classic security-wealth situation. Megatons to Megawatts is a “quintessential swords to plowshares” program that is credited with conversion of enough military-grade uranium to forge 14,000 nuclear warheads. 146 CONG. REC. 16,346 (2000) (statement of Sen. Murkowski); U.S. Enrichment Corp., Nuclear Non-proliferation—Megatons to Megawatts, <http://www.usec.com/megatonstomegawatts.htm> (last visited Jan. 23, 2010) (recording number of warheads eliminated by Megatons to Megawatts program). Deriving LEU from warheads, however, is more expensive than extracting LEU from ore; buying this uranium therefore imposes a cost on U.S. industries not incurred when uranium is ore-derived. See, e.g., TONI JOHNSON, COUNCIL ON FOREIGN RELATIONS, GLOBAL URANIUM SUPPLY AND DEMAND 1 (2010), <http://www.cfr.org/publication/14705>. Some even believe that the Megatons to Megawatts program is economically unviable. Voicing opposition to the program’s privatization, economist Joseph Stiglitz warned, “[T]he economic incentives are not there for USEC to import the Russian [downblended] uranium. So you’re putting some-

In December 2000, faced with increased competition from European importers, USEC began to pressure the U.S. government to protect USEC from foreign competitors that were delivering ore-derived uranium at lower prices than USEC could offer.<sup>98</sup> In response, the Commerce Department proposed in May 2001 to impose antidumping and countervailing tariffs on uranium processed abroad, with the exception of warhead-derived uranium.<sup>99</sup> The department implemented the tariff in December 2001,<sup>100</sup> at which point Eurodif S.A., a French company, brought suit to challenge the decision.<sup>101</sup> Eurodif argued that the Commerce Department had exceeded its authority because uranium refinement constituted a “service” rather than a “good” and thus was not subject to countervailing antidumping laws.<sup>102</sup> Both the Court of International Trade and the Federal Circuit accepted Eurodif’s argument and held that the Commerce Department could not impose duties on the imported refined uranium.<sup>103</sup>

John Bellinger, counsel for the State Department, and Jim Haynes, General Counsel for the Defense Department, appeared on the petition to the Supreme Court for a writ of certiorari.<sup>104</sup> It was the first involvement of the State and Defense Departments in the case. The petition criticized the lower courts’ characterization of refinement as a “service,” and placed heavy emphasis on the national security interests implicated, arguing that “[t]he decision below, in a truly unprecedented manner for a trade case, threatens to undermine U.S. foreign policy and national security interests in the remarkably sensi-

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thing that’s in our national security interests in direct conflict with USEC’s private property interests.” Kennedy, *supra* note 95, at 765 (quoting Nurith C. Aizenman, *National Security for Sale*, WASH. MONTHLY, Dec. 1997, at 17, 20).

<sup>98</sup> Eurodif S.A. v. United States, 411 F.3d 1355, 1358 (Fed. Cir. 2005), *rev’d*, 129 S. Ct. 878 (2009).

<sup>99</sup> Notice of Preliminary Affirmative Countervailing Duty Determination and Alignment with Final Antidumping Duty Determination: Low Enriched Uranium from France, 66 Fed. Reg. 24,325 (May 14, 2001).

<sup>100</sup> Notice of Final Determination of Sales at Less than Fair Value: Low Enriched Uranium from France, 66 Fed. Reg. 65,877 (Dec. 21, 2001).

<sup>101</sup> See United States v. Eurodif, S.A., 129 S. Ct. 878, 884–85 (2009) (discussing initiation of case).

<sup>102</sup> *Eurodif*, 411 F.3d at 1361.

<sup>103</sup> USEC Inc. v. United States, 259 F. Supp. 2d 1310 (Ct. Int’l Trade 2003) (remanding to Commerce Department to reconsider applicability of duties); USEC Inc. v. United States, 281 F. Supp. 2d 1334 (Ct. Int’l Trade 2003) (rejecting Commerce Department’s reconsideration), *aff’d sub nom. Eurodif*, 411 F.3d 1355. The Federal Circuit also noted that in prior cases, the government characterized uranium refinement contracts as pertaining to services. *Eurodif*, 411 F.3d at 1361; see also Fla. Power & Light Co. v. United States, 307 F.3d 1364, 1373 (Fed. Cir. 2002).

<sup>104</sup> Petition for Writ of Certiorari at 32, *Eurodif*, 129 S. Ct. 878 (2009) (No. 07-1059).

tive context of nuclear fuel, nonproliferation, and ensuring domestic supplies for nuclear weaponry.”<sup>105</sup> The security concerns were threefold: (1) the decision threatened the Megatons to Megawatts agreement with Russia; (2) it jeopardized the viability of USEC, the only domestic uranium refiner; and (3) it made the United States dependent on uranium importers and put the nation at the mercy of those states.<sup>106</sup>

The Supreme Court granted certiorari and unanimously reversed the lower courts, finding the Commerce Department’s classification of refined products as “good[s]” a permissible interpretation of the duty statutes.<sup>107</sup> Justice Souter, writing for the majority, began his analysis by framing the issue, as scholars had urged, within the familiar framework of *Chevron*.<sup>108</sup> He went on to find the government’s ruling reasonable. The statute, he concluded, was ambiguous as to what constituted a service.<sup>109</sup> In such unclear cases, the Commerce Department’s “interpretation governs in the absence of unambiguous statutory [meaning] to the contrary.”<sup>110</sup>

*Eurodif*’s holding is, on the whole, both unremarkable and a seemingly expected outcome of a *Chevron* inquiry into the countervailing duties statute. The intriguing element of Souter’s opinion is the decision to apply *Chevron* instead of relying on *Curtiss-Wright* or even a simple application of formalism. Despite the government’s emphasis on the security elements of uranium imports, the opinion affords the executive branch no more discretion than any other “authoritative agency” in the federal government.<sup>111</sup> Instead of deferring to the “sole organ” rationale, the Court only accepted the Agency’s interpretation after finding the Department offered “good analytical grounds” as to why uranium processing constituted a

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<sup>105</sup> *Id.* at 25–26.

<sup>106</sup> *Id.* at 26–31.

<sup>107</sup> *Eurodif*, 129 S. Ct. at 881.

<sup>108</sup> *Id.* at 886–87 (“The issue is not whether, for purposes of [the countervailing duty statute], the better view is that [the refinement] contract is one for the sale of services, not goods. . . . [T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996))).

<sup>109</sup> Souter reasoned that a laundry service clearly offers a service when shirts are brought to it and a computer manufacturer clearly produces a good for its client (even if given a bag of sand to serve as the silicon for microchips). *Id.* at 888. The facts of *Eurodif*, however, fell somewhere in a blurry middle.

<sup>110</sup> *Id.* at 886.

<sup>111</sup> *Id.* at 888.

good.<sup>112</sup> The only discretion noted in the opinion was that “provided by the ambiguities of a statute.”<sup>113</sup>

*Eurodif*'s omission of *Curtiss-Wright* is not smoking-gun evidence of a revolution in foreign affairs law. The use of the *Chevron* framework here may have been an anomaly; *Curtiss-Wright* may re-emerge in later cases. Still, other evidence suggests that the omission of *Curtiss-Wright* may not have been a mere coincidence. After all, *Boumediene v. Bush*,<sup>114</sup> handed down in the term before *Eurodif*, had greatly undermined the rationale that drove the *Curtiss-Wright* opinion. While the *Boumediene* majority cited *Curtiss-Wright* for the proposition that deference is owed to the political branches when they act in tandem, the Court ultimately struck down as unconstitutional the procedures established for reviewing the status of detainees held at Guantanamo Bay, Cuba.<sup>115</sup> In other words, the Court directly contradicted the first of Justice Sutherland's two assumptions: that there is no constitutional ceiling on the political branches when they act in tandem in the realm of foreign affairs.<sup>116</sup>

Just as *Boumediene* undermines the first of Sutherland's two assumptions, the extension of *Chevron* to foreign affairs law poses a challenge to the second: the presumption of accord between the two branches.<sup>117</sup> More fundamentally, *Chevron*'s application in foreign affairs may indicate a shift in assumptions about the nature of foreign affairs law dealing with security-wealth cases. The next Part considers the significance of that shift.

### III

#### CURTISS-WRIGHT, CHEVRON, AND TWO PARADIGMS OF INTERNATIONAL POLITICS

This Part explains the significance of the shift from *Curtiss-Wright* to *Chevron* in security-wealth cases.<sup>118</sup> *Chevron* carries implicit assumptions about the role of each branch of government, many of which diverge from the assumptions that underlie *Curtiss-Wright*. Because the assumptions of *Chevron* and *Curtiss-Wright* are irreconcilable, *Eurodif* may represent a veritable paradigm shift. If *Chevron*

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<sup>112</sup> *Id.* at 889.

<sup>113</sup> *Id.* at 887 (quoting *Smiley*, 517 U.S. at 742).

<sup>114</sup> 128 S. Ct. 2229, 2276 (2008).

<sup>115</sup> *Id.* at 2277.

<sup>116</sup> See *supra* note 59 and accompanying text.

<sup>117</sup> See *supra* notes 60–64 and accompanying text.

<sup>118</sup> Whatever the significance, the use of *Chevron* was undoubtedly in keeping with the times. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND POLICY: PROBLEMS, TEXT, AND CASES 247 (6th ed. 2006) (noting *Chevron* has already been cited by courts more times than *Brown v. Board of Education*, *Roe v. Wade*, and *Marbury v. Madison*).

is to be expanded to foreign affairs law, the Court must jettison the logic and language of *Curtiss-Wright*.

This point has more than semantic value. Advocates of expanding *Chevron*'s application, for instance, have relied on *Curtiss-Wright* to support their claims.<sup>119</sup> Others have called for the incorporation of *Curtiss-Wright* as a "canon of construction" within the *Chevron* framework.<sup>120</sup> Both recommendations run into logical difficulties when one recognizes that the two doctrines perch on different sets of assumptions. Moreover, exploring the differing assumptions of *Chevron* and *Curtiss-Wright* highlights the fact that *Eurodif*'s move to *Chevron* represents a narrowing of executive discretion in the world of foreign affairs—a rather unexpected result given that the *Chevron* framework is traditionally considered a deferential approach.<sup>121</sup>

#### A. *The Respective Assumptions of Curtiss-Wright and Chevron*

The theory underpinning *Curtiss-Wright* envisions foreign affairs as a continuous struggle among states vying for supremacy in a condition of international anarchy.<sup>122</sup> Such anarchy leads to perpetual tension, Sutherland argued, with states poised for future hostilities.<sup>123</sup> "We are still a long way from that millennium of the poet's vision which is to witness the permanent retirement of the war drum and the battle flag," Sutherland warned, "and until that long-desired and blessed event shall have come to pass, it will be well for us to shape

<sup>119</sup> See, e.g., Posner & Sunstein, *supra* note 90, at 1202 (defending *Chevron*'s expansion by pointing to *Curtiss-Wright*).

<sup>120</sup> Bradley and Goldsmith have argued that, in the realm of foreign affairs, the logic of *Curtiss-Wright* works to eliminate normally applicable canons of construction—particularly the nondelegation canon—in what can be seen as a "counter-canon." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2101 (2005). In calling for *Chevron* to be expanded to foreign affairs law, no supporter has ever suggested that *Curtiss-Wright*'s counter-canon should be jettisoned. See, e.g., Posner & Sunstein, *supra* note 90, at 1196–97 & n.79 (arguing that canons of construction should continue to have role in *Chevron* framework and noting Bradley and Goldsmith's analysis of *Curtiss-Wright*'s role as counter-canon).

<sup>121</sup> See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) ("Indeed, [*Chevron*] suggests that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is.").

<sup>122</sup> See Knowles, *supra* note 31, at 121 ("[Sutherland's opinion] essentially draws on all three major realist tenets—anarchy, unitary states, and *realpolitik*—to create a new paradigm for courts' treatment of foreign affairs issues.").

<sup>123</sup> Modern courts have alluded to the omnipresence of this *realpolitik* in foreign affairs. See, e.g., *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (discussing "unjudicial mindset that goes by the name *Realpolitik*"); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978) ("In their external relations, sovereigns are bound by no law . . .").

our course upon the theory that . . . days of stress are sure to come . . . .”<sup>124</sup>

The danger posed by international affairs had significant effects domestically, Sutherland concluded, necessitating a two-world distinction between “our *internal* and our *external* relations.”<sup>125</sup> Specifically, Sutherland believed that the threat of enemies abroad quells internal dissent to the point that harmony among important political groups can be assumed—an effect known in politics as the “rally-around-the-flag effect.”<sup>126</sup> This expedites judicial inquiry by permitting a conclusive presumption that the executive is acting in accord with the legislature, but it bypasses any political dissension that may have restrained the executive branch.<sup>127</sup>

Where *Curtiss-Wright* encourages skirting political disagreement arising in foreign affairs debates, extending *Chevron* sets jurisprudence on a doctrinal path toward embracing whatever discord exists in setting national policy. *Chevron*, after all, implicitly acknowledges through its two-step inquiry that political disagreements arise between the executive and legislative branches. Before accepting the executive’s interpretation of the law, “*Chevron* step one” requires that the judiciary first look to congressional intent.<sup>128</sup> If, at step one, the court concludes that the unambiguous meaning of the statutory language forecloses the executive’s interpretation, the court often rationalizes

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<sup>124</sup> SUTHERLAND, *supra* note 52, at 174–75.

<sup>125</sup> George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 373, 374 (1910); *see also* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–18 (1936) (repeating distinctions between domestic and foreign affairs). Sutherland thought this two-world distinction explained differing levels of deference to political branches by the courts. After all, he was one of the “Four Horsemen,” conservative justices who repeatedly struck down New Deal legislation as an impermissible expansion of the federal government. Justice Sutherland reconciled his different positions by claiming a fundamental distinction between domestic and international affairs. *See, e.g.*, SUTHERLAND, *supra* note 52, at 31 (claiming distinction between interstate and foreign commerce); *see also* White, *supra* note 31, at 47–48 (discussing Sutherland’s early writings distinguishing domestic and international spheres).

<sup>126</sup> *See supra* notes 60–64 and accompanying text (detailing Sutherland’s description of political harmony); *see also* Mark Souva, *Foreign Policy Determinants: Comparing Realist and Domestic-Political Models of Foreign Policy*, 22 CONFLICT MGMT. & PEACE SCI. 149, 152 (2005) (describing conditions of rally-around-the-flag effect). Sutherland himself noted the “passionate love of country and that flaming devotion to her flag” that outshines cosmopolitanism in international affairs. SUTHERLAND, *supra* note 52, at 177.

<sup>127</sup> *See supra* notes 60–64 and accompanying text (noting Sutherland’s assumption of accord between political branches).

<sup>128</sup> *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); Note, “*How Clear Is Clear*” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1691 (2005) (reviewing step one inquiry).

its invalidation of the executive's policy decision on the grounds that Congress disagreed and foreclosed the executive's choice in writing the statute.<sup>129</sup> In this way, *Chevron* embraces discord among the political branches, thereby balancing decisionmaking between them.

In selecting a framework for foreign affairs law that embraces the political component of law, *Eurodif* recognizes that the primary factors influencing foreign policymaking come from *within* a state. When extended to foreign affairs law, *Chevron* seems to acknowledge that political pressure groups, politicians, and bureaucrats have a significant impact on foreign policy, contradicting Sutherland's description of the executive as "the sole organ of the federal government in the field of international relations."<sup>130</sup> Using *Chevron* implicitly acknowledges that foreign affairs law is forged by the same political forces responsible for domestic policy. In other words, *Chevron* situates the judicial theory of international relations within a paradigm that sees no significant difference between the policymaking processes in foreign and domestic settings and permits the judiciary to proceed without switching any of its traditional tools.<sup>131</sup> Extending *Chevron* to foreign affairs law reverses the central premise of *Curtiss-Wright* that foreign affairs are different from domestic politics.<sup>132</sup>

### B. *The Significance of Eurodif's Paradigmatic Shift*

The shift back to a unitary paradigm would have three significant consequences. First, abandoning *Curtiss-Wright's* dichotomy between domestic and foreign affairs law undermines the previous rationale for extensive deference to the executive in international relations because *Curtiss-Wright* deference was premised on a notion of foreign affairs as driven by concerns fundamentally different from domestic affairs. While it is common to refer to "*Chevron* deference," it is a different kind of deference. *Chevron's* central goal is to return decisionmaking

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<sup>129</sup> See, e.g., *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 935–36 (6th Cir. 2009) (striking agency's final rule on grounds that it contradicted Clean Water Act and "Congress's expressed intent" to regulate broad arrays of pollutants under statute).

<sup>130</sup> *Curtiss-Wright*, 299 U.S. at 320; see also *Pasquantino v. United States*, 544 U.S. 349, 351 (2005) (citing *Curtiss-Wright*, 299 U.S. at 320).

<sup>131</sup> See Bradley, *supra* note 89, at 651 (noting that Supreme Court's explanations for deference to executive "have relied too heavily on a bright-line distinction between 'foreign' and 'domestic'—a distinction that appears increasingly less tenable in this age of globalization").

<sup>132</sup> *Curtiss-Wright*, 299 U.S. at 315 (noting "fundamental" differences between powers of federal government with respect to foreign affairs versus domestic affairs); see also Nzelibe, *supra* note 38, at 944 (arguing that "[f]oreign affairs is different").

to the politically accountable branches,<sup>133</sup> but a court defers to the collective decisions of *two* branches, and in this way breaks from the one-dimensional deference encouraged by *Curtiss-Wright*.

Second, extending *Chevron* to foreign affairs law restores judicial inquiry into congressional intent. Congressional intent is dispositive under *Chevron* because deference to the executive at “*Chevron* step two” can only take place if explicitly or implicitly allowed by the statute at issue.<sup>134</sup> This has led the Court to embrace a more rigid inquiry at step one, on the theory that unambiguous language is a congressional proscription on executive actions that conflict.<sup>135</sup> In a similar vein, some judges have seen *Chevron* step one as the proper moment to inquire into the legislative history of the statute at issue, using congressional reports, floor debates, and other materials to clarify its meaning.<sup>136</sup> Consequently, *Chevron* is a more balanced inquiry than *Curtiss-Wright*’s single-minded focus on the executive branch. Extending the administrative law framework to foreign affairs ultimately means revisiting the role of the legislative branch in foreign affairs, a dimension elided when operating under *Curtiss-Wright*.

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<sup>133</sup> *Chevron*, 467 U.S. at 866 (“The responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))).

<sup>134</sup> *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 479 n.14 (1997); see also *Chevron*, 467 U.S. at 842–43 (requiring judiciary to give effect to clear congressional intent); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *GEO. L.J.* 833, 836 (2001) (“The conclusion that *Chevron* rests on an implied delegation from Congress . . . has important implications for *Chevron*’s domain: It means that Congress has ultimate authority over the scope of the *Chevron* doctrine, and that the courts should attend carefully to the signals Congress sends about its interpretative wishes.”). Some *Chevron* proponents, of course, reject associating deference with any congressional intent inquiry. Justice Scalia, for instance, advocates *Chevron* deference but, as a textualist, makes no argument about Congress’s intent. Elizabeth Garrett, *Legislating Chevron*, 101 *MICH. L. REV.* 2637, 2643 (2003).

<sup>135</sup> See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”); *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (“[T]he first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute.”).

<sup>136</sup> Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *WASH. U. L.Q.* 351, 357 (1994) (“The *Chevron* opinion speaks the language of legislative intent and was authored by Justice Stevens, the last true-blue holdout in favor of intentionalism and legislative history in statutory interpretation.”). In contrast, *Curtiss-Wright* made only cursory claims of a “legislative practice” of deference to the executive in foreign affairs. See White, *supra* note 31, at 107–08 (discussing *Curtiss-Wright*’s cursory approach to legislative history); *supra* note 60–61 and accompanying text (describing legislative history analysis in *Curtiss-Wright*).

Third, if *Chevron* requires a genuine inquiry into the meaning of a statute—rather than simply presuming the executive’s interpretation to be correct—then Congress is empowered to foreclose certain executive actions that involve the security-wealth tradeoff.<sup>137</sup> Unlike *Curtiss-Wright*, *Chevron* makes no absolute presumptions about harmony among the political branches.

Empirical studies of the relationship between citations of *Curtiss-Wright* or *Chevron* and case outcomes similarly suggest that the *Chevron* framework applies more scrutiny to government claims than does *Curtiss-Wright*. As noted above, in almost every Supreme Court case citing *Curtiss-Wright*, the government has prevailed.<sup>138</sup> In contrast, the government has lost approximately one-third of the Supreme Court cases applying the *Chevron* framework.<sup>139</sup> While both are more deferential to the executive than not, these figures show how significant the selection of a framework can be.

Because *Curtiss-Wright* and *Chevron* rest on such irreconcilable assumptions, courts will have to settle on one theory to the exclusion of the other to be logically consistent. Merely identifying the two opinions’ respective assumptions, however, adds little insight into which approach is more desirable.<sup>140</sup> The next Part explains why *Chevron* is preferable in security-wealth cases.

#### IV

##### THE RESPECTIVE MERITS OF THE *CHEVRON* AND *CURTISS-WRIGHT* FRAMEWORKS FOR SECURITY-WEALTH TRADEOFFS

This Part evaluates the merits of the *Chevron* framework in security-wealth cases as compared to the approach that always defers to executive action—an approach I refer to as the “*Curtiss-Wright* framework.”<sup>141</sup> Sticking to a traditional economic definition of good government, this Note defines a legal regime’s effectiveness by the

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<sup>137</sup> In other words, *Chevron* leads to the possibility that (borrowing Justice Jackson’s trichotomy) the executive’s power could be at “its lowest ebb,” and its actions would consequently be “scrutinized with caution.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

<sup>138</sup> See *supra* note 82 and accompanying text. Again, due to Justices’ latitude in selecting citations, these studies must be scrutinized with caution.

<sup>139</sup> Posner & Sunstein, *supra* note 90, at 1199.

<sup>140</sup> Cf. POSNER & VERMEULE, *supra* note 12, at 27 (noting identification of Pareto frontier does not by itself indicate which policy maximizes social welfare).

<sup>141</sup> The focused nature of this Part’s inquiry leaves open the possibility that *Curtiss-Wright* may be the appropriate framework for judicial inquiry into other subfields of foreign affairs law. For instance, the general merits of the *Chevron* framework in security-wealth cases, outlined below, may not hold in times of national emergency. Therefore, this Note is complementary to, rather than undermining of, scholarship calling for a deferential

probability that through it society will select the ratio of wealth to security that will maximize the aggregate welfare of all citizens.<sup>142</sup> This Part assesses effectiveness in several steps. Parts A and B outline two conditions where the *Curtiss-Wright* framework would likely be the more efficient approach, before concluding that neither condition is likely to recur systemically in security-wealth cases. Part C highlights some advantages that using *Chevron* offers in certain security-wealth cases and concludes that these benefits outweigh those of *Curtiss-Wright*.

### A. *The Security State*

One condition favoring a *Curtiss-Wright* framework would arise where state decisionmaking is almost entirely focused on security. I refer to this condition as the “security state.”<sup>143</sup> Here, the state is singularly focused on one problem—protecting the state—and consequently gravitates toward policies that maximize security without regard to national wealth.<sup>144</sup>

Under security-state conditions, *Curtiss-Wright* is appropriate for a number of reasons. First, as decisionmakers are presented with fewer choices that they perceive as realistic due to external security-related pressures on the state in an anarchical world, there is less chance of discord among the political branches. Similarly, an unequivocal preference for security reduces the chances that a policymaker will err in setting policy. Rather than having to calculate the relative advantages and weaknesses of each position as a function of two variables, the decisionmaker in the security state takes only security into account. Reducing the difficulty of setting policy also reduces the benefit of having a second branch vet the first decisionmaker’s choice because there is a reduced chance of error and, consequently, less value in oversight. Reduced need for judicial review expedites judicial inquiry, lowering transactional costs that two-branch decisionmaking

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judicial approach in times of genuine emergency. See, e.g., POSNER & VERMEULE, *supra* note 12 (championing broad deference to executive branch in emergency situations).

<sup>142</sup> See POSNER & VERMEULE, *supra* note 12, at 30 (arguing that “well-motivated” governments choose policies according to what they believe will “maximize the welfare of all persons properly included in the social welfare function” (emphasis omitted)).

<sup>143</sup> Koh and Yoo use a similar term, the “national security state,” to refer to the Cold War period of “heightened U.S. concern for national security.” Koh & Yoo, *supra* note 23, at 730.

<sup>144</sup> The security-state condition is a well-accepted concept in political science, serving as the central paradigm of the realist school of international relations. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 91 (1979) (laying out theory of structural realism). See generally Jack Donnelly, *Realism*, in *THEORIES OF INTERNATIONAL RELATIONS* 29 (Scott Burchill et al. eds., 3d ed. 2005) (summarizing realism).

can impose on foreign policy.<sup>145</sup> The lower possibility of disagreement between the political branches, the lower chance of errors by a single actor, and the advantages of expedited review of foreign policy decisions all favor the broader *Curtiss-Wright* deference under security-state conditions.

But while the accuracy of the security-state paradigm is ultimately an empirical question, neither history nor the nation's constitutional structure suggests that the United States is willing to fully subjugate national wealth to national security. First, the constitutional separation of the purse and the sword suggests that the United States is not the security state that realists describe.<sup>146</sup> Placing military authority in the executive branch while allocating the various purse powers to Congress—especially the power to raise armies—contradicts the description of a state as privileging security over all other national goals.<sup>147</sup> Rather, this separation of powers suggests that the Framers hoped to restrain the executive in the exercise of his military powers and consequently selected a framework that encouraged compromise.<sup>148</sup>

Second, American history undermines the claim that the United States is singularly focused on security without any thought to cost.<sup>149</sup> American history includes periods such as World War II or the global war on terrorism when, in fully mobilizing for war, the nation wrote

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<sup>145</sup> Costs that a court can impose on a state in foreign policy include erosion of secrecy, embarrassment, and undermining of the legitimacy of the political branches. Knowles, *supra* note 31, at 127–38; *cf. infra* notes 156–58 and accompanying text (listing transaction costs imposed by legislature on executive decisionmaking).

<sup>146</sup> Similarly, the constitutional theory expounded in *Curtiss-Wright* is a “dramatically different vision of the National Security Constitution from that which has prevailed since the founding of the Republic.” HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990); *see also* *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (“[T]he never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge . . . and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.”).

<sup>147</sup> This clear separation of the sword and the purse is much more explicit than the division between the sword and those constitutional mechanisms intended to protect personal liberty (embodied in the Suspension Clause, for instance). Consequently, unilateral decisionmaking by the executive is even more difficult to reconcile with the constitutional framework specifically intended to adjudicate security-wealth cases.

<sup>148</sup> *Cf.* EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 171 (1957) (noting that Constitution is, as between governmental branches, “an invitation to struggle for the privilege of directing American foreign policy”).

<sup>149</sup> Indeed, realism as a school has been attacked in the post-Cold War era as having little empirical evidence to support its predictions. *See, e.g.*, Friedrich Kratochwil, *The Embarrassment of Changes: Neo-realism as the Science of Realpolitik Without Politics*, 19 *REV. INT’L STUD.* 63, 69–74 (1993) (arguing realism during, and at close of, Cold War suffered from serious empirical deficiencies).

the military a blank check.<sup>150</sup> Such episodes, however, are rare; generally, the state prefers not to spend unlimited amounts for the Defense and State Departments.<sup>151</sup> Even national defense programs are not immune from periodic rounds of budget cuts.<sup>152</sup> Decisions to favor wealth over security, in fact, often have popular support.<sup>153</sup>

Both history and constitutional structure, then, suggest the security-state condition is rarely found in the United States. Consequently, the security-state imperative provides no convincing reason to apply *Curtiss-Wright* in general security-wealth cases.

### B. Fluid Decisionmaking: Institutional Capacity Arguments

Instead of a “security-first” mindset, a state’s optimal point on the Pareto frontier may not be simplistic or fixed. Describing state preferences for security as opposed to liberty (similar to this Note’s discussion of preferences for security as opposed to wealth), Posner and Vermeule argue that, given the unstable and unpredictable nature of foreign affairs, the Pareto frontier is ever-changing, meaning the equilibrium along the frontier cannot be fixed.<sup>154</sup> The very difficult job of government, they argue, is to establish the tradeoff point based on the preferences of the population over time and to set state policy based on that tradeoff point.<sup>155</sup>

Posner and Vermeule’s conclusions about the preferable level of judicial deference to the executive in liberty-security cases are drawn from institutional comparisons of the three branches of government. In an executive-versus-legislature comparison, Posner and Vermeule

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<sup>150</sup> During World War II, military spending reached thirty-seven percent of the national GDP. Travis Sharp, *Tying U.S. Defense Spending to GDP: Bad Logic, Bad Policy*, 38 *PARAMETERS* 5, 10 (2008); see also *supra* note 1 (reciting 2009 Department of Defense budget request).

<sup>151</sup> For instance, in a 2003 hearing held by the Senate Appropriations Committee, Senator Byrd said there would be oversight of the budget for the Iraq war because “we are talking about the expenditure of the taxpayers’ money. . . . There are limitations, there will be limitations, there ought to be limitations.” *Supplemental Appropriations for Fiscal Year 2003: Hearing Before the S. Comm. on Appropriations*, 108th Cong. 32 (2003).

<sup>152</sup> In the immediate post-Cold War period, both Republican and Democratic administrations led rounds of budget cuts in the defense and intelligence sectors. In President George H.W. Bush’s last year in office, for instance, he proposed a \$3 billion reduction in military spending. Eric Schmitt, *Clinton Seeking \$14 Billion Cut by the Military*, *N.Y. TIMES*, Feb. 4, 1993, at A1. Upon taking office, the Clinton administration proposed a \$14 billion reduction. *Id.*

<sup>153</sup> In the 1992 presidential campaign, for example, both candidates pledged to make cuts in the military budget. *Id.*

<sup>154</sup> POSNER & VERMEULE, *supra* note 12, at 27 (“As threats increase, the value of security increases.”).

<sup>155</sup> See *id.* at 26–28 (discussing trade-offs governments make as “security-liberty frontier” change over time).

conclude that the legislature may threaten to “block or delay justified security measures” because minorities in Congress are empowered to block policies and laws that are, on the whole, good for the nation.<sup>156</sup> Moreover, Congress has other institutional disadvantages, such as “lack of information about what is happening [in emergency situations], lack of control over the police and military, [and] inability to act quickly and with one voice.”<sup>157</sup> Unilateral executive decision-making, in contrast, avoids any errors or delay that congressional input might create.

Using institutional capacity arguments, Posner and Vermeule thus outline another circumstance where the *Curtiss-Wright* framework could be preferable for security-wealth cases, one that I refer to as the condition of *executive superiority*. Under this condition, dynamic external circumstances lead to an unstable point of indifference—namely, how many units of wealth a state is willing to trade for a marginal unit of security. As such, identifying the optimal tradeoff point is a significant difficulty for rational government decisionmakers, and each decisionmaker is limited by the institutional constraints on his corresponding branch.

Unilateral decisionmaking by the executive allows difficult policy choices about security-wealth tradeoffs to be made by the most competent branch. It also avoids the transactional “costs of process, including the opportunity costs of governmental action that is delayed or forgone while the wheels of legal liberalism turn ponderously.”<sup>158</sup> These gains, in turn, outweigh the costs of unchecked executive decisionmaking, such as more errors or systemic biases in a single branch.

Posner and Vermeule persuasively outline a deferential judicial framework that can have advantages in certain foreign affairs cases.<sup>159</sup> Many sources of these executive institutional advantages, however,

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<sup>156</sup> *Id.* at 46–47 (noting Congress can play a productive role in decisionmaking but arguing Congress is generally “not well suited for emergency action”).

<sup>157</sup> *Id.* at 47. Posner and Vermeule do not dwell on the Congress-versus-President aspect of institutional comparisons. Instead, they largely assume that, in emergency situations, Congress and the President are in accord—just as Justice Sutherland assumed in *Curtiss-Wright*. See *id.* (noting Congress rarely challenges President, and is more likely to “confine [itself] to expressions of support or concern”). Even if Congress has not traditionally challenged the executive during times of emergency, however, the same passivism does not exist in everyday policy decisions. See Nzelibe, *supra* note 38, at 965 (“Far from taking a ‘single-voice’ approach to foreign affairs matters, Congress and the President routinely joust for power in foreign affairs matters.”).

<sup>158</sup> POSNER & VERMEULE, *supra* note 12, at 273.

<sup>159</sup> See *id.* at 12 (introducing argument that “judges deciding constitutional claims during times of emergency should defer to government action”). Posner and Vermeule, however, avoid answering one pressing question head-on: whether the marginal benefit gained by a highly deferential framework exceeds the benefits of a system of checks and balances. Failing to compare both sides of this ledger leaves an unfinished argument as to why for-

have only marginal importance in the average security-wealth case.<sup>160</sup> Dispatch, for instance, is important in a notable number of foreign policy decisions (for instance, whether to deploy emergency troops to a newly destabilized region) in which involving other branches will likely slow the ability of the government to respond to immediate foreign threats.<sup>161</sup> But most programs that involve security-wealth decisions do not require the same expediency.<sup>162</sup> Programs like sanctions and other coercive economic measures can take years to have an effect. Similarly, government agencies are hardly expedient. The Commerce Department regulations challenged in *Eurodif*, for instance, took one year to promulgate after USEC petitioned the Department and six additional months to finalize.<sup>163</sup>

The lack of any need for dispatch in the average security-wealth case suggests that the persuasiveness of Posner and Vermeule's argument for *Curtiss-Wright*-like deference in some cases is less gripping in the context of run-of-the-mill security-wealth situations.<sup>164</sup> Before recommending the abandonment of such deference, however, this Note explores the advantages of *Chevron* in security-wealth cases.

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eign affairs law justifies diverging from traditional checks and balances. The advantages of a divided political system are discussed *infra* notes 166–77 and accompanying text.

<sup>160</sup> This is not to say that *Curtiss-Wright* does not retain utility in certain subfields of foreign affairs law. In many cases involving the military and immediate national security interests, the framework may remain a useful tool. See, e.g., *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008) (arguing judiciary's second-guessing of foreign policy decisions undermines "the Government's ability to speak with one voice").

<sup>161</sup> See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 188 ("[I]nstitutional structure suggests that judicial activity in foreign policy may be slow, in terms of both implementation and self-correction.").

<sup>162</sup> The expediency argument has also been raised in some foreign affairs cases when the need for dispatch could be genuinely contested. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 241 (1944) (Murphy, J., dissenting) (noting nearly year-long delay in establishing internment camps).

<sup>163</sup> See *supra* notes 99–100 and accompanying text (discussing *Eurodif* rulemaking). This turnover is actually quick compared to other decisions made through the processes of the administrative state. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–91 (1992) (discussing examples of delays in rulemaking process).

<sup>164</sup> Posner and Vermeule offer alternative characteristics of the executive that make it superior to Congress. They suggest that Congress, for instance, may be susceptible to minority influence that will prevent optimal policymaking. POSNER & VERMEULE, *supra* note 12, at 4–7. These arguments, however, are huge broadsides against the democratic system and would suggest that congressional input is never useful. Other arguments, like the expertise of the executive branch, are framed by the authors such that they are intimately related to dispatch (for instance, the suggestion that "Congress is more deliberative" than the executive). *Id.* at 47.

### C. *The Appeal of Chevron in Security-Wealth Cases*

Because the advantages of a *Curtiss-Wright* framework do not apply with the same force in security-wealth cases, there is good reason to doubt the appropriateness of its application to such scenarios. This Section goes on to consider why *Chevron* might offer a fruitful alternative.<sup>165</sup>

*Chevron's* advantages in foreign affairs law begin with the advantages of dividing decisionmaking authority between two political branches. As a framework that distributes power between two branches, *Chevron* is a system that mitigates the effects of an executive who fails to act in the public interest.<sup>166</sup> Executive divergence from the public interest can arise for a number of political reasons.<sup>167</sup> For instance, the President's relatively short term in office can lead the politically motivated executive to avoid policies that have deferred payoffs.<sup>168</sup> Many policies implicating national wealth and national security, however, do not have significant effects for many years. Trade regimes, for instance, can take years to increase national welfare conditions because firms may have to relocate or grow in response to reshuffled incentives; similarly, some military actions like sanctions or blockades do not have immediate consequences. Because members of Congress often serve much longer, empowering the legislature in security-wealth cases can help the state select a mix of policies that includes those with deferred payoffs.<sup>169</sup>

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<sup>165</sup> Many of these reasons are not unique to the security-wealth context. Coupled with the reasons why *Curtiss-Wright* offers little benefit in this context, however, these reasons may ultimately prove dispositive because fewer countervailing considerations exist.

<sup>166</sup> Posner and Vermeule largely dismiss the value of two-branch decisionmaking by assuming perfectly rational decisionmakers. POSNER & VERMEULE, *supra* note 12, at 29–30 (explaining assumption of “rational and well-motivated” policymaker). This assumption, unqualified, proves too much because it suggests that a two-branch system of government is never (or, at best, rarely) advisable. *See id.* at 30–31 (admitting that this simple assumption is “almost certainly incorrect”).

<sup>167</sup> Michael Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2106 (2006) (“Indeed, because the President and Congress may be effectively answerable to somewhat different constituencies, and because they have different, and even at times antagonistic, institutional interests and priorities, they may each approach the conflict between security and liberty somewhat differently.”).

<sup>168</sup> *See generally* Henry W. Chappell, Jr. & William R. Keech, *Welfare Consequences of the Six-Year Presidential Term Evaluated in the Context of a Model of the U.S. Economy*, 77 AM. POL. SCI. REV. 75 (1983) (using experiments based on model of vote-maximizing choice of policy instruments to conclude that longer presidential terms would lead to reduced welfare loss).

<sup>169</sup> It lies beyond the scope of this Note to delve deeply into the virtues of a political system of checks and balances. Here, it suffices to say that there must be some positive value to be gained from a political system that checks one branch with another, simply because no leader is an angel. *Cf.* THE FEDERALIST NO. 51, at 322 (James Madison)

Other electoral differences can cause divergence between executive and legislative choices in security-wealth cases. For instance, the public may consider national security more of a presidential responsibility than a congressional one; if so, a vote-seeking executive would systematically select security-maximizing positions at the expense of national wealth. Even if the general public does not make this distinction, the difference in presidential and congressional constituencies can cause bias in the selection among security-wealth policies. Suppose, for instance, that arms dealers provide critical political support for the President, while key members of Congress rely on the support of certain importers.<sup>170</sup> In these cases, balancing power between the branches helps avoid rent-seeking behavior along the security-wealth Pareto frontier.

In a different vein, *Chevron's* emphasis on procedure—incorporating the executive to respect certain established protocols like notice-and-comment rulemaking—can help decisionmaking by passing on the institutional memory of former administrations.<sup>171</sup> Given the sporadic nature of foreign policy decisionmaking (only rarely does the executive face the same strategic security-wealth problem multiple times), laws “borne out of experience”<sup>172</sup> can enhance imperfect executive decisionmaking.

A third type of advantage that *Chevron* offers arises from the fact that security-wealth cases often require negotiations with another foreign party, whether over the sale of fighter jets or a mutual tariff reduction.<sup>173</sup> In international negotiations, the structure of political institutions can have an important role in building a state's reputa-

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(Clinton Rossiter ed., 1961) (“If angels were to govern men, neither external nor internal controls on government would be necessary.”).

<sup>170</sup> This example is adapted from Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1004 (2008).

<sup>171</sup> Stephen Holmes illustrates this point: “[Procedural] [r]ules do not function always and exclusively as disabling restraints, binding our hands; they can also serve as steadying guidelines, focusing our aim, and reminding us of long-term objectives and collateral dangers that might otherwise slip from view in the flurry of an unfolding crisis.” Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 303–04 (2009).

<sup>172</sup> Cf. Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1267 (2004) (discussing electronic surveillance laws, which were “borne out of experience”).

<sup>173</sup> In contrast, security-liberty issues are largely domestic debates with few foreign parties directly involved. Common security-liberty cases, for instance, are the suspension of habeas corpus or the use of coercive interrogations, where international pressure may be applied but where diplomacy is not central to the debate. There are, of course, exceptions to both generalizations.

tion.<sup>174</sup> Public participation and open debate—particularly in fora like Congress—can send clear and credible information regarding U.S. intentions to other states.

Two-branch decisionmaking can increase state credibility in at least two ways. First, when the executive is not empowered to make international agreements unilaterally but rather serves as an agent requiring approval of Congress, he can credibly claim certain concessions are beyond legislative acquiescence.<sup>175</sup> Second, interbranch communication through public forums, such as the media and the congressional record that inevitably takes place during two-branch decisionmaking, can send credible signals to adversaries. Democracies, for instance, may be constrained from misleading other countries by the disincentives of misleading their own public. If signals to other countries also are likely to be seen by the public, a democracy's message may be much more believable. In contrast, autocratic leaders have less incentive to be truthful to their own populations and therefore cannot send the same signals credibly.<sup>176</sup>

Administrative decisionmaking, particularly through informal rulemaking, is a similarly transparent process that conveys U.S. intentions in a credible way. The *Chevron* framework, then, increases credibility by requiring interbranch coordination and encouraging the executive to use public procedures like notice-and-comment rulemaking. In contrast, the one-branch decisionmaking process facilitated by *Curtiss-Wright* reduces the likelihood of intragovernmental debate that can be witnessed by other states.<sup>177</sup>

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<sup>174</sup> Factors related to perceptions, for instance, explain why the United States does not view French nuclear weapons with the same alarm as nuclear weapons in North Korea. See STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* 5 (1987) (“[T]he level of threat is also affected by . . . perceived intentions.”).

<sup>175</sup> As Thomas Schelling once noted:

If the executive branch is free to negotiate the best arrangement it can, it may be unable to make any position stick and may end by conceding controversial points . . . . But if the executive branch negotiates under legislative authority, with its position constrained by law . . . then the executive branch has a firm position that is visible to its negotiating partners.

Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 286–87 (1956). From this perspective, one sees that the advantages of dispatch and secrecy extolled by Justice Sutherland in his *Curtiss-Wright* opinion, *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936), can be costly. Particularly in cases where secrecy and dispatch have limited utility, secrecy—and a judicial framework that encourages secrecy—may cut against the national interest.

<sup>176</sup> Gilat Levy & Ronny Razin, *It Takes Two: An Explanation for the Democratic Peace*, 2 J. EUR. ECON. ASS'N 1, 12 (2004).

<sup>177</sup> While the executive could strategically volunteer for such a dialogue, the political costs of pushing legislation through Congress inherently limits the number of times that the President elects to go to Congress when it is not necessary.

Credibility is also valuable as a means of extracting concessions from other states. Political scientists and legal scholars have emphasized the ways in which state credibility strengthens a state's position during international conflicts, deterring other states from belligerent behavior toward the United States.<sup>178</sup> Credibility also strengthens U.S. efforts to cooperate internationally by reducing the concern other states commonly have about potential cheating.<sup>179</sup>

For these reasons, the movement toward *Chevron* in security-wealth cases is welcome both as an improved process of decision-making and as a method of signaling U.S. intentions to other nations.<sup>180</sup> While *Curtiss-Wright* may still be useful in other cases,<sup>181</sup> this Note recommends confining that subset and extending *Chevron* to the remainder.

#### CONCLUSION

This Note sheds light on an overlooked corner of foreign affairs law: the security-wealth tradeoff. As with the security-liberty tradeoff, security and wealth are often substitutable goods, with leaders facing a tough decision whether to increase one at the expense of the other. While courts for the last ninety years have been content to leave such decisionmaking almost exclusively to the executive branch, the recent expansion of the *Chevron* framework to foreign affairs law in *Eurodif*

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<sup>178</sup> See, e.g., James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 586–87 (1994) (explaining how credibility helps democracies in international conflicts); Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1003–04 (2006) (arguing congressional authorization sends signal of U.S. resolve to foreign enemies, helping deter aggression).

<sup>179</sup> See, e.g., Charles L. Glaser, *The Security Dilemma Revisited*, 50 WORLD POL. 171, 190 (1997) (“[U]nder a range of conditions security seekers should find cooperation to be their preferred policy.”).

<sup>180</sup> *Chevron* may be preferable not only as an alternative to *Curtiss-Wright* but also to the older formalist framework discussed above. See *supra* Part II.A. *Chevron* accommodates a certain amount of flexibility in the law by granting the executive some discretion. Bradley, *supra* note 89, at 674. Likewise, *Chevron* allows Congress to delegate to the executive specified decisions best made by the President. See Eisner, *supra* note 90, at 422 (“The *Alejandro II* court correctly pointed out that *Chevron* deals with an administrative agency’s construction of an ambiguous statute that Congress has mandated that it administer and does not mandate that courts defer to a presidential interpretation of statutory ambiguity.”) (citation and internal quotes omitted); Posner & Sunstein, *supra* note 90, at 1204 (“[C]ourts should defer to the executive’s judgment [rather than relying on international comity doctrine] unless it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable.”). The framework, then, allays fears about formalism, see *supra* notes 54–55 and accompanying text, without jettisoning two-branch decisionmaking.

<sup>181</sup> Peculiarities of other subfields of foreign affairs law—such as the greater need for dispatch or secrecy—might alter the value of two-branch decisionmaking vis-à-vis one-branch decisionmaking. Consequently, further investigation is needed before recommending one framework over another.

may have been the first step in returning valuable congressional input into the decisionmaking process. Only time will tell if *Eurodif* is the first case of a new *Chevron* era for security-wealth cases or if *Eurodif* will go down as an anomaly. If the former is the case, *Chevron* will improve foreign policy decisionmaking and return much-needed reflection to the policymaking process.