ARTICLE

FOREIGN AFFAIRS, NONDELEGATION, AND ORIGINAL MEANING: CONGRESS'S DELEGATION OF POWER TO LAY EMBARGOES IN 1794

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Originalist proponents of a tougher nondelegation doctrine confront the many broad delegations that Congress enacted in the 1790s by claiming that each fell into some exceptional category to which the original nondelegation doctrine was inapplicable or weakly applicable, one being foreign affairs. There is lively debate on whether the founding generation actually recognized an exception to nondelegation principles for foreign affairs. This Article, commissioned for a symposium on "The Statutory Foreign Affairs Presidency," intervenes in the debate by examining the Embargo Authorization Act of 1794, which empowered the President to lay an embargo on all ships in U.S. ports (and/or other classes of ships) if "the public safety shall so require," for the upcoming five-month congressional recess. This was a delegation of remarkable power over the U.S. economy, which at the time depended heavily on maritime transport.

An examination of the Act undermines the idea that there existed a foreign-affairs exception to cover it. Originalist proponents of a tougher nondelegation doctrine claim the doctrine was meant to protect private individual rights of liberty and property, yet Americans in the late 1700s lived in an economy that was more dependent on foreign commerce than it has ever been since, in which a five-month international embargo could be disastrous for private business nationwide. In this context, an

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"exception" for foreign affairs would be strange, turning economic reality on its head. Furthermore, the Act itself flouted any objective or even workable distinction between the foreign and the domestic. The Act's unqualified use of the term "embargo" authorized the President to prohibit the departure of all ships, not only those sailing to foreign ports but also to other U.S. ports in the coastwise trade, which was then the main channel of U.S. domestic commerce. And even if the President were to impose an embargo aimed mainly at international maritime trade, preventing evasion of such a restriction required regulation of the coastwise trade—regulation that contemporaries apparently understood the Act to authorize.

INTRODUCTION

When Congress enacts a statute, it often gives the executive branch discretion in implementing it. But if the discretion delegated by Congress is too great, then there is a constitutional violation, in that the discretion ceases to be merely executive and becomes legislative. That goes against Article I's vesting clause, under which "[a]ll legislative Powers herein granted shall be vested in" Congress[1] and cannot be given away. This principle, recognized by the Supreme Court since the 1800s, is the nondelegation doctrine. In practice, as applied to the statutes Congress has actually enacted, the doctrine has proven very permissive. Only two statutory provisions have ever been held to violate it, both in 1935 and both from the National Industrial Recovery Act (NIRA), which empowered the President to set output, prices, and other

1 U.S. CONST. art. I, § 1.

parameters for all industries and was very likely the most extreme delegation in congressional history.[2]

Today, there is a movement of jurists, scholars, and advocates—whom I call the nondelegation reformers—who think congressional delegations have gone too far and that the judiciary should toughen the nondelegation doctrine to strike down more statutes.[3] These reformers generally believe that a tougher nondelegation doctrine is required by the Constitution's original meaning, and they claim that a tougher doctrine is integral to what they consider the framers' larger vision that lawmaking needed to be difficult so as to minimize intrusion on "individual liberty," at the "heart" of which "were the Lockean private rights: life, liberty, and property."[4]

But if we examine the constitutional text and the discourse leading up to ratification in 1788, we find these sources may not establish a nondelegation doctrine at all,[5] and they certainly say nothing useful about what the content or stringency of such a doctrine should be, meaning they do not tell us whether to keep the permissive doctrine we have (striking down the NIRA but nothing short of it) or adopt something stronger.[6]

With so little guidance from text and pre-ratification discourse, the debate over nondelegation and original meaning often focuses on another type of evidence: early congressional legislation. But here, the nondelegation reformers run into the problem that Congress in the 1790s enacted several statutes with broad delegations, to little or no constitutional objection.[7] The

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2 *See* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1870-79 (2019).

3 For examples, see the opinions and studies *infra* note 9.

4 Dep't of Transp. v. Ass'n of Am. R.Rs, 575 U.S. 43, 75-76 (2015) (Thomas, J., concurring in the judgment). *See also* Gundy v. United States, 139 S. Ct. 2116, 2133-34 (2019) (Gorsuch, J., dissenting) (stating that "the framers understood [nondelegable legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons," that in their view "the new federal government's most dangerous power was the power to enact laws restricting the people's liberty," and that a nondelegation doctrine is necessary to restrict this power).

5 *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 289-332 (2021) (examining preratification sources to argue the doctrine was not established).

6 *See* Nicholas R. Parrillo, *Supplemental Paper to: "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s"* 3-8, 36-49 (May 14, 2021) [hereinafter Parrillo, *Supplemental Paper*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902 [https://perma.cc/VT2S-64B4]. A recent study discovers further pre-1788 evidence of some sort of nondelegation doctrine but acknowledges it does not speak to the doctrine's content. Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795, 801 n.25 (2022).

7 *E.g.*, Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 112-47 (2021); Mortenson & Bagley, *supra* note 5, at 332-66; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1311-12 (2021) [hereinafter Parrillo, *Critical Assessment*].

reformers have confronted these statutes by claiming they all fall into supposed exceptional categories to which (the reformers claim) the original nondelegation doctrine was inapplicable, or less-strongly applicable. One major exceptional category posited by the reformers is for foreign affairs.[8] The exception, in the reformers' view, doesn't merely cover delegated powers that are redundant with the subset of foreign-affairs powers that are within the executive's inherent authority under Article II. Instead it encompasses foreign affairs per se, extending to delegations of the subset of foreign-affairs powers that are vested in Congress under Article I, such as regulating commerce with foreign nations and Native tribes, even if such regulation interferes with individual private rights of liberty and property.[9] The

8 The other major exception is for noncoercive legislation, Parrillo, *Supplemental Paper*, *supra* note 6, at 17-18, in keeping with the nondelegation doctrine's supposed necessity for preserving private rights. I have argued elsewhere that, first, the supposed exceptions for foreign affairs and noncoercive legislation cover such a large majority of early congressional statutes that an absence of delegations in the small category of domestic-and-coercive legislation could result from the smallness of that category and not from any constitutional norm against delegations therein, *id.* at 21-25, and, second, that broad delegation was *not in fact* absent even from this small category of domestic-and-coercive legislation, Parrillo, *Critical Assessment*, *supra* note 7.

9 Justice Gorsuch posits an exception to the nondelegation doctrine for "non-legislative responsibilities," *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting), under which Congress may delegate "broad authority regarding the conduct of foreign affairs or other matters where [the President] enjoys his own inherent Article II powers," *id.* at 2144. But Gorsuch does not mean to confine this exception to the delegation of powers already within the President's inherent Article II authority (which delegations would be superfluous anyway). The main example he gives is an 1810 statute delegating power to ban commercial intercourse with another country during peacetime, *id.* at 2137 (citing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813)), which does not fall within inherent Article II authority but within Congress's Article I power to "regulate Commerce with foreign Nations." *See* U.S. CONST. art. I, § 8; THE FEDERALIST NO. 69 (Alexander Hamilton) (contrasting the British monarch's inherent power to "lay embargoes" with the lack of such inherent power in the President).

Gorsuch also posits a related exception for delegation of military-related powers, which likewise extends beyond the President's inherent Article II authority to cover matters within Congress's Article I authority. Thus, it is constitutional for Congress to authorize "the President to prescribe aggravating factors that permit a military court-martial to impose the death penalty on a member of the Armed Forces," because such a decision "may implicate in part the President's independent commander-in-chief authority," *Gundy*, 139 S. Ct. at 2140, even though the power to "make Rules for the Government and Regulation of the land and naval Forces" is vested in Congress by Article I. U.S. CONST. art. I, § 8.

For other originalist articulations of a foreign-affairs exception (often including military affairs), all of which extend it to matters vested in Congress by Article I (such as commerce with foreign nations or Native tribes), see *Ass'n of Am. R.Rs*, 575 U.S. at 80 (Thomas, J., concurring in the judgment) (positing an exception for delegations that "involved the external relations of the United States," such as governing embargoes); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 157-58 (2017) (positing a "special realm of national security and foreign affairs powers" in which otherwise impermissible delegations can be constitutional, such as regarding "embargoes"); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 782 (2020) ("Congress has broad license to delegate rulemaking authority to the president in the area of foreign affairs, even if such rules incidentally affect private actors

existence of this exception is important to the reform movement, as it gives reformers a rationale for dismissing early statutes that would otherwise be clear evidence against a tough nondelegation doctrine, such as an act of 1790 giving the President unlimited discretion to make regulations for anyone trading goods with Native tribes;[10] an act of 1792 allowing the President to lay off half the U.S. army "in case events shall in his judgment, render his so doing consistent with the public safety" (Congress had recently authorized expansion of the army for conflict with Natives);[11] or an act of 1794 empowering the President to lay and revoke embargoes during the upcoming five-month congressional recess "whenever, in his opinion, the public safety shall so require."[12]

There is lively debate today over whether Americans of the founding era actually understood foreign affairs to constitute an exceptional category with regard to nondelegation. Skeptics of the exception's existence have noted that, of the occasional nondelegation-based objections that lawmakers of the 1790s and early 1800s made against bills in Congress, several were against bills that would seem to fall *within* a foreign-affairs exception, suggesting the objectors recognized no such exception.[13] Conversely, lawmakers who defended such

domestically."); *id.* at 785 (applying this to matters "in the area of foreign affairs, and particularly national security," including foreign trade restrictions); Philip A. Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1203-04 (2023) (arguing that the early Congress did not authorize the executive to make "binding national domestic rules" but did allow "executive lawmaking in cross-border matters," such as trade with Native tribes); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 334 (2020) (suggesting an exception for powers that "do not involve limitations on the liberty or property of American nationals within American territory," including "implementation or termination of trade sanctions, and foreign affairs"); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line-Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 353 (2001) ("[T]here are strong reasons for believing that the exception for delegations concerning embargoes extends, in accordance with existing law, to delegations concerning military and foreign relations generally," and "for permitting delegations under laws involving foreign relations, such as foreign commerce"); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1549 n.322 (2021) ("Congress can . . . delegate . . . perhaps more in the foreign affairs space"); *id.* at 1543 (applying the exception to commerce with Natives tribes, which the author says fell into the "special context" of "the President's Treaty and Commander-in-Chief Powers").

10 Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. This Act is dismissed in, for example, Hamburger, *supra* note 9, at 1203; Wurman, *supra* note 9, at 1543.

11 Act of Mar. 5, 1792, ch. 9, §§ 2-3, 12, 1 Stat. 241, 241-43. This Act is discussed in MARVIN A. KREIDBERG & MERTON G. HENRY, HISTORY OF MILITARY MOBILIZATION IN THE UNITED STATES ARMY 1775-1945, at 29 (1955).

12 Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372. This Act is dismissed in, for example, *Ass'n of Am. R.Rs*, 575 U.S. at 78-80 (Thomas, J., concurring the judgment); Cass, *supra* note 9, at 157; Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152, 201-02 (2023).

13 Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2351-52 (2022); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1143-46 (2021) [hereinafter Note].

bills against nondelegation objections usually formulated their defenses in ways that ignored any supposed foreign-affairs exception, even though it would have been in their interest to invoke one.[14] Believers in the exception cite one lawmaker who defended a delegation's constitutionality on the ground of its foreign-affairs subject matter, Rep. William Findley, in a speech of 1808.[15] But skeptics respond by noting that Findley articulated his defense in loose functionalist terms, dependent upon the President's practical competence in foreign matters pertaining to the question at issue, not in terms of some formal "foreign affairs" category[16]—and, further, that Findley's was merely one speech out of the long founding era.[17] But the other side might retort that a foreign-affairs exception just makes sense given the Constitution's structure, that it seems implicit in the pattern of how early Congresses legislated,[18] and that Findley's speech must have reflected what his contemporaries generally assumed. (Ironically, nondelegation reformers defending the exception have modern non-originalist Supreme Court jurisprudence on their side, as the Court held in *United States v. Curtiss-Wright Export Corporation* in 1936 that the nondelegation doctrine is only weakly applicable in "the category of foreign affairs."[19] But that opinion did not follow originalist principles, so reformers reject its reasoning, even as they agree with its outcome.[20])

This Article intervenes in this debate by examining the most economically sweeping of the 1790s statutes that reformers have placed within a foreign-affairs exception and thereby dismissed: the act of June 4, 1794, empowering the President to lay and revoke embargoes whenever required by the "public safety" during the upcoming five-month congressional recess, which I call the Embargo Authorization Act.[21] Considering the relative magnitude of maritime commerce at the time, this was a remarkable delegated power to impact the U.S. economy. If the Act is not dismissible as falling within some exception like foreign affairs, it is strong evidence against a tough nondelegation doctrine. But while scholars of nondelegation have often noted

14 Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 290-92 (2021); Note, *supra* note 13, at 1143-46.

15 *E.g.*, Gordon, *supra* note 12, at 186-87.

16 Arlyck, *supra* note 14, at 291 n.312; Note, *supra* note 13, at 1144-45.

17 Additional evidence offered for a foreign-affairs exception in Gordon, *supra* note 9, at 782-86, is shown to be inapposite by Arlyck, *supra* note 14, at 288-90. For arguments against the relevance of other evidence offered by reformers, see Mortenson & Bagley, *supra* note 5, at 342; Parrillo, *Supplemental Paper*, *supra* note 6, at 19. *See also* Michael D. Ramsey & Matthew C. Waxman, *Delegating War Powers*, 96 S. CAL. L. REV. 741, 815-16 (2023) (finding insufficient basis in originalist materials for excepting war powers from the nondelegation doctrine).

18 *But see* Parrillo, *Supplemental Paper*, *supra* note 6, at 21-25.

19 299 U.S. 304, 315, 320 (1936).

20 *E.g.*, MCCONNELL, *supra* note 9, at 334; Rappaport, *supra* note 9, at 314-15.

21 *See supra* note 12.

the Act briefly (and noted, correctly, that it elicited no recorded constitutional objections),[22] the literature on nondelegation has no account of why Congress delegated this power or what its nature, scope, and gravity would have been if exercised (which, in the event, it never was).

A closer look at the Embargo Authorization Act undermines the idea that there existed a foreign-affairs exception to cover it. Part I introduces the Act, recounts the British threats to U.S. commerce that led to its passage, and explains Congress's reasons for delegating so broadly. Part II puts the Act in perspective. Reformers claim that the nondelegation doctrine was essential because it protected private individual rights of liberty and property, and yet they insist the doctrine had an exception for foreign affairs including foreign commerce. But that exception would only make sense in a country where exercising one's rights of liberty and property didn't practically depend much on foreign commerce, which is not the kind of country the United States was in the 1780s and 1790s. Amid the predominance of the domestic market that has prevailed in this nation since the mid-1800s (lessened only moderately by the rise of globalization since the late 1900s), it is easy to forget that Americans in the late 1700s lived in an economy that was more dependent on foreign commerce than it has ever been since, in which a five-month international embargo could be disastrous for private business nationwide. In this context, an "exception" for foreign affairs would be strange; it would turn reality on its head. Part III then explains how the Act itself flouted any objective or even workable distinction between the foreign and the domestic. First, the Act's unqualified use of the term "embargo" textually conferred the power to halt the departure of *all* ships, both those sailing to foreign ports *and* to other U.S. ports in the coastwise trade, which was then the main channel of U.S. *domestic* commerce. Second, even if an embargo aimed mainly at international maritime commerce, preventing evasion of such a restriction required regulation of the coastwise trade, that is, domestic regulation. President George Washington and Treasury Secretary Alexander Hamilton probably believed the Act gave them power to impose such domestic restrictions, judging from how they administered related legislation earlier in the year 1794.

(An alternative argument for why the Embargo Authorization Act does not undermine the case for a strong nondelegation doctrine—that the delegation was limited to the upcoming five-month congressional recess—is

22 *E.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 186 (1997); Mortenson & Bagley, *supra* note 5, at 356.

beyond the scope of this Symposium and of this Article, but some difficulties with the argument are noted in an online appendix.[23])

I. THE EMBARGO AUTHORIZATION ACT OF 1794

A. *The Act Itself*

The Embargo Authorization Act of June 4, 1794 had the full title "An Act to authorize the President of the United States to lay, regulate and revoke Embargoes."[24] Its entire text, omitting only the enacting clauses, was:

> Section 1. . . . That the President of the United States be, and he hereby is authorized and empowered, whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper. And the President is hereby fully authorized to give all such orders to the officers of the United States, as may be necessary to carry the same into full effect: *Provided*, The authority aforesaid shall not be exercised, while the Congress of the United States shall be in session: And any embargo, which may be laid by the President, as aforesaid, shall cease and determine in fifteen days from the actual meeting of Congress, next after laying the same.
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> Sec. 2. . . . That this act shall continue and be in force until fifteen days after the commencement of the next session of Congress, and no longer.[25]

Five basic points should be noted:

First: The ships that the President could subject to an embargo were of three classes: "[1] on all ships and vessels in the ports of the United States, or [2] upon the ships and vessels of the United States, or [3] the ships and vessels of any foreign nation." The first class simply referred to vessels by their location at the time the embargo was laid. The second class, "the ships and vessels of the United States," was a term of art referring to all ships that were of U.S. national character, that is, entitled to the protection of the United

23 Online Appendix, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4818549 [https://perma.cc/7EKR-GUC9].

24 Act of June 4, 1794, ch. 41, 1 Stat. 372, 372.

25 Act of June 4, 1794, ch. 41, 1 Stat. 372, 372.

States as a sovereign.[26] Under statutes of 1792 and 1793, these consisted of vessels that had obtained one of two types of government authorization. They either had to be (a) *registered*, which allowed them to sail to foreign ports, which is what they "usually" did, though they were also allowed to sail between U.S. ports along the coast;[27] or (b) *licensed*, which allowed them to sail between U.S. ports along the coast, but not to foreign ports.[28] To be registered or licensed, a vessel had to be wholly-owned by U.S. citizens.[29] If ships not registered or licensed attempted to sail between U.S. ports along the coast, they would face "virtually prohibitory" tonnage duties or be forfeited, depending on the circumstances.[30] Thus, the laws of 1792-93 gave U.S.-citizen-owned vessels an effective monopoly on what was called the "coastwise trade."[31] Finally, the Embargo Authorization Act said an embargo could be laid on "the ships and vessels of any foreign nation," meaning vessels of any other national character, such as Britain or France.

Second: What the Embargo Authorization Act empowered the President to do to any of these classes of ships was lay "an embargo" (or, as the title says, "embargoes") and to "continue or revoke the same." The term *embargo* was not defined by the Act. Its core meaning was a prohibition against ships leaving a port,[32] and I will explain later that the term, when not accompanied by a specification of the embargoed ships' destination, applied to all ships

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26 LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 437 (1956).

27 Act of Dec. 31, 1792, ch. 1, § 1, 1 Stat. 287, 287-88 (establishing U.S. national character of registered vessels); Act of Feb. 18, 1793, ch. 8, § 8, 1 Stat. 305, 308 (excepting registered vessels from prohibition against foreign voyages); *id.* § 6 (excepting registered vessels sailing coastwise from duties for foreign-owned vessels); *id.* § 20 (contemplating that a "registered" vessel may sail from "one [customs] district in the United States" to "any other [U.S. customs] district"); Oliver Wolcott, Circular to the Collectors, Naval Officers, and Surveyors (Dec. 28, 1793), *in* ROBERT MAYO, A SYNOPSIS OF THE COMMERCIAL AND REVENUE SYSTEM OF THE UNITED STATES 235 (extra ed., Washington, J. & G.S. Gideon 1847) [hereinafter Wolcott Circular] (explaining that registered vessels are "usually employed in a foreign trade"); 1 EMORY R. JOHNSON, T.W. VAN METRE, G.G. HUEBNER & D.S. HANCHETT, HISTORY OF DOMESTIC AND FOREIGN COMMERCE OF THE UNITED STATES 330 (1915) ("Registered vessels were permitted to engage in the coastwise trade.").

28 Act of Feb. 18, 1793, ch. 8, § 1, 1 Stat. 305, 305 (establishing U.S. national character and coasting privileges of licensed vessels); *id.* § 8 (prohibiting licensed vessels from foreign voyages). Licensed vessels over twenty tons also had to go through a process called enrollment. *Id.* § 1; Wolcott Circular, *supra* note 27, at 235 ("All Enrolled vessels must also be licensed"; both enrolled vessels and licensed vessels under 20 tons are all "employed in the coasting trade" or fisheries). Vessels under 20 tons, licensed but not enrolled, did not have to go through as many procedures. WHITE, *supra* note 26, at 438.

29 Wolcott Circular, *supra* note 27, at 235.

30 Act of Feb. 18, 1793, ch. 8, § 6, 1 Stat. 305, 307-08. On this provision, plus the "virtually prohibitory" nature of the discriminatory duties, see JOHNSON ET AL., *supra* note 27, at 328.

31 WHITE, *supra* note 26, at 437.

32 *See infra* text and accompanying notes 178-180.

regardless of their destination.[33] This meant that unless the President narrowed the prohibition according to the ships' destination, it would apply not only to ships sailing from a U.S. port to a foreign port (foreign commerce) but also to ships sailing from one U.S. port to another U.S. port (the domestic coastwise trade).

Third: The President was empowered not only to lay embargoes on any or all these classes but to issue "regulations" and "orders." He could lay the embargo "under such regulations as the circumstances of the case may require" and "give all such orders to the officers of the United States, as may be necessary to carry the [embargo] into full effect."

Fourth: The criteria for exercising all these powers were broad. The President could lay the embargo "whenever, in his opinion, the public safety shall so require." He could continue or revoke it "whenever he shall think proper." The regulations he could impose were simply those "as the circumstances of the case may require." The orders he could give were "as may be necessary to carry the [embargo] into full effect."

Fifth: The delegation had a time limitation of a little more than five months. It would not exist "while the Congress of the United States shall be in session," meaning the power became operative on June 9, 1794, when the Third Congress ended its first session and went into recess.[34] And the delegation was in force only "until fifteen days after the commencement of the next session of Congress," which turned out to be November 18, 1794, that is, fifteen days after the Third Congress began its regularly-scheduled second session on November 3, 1794.[35] Like the delegation itself, any embargo laid would expire on that same schedule.[36] Of course, the delegation (and any embargo) would expire sooner than November 18 if Congress began a special session earlier than the regular date of November 3, but calling a special session was the President's choice.[37]

B. *Events Leading to the Act*

The Embargo Authorization Act was passed at the end of the Third Congress's first session, which was held in Philadelphia from November 1793 through early June 1794 and was dominated by the problem of British attacks on U.S. shipping. The elections of fall 1792 had produced a House with a

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33 *See infra* Section III.A.

34 4 ANNALS OF CONG. 784 (1794).

35 *Id.*

36 *See* Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372 ("[A]ny embargo, which may be laid by the President, as aforesaid, shall cease and determine in fifteen days from the actual meeting of Congress, next after laying the same.").

37 U.S. CONST. art. II, § 3.

majority of Republicans, broadly opposed to Washington's Federalist administration and to Hamilton's financial program, while the Senate was almost evenly divided.[38] When revolutionary France went to war with Britain in early 1793, the conflict further polarized U.S. politics, with Republicans more sympathetic to France and Federalists more to Britain.[39] Republicans had long been angry about Britain's restrictions on U.S. trade with the British West Indies that dated to the 1780s, and their anger increased in the course of 1793 as Britain adopted a broad definition of wartime contraband that allowed British naval ships and privateers to seize U.S. shipments of grain to France.[40] In the House, Republican leader James Madison in January 1794 proposed retaliatory trade duties and restrictions on Britain that he believed would force the British to back off.[41] Federalists countered that the United States was still benefiting greatly from trade with Britain and that Madison's proposals would not succeed in changing British policy anyway. Losing support, Madison and his allies got the matter postponed; it was to be taken up again on March 10.[42]

But just before that date, news arrived in Philadelphia that British provocations were getting worse. One might have expected this to boost support for Madison's anti-British proposals, but the "news was so bad" that even Madison's remedies "became obsolete overnight, and it now looked as though the only adequate remedy might be war" against Britain.[43] It was learned on March 7, 1794, that the British government had issued a secret Order in Council on November 6, 1793, which had become public in Britain in late December 1793, authorizing the seizure of any U.S. shipments of foodstuffs not only to France but also to the French West Indies, and not (as before) with compensation for the loss.[44] Despite their party's usual sympathies, some Federalists decided Britain had gone too far, and they shifted to a more hawkish stance.[45] Hamilton wrote to Washington on March 8 urging that Congress should provide for various military preparations and "ought to vest the President of the United States with a power to lay an embargo partial or general and to arrest the exportation of

38 ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON 100 (1958); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 288-92 (1993).

39 ELKINS & MCKITRICK, *supra* note 38, at 311, 354-56.

40 *Id.* at 377, 380-81, 383-84, 389.

41 *Id.* at 376, 380-81, 384, 387.

42 *Id.* at 381-88.

43 *Id.* at 388. Madison's proposals were put off indefinitely. *Id.* at 390.

44 *Id.* at 389, 828 n.44.

45 DECONDE, *supra* note 38, at 97-98, 103, 405-06; ELKINS & MCKITRICK, *supra* note 38, at 390.

commodities partially or generally."[46] Washington was non-committal. He did not act publicly on Hamilton's proposal, but at the same time, he was unreceptive to the advice of more dovish Federalists that he send a special envoy to negotiate with Britain, a move he thought humiliating under the circumstances.[47] In any event, Hamilton had allies in Congress to press his views. On March 12, House speaker Theodore Sedgwick, a Federalist, made proposals similar to Hamilton's, including the delegation of power to lay an embargo.[48]

It is worth pausing to consider the rationales for imposing an embargo and, more particularly, for delegating the power to impose it. In general, governments in this era imposed embargoes for a range of reasons. Sometimes a government imposed an embargo to ensure that a supply of goods or of seamen's labor remained in its home country, often to help with its anticipated or ongoing war effort.[49] Other possible purposes were to avoid capture and loss of the nation's merchant vessels and seamen and—insofar as the adversary was economically dependent on trading with the embargo-imposing nation—to avoid supplying the adversary. These latter two purposes—to shield ships and seamen from capture and to avoid supplying the adversary—were the ones invoked for a U.S. embargo in spring 1794.[50] Sedgwick emphasized that Britain's forces in its West Indies colonies were trying to capture the French West Indies but were dependent on American foodstuffs to keep operating.[51] Historians have questioned whether the British West Indies were sufficiently dependent on American goods to make the embargo advantageous for the United States, but there was genuine uncertainty and controversy over this question at the time.[52]

Related to the decision of whether to impose an embargo was the question of whether to *delegate* the decision to the executive. On this point, Sedgwick said:

> If such an embargo shall be necessary, the operation can be better performed by the PRESIDENT than by the Legislature. In a body as numerous as the

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46 Letter from Alexander Hamilton to George Washington (March 8, 1794), https://founders.archives.gov/documents/Hamilton/01-16-02-0107-0002 [https://perma.cc/LW8L-DC9J]; ELKINS & MCKITRICK, *supra* note 38, at 389.

47 ELKINS & MCKITRICK, supra note 38, at 389-90.

48 4 ANNALS OF CONG. 501 (1794) (statement of Rep. Sedgwick).

49 *See infra* notes 170, 181-183 and accompanying text; 40 THE PARLIAMENTARY REGISTER 462 (London, J. Debrett, 1795) (referring to an "embargo" imposed by the Privy Council "for the better manning of His Majesty's navy").

50 *E.g.*, 4 ANNALS OF CONG. 680 (1794) (statement of Rep. Murray) (looking back on the purpose of the March embargo).

51 4 ANNALS OF CONG. 503 (1794).

52 JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 146-47 (1970); ELKINS & MCKITRICK, *supra* note 38, at 384.

> Legislature, it is impossible to keep a secret for any length of time, and the delays which the necessary forms require, would be such, that the effect of the measure would be lost before finally adopted; for every ship, and all the produce which possibly could, would immediately be put out of the reach of Government. . . . . .On great occasions, confidence must be reposed in the Executive; and the universal confidence in the present head of that Department [i.e., Washington], would prevent all fears of its being abused in his hands.[53]

Note that, although the context involves conflict with a foreign country, Sedgwick's rationale for delegation does not expressly speak to constitutionality, nor does it suggest that the constitutionality of broad delegations is confined to foreign-policy matters.

During the week of March 17-21, the House debated whether to impose an embargo and, relatedly, whether to impose it directly or to delegate the power. While the debate was held in secret and never recorded, we know from private correspondence that the House on March 21 voted 48-46 not to directly impose an embargo, although it seems many of those voting "no" did want to delegate power to impose one. Madison wrote that many Southerners (presumably mostly Republican) voted to impose an embargo directly, with Easterners (presumably mostly Federalist) favoring delegation of the power to impose one.[54]

Days later, the crisis escalated dramatically. On or just before March 24, Washington received reports, written by a U.S. consul in the West Indies up to March 7, that the British were seizing and condemning U.S. ships in much larger numbers and on a more aggressive basis than he and Congress had thought.[55] He sent the news to Congress on March 25.[56] The mostly Federalist House members who had resisted a direct embargo on March 21 now felt compelled to go along with one, reasoning that, even if Republicans were too sanguine in thinking the measure would hinder the British war effort, it would at least keep U.S. ships out of British hands.[57] And so on March 25 the House voted unanimously to impose an embargo for thirty days (expiring

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53 4 ANNALS OF CONG. 503 (1794) (statement of Rep. Sedgwick).

54 Letter from James Madison to Thomas Jefferson (Mar. 24, 1794), https://founders.archives.gov/documents/Madison/01-15-02-0187 [https://perma.cc/8ATB-PERV]; ELKINS & MCKITRICK, *supra* note 38, at 391, 828 n.43.

55 ELKINS & MCKITRICK, *supra* note 38, at 391, 828 n.45.

56 *Id.* at 392.

57 Letter from James Madison to Thomas Jefferson (March 26, 1794), https://founders.archives.gov/documents/Madison/01-15-02-0192 [https://perma.cc/MP4M-9NJL]; COMBS, *supra* note 52, at 121.

April 25).[58] The Senate made a minor amendment on March 26,[59] in which the House concurred,[60] and Washington approved the measure the same day. Its entire substantive text was:

> That an embargo be laid on all ships and vessels in the ports of the United States, whether already cleared out, or not, bound to any foreign port or place, for the term of thirty days; and that no clearances be furnished, during that time, to any ship or vessel bound to such foreign port or place, except ships or vessels, under the immediate directions of the President of the United States: And that the President of the United States be authorized to give such instructions to the revenue officers of the United States, as shall appear best adapted for carrying the said resolution into full effect.[61]

Note the embargo was limited to vessels "bound to any foreign port or place," thus exempting the U.S. coastwise trade while not discriminating among foreign nations. Federalist lawmakers, who tended to be more pro-British, "were careful to see that the embargo applied to ships destined for any foreign port whatsoever, and thus they avoided a direct challenge to Britain."[62]

Also on March 26, the House appointed a committee "to bring in a bill for continuing and regulating embargoes in the United States"—the committee that would eventually put forth the Embargo Authorization Act. Despite the chamber's Republican majority, the committee consisted of three Federalists: Samuel Dexter and Benjamin Goodhue of Massachusetts and William Vans Murray of Maryland.[63]

Then momentum shifted away from war and toward negotiation, if only moderately. On March 28, 1794, news arrived in Philadelphia that the notorious British Order in Council of November 6, 1793, had actually been revoked and replaced by a different and much less aggressive Order on January 8, 1794. "Whereas the previous Order had instructed commanders to seize all ships going to or from the French islands, or even suspected of intentions thereof, the new Order in effect permitted the resumption of such trade—unless in contraband, and excepting any direct trade between the

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58 On unanimity, see Letter from James Madison to Thomas Jefferson, *supra* note 57, at n.1 (footnote added by modern scholars who produced the published edition of Madison's papers and letters in the late 20th century). The yeas and nays are unrecorded in 4 ANNALS OF CONG. 530 (1794).

59 4 ANNALS OF CONG. 76 (1794).

60 4 ANNALS OF CONG. 531 (1794).

61 Joint Resolution of Mar. 26, 1794, 1 Stat. 400.

62 COMBS, *supra* note 52, at 121.

63 4 ANNALS OF CONG. 531 (1794); H. JOURNAL, 3d Cong., 1st Sess. 104 (1794). For party affiliations, see BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., bioguide.congress.gov [https://perma.cc/63KS-FA3K] (last visited Apr. 17, 2024) [hereinafter Directory].

islands and the ports of France."[64] This might seem like a welcome British shift toward a more friendly stance, but Americans had reason to be wary. For one thing, a dispatch that arrived on April 3, 1794, from the U.S. minister to Britain, written on January 9, said he'd been told by the British foreign minister that the now-revoked Order had been a response to special British military needs that were now past. "This was confusing and not altogether satisfactory, and it certainly did not explain the sweeping condemnations described in [the U.S. consul's] letters" that were written up to March 7, opening "a whole new area of doubt" as to "the present state of British intentions."[65] Relations remained on edge, as reflected in the anger Hamilton expressed in a meeting soon afterward with the British minister to the United States.[66] Washington, facing uncertainty about British intentions and conflicting pressures from hawks and doves, opted for sending a special envoy to negotiate with Britain. He offered the job on April 15 to John Jay, who was confirmed by the Senate on April 19.[67]

While this peace overture was getting underway mid-April, an extension of the embargo for another thirty days (to May 25) was proposed in the House, which was one of several pending measures that were broadly anti-British and could in principle serve as threats that might give Jay more bargaining power—or might instead be so threatening as to make the British less willing to negotiate.[68] The other pending proposals were (1) a military buildup, (2) a new "non-intercourse" proposal by Madison imposing restrictions and taxes on trade, targeted at Britain, and (3) a bill for sequestering debts owed by Americans to British subjects. Federalists considered a military buildup useful in backing Jay's mission but thought non-intercourse and sequestration were imprudently provocative, while Republicans supported those two latter measures, as threats necessary to bring Britain to terms.[69] Non-intercourse and sequestration caused much division within Congress and ultimately both failed of enactment, partly because of Jay's arguments that the measures would do more harm than good to his mission.[70] Meanwhile, the proposal to extend the embargo through May

64 ELKINS & MCKITRICK, *supra* note 38, at 392.

65 *Id.* at 393.

66 *Id.* at 405.

67 *Id.* at 394-95.

68 *Id.* at 394 ("The momentum of the House . . . though slowing, remained well up.").

69 COMBS, *supra* note 52, at 122, 128, 134.

70 Jay told Washington that he could not negotiate with Britain if non-intercourse or sequestration became law. ELKINS & MCKITRICK, *supra* note 38, at 394-95. Washington seems to have agreed. COMBS, *supra* note 52, at 126. The former measure ended up passing the House, but it was narrowly defeated by the Senate on April 28, in part because lawmakers thought it would interfere too much with Jay's negotiation; sequestration was debated but never passed the House. ELKINS & MCKITRICK, *supra* note 38, at 395, 829 n.55.

25 enjoyed broad bipartisan support. On April 17, a "very large majority" of the House voted for a preliminary plan to extend the embargo, and the extension itself passed the House later that day without a recorded vote,[71] becoming law on April 18.[72] It seems the embargo extension was anti-British enough to be attractive to Republicans but not so aggressive as to shed Federalist support. Later on, Rep. Murray, one of the Federalists on the embargo committee, explained that he voted for the extension because he still did not trust British intentions.[73]

A few weeks later, in mid-May, the House confronted the question of whether to extend the embargo beyond its (once-extended) expiration date of May 25. There turned out to be a bipartisan majority for letting it expire. On the one hand, the embargo was nearing its sixtieth day, and lawmakers were increasingly worried about its economic toll.[74] On the other, a few weeks had passed since Congress had learned of the new and friendlier Order in Council, and some lawmakers (though not all) believed the news in the interim indicated Britain was acting consistently with its friendlier official stance.[75] Another few lawmakers said they viewed the embargo as part of an integrated package with non-intercourse; since non-intercourse had been defeated, the United States should give up the embargo and concentrate on the peace mission.[76] Ultimately, the House on May 12 voted against further extending the embargo by a vote of 73-13. The voting was not partisan; the thirteen voting to extend were eight Federalists and five Republicans.[77] The embargo would end on May 25.

However, in a development that underscored the continuing unpredictability of the situation, news arrived on May 20 that the governor of British Canada had ordered his soldiers to occupy a fort within U.S. territory. This was a threatening move. It was not enough to motivate reimposing the embargo,[78] but historians have suggested that, "[h]ad [the incursion] been known in Philadelphia a few weeks earlier, it might well have

71 4 ANNALS OF CONG. 597-98 (1794); H. JOURNAL, 3d Cong., 1st Sess. 123 (1794).

72 Joint Resolution of Apr. 18, 1794, 1 Stat. 401.

73 4 ANNALS OF CONG. 681 (1794) (statement of Rep. Murray).

74 *See infra* text and accompanying notes 150-151.

75 For comments that British behavior had improved, see 4 ANNALS OF CONG. 677 (1794) (statement of Rep. Wadsworth); *id.* at 680-81 (statement of Rep. Murray). For suspicion about whether it was improving, see *id.* at 676-77 (statement of Rep. W. Smith); *id.* at 678 (statement of Rep. Dayton).

76 *Id.* at 675-76 (statement of Rep. Parker); *id.* at 677-78 (statement of Rep. Giles).

77 *Id.* at 683; H. JOURNAL, 3d Cong., 1st Sess. 154 (1794). For party affiliations, see Directory, *supra* note 63.

78 There was a failed effort to do so on May 24. 4 ANNALS OF CONG. 722 (1794).

scuttled the entire Jay mission."[79] As it was, Jay had sailed on May 12;[80] he would arrive in Britain on June 8.[81]

Amid this atmosphere—calmer than in late March but with continuing uncertainty about the possibility of British surprises and the future of Jay's mission—Congress looked ahead to its June adjournment and adopted the Embargo Authorization Act to remain in force through the upcoming recess. While the legislative record on the Act is scant on substance, it is clear that Congress deliberated and even experienced some division; the bill did not slip through unnoticed. Back on May 5, before the vote against a further extension of the embargo, the Dexter-Goodhue-Murray committee had "presented" the House with a "bill authorizing the President of the United States to lay, regulate, and revoke embargoes,"[82] whose text is not extant.[83] The House took up the bill on May 29, made "several amendments," whose content is not recorded,[84] and engaged in some debate, though all of it that is recorded concerns whether Congress should directly reimpose an embargo, not anything about delegation.[85] On May 30, the House passed the bill without a recorded vote.[86] When the bill reached the Senate that day, the chamber held a recorded vote on whether to agree to Section 1 of the act. Section 1 as it then stood is recorded in the *Annals of Congress* and is identical to the first section of the eventual enacted statute, which is to say, the entire act except the brief Section 2 with the expiration clause.[87] The vote was in favor of the Section (which is to say, in favor of nearly the whole act), by a count of 14 to 5.[88] The five "no" votes were all Federalists, while the fourteen "yes" votes included ten Federalists (including leading ones like Rufus King) and four Republicans.[89] The *Annals* give no substantive material, so we do not know why these five Federalists voted no; perhaps they thought the measure too provocative toward Britain. In any event, we know lawmakers were paying enough attention to the bill to disagree about its main section. The Senate would pass the bill on May 31 without a recorded vote,[90] and the President signed it on June 4.

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79 ELKINS & MCKITRICK, *supra* note 38, at 395-96.

80 *Id.* at 395.

81 *Id.* at 404.

82 4 ANNALS OF CONG. 632 (1794); H. JOURNAL, 3d Cong., 1st Sess. 137 (1794).

83 The ProQuest Congressional database has digitized congressional archives for this period, see Parrillo, *Critical Assessment*, *supra* note 7, at 1323-24 n.147, but does not contain this bill.

84 H. JOURNAL, 3d Cong., 1st Sess. 186 (1794).

85 4 ANNALS OF CONG. 731-34 (1794).

86 *Id.* at 735; H. JOURNAL, 3d Cong., 1st Sess. 187 (1794).

87 4 ANNALS OF CONG. 114 (1794).

88 *Id.*

89 For affiliations, see Directory, *supra* note 63.

90 4 ANNALS OF CONG. 115 (1794).

Over the ensuing recess from June 9 to November 3, the delegated power was not exercised. There were "substantial British shipments of merchandise to America in the fall" of 1794, which constituted "a clear sign that Britain neither expected nor intended war with the United States."[91] Jay would sign his famous treaty with Britain on November 19, 1794, which was ratified by the Senate in summer 1795.[92] Yet soon after Senate ratification, "Washington received news in early July [1795] that the British were again seizing American grain ships bound for France, apparently on the authority of a new Order in Council the text of which nobody had yet seen."[93] In fact, Britain was trying to solve an unexpected domestic bread crisis. But this was unknown to the U.S. government, to whom the seizures were "new and unexplained outrages on the part of Great Britain."[94]

C. *Reasons for the Delegation*

Despite the scant legislative history of the Embargo Authorization Act, the context set forth in the preceding Section gives a sense of the purposes for which the President might exercise the delegated power to lay an embargo. As with the actual embargo imposed by Congress from March 26 to May 25, the purpose might be to protect U.S. ships and seamen from capture by the British, or to bring commercial pressure on Britain by withdrawing the United States as a source of supplies. And as with other embargoes of the era, the purpose might be to keep seamen or goods within the United States should they be needed for war against Britain. Furthermore, with the Jay mission underway, an embargo (or the threat of one) might be employed to influence negotiations. On May 29, one member of the House, in urging immediate reimposition of the embargo, said that trapping British ships and property in U.S. ports—something the previous embargo had done and that the Embargo Authorization Act would empower the President to do—meant those ships could be held as bargaining chips until the British made concessions.[95] Some observers of Jay's mission took this bargaining-power view of other potential congressional economic sanctions.[96]

The key point—and the apparent reason for the delegation's open-endedness—is that the situation was unpredictable. Yes, America seemed less likely to be drawn into a war with Britain in (say) mid-May than it had a

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91 ELKINS & MCKITRICK, supra note 38, at 441.

92 *Id.* at 410, 419.

93 *Id.* at 421.

94 *Id.* at 422.

95 4 ANNALS OF CONG. 733-34 (1794) (statement of Rep. Gillon).

96 ELKINS & MCKITRICK, supra note 38, at 394; DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 192 (1969).

couple of months earlier, as two of the House committee members who reported the Embargo Authorization Act stated when on May 12 they voted against extending the embargo.[97] But the likelihood was not zero, and informed people disagreed over what exactly it was. Another lawmaker on that day "asked what assurance we have, that Britain will not play the same game over again that she has done already?"[98] On May 30, after the British-Canadian forces' incursion, Speaker Sedgwick said he "did not think that, in certain contingencies, war was so distant a prospect."[99]

One can understand the disagreement and uncertainty. The British government's behavior over the preceding several months had been a series of zigzagging surprises, aggravated by the secrecy with which it could give orders to its armed ships, not to mention the slow progress of news from across the Atlantic (taking one or two months) or even from the Caribbean (taking two or three weeks). Recall the twists and turns of the story told above. Britain had seemed suddenly more aggressive with its Order in Council of November 6, 1793 (not known in Philadelphia until March 7, 1794), then seemed more pacific with its order of January 8, 1794 (not known until March 28), then confused with the minister's dispatch of April 3, then aggressive again with the Canadian governor's incursion (known on May 20). Nobody could be sure how the British would react to Jay, or even if the United States might need to confront some change in the behavior of the British before they even learned Jay was coming—indeed, Britain did not know any special envoy was coming until Jay arrived on June 8.[100] Indeed, Britain's behavior *could not* be predictable, because the country was engaged in a multi-continent war against the most formidable enemy it had ever faced: Robespierre's mass-mobilized France. As one U.S. lawmaker rightly observed on May 12, 1794, "their British system changes with the course of events in Europe."[101] That is just what happened in summer 1795, when Britain faced a war-induced bread shortage and renewed its aggressive seizures of American grain.

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97 *See* 4 ANNALS OF CONG. 678-79 (1794) (statement of Rep. Dexter) ("It was become pretty evident that the United States are not in immediate danger of hostilities. It was difficult to continue the Embargo till we could hear from Mr. Jay, which might require six months."); *id.* at 681 (statement of Rep. Murray) ("As the aspect of affairs had certainly considerably altered, and the reasons that led to the Embargo had so diminished as no longer to warrant either a dread of the capture of our vessels or the apprehension of war, (at least speedily,) he hoped the resolution [to renew] would fail of success.").

98 *Id.* at 681 (statement of Rep. Boudinot)

99 *Id.* at 738 (statement of Rep. Sedgwick).

100 ELKINS & MCKITRICK, supra note 38, at 405.

101 4 ANNALS OF CONG. 680 (1794) (statement of Rep. Gillon).

II. THE STRANGENESS OF EXCEPTING FOREIGN COMMERCE

The reformers contend that the nondelegation doctrine was crucial to the integrity of the original constitution and especially to its protection of individual private rights of liberty and property. And yet, at the same time, they say the doctrine had an exception for foreign affairs—an exception that covered not merely delegated powers that were redundant with the President's inherent Article II authority but also delegated powers ranging well beyond that inherent authority, such as restricting foreign commerce, even though such restriction impinged on private liberty and property.

In this Part, I argue that setting aside the foreign aspect of commerce as somehow exceptional, leaving the nondelegation doctrine (and its putative protection of private liberty and property) strongly applicable only to the portion of commerce that happened domestically, would not have made sense in the founding era. The reason is that foreign commerce in the founding era was so important relative to, and so dominant of, the whole U.S. market economy, including its domestic agricultural sector and its channels of domestic commercial transportation—more important and dominant than has been the case at any time since, including today. The importance of foreign commerce was reflected in *Federalist* No. 42, in which Madison referred to Congress's "great and essential power of regulating foreign commerce" and characterized its power "to regulate commerce among the several States" as a mere "supplemental provision."[102] Treating the foreign as exceptional would have turned founding-era reality on its head.

A. *Relative Magnitude of Foreign Commerce Circa 1794*

As evidence of the high relative importance of foreign commerce, consider the ratio of U.S. exports of goods and services (including shipping services) to GDP. According to a leading recent estimate of the ratio by historian Lawrence Officer for the period before 1920, the ratio was about 15.5% in 1793, about 16% in 1794, and about 18% in 1795. Over the whole period 1790 to 1807, it fluctuated between about 12% and 24%. This range was high compared with all subsequent U.S. history. By the same estimate, the ratio plummeted during the embargo-and-war years of 1807-1815, to the range of about 3% to 15%, then rose into the range of 10% to 15% in the period from 1815 to the late 1820s, but then stayed low, in the range of 5% to 10%, throughout the eighty-five years from 1830 to World War I, with only two or three years that ticked a little above 10%.[103] Although World War I and its

102 THE FEDERALIST NO. 42 (James Madison).

103 LAWRENCE OFFICER, A NEW BALANCE OF PAYMENTS FOR THE UNITED STATES, 1790-1919, at 336 fig.1 (2021). For a generally similar story, see Robert E. Lipsey, *U.S. Foreign Trade and*

immediate aftermath saw an extraordinary rise in the ratio, it went down soon afterward,[104] and, by a leading estimate for the period beginning in 1929, the ratio stayed in the range of 3% to 6% from 1929 to 1970 (except during the World War II aftermath of 1945-1947).[105] The ratio since the 1970s has generally been in a higher range, amid the last half-century of globalization, but it has never gone above 13% and was between 11% and 12% in 2022.[106]

To provide additional context for the high export-to-GDP ratio circa 1794, let me note that high ratios were the historical norm for early America, going far back into the colonial era. The original "business plans" that rendered the British North American colonies viable, combined with the British Empire's mercantilist policies, ensured the colonies would be oriented toward overseas exports. The "colonies throughout the colonial period were commercially closer to Europe than they were to each other."[107] Their export-GDP ratio was probably around 25% in the early 1700s.[108] Thus, the ratios in the U.S. early republic (ranging between 12% and 24%) reflected something of a long-run decline, though they were still at a high level compared to all that came after. Circa 1800, concludes a leading estimate, the United States' ratio of exports to population was twice the ratio for the nations of Europe.[109] U.S. exports in that era consisted overwhelmingly of agricultural commodities (such as flour, tobacco, and rice), plus lumber and fish, bound overwhelmingly for Europe or the West Indies.[110]

The profound shift by which the colonies and then the United States became gradually less export-oriented from the mid-1700s to the 1900s had its causes in the growth of the American population, the expansion of the American domestic market, and that market's internal integration through a revolution in transportation. In the 1790s, the shift had advanced only a small

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the Balance of Payments, 1800-1813, *in* 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 685, 691 tbl.15.3 (2000).

104 OFFICER, *supra* note 103, at 336 fig.1.

105 To calculate the ratio, I divided the estimates for exports (Series Ee418) by the estimates for GDP (Series Ca10) drawn from HISTORICAL STATISTICS OF THE UNITED STATES: MILLENNIAL EDITION 3-23 to -26, 5-508 to -09 (Susan B. Carter et al., eds., 2006). This is the same calculation used in Douglas A. Irwin, *International Trade in Goods and Services*, *in* HISTORICAL STATISTICS, *supra*, at 5-445 fig.Ee-C.

106 *Shares of Gross Domestic Product: Exports of Goods and Services*, FRED ECON. DATA (Mar. 28, 2024), https://fred.stlouisfed.org/series/B020RE1Q156NBEA [https://perma.cc/2ZDR-FLC6].

107 CAROLINE E. MACGILL, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860, at 3 (1917). A more recent study concludes, on the basis of quantitative data in the years 1768-1772, that "the coastal trade [i.e., among the thirteen colonies] does not appear to have been large in comparison with either overseas trade or with total output," averaging "about 25 percent of exports [by value] to overseas areas for this period." James F. Shepherd & Samuel H. Williamson, *The Coastal Trade of the British North American Colonies, 1768-1772*, 32 J. ECON. HIST. 783, 802 (1972).

108 Lipsey, *supra* note 103, at 685.

109 *Id.*

110 *Id.* at 686, 699-700.

amount. Overland domestic transport, which would ultimately become the lifeblood of the domestic market, was primitive. There were roads, but they were dirt (or mud), often unleveled and obstructed by rocks and stumps.[111] Each road was maintained by a contiguous series of localities, among which no individual locality was in a position to internalize the benefits of good transport across many localities, so each invested little in its segment, conscripting its inhabitants to do a few days of work per year.[112] Turnpike companies building toll roads, subject to better incentives, would ultimately build far better thoroughfares, but the first turnpike did not open till 1794.[113] Similarly, canals would eventually offer big improvements, but the first few canals only started to open in the 1790s.[114] The first railroad was not completed until the 1820s.[115] (Overland international transport during the 1790s, say to Canada, was negligible.)[116]

With overland transport so inadequate, and with so much of the population near the seaboard, large-scale long-distance commerce in the 1790s occurred overwhelmingly on the water.[117] There was the "foreign trade," mainly with Europe or the West Indies or Canada, and the "coastwise trade," either between states or within a state. The available statistics suggest that, between the foreign trade and the coastwise trade, the foreign trade was dominant in a way that makes understandable Madison's characterization of the power over foreign commerce as "great and essential" and that over commerce among the states as merely "supplemental."[118]

First, some background. Ships of U.S. national character fell into one of two categories. The first were *registered* vessels, which could sail in the foreign trade and "usually" did so (though they could also sail in the coastwise trade,

111 MACGILL, *supra* note 107, at 54-58.

112 Daniel B. Klein & John Majewski, *Turnpikes and Toll Roads in Nineteenth-Century America*, EH.NET ENCYC., https://eh.net/encyclopedia/turnpikes-and-toll-roads-in-nineteenth-century-america [https://perma.cc/F9G5-FDR7] (last visited Apr. 18, 2024).

113 *Id.*

114 RONALD E. SHAW, CANALS FOR A NATION: THE CANAL ERA IN THE UNITED STATES, 1790-1860, at 3 (1990).

115 Klein & Majewski, *supra* note 112.

116 Lipsey breaks down U.S. exports by destination—including "America," to which any overland international exports must have gone—but he notes that "almost all the exports to 'America' in 1795-1802 . . . were to the West Indies." Lipsey, *supra* note 103, at 686, 712-13 tbl.15.16. In the earliest years for which Lipsey breaks out the share for Canada (1819-1828), the share is a tiny 3%. *Id.* at 713 tbl.15.16. Also, it should be noted that Officer's export-GDP ratios include goods transported overland, but he reports that, for the entire period 1790 to 1893, his estimates of annual exports vary from maritime-only versions of the same figures by an average of only 4% (and never more than 11%, for 1846). OFFICER, *supra* note 103, at 127 tbl.2.

117 2 JOHNSON ET AL., *supra* note 27, at 8 ("It is certain that the traffic handled coastwise was much larger than that by land routes. The original states were all maritime, and the larger share of their population, even in 1790, was on or near the seaboard.").

118 See THE FEDERALIST NO. 42 (James Madison).

without discriminatory duties).[119] The second were *licensed* vessels (of which the higher-tonnage subset were called *enrolled* vessels), which could sail only in the coastwise trade.[120] Vessels of foreign character were kept out of the coastwise trade by "virtually prohibitory" duties.[121]

To help gauge foreign commerce's significance, we can use registered vessels' tonnage as a measure of U.S. shipping capacity in the foreign trade, and we can use licensed vessels' tonnage, including tonnage of enrolled vessels, as a measure of U.S. shipping capacity in the coastwise trade (this doesn't cover vessels under five tons, but those were very small).[122] The ratio of our foreign measure to our coastwise measure in the years 1793, 1794, and 1795 comes to 3.0, 2.4, and 2.9, respectively.[123] That is, U.S. foreign-trade capacity was more than double and approaching triple U.S. coastwise-trade capacity. That said, this shipping-capacity ratio does not perfectly capture the ratio in total *value* of goods as between foreign commerce and coastwise commerce, but the imperfections go in both directions and may roughly balance each other. On the one hand, the ratio overstates the relative value of foreign commerce in that (a) the coastwise tonnage statistics don't include tiny vessels under five tons, (b) registered vessels could sail in the coastwise trade even if they "usually" did not, and (c) coastwise journeys were shorter, so each coastwise vessel would usually make more trips per year than a vessel going abroad.[124] On the other hand, the ratio understates the relative value of foreign commerce in that (a) goods moving to and from foreign ports tended to be more valuable per ton (e.g., indigo versus lumber)[125] and (b) foreign trade to and from the United States was carried not only in registered U.S. vessels but also vessels of foreign character, which aren't accounted for in the statistics above. A different statistical series suggests that including the

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119 *See supra* text and accompanying note 27.

120 *See supra* text and accompanying note 28.

121 1 JOHNSON ET AL., *supra* note 27, at 328.

122 On the five-ton threshold for licensing, see Act of Feb. 18, 1793, ch. 8, § 6, 1 Stat. 305, 307-308.

123 I used the table of tonnage figures in ADAM SEYBERT, STATISTICAL ANNALS 317 (Philadelphia, Thomas Dobson & Son, 1818). For the foreign measure, I used, for each year, Seybert's figure in his column "Registered Tonnage employed in Foreign Trade." For the coastwise measure, I used, for each year, the sum of (a) Seybert's figure in his column "Enrolled Tonnage employed in the Coasting Trade" and (b) Seybert's figure in his subcolumn "Employed in the Coasting Trade," which is under the main column "Licensed vessels under 20 Tons." My foreign measure and coastwise measure are the same as those used in 1 JOHNSON ET AL., *supra* note 27, at 334, and produce the exact same figures for the years that I cover in common with Johnson et al. (1793 and 1795).

124 On this last point, see 2 JOHNSON ET AL., *supra* note 27, at 8.

125 CLIVE DAY, HISTORY OF COMMERCE OF THE UNITED STATES 67 (1925); ALEX ROLAND, W. JEFFREY BOLSTER & ALEXANDER KEYSSAR, THE WAY OF THE SHIP: AMERICA'S MARITIME HISTORY REENVISIONED, 1600-2000, at 78-79 (2008).

capacity of foreign-character vessels would augment our measure of the foreign trade by something like one-tenth to one-third.[126]

The apparent dominance of foreign commerce is also confirmed by a different assembly of data from a classic study by Robert Albion, who used newspapers to measure how many ships were arriving, by tonnage, in two of the largest U.S. ports in the early 1790s—including the ships' origins, which allows us to gauge the ratio of foreign-trade to coastwise-trade tonnage. In Philadelphia in 1792, Albion found that 63% of arriving tonnage was from foreign ports and 37% from domestic.[127] In New York in 1793, he found that 76% was from foreign ports and 24% from domestic.[128] Albion's use of arriving-tonnage data avoids some of the imperfections discussed in the preceding paragraph: it accounts for the possibility that registered vessels might be sailing domestically, for the fact that coastwise vessels made more trips per year, and for the role of foreign-character vessels. That said, Albion is only measuring tonnage, so his numbers still understate the relative *value* of foreign commerce, given its higher value-per-ton. And there is another imperfection, going in the opposite direction: Albion did not count vessels arriving from the same state or a neighboring state, for example, sailing from Delaware or New Jersey to Philadelphia, or sailing from Connecticut or New Jersey to New York.[129] (A separate study of ports in North Carolina in 1788 finds that roughly 60% of departing tonnage was bound to foreign ports.[130])

The coastwise trade wasn't merely smaller in value than the foreign trade but also *dependent upon* the foreign trade to a substantial degree. Many coastwise vessels were picking up goods produced in one part of the United States and carrying them to some other U.S. port for consumption, but many other coastwise vessels were instead engaged in *distribution* of foreign-produced goods that had been imported to a large U.S. port and needed to be carried to smaller U.S. ports, or in *collection* of U.S.-produced goods in smaller U.S. ports that needed passage to a larger U.S. port for eventual

126 Whereas the figures cited in *supra* text and accompanying note 123 measure a stock, the available figures comparing the capacity of U.S. vessels in the foreign trade with that of foreign-owned vessels in the foreign trade measure a flow, that is, the total tonnage *entering* U.S. ports during each year (which would count twice any ship that entered U.S. ports twice during the year). SEYBERT, *supra* note 123, at 318-19. If we start with Seybert's figures for tonnage entered by "American vessels employed in the foreign trade," we find that his figure for "total foreign" tonnage entered adds 37% to that starting figure for 1793, adds 16% for 1794, and adds 11% for 1795.

127 Robert Greenhalgh Albion, *New York Port in the New Republic, 1783-1793*, 21 N.Y. HIST. 388, 393 tbl. (1940).

128 *Id.*

129 *Id.* at 393 ("[T]he coastal figures do not include arrivals from the same state and two adjacent states.").

130 CHARLES CHRISTOPHER CRITTENDEN, THE COMMERCE OF NORTH CAROLINA, 1763-1789, at 158-59, 159 n.12 (1936) (excluding intrastate voyages that occurred "[o]nly very rarely").

export abroad.[131] This image of the coastwise trade as partly a distribution-and-collection facility for the foreign trade is precisely what Madison had in mind in *Federalist* No. 42 when he called the interstate commerce power "supplemental."[132] That power would allow Congress to provide "relief" to "the States which import and export through other states, from the improper contributions [i.e., trade taxes] levied on them by the latter."[133] The states with larger and more internationally-oriented ports, by imposing such taxes, could perversely force the states with smaller and more domestically-oriented ports "to resort to less convenient channels for their foreign trade."[134] *Federalist* No. 42 hardly discussed interstate commerce *except* as a means for the states to access the channels of *foreign* commerce. Madison had said during the Philadelphia Convention that he "was more & more convinced that the regulation of Commerce was in its nature indivisible."[135]

The image of the U.S. economy as a more or less stand-alone phenomenon, to which foreign commerce can be characterized as some kind of "exception," is an artifact of the period from approximately the 1830s through the 1960s in which the nation's engagement with international trade was (except for the two world wars) less than it is today and much less than it was in the 1700s and early 1800s.[136] Notably, this domestic-dominated period (circa 1830-1970) encompasses the formative era of U.S. constitutional doctrine as it relates to the modern regulatory state, covering the elaboration of the nondelegation doctrine in the 1890s, the New Deal crisis and *Schechter Poultry* and *Curtiss-Wright* in 1935-36, and the acceptance of the New Deal in the late 1930s and 1940s. The image of regulation as essentially domestic was stamped on our collective legal mind in this period (as reflected in *Curtiss-Wright*'s treatment of foreign affairs as exceptional),[137] and I think we tend to project that domestic-centeredness back onto the founding, even though it doesn't actually fit the 1700s.

131 A classic history characterizes the coastwise trade as mostly dedicated to distribution and collection for foreign trade as late as the early 1800s, 1 JOHNSON ET AL., *supra* note 27, at 332, 334, while a more modern statistical study of the period 1768-1772 suggests that collection and distribution played a substantial but not predominant role in coastwise shipping, Shepherd & Williamson, *supra* note 107, at 796-98.

132 THE FEDERALIST NO. 42 (James Madison).

133 *Id.*

134 *Id.*

135 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., 1911).

136 See *supra* text and accompanying notes 103-106.

137 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315, 320 (1936).

B. *A "Foreign" Embargo's Damage to the Domestic Economy*

Given the magnitude of maritime foreign commerce, plus the partial dependence of the coastwise trade upon it, an embargo blocking foreign commerce could powerfully impact the whole economy—a concern that likely would have been foremost in the minds of Americans who owned productive property, more than whether the restrictions fell into a foreign or domestic category.[138] The most striking illustration is the Jeffersonian embargo that Congress imposed on December 22, 1807, covering all ships bound for foreign ports, which lasted until March 1, 1809 (435 days).[139] A recent study estimates that this embargo "cost about 5 percent of America's 1807 GNP."[140] Broadly consistent with this, a leading estimate of annual real U.S. GDP shows a 4.1% decline between the years 1807 and 1808.[141] These numbers are catastrophic. To illustrate, real GDP during the Great Recession of 2008 "fell 4.3 percent from its peak in 2007Q4 to its trough in 2009Q2, the largest decline in the [post-1945] era."[142]

In light of the experience of 1807-09, we can ask: how bad could the impact of exercising the power under the Embargo Authorization Act of 1794—which allowed an embargo somewhat longer than five months—have been? Let's first assume crudely that the percent contraction of the economy has a linear relationship to embargo length. The maximum embargo length under the 1794 delegation (June 9 to November 18) was 162 days, which is 37% of the 435 days of the Jeffersonian embargo. Multiplying each of the two estimates of the Jeffersonian-embargo contraction (5% and 4.1%) by 37%, we get estimated contractions of 1.9% and 1.5%, either of which would be a serious recession. Of course, in real life, economic disruption wouldn't increase linearly with embargo length; some effects might occur soon, while others might accelerate over time. This was evident during the Jeffersonian embargo. When it was imposed, prices of several of the nation's top exportable commodities were affected rapidly. Within four months of the embargo's

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138 See Arlyck, *supra* note 14, at 292 ("In an era when constant international armed conflict threatened the nation's commerce and security . . . concern over foreign relations impacted virtually all 'domestic' policymaking.").

139 Embargo Act of 1807, ch. 5, § 1, 2 Stat. 451, 451-52 (effective date of Dec. 22, 1807, noting repealing acts).

140 Douglas A. Irwin, *The Welfare Cost of Autarky: Evidence from the Jeffersonian Trade Embargo, 1807-09*, 13 REV. INT'L ECON. 631, 631 (2005). GNP and GDP are different in that the former focuses on activity of U.S. persons while the latter focuses on activity within U.S. borders; however, estimates for such an early historical period are probably not exact enough for such a distinction to be material.

141 HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 105, at 3-23 tbl.Ca9-19.

142 Robert Rich, *The Great Recession*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-of-200709 [https://perma.cc/HBY4-TD6V].

start, cotton had fallen about 40%, rice and flour 33%, and tobacco 12%.[143] But imports responded more slowly. This was because the embargo didn't bar vessels from *entering* U.S. ports, although it gave them some incentive not to (by trapping U.S. ships once they entered, and by trapping foreign ships unless they unloaded and departed empty).[144] Thus, imports continued to arrive for some time, and their prices rose only gradually if at all for the embargo's first eight months, though they then skyrocketed (by about 30%) over the next three.[145]

All this suggests that the impact of a five-month embargo under the 1794 delegation could have been a serious hit to the national economy as a whole, including its agricultural sector. To be sure, the actual embargo imposed by Congress in 1794 (from March 26 to May 25) was nothing like the catastrophe of the 1807-09 embargo. Yes, there were reports in Boston during the 1794 embargo that "our seamen were idle and disturbing the peace of our towns . . .; that more than 20,000 tons of shipping, were decaying at the wharves . . .; [and] our produce was perishing on our hands."[146] Yet the literature suggests no major dislocation, in part because the economy later made up for lost time: the summer passed without British outrages, and business began to boom by fall.[147] But the mild impact of the 1794 embargo may have resulted from an expectation that Congress would not extend it long, especially after news broke on March 28 that the notorious Order in Council was revoked, and the subsequent weeks brought no new reports of British attacks. Additionally, one observer later recalled that the embargo from March 26 to May 25 "was at a season of the year when its operation was not very injurious,"[148] perhaps referring to the seasonal harvest and shipping times of perishable agricultural commodities, for which a restriction under the Embargo Authorization Act (which could have run from June 9 to November 18) may have been less favorable.[149] It should also be noted that, insofar as trade restrictions have cumulative effects over time, a restriction under the Embargo Authorization Act might have been worse because it could have been imposed as early as June 9, just two weeks after Congress's direct embargo had expired on May 25.

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143 Irwin, *supra* note 140, at 634-35, 635 fig.3.

144 Embargo Act of 1807, ch. 5, § 1, 2 Stat. 451, 451-52; Irwin, *supra* note 140, at 634.

145 Irwin, *supra* note 140, at 635 fig.4.

146 MANLIUS; WITH NOTES AND REFERENCES 47-48 (Boston, n. pub. 1794) (pamphlet attributed to Christopher Gore).

147 ELKINS & MCKITRICK, *supra* note 38, at 441.

148 19 ANNALS OF CONG. 1011 (1809) (statement of Rep. Livermore).

149 The nation's top export by 1790 was flour, which was perishable; in the mid-Atlantic, the longest annual period during which flour was shipped from the mills that produced it was the months from August through November. Brooke Hunter, Rage for Grain: Flour Milling in the Mid-Atlantic, 1750-1815, at 37, 57, 121 (2001) (Ph.D. dissertation, University of Delaware).

Members of Congress in the debate of May 12, 1794, on whether to let the embargo expire, were seriously concerned about its possible *upcoming* effects in lowering the prices American farmers would get for their crops and raising the prices farmers would pay for necessary imports like salt. Jonathan Dayton, the New Jersey Federalist, said:

> [A]n Embargo would operate hereafter most unfavorably for ourselves, particularly our farmers . . . . Produce . . . would certainly fall much lower, if we continued the Embargo longer than the 25th. Our farmers and planters depend upon the sale of that produce to pay their debts, or to purchase necessaries for their families; and the resolution on the table [to extend the embargo] would operate doubly hard for them, not only in lowering the value of the product of their farms, but by increasing the price of every foreign article which they would need to purchase from the merchants.[150]

Other lawmakers made similar warnings.[151] When the House voted to let the prohibition lapse, prices of exports in the ports soon rose.[152]

III. THE ACT'S AUTHORIZATION TO REGULATE DOMESTIC COMMERCE

It wasn't just that an embargo against sailing to foreign ports could have impacted the economy in a way that would make any foreign-domestic distinction seem meaningless. There is also reason to think the Embargo Authorization Act of 1794, in empowering the President to lay an "embargo"—and to do so "under such regulations as the circumstances of the

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150 4 ANNALS OF CONG. 678 (1794) (statement of Rep. Dayton).

151 4 ANNALS OF CONG. 679 (1794) (statement of Rep. Dexter) ("Farmers suffer as much by the present restraint upon commerce as they would suffer by war."); 4 ANNALS OF CONG. 677 (1794) (statement of Rep. Wadsworth) ("A million bushels of salt will be wanted this season in the American states; and they will be a million dollars dearer, if the Embargo is kept on, than if it is taken off."); 4 ANNALS OF CONG. 677 (1794) (statement of Rep. Giles) ("He was for the Embargo being taken off, . . . because it would materially affect the American farmers . . . . Farmers in the United States had entered into contracts of various kinds. For the discharge of these, they depended on the sale of their crops."). Rep. Gillon, a Charleston Republican, argued that, contrary to the prediction that "the price of imports would rise," "salt is at present only three shillings and six pence, or four shillings a bushel in Charleston. The price has fallen there, and it has not even risen at Philadelphia." Gillon attributed this to the fact that ships were still allowed to enter U.S. ports and were doing so: "He did not see much danger of a rise in the price of foreign articles here; merchants ships came at present frequently to the country. They encourage one another, as sure of a high market; and, as to the Embargo they say it cannot hold long," i.e., Congress would allow the restriction to lapse, as indeed it did. 4 ANNALS OF CONG. 679-80 (1794) (statement of Rep. Gillon).

152 Letter from George Washington to William Pearce (May 18, 1794), https://founders.archives.gov/documents/Washington/05-16-02-0073 [https://perma.cc/K476-RLAV] (flour in Philadelphia); Letter from Abigail Adams to John Adams (May 23, 1794), https://founders.archives.gov/documents/Adams/04-10-02-0115 [https://perma.cc/2LLW-HARF] (flour, grain, and lumber in Boston).

case may require" and "to give all such orders to the officers of the United States, as may be necessary to carry the same into full effect"—was understood to authorize the President to *directly* regulate the coastwise trade, that is, domestic commerce. Section A presents evidence that the Act's term "embargo" referred to any prohibition on ships departing a port, even if they were sailing domestically. Section B shows that restrictions on the domestic coastwise trade might be necessary to the effectiveness of an embargo even when it aimed mainly at international commerce. Further, Section B shows that Washington and Hamilton asserted the power to impose at least one domestic restriction under analogous legislation whose textual warrant for such regulation was *less* clear than that in the Embargo Authorization Act. Given the broad ordinary meaning of "embargo" and the Act's authorization to issue "regulations" and "orders," it is quite plausible that Washington could have used the Act's delegation to restrict domestic trade, relying upon any one of these three textual hooks or a combination of them.

These findings undermine any originalist argument for a foreign-affairs exception to the nondelegation doctrine covering the Act. They directly contradict the idea of a distinction defined in objective terms according to the foreign or domestic locations of the activities (or the foreign or domestic nationalities of the persons or property) that were formally subject to the delegated power. Perhaps one might try to define the distinction in a looser, more nebulous way, permitting delegations affecting domestic activities or U.S. citizens so long as such effects are incidental to a delegation whose purpose lies in foreign affairs.[153] But formulating the doctrine so that it depends upon distinguishing a delegatory statute's purposeful impositions from its incidental ones would be out-of-step with the ascendancy of textualist methods of statutory interpretation over purposive ones. (The *text* of the Embargo Authorization Act did not indicate a *mainly* foreign purpose; its term "embargo" did not differentiate between foreign and domestic, nor did its "public safety" criterion, and while the option to cover "the ships and vessels of any foreign nation" suggested a foreign concern, that was only one of three options.) And the distinction between purposeful and incidental impositions will prove unworkable in any event if applied to statutes generally, given that "many contemporary statutes either cover both foreign and domestic issues, or are vague as to their coverage"; that "in an era of globalization, most statutes . . . will likely have significant foreign *and*

153 *E.g.*, Gordon, *supra* note 9, at 782 (arguing an exception for delegations "in the area of foreign affairs" so long as the executive act "affect[s] private actors domestically" only "incidentally").

domestic aspects that are intertwined"; and that the judiciary "lacks the tools to disentangle these aspects."[154]

A. *The Word "Embargo" Encompassed Domestic Maritime Trade*

In the Embargo Authorization Act of 1794, a great deal turned upon the word "embargo," which the statute did not define. The act specified the various classes of ships on which the President could choose to lay the embargo—ships of U.S. national character, ships of any foreign national character, or all ships located in U.S. ports regardless of character—but it didn't say what an embargo *was*.[155] In particular, it didn't say that an embargo was a prohibition on the departure of ships bound to foreign ports. The embargo directly imposed by Congress a few months earlier, on March 26, had been express on that point, stating: "That an embargo be laid on all ships and vessels in the ports of the United States, whether already cleared out, or not, *bound to any foreign port or place*, for the term of thirty days."[156] The later act imposing the Jeffersonian embargo, on December 22, 1807, similarly stated: "That an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits or jurisdiction of the United States, cleared or not cleared, *bound to any foreign port or place*."[157]

This statutory language seems to suggest, by negative implication, that using the term *embargo* without limiting language as to the embargoed ships' destinations—as the Embargo Authorization Act of 1794 did—indicated that the embargo was (or could be) unlimited as to the ships' destinations. That is, the embargo could encompass not only the foreign trade but the coastwise trade.

To be sure, one can think of alternative reasons why Congress might have added "to any foreign port or place" in the embargoes of March 26, 1794, and of December 22, 1807. Perhaps that phrase was baked into the inherent ordinary meaning of "embargo," but the sovereign had the option to specify some narrower subset of prohibited foreign destinations, and these acts added "to any foreign port or place" to make clear that no such narrower subset was intended.

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154 Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 81 (2023) (discussing the closely related problem of whether to formulate a foreign-affairs exception to the major questions doctrine). *See also* Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. DAVIS L. REV. 57, 70-90 (2023) (noting that in recent years U.S regulatory agencies have frequently invoked foreign-affairs factors in their decisionmaking and that courts have given them wide latitude to do so).

155 Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372.

156 Joint Resolution of Mar. 26, 1794, 1 Stat. 400 (emphasis added).

157 Embargo Act of 1807, ch. 5, § 1, 2 Stat. 451, 451-52 (emphasis added).

But this interpretation is in tension with the dictionary definitions of "embargo" from the period, which overwhelmingly defined the word with no reference to the destination of the embargoed ships, nor any reference to an embargo being an international restriction. To conduct a survey of dictionaries, I drew upon a study by Jennifer Mascott that addresses an entirely unrelated constitutional question but is notable for the rigor of its language-based originalist methods. Mascott identified ten general English dictionaries and four law dictionaries published in Britain near to 1788.[158] For each of these dictionaries, I identified the edition that was most recent as of 1794. All ten of the general dictionaries had an entry for "embargo," as did two of the four law dictionaries. While the ten general dictionaries vary in whether an embargo bars only ships departing a port or can also bar ships entering it—one refers only to departures,[159] four say the word can cover departure or entrance,[160] and five are non-specific[161]—none of them say anything about the foreign or domestic status of the ships' destinations (or origins). Of the two law dictionaries, both refer only to departures, and neither says anything about foreign or domestic destinations. The definition in the first is "[a] prohibition upon shipping, not to go out of any port, on a

158 Jennifer L. Mascott, *Who Are "Officers of the United States"?* 70 STAN. L. REV. 443, 484 (2018).

159 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775) ("A prohibition, an order not to depart, a stop put to trade.").

160 FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (London, J. Wilson & J. Fell 1765) ("[A] prohibition or restraint laid upon vessels by a sovereign, whereby they are prevented from going out, or from entering into a port, for a certain time."); JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (new ed., London, J.F. & C. Rivington 1792) ("[A] prohibition or restraint laid upon vessels by a sovereign, whereby they are prevented from going out of, or from entering into a port, for a certain time."); FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (London, n. pub. 1772) ("[A] prohibition laid upon vessels by a sovereign, whereby they are prevented from going out or entering into a port for a certain time."); THOMAS DYCHE, A NEW GENERAL ENGLISH DICTIONARY (17th ed., London, T. Longman, B. Law & Son 1794) ("[A] prohibition to enter into, or go out of certain places; a stop to trade.").

161 N. BAILEY & EDWARD HARWOOD, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed., London, J.F. & C. Rivington 1790) ("[A] stop or arrest of ships."); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed., London, James Duncan & Son 1792) ("A prohibition to pass; a stop to trade."); WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (London, John & Francis Rivington 1773) ("A prohibition to pass; in commerce, a stop put to trade."); W. PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 228 (8th ed., Edinburgh, Bell & Bradfute 1793) ("[A] prohibition to pass or sail."); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., Dublin, Pat. Wogan 1790) ("A prohibition to pass, a stop put to trade.").

war breaking out, &c."[162] while the other says "a prohibition upon shipping not to go out of any port."[163]

While no general dictionaries or law dictionaries had originated in the colonies or United States as of 1794, we may consult the earliest general dictionaries that appeared in America later on: Noah Webster's *Compendious Dictionary* (1806) and his more extensive and successful *American Dictionary of the English Language* (1828). Webster's 1806 dictionary defined the term disjunctively as "a prohibition to prevent vessels from leaving a port, *or* commodities from being exported."[164] This definition does have some reference to foreign destinations, as the same dictionary defines "export" as "to carry or send out of a country,"[165] but the reference appears only in the second half of the disjunctive definition, and not the half that has reference to ships. Further, Webster's later but more elaborate 1828 dictionary drops any reference to the foreign-versus-domestic destinations of ships: "In *commerce*, a restraint on ships, or prohibition of sailing, either out of port, or into port, or both; which prohibition is by public authority, for a limited time. Most generally it is a prohibition of ships to leave a port."[166]

Additionally, in 1817, the U.S. Supreme Court, in a case about the 1807 embargo, said that, "when we look into the definition of the word *embargo* we find it to mean 'a prohibition to sail.'"[167]

Most strikingly, British and American governments would at times impose an "embargo" that was understood to cover voyages to domestic destinations, suggesting the word did encompass such measures when used without limitation. While sovereigns usually did limit embargoes to international commerce, here are three examples of the unadorned term being understood to cover the domestic:

First: Amid conflict arising from the overthrow of James II, the English Privy Council in 1689 ordered the Admiralty "to cause an Embargo, or Stay to be made of all Ships and Vessels whatsoever now within, or which hereafter shall come into any [of] the Ports, Harbors or Roads [i.e., roads in the maritime sense] within his Majesty's Kingdom of England," with no stated

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162 GILES JACOB & J. MORGAN, A NEW LAW-DICTIONARY (10th ed., London, W. Strahan & W. Woodfall 1782).

163 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 308 (London, A. Strahan & W. Woodfall 1792).

164 NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 100 (New Haven, Hudson & Goodwin 1806) (emphasis added).

165 *Id.* at 110.

166 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

167 The William King, 15 U.S. (2 Wheat.) 148, 153 (1817).

limitation as to destinations of the vessels.[168] That this order's use of the term "embargo" was understood to cover coastwise shipping was made explicit in a later order stating "that the present Embargo," while canceled for some vessels, "be continued on all Ships within the Severall Ports from Padstow to Carlisle inclusive [i.e., up and down the west coast of England] and renewed *on the Coasters* and Cole Traders in those Ports."[169]

Second: During the French and Indian War, the British commander-in-chief in North America, Lord Loudoun, seeking to conserve supplies for his forces, demanded that the governments of individual colonies impose embargoes.[170] The Governor in Council of Maryland in March 1757 sent a message to the collectors of customs in the colony's several ports. The message recited that Loudoun had "recommended to me . . . that an Embargo should be laid in the several Ports within my Government," and it then gave an order indicating an understanding of "embargo" that was not limited by ships' destinations: "you are therefore hereby required not to clear any Ship or Vessel now lying within your Port, until you shall receive my further Directions herein."[171]

Third: During the War of 1812, when Britain blockaded the U.S. coast, Congress was concerned about the existence of U.S. commerce that effectively aided the British, and it imposed an embargo in December 1813, which faced strong resistance from New England and was repealed four months later. The statute was structured around a master clause that "an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits or jurisdiction of the United States and the territories thereof, cleared or not cleared."[172] There was nothing equivalent to the phrase "bound for any foreign port or place" that we observe in the embargo statutes of 1794 or 1807. This master clause—using the word *embargo* with no limitation as to the ships' destination—set a baseline that even coasting vessels were prohibited to sail. The rest of the legislation was crafted against that baseline. Most notably, a narrow subset of coastal shipping was expressly excepted: vessels "whose employment has uniformly been confined to the navigation of bays, sounds, rivers, or lakes," and then only with permits granted by the President.[173] The Treasury Department immediately issued a

168 Privy Council Order of April 15, 1689, PC 2/73: Privy Council Registers (Feb. 14, 1689—Aug. 27, 1690), at page 74, National Archives (Kew, United Kingdom) (Gale: State Papers Online 1509-1714) (on file with author).

169 Privy Council Order of July 8, 1689, PC 2/73, *supra* note 168, at page 171 (emphasis added). For background, see T.S. WILLAN, THE ENGLISH COASTING TRADE, 1600-1750, at 10 (1938).

170 ALAN ROGERS, EMPIRE AND LIBERTY: AMERICAN RESISTANCE TO BRITISH AUTHORITY 1755-1763, at 93-97 (1974).

171 31 ARCHIVES OF MARYLAND 184-85 (William Hand Browne ed., 1911).

172 Act of Dec. 17, 1813, ch. 1, § 1, 3 Stat. 88, 88.

173 *Id.* § 4.

circular making explicit that, except for this narrow exception for vessels of "bays, sounds, rivers, or lakes," no vessel could sail, stating that "[t]his prohibition extends as well to *coasting and fishing vessels* and boats, as to registered and sea-letter vessels."[174] Domestic trade was so restricted that the island of Nantucket could not obtain food from mainland Massachusetts, and Congress had to pass a special statute allowing ships to sail "from the main land to said island."[175] The embargo's interdiction of the coasting trade is also evident from the opposition expressed in Congress[176] and is noted in the secondary literature.[177]

An aside before concluding this Section: There is an interesting question as to whether the Embargo Authorization Act's use of the word "embargo" authorized stopping only the departure of ships or both the departure and entry of ships. The dictionaries were about evenly divided on whether an embargo only barred ships departing or could also bar ships entering.[178] The references to ships "bound to any foreign port" in the actual embargoes of 1794 and 1807 made clear that those two prohibitions were concerned only with departures, and sources confirm that ships were in fact permitted to enter during those two prohibitions, although the prospect of being trapped gave ships some incentive not to enter.[179] Most likely the Embargo Authorization Act was using the narrower dictionary definition and covered only departures; there was a contemporaneous trend of bills and acts that focused explicitly on prohibiting entries or imports and were labeled "non-intercourse" or "non-importation," rather than "embargo."[180]

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174 *The Embargo Law,* 5 THE WEEKLY REGISTER 353, 353 (H. Niles ed., Jan. 29, 1814) (reprinting William Jones, Circular (Dec. 24, 1813)) (emphasis added).

175 Act of Jan. 25, 1814, ch. 5, 3 Stat. 94. For another exception, see Act of Mar. 4, 1814, ch. 17, 3 Stat. 98.

176 *See* 26 ANNALS OF CONG. 938 (1814) (statement of Rep. King) (proposing resolution to repeal embargo's interdiction of "the coasting trade" within a state or between adjoining states).

177 HARRY L. COLES, THE WAR OF 1812, at 243 (Daniel J. Boorstin ed., 1966) ("[A]bsolutely forbidding the coastal trade.").

178 Of the dictionaries that spoke to the issue, the departure-only definition appeared in one general English dictionary, two English law dictionaries, and Webster's two dictionaries (with his 1828 dictionary acknowledging departure and entry but stating that the departure definition applied "[m]ost generally"), while the entry-or-departure definition appeared in four general English dictionaries. *See supra* text and accompanying notes 159-166.

179 On entries during the 1794 embargo, see 4 ANNALS OF CONG. 679-80 (1794) (statement of Rep. Gillon) ("[M]erchants ships came at present frequently to this country. They encourage one another, as sure of a high market; and, as to the Embargo, they say that it cannot hold long."); 4 ANNALS OF CONG. 680 (1794) (statement of Rep. Murray) (referring to "the daily arrivals in various parts of the Union" of vessels that had been seized by the British but released). On entries during the 1807 embargo and the prospect that a ship would become trapped at port, see *supra* text and accompanying note 144; and Herbert Heaton, *Non-Importation, 1806-1812*, 1 J. ECON. HIST. 178, 190 (1941).

180 For acts prohibiting entry of certain ships, referring in their titles to the suspension or interdiction of "intercourse" and never using the term "embargo," see Act of June 13, 1798, ch. 53, 1

B. *Restricting International Trade Necessitated Restricting Domestic Trade*

If a government imposed an embargo to restrict voyages to foreign ports but allowed vessels to sail coastwise, there was the risk that a vessel might promise to sail coastwise, thereby obtain permission to depart, and then sail internationally once it was out of sight. To Americans in the 1790s, this would have been evident from the experience of the Revolutionary War. During that conflict, the Continental Congress in June 1778 successfully persuaded each state to impose its own embargo on the out-of-state exportation of provisions, so as to keep them for U.S. forces and out of British hands.[181] The states' respective embargoes, sought and coordinated by the Continental Congress, amounted to a ban on sending provisions out of the United States or between the individual states, effectively banning *interstate* coastwise trade in such goods.[182] But the *intrastate* coasting trade that was allowed by this arrangement was recognized as an evasion risk, as when the Continental Congress in September 1778 asked New Jersey "to take the most effectual measures to enforce the due observance of the embargo," warning "that the coast trade with provisions may be productive of supply to the enemy" in British-occupied New York City.[183]

When Congress imposed the embargo of March 26, 1794, banning departures of ships "bound for any foreign port or place" but leaving untouched the coastwise trade, Washington and Hamilton immediately saw the potential for evasion and acted to mitigate it. Hamilton, relying upon the embargo enactment's authorization for the President to give "instructions to the revenue officers,"[184] issued a circular to the collectors of customs on March

Stat. 565; Act of Mar. 1, 1809, ch. 24, 2 Stat. 528. The congressional debate in 1794 on a measure to prohibit importation of British goods in British ships did not refer to it with the term "embargo." 4 ANNALS OF CONG. 561-602 (1794). On this distinction during the Jefferson administration, see Heaton, *supra* note 179, at 178-79.

181 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 569 (Gaillard Hunt ed., 1908) [hereinafter JCC]. The Journal says: "Resolved, That it be recommended to the several States to take effectual Measures for preventing the Exportation of the said Articles." *Id.* A marginal entry in the handwriting of Henry Laurens, President of the Continental Congress, says: "Agreed, that an embargo shall be laid." *Id.* at 569 n.1. Later resolutions referred to this initiative as an "embargo." *E.g.*, *infra* text and accompanying note 183.

182 The interstate coastwise trade embargo was so restrictive that Congress ended up making specific exceptions to it. In September 1778, it resolved that any Southern state could allow exportation of provisions to any Eastern state if they were carried in a ship designated by the executive of the said Eastern state. 12 JCC, *supra* note 181, at 861-62. In February 1779, Congress also decided that Connecticut and New York could export provisions to Rhode Island to prevent starvation there. 13 JCC, *supra* note 181, at 152.

183 11 JCC, *supra* note 181, at 788.

184 *See* Letter from Alexander Hamilton to William Ellery (Apr. 25, 1794), https://founders.archives.gov/documents/Hamilton/01-16-02-0267 [https://perma.cc/4QLM-RKQ4] (stating, with regard to the embargo: "Instructions on the execution of a law do not

26. In the circular, Hamilton recognized that the embargo statute was "not to interfere with any of the usual proceedings in the cases of vessels employed in the coasting trade,"[185] but he ordered two precautionary measures.

Hamilton's first precautionary measure had to do with fact that, under existing statutory law, vessels with *licenses* to sail in the coastwise trade were entitled to exchange those authorizations for *registrations* to sail in the foreign trade, and, conversely, vessels with *registrations* for the foreign trade were entitled to exchange those authorizations for *licenses* to sail in the coastwise trade.[186] Hamilton told the collectors that "the surrender of a license in order to the proceeding on a foreign voyage is not to be received."[187] As Washington described this requirement in a message to Congress two days later, "the collectors have been instructed to refuse to receive the surrender of coasting licenses for the purpose of taking out registers."[188] The idea seems to have been that, because a registration made a vessel look like it had authorization for the foreign trade (say, in the eyes of officials in foreign ports), the present advent of a month-long ban on foreign trade meant that no such papers should be given out. This might seem technically to violate coastwise vessels' statutory entitlement to seek registers, but Washington and Hamilton apparently interpreted the new embargo as empowering them to refrain from honoring that entitlement while the embargo was in force.

Hamilton's second precautionary measure had to do with the fact that, under existing statutory law, vessels of U.S. national character registered for the foreign trade were entitled to sail in the coastwise trade if they wished, without facing restrictions or discriminatory duties.[189] To be sure, registered vessels were "*usually* employed in a foreign trade"[190]—that was why they had gone to the extra trouble of obtaining and maintaining a registration.[191] But a registered ship *could* sail in the coastwise trade if it wished, and one can

immediately go from the President of the United States. This department [i.e., the Treasury] is the organ of the instructions of the President to the collectors.").

185 Alexander Hamilton, *Treasury Department Circular to the Collectors of Customs*, *26 March 1794*, FOUNDERS ONLINE [hereinafter Hamilton Circular], https://founders.archives.gov/documents/Hamilton/01-16-02-0152 [https://perma.cc/4BLW-LS82].

186 Act of Feb. 18, 1793, ch. 8, § 3, 1 Stat. 305, 306. On the subset of licenses known as enrollments, see *supra* note 28.

187 Hamilton Circular, *supra* note 185.

188 George Washington, *Message Suggesting the Extension of the Embargo to Fishing Vessels, &c.* (March 28, 1794), *in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 429 (Washington, Gales & Seaton 1833) [hereinafter Washington Message].

189 *See supra* note 27 (discussing the statutory regime governing registered vessels).

190 Wolcott Circular, *supra* note 27, at 235 (emphasis added).

191 For example, registered vessels faced higher bond requirements than licensed vessels for most vessel sizes, plus higher endorsement fees. *Compare* Act of Dec. 31, 1792, ch. 1, §§ 7, 25, 1 Stat. 287, 290, 297-98 (setting requirements for registered vessels), *with* Act of Feb. 18, 1793, ch. 8, §§ 4, 34, 1 Stat. 305, 306-07, 316 (setting requirements for licensed and enrolled vessels).

imagine scenarios where it might do so, say, if it were collecting or distributing foreign goods at more than one U.S. port, or if a coastwise opportunity arose between foreign voyages. In the embargo instructions, Hamilton told the collectors that, during the embargo, "no clearance for a foreign port or place is to be granted"—that much was obvious—but then, importantly, he added a bond-and-surety requirement:

> nor are any but vessels employed in the coasting trade or Fisheries, to be permitted to clear from district to district without bond being first given with one or more sureties to your satisfaction in a sum equal to the value of whatever lading she may have on board, with condition that she will proceed to the district for which she shall clear, and there enter, and shall produce within a term not exceeding four months, a certificate from the Collector of some other district, of her having there duly landed her said lading.[192]

A few words of clarification about this bond-and-surety requirement. Hamilton's reference to vessels sailing "from district to district" referred to the fact that Congress had divided the entire U.S. coastline into a series of customs districts, with each district centered on a port (e.g., Massachusetts had twenty districts).[193] Sailing "from district to district" essentially meant sailing coastwise from one U.S. port to another U.S. port. Second, the category of ships on which Hamilton was imposing the bond-and-surety requirement—"any [ships] *but* vessels employed in the coasting trade or Fisheries"—meant all ships of U.S. national character *registered* for the foreign trade, who would normally be entitled to sail coastwise, freely, from one U.S. customs district to another.[194] This meaning is evident from the description of this instruction that Washington sent to Congress two days later, in which Washington also explained the anti-evasion rationale for the instruction:

> It also deserves the attention of Congress how far the clearances from one district to another, under the law as it now stands, may give rise to evasions of the embargo. As one security, the collectors have been instructed . . . to require bond from registered vessels, bound from one district to another, for the delivery of the cargo within the United States.[195]

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192 Hamilton Circular, *supra* note 185.

193 *See* Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 30 (establishing the customs districts).

194 Technically Hamilton's category may also have encompassed vessels of foreign national character, but those vessels generally would never sail between U.S. ports because of prohibitory duties. *See supra* text and accompanying notes 29-30 (discussing duties on foreign-character vessels).

195 Washington Message, *supra* note 188, at 429. For a registered vessel sailing coastwise during the embargo, see Letter from Jeremiah Olney to Alexander Hamilton (Apr. 24, 1794), https://founders.archives.gov/documents/Hamilton/01-16-02-0260 [https://perma.cc/D7RS-2XLW].

In other words, Washington and Hamilton feared that registered vessels purporting to sail coastwise from one U.S. port to another (as they were normally entitled to do freely) might instead sail to foreign ports, and the two men sought to prevent such evasion by requiring all these registered vessels, before departing on such coastwise voyages, to give "bond . . . with one or more sureties to [the collector's] satisfaction in a sum equal to the value of whatever lading she may have on board, with condition that she will proceed to the district for which she shall clear, and there enter," and not instead sail to some foreign port.[196]

To appreciate the nature of the requirement that Washington and Hamilton were imposing, we need some background on bonds and sureties. Federal statutory law on shipping often required ship owners to *give bond with sureties* as a means of assuring the government that the ship would not violate some requirement or other.[197] This meant that you, as the ship owner, executed a written promise to pay a penalty—enforceable in court—in the event you were caught in a violation.[198] The added requirement to provide "sureties" meant that you had to get one or more people to co-sign the bond and make themselves liable for the penalty, jointly and severally with you, in the event you were caught in a violation.[199] And the co-signing persons had to be to the collector's "satisfaction," that is, they had to be wealthy enough for the collector to think they could pay the penalty if necessary. Essentially, the surety requirement meant you had to get one or more wealthy people to vouch for you and put themselves "on the hook" for whatever penalty you might incur. Although bond-and-surety requirements were ubiquitous in eighteenth-century governance, the ways in which persons facing such requirements obtained sureties have barely been studied.[200] One monograph on English shipping in this era posits that persons seeking sureties may have gone to friends and relatives, or fellow investors in the venture at issue, or simply made a payment to wealthy persons who made a business of serving as sureties, somewhat like insurers.[201] In any event, a bond-and-surety requirement was costly and restrictive in that the ship owner had to have

196 Hamilton Circular, *supra* note 185.

197 *See, e.g.*, statutory provisions cited *infra* note 202.

198 See the bond forms for registered and coasting vessels in Wolcott Circular, *supra* note 27, at 246-47.

199 On sureties' role of co-signing and guaranteeing all manner of bonds in this era, see Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1818, 1845-48 (2024).

200 For a pioneering exploration of one part of the early American world of bonds, see *id.* On a somewhat later period, see Erik Mathisen, *"Know All Men By These Presents": Bonds, Localism, and Politics in Early Republican Mississippi*, 33 J. EARLY REPUBLIC 727 (2013).

201 *See* WILLAN, *supra* note 169, at 8-9 (describing the variety of different bondsmen in this system).

wealthy associates (and expend social capital with them) or pay somebody in an insurance-like arrangement.

Thus, by imposing this bond-and-surety requirement on registered vessels sailing district-to-district in the coastwise trade, Washington and Hamilton were creating a new regulatory burden on domestic commerce. It was a burden on voyages between the states and even voyages within a state (because a single state could contain several districts).

The new domestic regulatory burden that Washington and Hamilton were imposing had no explicit basis in the embargo statute of March 26 or elsewhere. The preexisting statutory law on shipping imposed various bond requirements, but none were equivalent to the new one appearing in Hamilton's circular in its amount and conditions.[202] Plus, Washington and Hamilton had exercised creative policy discretion in deciding the exact parameters of the bond—that it be for the value of the cargo (bonds could instead include the value of the ship, or some multiple of the value of the cargo or ship) and that the certificate of landing be produced in four months (rather than some other amount of time).[203]

After hearing from Washington on March 28 about the evasion risk and the new executive-imposed requirements, Congress enacted supplemental legislation on April 2 that embraced the bond-and-surety requirement for registered vessels sailing between U.S. districts and increased it to *double* the value of both the cargo *and* the vessel, while omitting to say anything about the deadline by which the ship had to produce a certificate of landing.[204] Let me emphasize, however, that Hamilton and Washington had *already* sent the instructions imposing the bond-and-surety requirement on March 26, before Washington wrote to Congress on March 28 and before Congress acted on April 2. The two men believed they already had the authority to devise this requirement, even though no legislation gave them the authority explicitly.

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202 For the bond requirements in preexisting statutory law, see Act of Sept. 1, 1789, ch. 11, § 9, 1 Stat. 55, 57 (requiring bond not to transfer certificate and, if ship is lost or ceases to be solely owned by U.S. citizens, to deliver up certificate); *id.* § 22 (requiring $200 bond not to engage in illicit trade or commerce by 5-to-20-ton coasting vessels); *id.* § 23 (requiring $1000 bond not to engage in illicit trade or commerce by registered or larger coasting vessels); Act of Dec. 31, 1792, ch. 1, § 7, 1 Stat. 287, 290 (requiring bond not to transfer certificate and, if ship is lost or ceases to be solely owned by U.S. citizens, to deliver up certificate); Act of Feb. 18, 1793, ch. 8, § 4, 1 Stat. 305, 306-07 (requiring bond not to engage in defrauding the revenue, by coasting vessels); *id.* § 23 (requiring bond in case of lost manifest or permit).

203 *See* Hamilton Circular, *supra* note 185. For an example of a different type of bond, see Letter from Alexander Hamilton to Otho H. Williams (May 3, 1794), https://founders.archives.gov/documents/Hamilton/01-16-02-0316 [https://perma.cc/24NW-KTRA] (exercising power expressly delegated to the president under the embargo statute to allow an ad-hoc voyage to a foreign port, but requiring a bond "for not less than treble the value of the [v]essel").

204 Joint Resolution of Apr. 2, 1794, 1 Stat. 400, 400-01.

That Washington and Hamilton crossed the line into regulating domestic commerce notwithstanding the embargo's limitation to vessels bound to "foreign port[s]" may suggest they were broadly construing the embargo act's provision "that the President of the United States be authorized to give such instructions to the revenue officers . . . as shall appear best adapted for carrying the said [embargo] into full effect."[205] Or perhaps they simply read the term "embargo" as including whatever enforcement measures were necessary.[206]

All this suggests that Washington and Hamilton, if they had exercised the power delegated under the Embargo Authorization Act of June 4, would have construed it to authorize even more aggressive anti-evasion restrictions on domestic commerce, given that the Act's term "embargo" was not limited by ships' destinations and that the act authorized not merely "instructions" (as under the March 26 embargo) but "regulations" and "orders" (which seem even stronger).

There were plenty of possible anti-evasion regulations that Washington and Hamilton might have decided to impose on domestic commerce if they had ever acted under the Embargo Authorization Act. What they had done under the March 26 embargo, requiring bonds of registered ships sailing coastwise, was probably the most obvious anti-evasion measure, because registered ships tended to present the greatest risk of illicit voyages to foreign ports: they tended to be larger than coastwise vessels, meaning they could go longer distances, and their registers made it easier for them to appear legitimate to foreign port officials. But there were additional evasion risks that were also substantial. Vessels enrolled or licensed for the coastwise trade might go to foreign ports; the larger ones were capable of sailing overseas, and even smaller ones might reach Canada or Spanish Florida. And because preexisting law allowed registered vessels to shift to coastwise licenses, even bigger ships might take advantage of this route.

To get a sense of the evasions that could have occurred if the power delegated under the Embargo Authorization Act had been exercised—and what restrictions on domestic commerce might have been necessary to respond to those evasions—we can look to what happened in the course of the Jeffersonian embargo in 1807-09. Soon after it was imposed, registered vessels sought to convert foreign registrations to coastwise licenses in large numbers,[207] and Congress, fearing evasion, responded within two weeks by

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205 Joint Resolution of Mar. 26, 1794, 1 Stat. 400.

206 Washington had also notified Congress on March 28 that he'd asked state governors to call out the militia if necessary to detain vessels, adding: "[t]his power is conceived to be incidental to an embargo." Washington Message, *supra* note 188, at 429.

207 JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 93 (2012).

imposing bond-and-surety requirements on all coastwise vessels (not just registered ones).[208] Soon, lawmakers sympathetic to the smaller coasting vessels—whose poorer owners would have more trouble getting sureties—condemned the bond requirements as a "hardship" and as "extreme and harassing regulations."[209] Four months into the embargo, Congress saw the need for more extreme measures. It prohibited all coastwise vessels from loading except under the supervision of a federal inspector and completely banned the domestic coastwise trade to U.S. customs districts adjacent to Canada or Spanish Florida, except with the President's "special permission."[210] Though Congress's restrictions of the coastwise trade became even more extreme later on,[211] those just described are what the government found necessary over just a four-month period, shorter than that allowed by the Embargo Authorization Act of 1794. The foreign and the domestic were indivisible.

208 Act of Jan. 9, 1808, ch. 8, § 1, 2 Stat. 453, 453.

209 18 ANNALS OF CONG. 1651 (1808) (statement of Rep. D.R. Williams).

210 Act of Apr. 25, 1808, ch. 66, §§ 2, 6, 2 Stat. 499, 499-500.

211 *See* MASHAW, *supra* note 207, at 94-96 (discussing the even stricter 1809 Enforcement Act).