

ARTICLE

# The Secret Life of Statutes: A Century of the Trading with the Enemy Act

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*In 1917 Congress passed the Trading with the Enemy Act to prevent trade with Germany and the Central Powers. It was a wartime law designed for wartime conditions but one that, over the course of the following century, took on a secret, surprising life of its own. Eventually it became the basis for a project of worldwide economic sanctions applied by the United States at the discretion of the president during times of both war and peace. This article traces the history of the law in order to explore how the expansion of American power in the twentieth century required a transformation of the American state and the extensive use of executive powers justified by repeated declarations of national emergency.*

October 6, 2017 marked the hundredth anniversary of the Trading with the Enemy Act. What began as an effort to “define, regulate, and punish trading with the enemy” in the context of a congressionally declared war of limited duration has transformed over the decades into a broad writ of executive authority to wage economic warfare against loosely defined enemies virtually anywhere and at any time.<sup>1</sup>

Tracing this history sheds light on what might be called the secret life of statutes: the way that laws survive beyond their initial moment of creation, to be revived, reworked, and redeployed in later times of need. Over time, through executive proclamations, congressional amendments, and judicial decisions, the Trading with the Enemy Act concentrated more and more power in the hands of the president. By the 1950s, it served as the legal underpinning of most of the nation’s highest-profile economic sanctions regimes—a function that it and its legislative offspring continue to perform. The law has granted presidents the unilateral authority to interfere with private economic transactions—including by freezing assets or imposing trade embargoes—in times of declared emergencies. Though overshadowed by military operations, U.S. economic sanctions have affected the lives of millions of people around the world.<sup>2</sup> The story of the act, then, is part of the story of the rise of American global power, and the legal and government foundations that made possible its exercise.

The Trading with the Enemy Act has drawn the attention of political scientists, lawyers, and economists who have debated the efficacy of sanctions or focused on the law’s implications for

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The author would like to thank attendees at the 2017 Annual Meeting of the Society for Historians of American Foreign Relations in Washington, D.C., for their helpful feedback on an earlier version of this essay. Colleagues in a History Department seminar at Wake Forest University provided useful suggestions at a later stage in the process. The Wake Forest History Department also provided generous financial assistance for archival research related to this article.

<sup>1</sup>Trading With the Enemy Act, Pub. Law No. 65-91, 40 Stat. 411 (1917); 12 U.S.C., sec. 95a (1917); 50 U.S.C. App. 1–44 approved Oct. 6, 1917.

<sup>2</sup>For a historical overview of the United States and sanctions, see Alan P. Dobson, *US Economic Statecraft for Survival, 1933–1991: Of Sanctions, Embargoes and Economic Warfare* (London, 2002).

constitutional interpretation and current policy.<sup>3</sup> Far less attention has been given to the act's historical contexts and its unexpected outcomes.<sup>4</sup> Historians have chronicled a few of the episodes of heightened activity that have punctuated the history of the Trading with the Enemy Act—moments when the law justified new government actions, including during World War I, when the act allowed the United States to seize German property, and in 1933, when Franklin D. Roosevelt cited it to proclaim a “Bank Holiday.”<sup>5</sup> Some also note that the Trading with the Enemy Act justified freezing Japanese assets and the assets of European countries occupied by the Axis before Pearl Harbor, as well as imposing embargoes against China and North Korea during the Cold War.<sup>6</sup> Little has been written, however, about how Congress's attempts in the 1970s to rein in executive power led to the act's reinvention. Nor have historians considered the long arc of the law and its role in shaping U.S. global hegemony.

A historically grounded overview of the evolution and use of the Trading with the Enemy Act sheds light on how the expansion of U.S. global power reshaped the American state both at home and abroad beginning with World War I.<sup>7</sup> Wars built the modern state, scholars

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<sup>3</sup>Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* (New York, 1988), 186–96; “The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power,” *Harvard Law Review* 96, no. 5 (Mar. 1983): 1102–20; Michael P. Malloy, *Economic Sanctions and U.S. Trade* (Boston, 1990), 136–48; John P. Giraud, “Waging Economic Warfare: The Sanctions Power under the Constitution,” *New York University Journal of International Law and Politics* 19, no. 4 (Summer 1987): 935–57. On the efficacy of sanctions, see Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, and Barbara Oegg, *Economic Sanctions Reconsidered*, 3<sup>rd</sup> ed. (Washington, D.C., 2009); Robert A. Pape, “Why Economic Sanctions Do Not Work,” *International Security* 22, no. 2 (Fall 1997): 90–136; David A. Baldwin and Robert A. Pape, “Evaluating Economic Sanctions,” *International Security* 23, no. 2 (Fall 1998): 189–98; Peter Wallensteen, “A Century of Economic Sanctions: A Field Revisited,” Uppsala Peace Research Papers No. 1 (Uppsala, Sweden, 2000); M. S. Daoudi and M. S. Dajani, *Economic Sanctions: Ideals and Experience* (London, 1983); David Cortright and George A. Lopez, “Learning from the Sanctions Decade,” *Global Dialogue* 2, no. 3 (Summer 2000): 11–24; and T. Clifton Morgan, Navin Bapat, and Yoshiharu Kobayashi, “Threat and Imposition of Economic Sanctions 1945–2005: Updating the TIES Dataset,” *Conflict Management and Peace Science* 31, no. 5 (Nov. 2014): 541–58. A recent call for more intensive economic statecraft is Robert D. Blackwill and Jennifer M. Harris, *War by Other Means: Geoeconomics and Statecraft* (Cambridge, MA, 2016).

<sup>4</sup>Two brief overviews of the Trading with the Enemy Act written by historians are Edward S. Miller, *Bankrupting the Enemy: The U.S. Financial Siege of Japan before Pearl Harbor* (Annapolis, MD, 2007), 3–8; and Thomas W. Zeiler, “Trading with the Enemy Act,” in *The Oxford Encyclopedia of American Military and Diplomatic History*, ed. Timothy J. Lynch (New York, 2013), 377–8.

<sup>5</sup>On World War I, see David M. Kennedy, *Over Here: The First World War and American Society* (New York, 1980), 311–3; and Kathryn Steen, *The American Synthetic Organic Chemicals Industry: War and Politics, 1910–1930* (Chapel Hill, NC, 2014), 150–203. For 1933, see Frank Freidel, *Franklin D. Roosevelt: Launching the New Deal* (Boston, 1973), 175–236; and Raymond Moley, *The First New Deal* (New York, 1966), 140–80.

<sup>6</sup>For Japan, see Miller, *Bankrupting the Enemy*. For Cold War China, see Nancy Bernkopf Tucker, *The China Threat: Memories, Myths, and Realities in the 1950s* (New York, 2012), 121–37. On the Trading with the Enemy Act as part of the broader history of sanctions, see Dobson, *US Economic Statecraft for Survival*.

<sup>7</sup>In highlighting a long-term legacy of World War I, the history of the Trading with the Enemy Act complements existing literature that has shown how the war transformed African-American political consciousness, contributed to veteran political organizing and the GI Bill, reshaped citizenship, and developed international law and the peace movement. Adriane Lentz-Smith, *Freedom Struggles: African Americans and World War I* (Cambridge, MA, 2011); Jennifer D. Keene, *Doughboys, the Great War, and the Remaking of America* (Baltimore, MD, 2001); Christopher Capozzola, “Legacies for Citizenship: Pinpointing Americans during and after World War I,” *Diplomatic History* 38, no. 4 (Sept. 2014): 713–26; Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (New York, 2016), 152–76; Stephen Wertheim, “The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920,” *Diplomatic History* 35, no. 5 (Nov. 2011): 797–836; Warren F. Kuehl and Lynne K. Dunn, *Keeping the Covenant: American Internationalists and the League of Nations, 1920–1939* (Kent, OH, 1997); Daniel Gorman, *The Emergence of International Society in the 1920s* (Cambridge, UK, 2012).

often remind us.<sup>8</sup> Military moments have led not only to larger bureaucracies, increased taxes, and widened state authority, but also to new ways to mobilize citizens to serve as private arms of state power.<sup>9</sup> Unraveling the history of the Trading with the Enemy Act highlights in particular how much the transformation of the modern American state has occurred by means of the stretching of laws during times of perceived crisis.

The Trading with the Enemy Act served as the statutory foundation for the nation's emergence as what might be called a "sanctioning state." This phrase has a dual meaning. It first denotes a state that frequently uses sanctions as a foreign policy tool. Since 1945 the United States has been the world's leading user of sanctions, imposing them—often unilaterally—against nations and individuals that have expropriated the property of U.S. nationals, violated human rights norms, or challenged American visions of proper conduct in other ways.<sup>10</sup> Second, the term "sanctioning state" refers to the legal and bureaucratic state apparatus required to implement and sustain sanctions regimes over months, years, and, in some cases, decades.<sup>11</sup> The history of the Trading with the Enemy Act illuminates how this apparatus expanded over time to meet the needs of a sanctions-imposing foreign policy.

Because presidents and their lawyers felt it was important to ground policies in legal authority, law was repeatedly called upon to justify such economic warfare policies.<sup>12</sup> Not surprisingly then, lawyers were central to shaping the Trading with the Enemy Act's secret life. It lay dormant for long stretches during the twentieth century, but lawyers remembered where it slept and at key moments reminded policymakers of powers it might grant once awakened. Over time, lawyers made the act the keystone in a broader legal infrastructure that permitted the implementation of long-running and wide-ranging sanctions.

In order to impose economic sanctions during peacetime, presidents generally cited the existence of a national emergency. The practice of emergency government has a long history in the United States, including Abraham Lincoln's seizure of virtually dictatorial authority in 1861, Franklin Roosevelt's extensive use of emergency authority during the Great Depression, and

<sup>8</sup>Two classics are Randolph S. Bourne, "The State," in *War and the Intellectuals: Collected Essays, 1915–1919*, ed. Carl Resek (Indianapolis, IN, 1964), 65–104; Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton, NJ, 1975).

<sup>9</sup>Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State* (Chicago, 2014); Alfred W. McCoy and Francisco A. Scarano, eds., *Colonial Crucible: Empire in the Making of the Modern American State* (Madison, WI, 2009); Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945–1954* (New York, 1998); Paul A. C. Koistinen, *Mobilizing for Modern War: The Political Economy of American Warfare, 1865–1919* (Lawrence, KS, 1997); Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York, 2008); James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York, 2011).

This is of course part of a larger story of state building in the United States. On the nineteenth century, see Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge, UK, 2009); William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113, no. 3 (June 2008): 752–72; Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton, NJ, 2017); and Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (New Haven, CT, 2013). For an overview of the expansion of the administrative state in the twentieth century, see Daniel Ernst, "Law and the State, 1920–2000: Institutional Growth and Structural Change," in *The Cambridge History of Law in America, Vol. III: The Twentieth Century and After (1920–)*, eds. Michael Grossberg and Christopher Tomlins (New York, 2008), 1–33.

<sup>10</sup>Morgan, Bapat, and Kobayashi, "Threat and Imposition of Economic Sanctions," 548; Hufbauer et al., *Economic Sanctions Reconsidered*, 5.

<sup>11</sup>On the legal basis of the sanctions regime, see Carter, *International Economic Sanctions*.

<sup>12</sup>On law and US foreign policy, see Mary L. Dudziak, "Legal History as Foreign Relations History," in *Explaining the History of American Foreign Relations*, 3rd ed., eds. Frank Costigliola and Michael J. Hogan (New York, 2016), 135–50; and Clara Altman, "The International Context: An Imperial Perspective on American Legal History," in *A Companion to American Legal History*, ed. Salley E. Hadden and Alfred L. Brophy (Hoboken, NJ, 2013), 543–61. See also Walter LaFeber, "The Constitution and United States Foreign Policy: An Interpretation," *Journal of American History* 74, no. 3 (Dec. 1987): 695–717.

Harry Truman's declaration of national emergency in 1950 during the Korean War.<sup>13</sup> From 1976 to 2004, presidents declared another thirty-eight national states of emergency (not including those that responded to domestic natural disasters).<sup>14</sup> By the end of 2017, twenty-eight separate declared national emergencies remained in place.<sup>15</sup>

The aggressive use of national emergencies, most justified under the Trading with the Enemy Act, contributed greatly in the twentieth century to both the expansion of presidential powers and the development of what amounts to a permanent state of war.<sup>16</sup> The maintenance of a large standing army, the stationing of troops overseas, the concentration in presidential hands of the practical power to declare and wage war—all of these departed in important ways from the original vision of the nation's founders.<sup>17</sup> The story of the Trading with the Enemy Act shows how the creative application of statutes advanced this dramatic transformation, and emphasizes the role of statutes in shifting the practical meaning of the Constitution over time.<sup>18</sup> It also highlights how these changes have been produced through political contestation and cooperation between Congress and the executive.<sup>19</sup>

The basic contours of the debate over emergency rule are little changed since two political scientists staked them out in the 1940s. In 1947, Princeton professor Edward Corwin lamented that the combination of two world wars and the Great Depression had transformed a "Constitution of Rights" that protected individuals into a "Constitution of Powers" that concentrated authority in the national government in general and the executive branch in particular.<sup>20</sup> Corwin traced the origins of this change to 1917. The modern Constitution of Powers, he claimed, was merely the "*Constitution of World War I ... adapted to peacetime uses in an era whose primary demand upon government is no longer the protection of rights but the assurance of security.*"<sup>21</sup> States of emergency, Corwin suggested, had stripped Americans of their fundamental rights and reduced the republic to a quasi-authoritarian state.

The following year, Clinton Rossiter, Corwin's former graduate student, suggested a different reading. Rossiter argued that the phenomenon of emergency government originated in ancient times. "Constitutional Dictatorship," he argued, was a necessary and potentially beneficial component of constitutional systems. During times of acute crisis, even democracies needed to arm the government with enhanced powers in order to survive.<sup>22</sup> While it was important to establish safeguards to protect rights during emergency conditions and to ensure the reestablishment of "normal" rule, republics and emergency government were fundamentally compatible.

<sup>13</sup>Harold C. Relyea, *A Brief History of Emergency Powers in the United States: A Working Paper*, Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate, 93 Cong., 2 sess., July 1974 (Washington, D.C., 1974).

<sup>14</sup>Kim Lane Scheppele, "Small Emergencies," *Georgia Law Review* 40, no. 3 (Spring 2006): 843–4.

<sup>15</sup>Catherine Padhi, "Emergencies Without End: A Primer on Federal States of Emergency," *Lawfare*, Dec. 8, 2017, <https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency> (accessed Feb. 1, 2018).

<sup>16</sup>On permanent war, see Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (New York, 2016).

<sup>17</sup>Louis Fisher, *Presidential War Power*, 3rd ed. (Lawrence, KS, 2013), 14–6.

<sup>18</sup>For the importance of statutes, see William J. Novak, "Making the Modern American Legislative State," in *Living Legislation: Durability, Change, and the Politics of American Lawmaking*, eds. Jeffery A. Jenkins and Eric M. Patashnik (Chicago, 2012), 20–43; and William N. Eskridge Jr. and John Ferejohn, *A Republic of Statutes: The New American Constitution* (New Haven, CT, 2010). For a study of how the application of a particular statute (the 1935 Social Security Act) had unexpected impacts on the interplay of individual rights and state-federal relationships, see Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York, 2016).

<sup>19</sup>Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (New Haven, CT, 2017).

<sup>20</sup>Edward S. Corwin, *Total War and the Constitution* (New York, 1947), 172.

<sup>21</sup>*Ibid.* (Emphasis in original.)

<sup>22</sup>Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, 2nd ed. (New York, 1963).

Scholarship since 9/11 has resuscitated this older debate.<sup>23</sup> Many analysts conclude that emergency powers subvert the rule of law and undermine basic republican and democratic values.<sup>24</sup> Such works often highlight Italian philosopher Giorgio Agamben's concept of the "state of exception." Agamben argues that modern states invoke the existence of a state of emergency or "exception" in order to exercise powers previously unavailable to them, including even the power over human life. For Agamben, the exception describes a space where law in practice no longer applies, and which therefore facilitates the untrammelled use of power and violence. This state of exception, Agamben argues, "has continued to function almost without interruption from World War One, through fascism and National Socialism, and up to our own time" and has "today reached its maximum worldwide deployment."<sup>25</sup>

A second strain of thought sees emergency powers as contained within the constitutional order. To say that emergency powers constitute an exception to the law is to suggest that a "normal" non-exceptional law reigns the rest of the time. Some legal scholars have argued that rather than interpreting emergency powers as the absence of legality, it is better to imagine them as a parallel form of law. In her study of European empires, for instance, Lauren Benton suggests that "[p]ockets of legal anomaly created in empire appear more often as patterned variations of legal ordering than as instances of exception."<sup>26</sup> Legal scholar David Kennedy points out that many allegedly "lawless" outposts of the War on Terror are in fact governed by law: "it is simply that different rules apply and different rules do not apply."<sup>27</sup> It is possible to cite this basic continuity to condemn the entire modern liberal system: In this critique, both "normal" and "emergency" rule are fundamentally authoritarian.<sup>28</sup> Others are less critical. Legal scholar Kim Lane Scheppele observes that the United States since World War I has been "virtually always in a state of emergency, one way or another," but emphasizes that this emergency condition has been "normalized" within the constitutional order.<sup>29</sup> This is because Congress has given its blessing to the president's emergency authorities, often beforehand (as in World War I) or shortly after (as during the Franklin Roosevelt administration). By delegating its powers to the executive, Congress has arguably undermined the founders' vision of limited executive power.<sup>30</sup> But it has done so willingly. And while presidents have twisted and at times tortured the law in search of justification for their actions, they have rarely claimed that emergencies granted them power entirely beyond the reach of Congress or the courts.<sup>31</sup>

<sup>23</sup>Ryan Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (Montreal, 2017).

<sup>24</sup>For example, see Sanford Levinson, "Constitutional Norms in a State of Permanent Emergency," *Georgia Law Review* 40, no. 3 (Spring 2006): 699–751; and Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA, 2010).

<sup>25</sup>Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, 2005), 86–7. Agamben draws heavily (though critically) from the controversial German jurist Carl Schmitt, who defined the sovereign as "he who decides on the exception." Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (1922; Chicago, 1985), 5. On the increasing popularity of Schmitt among legal scholars, see Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York, 2012), 116.

<sup>26</sup>Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (New York, 2010), 287.

<sup>27</sup>David Kennedy, "The Mystery of Global Governance," *Ohio Northern University Law Review*, no. 34 (2008): 827–60, here 849.

<sup>28</sup>Mark Neocleous, "The Problem with Normality: Taking Exception to 'Permanent Emergency'," *Alternatives: Global, Local, Political* 31, no. 2 (Apr. 2006): 191–213.

<sup>29</sup>Scheppele, "Small Emergencies," 836.

<sup>30</sup>LaFeber, "Constitution and United States Foreign Policy," 717.

<sup>31</sup>Stephen M. Griffin, "The Executive Power," in *The Oxford Handbook of the U.S. Constitution*, eds. Mark Tushnet, Mark A. Graber, and Sanford Levinson (New York, 2015), 343–64, here 359. Lincoln arguably ruled as a dictator during the first few months of 1861, but he asked Congress for retroactive approval. Daniel Farber, *Lincoln's Constitution* (Chicago, 2003). Scheppele notes that after 9/11 the George W. Bush administration seemed to contradict the pattern she had observed, by making secret assertions of the President's Article II powers and

The history of the Trading with the Enemy Act provides support for this second interpretation. While presidents have taken the lead in imposing sanctions under the act and have done so through the exercise of emergency powers, this is not a story of an “unbound” executive run amok.<sup>32</sup> Rather it shows a Congress willing to delegate power, and a court system willing to bless this arrangement. Congress passed amendments to the Trading with the Enemy Act that significantly expanded the president’s powers in 1917, 1918, 1933, 1940, and 1941, and made few attempts to rein them in afterwards.<sup>33</sup> Even during the 1970s, when Congress, in a fit of legislative assertiveness, made an important amendment to the Trading with the Enemy Act, the executive retained nearly all the powers that had initially applied only during wartime. In the process of making, amending, blessing, and wielding the law, all three branches of government have built a more powerful state capable of conducting global economic warfare even during times of peace.<sup>34</sup> This outcome is quite different from the intentions of the original bill’s architects.

In the beginning, the Trading with the Enemy Act had two primary functions: to prevent Germany from mobilizing American resources and to “conscript” German property for the benefit of the U.S. war effort.<sup>35</sup> The latter entailed seizing “enemy” funds—“enemy” referring to anyone living in the territory of the Central Powers, including American heiresses who had the misfortune of marrying Austro-Hungarian nobles—and investing them in U.S. liberty bonds.<sup>36</sup> The act also allowed U.S. firms to license German chemical patents—no small thing in an age when German firms dominated synthetic chemistry.<sup>37</sup> The patent for Salvarsan, then the most effective treatment for syphilis, was especially important considering the combination of war-induced pharmaceutical shortages and U.S. government fears about the sexual behavior of its new soldiers.<sup>38</sup>

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refusing to seek Congressional approval. Scheppele, “Small Emergencies,” 859–62. The second term of the George W. Bush administration and the Barack Obama administration sought to ground presidential powers more thoroughly in existing law—even if some scholars found their justifications unconvincing. See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York, 2007); Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (New York, 2012); and Charlie Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* (New York, 2015).

<sup>32</sup>For an argument that the president’s powers have become virtually unchallengeable within the modern constitutional system, see Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York, 2011). The Trading with the Enemy Act’s history is a case where the executive branch is not unchallengeable but rather has rarely been challenged by the other branches.

<sup>33</sup>For a legislative history, see U.S. Congress, House, Committee on International Relations, Subcommittee on International Trade and Commerce, *Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency*, 94 Cong., 2nd sess. (Washington, D.C., 1976).

<sup>34</sup>For a recent discussion of the extent of this power, see Juan Carlos Zarate, *Treasury’s War: The Unleashing of a New Era of Financial Warfare* (New York, 2013).

<sup>35</sup>The Trading with the Enemy Act was a long bill that contained additional elements only tangentially related to its main purpose. For instance, section 19 augmented the Espionage Act by forcing publishers of foreign-language newspapers to provide translations of articles related to the U.S. government or the war effort: Kennedy, *Over Here*, 77. The bill was first introduced as HR 4960 on June 11, 1917, and eventually passed both the House and Senate without a roll call vote. “Enemy Trade Bill Passed by House,” *New York Times*, July 12, 1917, 16; “Senate Puts Curb on German Press,” *New York Times*, Sep. 13, 1917, 1.

<sup>36</sup>“Many Heiresses Face Seizure of Estates,” *New York Times*, Dec. 11, 1917, 11; “Nation Takes Millions of Countess Szechenyi,” *New York Times*, Jan. 19, 1918, 1; “How Seized German Millions Fight Germany,” *New York Times*, Jan. 27, 1918, 63.

<sup>37</sup>Trading with the Enemy Act sec. 10(c). On the German chemical industry, see Steen, *The American Synthetic Organic Chemicals Industry*.

<sup>38</sup>Steen, *American Synthetic Organic Chemicals Industry*, 152. On licensing Salvarsan, see Trading With the Enemy Files, 1916–1924, boxes 1–3, Records of the Federal Trade Commission, RG 122, National Archives and Records Administration, College Park, MD [hereafter NARA II].

Opponents of the Trading with the Enemy Act complained that seizing such funds and assets violated basic property rights. They fretted about possible repercussions for postwar investment in the United States. “[W]e shall in the future, as in the past, probably be applicants for the investment of foreign funds,” noted Representative Ebenezer J. Hill (R-CT). “What position are we going to be in if we confiscate the stocks and bonds owned abroad?”<sup>39</sup> But the bill’s backers pointed out that sequestering enemy property during wartime followed Britain’s lead and comported with the norms of civilized practice.<sup>40</sup> “[T]he bill recognizes and affirms the interdiction of international law,” asserted Representative Andrew Jackson Montague (D-VA). Because it allowed the president to grant licenses to continue trade, it even “relaxes the scope and rigor of such interdiction.”<sup>41</sup> Assistant Attorney General Charles Warren, the bill’s main drafter, argued moreover that banning the “actual transfer and transport of commodities” was insufficient in an age when tremendous sums circuted the Atlantic via “transfer of credits and money by letter T cable, or wireless.”<sup>42</sup> Having just emerged as the world’s chief financier, the United States had immense economic power.<sup>43</sup> “This war is to be won as much by dollars as it is by men and guns,” said Rep. John Jacob Esch (R-WI), “and for this reason we are trying in this bill to make it impossible for a dollar of trade or business to inure to the advantage of the enemy.”<sup>44</sup>

Governmental seizure of private property for public ends was not as surprising in 1917 as it might have been three decades earlier before social and economic reformers had significantly expanded the role of the state. By the onset of war, laws and executive agencies at the municipal, state, and federal levels regulated business, supervised markets, and provided social insurance.<sup>45</sup> And while the government’s formal diplomatic machinery remained miniscule, other agencies had developed tools to classify and surveil people and goods that entered the country while pursuing fugitives who exited it.<sup>46</sup> In this sense the Trading with the Enemy Act represented less a clear break with the past and more an acceleration of previous trends.<sup>47</sup>

Still, the scale of the effort was dramatic. In a fawning January 1918 article, the *New York Times* marveled at the power and influence of A. Mitchell Palmer, the Alien Property Custodian in charge of overseeing seized enemy assets. His organization was at once “the biggest trust institution in the world, a director of vast business enterprises of varied nature, a detective agency, and a court of equity.” It already held \$135 million worth of enemy property, and daily took in more. “The noon conferences of executives of the organization which meet in Mr. Palmer’s office every day decide the fate of millions of property at each sitting,” the *Times*

<sup>39</sup>*Congressional Record—House*, 65 Cong., 1st sess., July 9, 1917, 4844.

<sup>40</sup>On British precursors, see Phillip Dehne, “The Ministry of Blockade during the First World War and the Demise of Free Trade,” *Twentieth Century British History* 27, no. 3 (Sept. 2016): 333–56.

<sup>41</sup>*Congressional Record—House*, 65 Cong., 1st sess., July 9, 1917, 4842.

<sup>42</sup>U.S. Congress, Senate, *Trading with the Enemy: Hearings before the Subcommittee of the Committee on Commerce*, 65th Cong., 1st sess., July 23, 24, 25, 27, 30, and Aug. 2, 1917 (Washington, D.C., 1917), 130.

<sup>43</sup>On the political implications of U.S. economic power, see Adam Tooze, *The Deluge: The Great War, America and the Remaking of the Global Order, 1916–1931* (New York, 2014).

<sup>44</sup>*Congressional Record—House*, 65 Cong., 1st sess., July 9, 1917 (Washington, D.C., 1917), 4863.

<sup>45</sup>Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA, 1998); Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920* (New York, 2003); Eric Rauchway, *Blessed Among Nations: How the World Made America* (New York, 2006).

<sup>46</sup>Rachel West, *The Department of State on the Eve of the First World War* (Athens, GA, 1978); Andrew Wender Cohen, “Smuggling, Globalization, and America’s Outward State, 1870–1909,” *Journal of American History* 97, no. 2 (Sept. 2010): 371–98; Katherine Unterman, *Uncle Sam’s Policemen: The Pursuit of Fugitives across Borders* (Cambridge, MA, 2015).

<sup>47</sup>Scholars have made similar observations about the war’s effect on the role of women in society and the content of American art. Lynn Dumenil, *The Second Line of Defense: American Women and World War I* (Chapel Hill, NC, 2017); David M. Lubin, *Grand Illusions: American Art and the First World War* (New York, 2016).

explained. Palmer had become a kind of “general receiver,” running all kinds of businesses. He was, a later headline quipped, the “Biggest Big Business Man.”<sup>48</sup>

Initially such authority was meant to be temporary. During the war, former (and future) Supreme Court justice and 1916 presidential candidate Charles Evans Hughes had defended the expansion of state power on the grounds that “the power to wage war is the power to wage war successfully.”<sup>49</sup> Expanded powers during wartime were part of the Constitutional plan, he argued, but only if they were restricted to wartime.<sup>50</sup> Initially American officials seemed to share this view. They had vowed to restore purloined property after the armistice. “[T]here is no thought of a confiscation or dissipation of property thus held in trust,” Palmer assured.<sup>51</sup> This was “a protection to the property owner against unjust seizure,” promised secretary of state Robert Lansing.<sup>52</sup> To confiscate property would undermine Americans’ vision of their role in the world. “International law does not sanction that, and the United States is not a pirate nation,” declared one newspaper editorial. Surely “[a]fter the war, the right of ownership will be recognized, and there will restoration of the property taken.”<sup>53</sup>

This promise proved empty. Instead, a series of amendments to the Trading with the Enemy Act gave Palmer ever increasing powers over seized property. On March 28, 1918, he received the authority to sell off seized assets.<sup>54</sup> Palmer argued for these powers on the grounds that German investment was not simply a private commercial matter, but formed part of a threatening national strategy. The “great German-owned industrial establishments were spy centres filled with the agents of Germany long plotting against the safety of the United States,” Palmer claimed. “It has been a knife at the throat of America.”<sup>55</sup> Critics would later allege that the true motivation for confiscation was personal enrichment. Indeed, after the war many well-connected individuals bought companies at below-market prices.<sup>56</sup> And a series of high-profile scandals ensnared Palmer’s successors in the 1920s. In 1927, for instance, Thomas W. Miller was sentenced to eighteen months in jail for returning some \$6 million in assets to a German-linked concern in exchange for a \$50,000 bribe.<sup>57</sup>

The Trading with the Enemy Act also boosted U.S. corporate fortunes. On November 4, 1918—a week before the armistice—an amendment allowed Palmer to permanently repossess German chemical patents. In April 1919, his successor Francis P. Garvan sold 4,500 patents to the newly formed Chemical Foundation, of which Garvan was president.<sup>58</sup> Though their value was estimated at up to \$8 million, they were transferred for only \$250,000.<sup>59</sup> The Foundation

<sup>48</sup>“How Seized German Millions Fight Germany,” 63; “Palmer Is Biggest Big Business Man,” *New York Times*, Dec. 15, 1918, 27.

<sup>49</sup>Charles Evans Hughes, “War Powers Under the Constitution,” *Marquette Law Review* 2, no 1. (Dec. 1917): 1–18, here 9.

<sup>50</sup>Matthew C. Waxman, “The Power to Wage War Successfully,” *Columbia Law Review* 117, no. 3 (Apr. 2017): 613–86.

<sup>51</sup>F. P. Huddle, “Enemy Property,” in *Editorial Research Reports 1945*, vol. II (Washington, D.C., 1945), <http://library.cqpress.com/cqresearcher/cqresrre1945070700> (accessed Feb. 1, 2018).

<sup>52</sup>“Lansing Bares German Plot to Involve Us with Allies Over Seizures of Ships,” *New York Times*, May 30, 1917, 1.

<sup>53</sup>“Using Enemy Property in the War,” *New York Times*, Oct. 26, 1917, 14.

<sup>54</sup>“Palmer Is Biggest Big Business Man.”

<sup>55</sup>*Ibid.*

<sup>56</sup>Huddle, “Enemy Property.”

<sup>57</sup>The company in question had also donated \$441,000 to the Republican National Committee. Mira Wilkins, *The History of Foreign Investment in the United States, 1914–1945* (Cambridge, MA, 2004), 113–4; Robert North Roberts, “Daugherty, Harry M. (1860–1941),” in *Dirty Deals? An Encyclopedia of Lobbying, Political Influence, and Corruption, Vol. I: Essays*, ed. Amy Handlin (Santa Barbara, CA, 2014), 425–6, here 426.

<sup>58</sup>“The Sale of German Owned Patents under the Trading with the Enemy Act as Amended,” *Yale Law Journal* 33, no. 7 (May 1924): 760–6, here 761; Steen, *American Synthetic Organic Chemicals Industry*, 175; Kennedy, *Over Here*, 312–3.

<sup>59</sup>Huddle, “Enemy Property.”



then licensed them to U.S. chemical firms, helping to jumpstart the postwar U.S. chemical industry, which eventually emerged as a challenger to German concerns.<sup>60</sup>

The end of the war brought little relief for foreign property owners. In 1921, under the Congressional resolution that formally ended the war with Germany, the United States “retained” all the property it had seized.<sup>61</sup> This echoed Article 297 of the Versailles Treaty, which permitted Entente nations to use enemy property to repay the claims of their citizens against the defeated powers.<sup>62</sup> Congress meanwhile left the Trading with the Enemy Act in place, even as it terminated most other wartime measures. As Representative Nicholas Longworth (R-OH) explained: “The trading with the enemy act is now the sole bar to the wholesale dumping into the American market of German goods, notably dyestuffs, coal-tar products, and so forth, and the only safeguard absolutely to the existence of the new chemical industry in this country.”<sup>63</sup>

Thus temporary seizure had become permanent confiscation—a development that drew complaints even in the United States. Confiscating private property was a “relic of barbarism,” a job for Vikings, not civilized nations, critics howled.<sup>64</sup> Plus it was counterproductive. Would foreigners continue to invest in the United States? Would Americans, fearing reprisals, invest abroad? International lawyers and conservatives commonly made such complaints but with little impact; during World War II the United States would seize foreign assets on an even bigger scale (by one reasonable estimate some \$8 billion compared to \$500 million in World War I), and hold them after the war’s end.<sup>65</sup> In this way the effects of warfare on private property continued long after “wartime” had officially ended.<sup>66</sup>

More fundamentally, World War I crystallized new conceptions about the relationship between property and war.<sup>67</sup> Economic warfare, of course, was not new. Nor was the idea that threats to property might enter into the calculus of going to war in the first place. But private property, even far from the battlefields, seemed newly vulnerable in the 1910s. At the start of the decade, the British author Norman Angell’s *The Great Illusion*—which contended that, given growing economic interdependence, modern wars had become economically irrational—sold more than two million copies.<sup>68</sup> Though the Great War falsified Angell’s accompanying prediction—that such wars were therefore unlikely to occur—it validated his ideas about the

<sup>60</sup>In the view of Kathryn Steen, the transfer of German patents was an important catalyst for the development of the U.S. industry. Steen, *American Synthetic Organic Chemicals Industry*, 287.

<sup>61</sup>Joint Resolution Terminating the State of War Between the Imperial German Government and the United States of America and Between the Imperial and Royal Austro-Hungarian Government and the United States of America, S. J. Res. No. 16, Pub. Res. No. 8, 67 Cong. (July 2, 1921); Edwin M. Borchard, “Enemy Private Property,” *American Journal of International Law* 18, no. 3 (July 1924): 523–32, here 532.

<sup>62</sup>Treaty text at The Avalon Project, Lillian Goldman Library, Yale Law School, <http://avalon.law.yale.edu/imt/partx.asp> (accessed Feb. 1, 2018).

<sup>63</sup>Committee on International Relations, Subcommittee on International Trade and Commerce, *Trading with the Enemy*, 239.

<sup>64</sup>E. Russell Lutz, “Treatment of Private Property of Liens on Land in Time of War,” *Proceedings of the American Society of International Law and Its Annual Meeting*, no. 27 (1933): 110–7, here 117; Borchard, “Enemy Private Property,” 526.

<sup>65</sup>Joseph W. Bishop, Jr., “Judicial Construction of the Trading with the Enemy Act,” *Harvard Law Review* 62, no. 5 (Mar. 1949): 721–59, here 722.

<sup>66</sup>Mary Dudziak, among others, has drawn attention to the artificiality of the concept of “wartime.” Focusing on the Trading with the Enemy Act helps push this story back into the interwar period, where few such histories have reached. Dudziak, *War Time*.

<sup>67</sup>Although some of these developments were rolled back after 1920, a belief in the power of government to improve society survived even during the “return to normalcy” of the Republican 1920s. See, for example, Ellis W. Hawley, *The Great War and the Search for a Modern Order: A History of the American People and their Institutions, 1917–1933* (New York, 1979).

<sup>68</sup>Norman Angell, *The Great Illusion: A Study of the Relation of Military Power in Nations to Their Economic and Social Advantage* (New York, 1910); H. Weinroth, “Norman Angell and *The Great Illusion*: An Episode in Pre-1914 Pacifism,” *The Historical Journal* 17, no. 3 (Sept. 1974): 551–74, here 551.

complexities of modern international economic relations.<sup>69</sup> No longer could one expect private property to remain unaffected by international conflict. Moreover, the successes of the Allied blockade had proven the power of the “economic weapon,” and architects of the postwar order made economic sanctions central to their vision of collective security.<sup>70</sup> Woodrow Wilson, for instance, praised Article 16 of the League Covenant, which called for a mandatory embargo of aggressor nations.<sup>71</sup> After World War I, economic sanctions and other forms of economic warfare would become increasingly important to foreign policymakers.

Though the Trading with the Enemy Act survived the end of World War I, it remained, in the eyes of most, a wartime law—until 1933, that is, when Franklin D. Roosevelt invoked it as the legal authority to proclaim a banking holiday, in other words to temporarily ban all banking transactions.<sup>72</sup> He cited section 5(b) of the act, which authorized the president to “investigate, regulate, or prohibit” all financial transactions involving foreign countries.<sup>73</sup> The origins of 5(b) are obscure, “short and sketchy,” as a senate committee later described its legislative history.<sup>74</sup> Congress wrote section 5(b) into the act during a struggle between Commerce and Treasury officials over which department would have authority over enemy financial transactions. Milton C. Elliott, general counsel of the Federal Reserve Board, offered what became 5(b) as an amendment; crucially its language applied not only to enemies but also to transactions “between the United States and any foreign country, whether enemy, ally of enemy, or otherwise.”<sup>75</sup> In 1966, a lawyer who had been one of Elliott’s clerks claimed that this broad language was a “sleight-of-hand” inserted intentionally so as to ensure that section 5(b) survived the war.<sup>76</sup> In any case there was little discussion at the time. Legislators appeared to see the act as a law that would be invoked during future wars, but not in times of peace.<sup>77</sup> If Congress had intended the Trading with the Enemy Act to grant blanket authority to handle domestic economic problems during a time when there was no “enemy” and no war, no one had said so publicly in 1917. Roosevelt’s stretching of the law thus often serves as an exhibit in accounts of the rise of unaccountable executive power and the exceptional malleability of law.<sup>78</sup>

But how exactly did the Trading with the Enemy Act wind up as the justification for the Bank Holiday? In 1932 the general counsel of the Federal Reserve Board, Walter Wyatt, had produced a memorandum asserting that 5(b) granted the authority to halt domestic financial transactions.<sup>79</sup> President Herbert Hoover’s attorney general, William D. Mitchell, was skeptical,

<sup>69</sup>Martin Ceadel, “The Founding Text of International Relations? Norman Angell’s Seminal Yet Flawed *The Great Illusion* (1909–1938),” *Review of International Studies* 37, no. 4 (Oct. 2011): 1671–93.

<sup>70</sup>Anton Bertram, “The Economic Weapon as a Form of Peaceful Pressure,” *Transactions of the Grotius Society*, no. 17 (1931): 139–74.

<sup>71</sup>Woodrow Wilson, “An Address in the Indianapolis Coliseum,” Sept. 4, 1919, *Papers of Woodrow Wilson*, ed. Arthur S. Link et al. (Princeton, NJ, 1990), vol. 63, 23.

<sup>72</sup>Freidel, *Launching the New Deal*, 215–7.

<sup>73</sup>Supplement to the Second Liberty Bond Act, Pub. Law No. 65-217, 40 Stat. 966 (1918), approved on Sept. 24, 1918.

<sup>74</sup>Committee on International Relations, Subcommittee on International Trade and Commerce, *Trading with the Enemy*, iv.

<sup>75</sup>For a discussion, see Miller, *Bankrupting the Enemy*, 5–7.

<sup>76</sup>Walter Wyatt to Raymond Moley, Mar. 16, 1966, in Moley, *First New Deal*, 157–9.

<sup>77</sup>“Other wars may grow out of this war: and therefore it is best to make one bite of a cherry,” explained Rep. Montague. *Congressional Record*, 65 Cong., 1st sess., Jul. 10, 1917 (Washington, D.C., 1917), 4908.

<sup>78</sup>For example, see Harold Hongju Koh and John Choon Yoo, “Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law,” *International Lawyer* 26, no. 3 (Fall 1992): 715–62, here 726; Posner and Vermeule, *The Executive Unbound*, 44.

<sup>79</sup>Wyatt knew about the Trading with the Enemy Act because he had served as a law clerk at the Fed during World War I and had worked on an amendment to the bill. Wyatt to Moley, Mar. 16, 1966, in Moley, *First New Deal*, 157–9.

but after being shown Wyatt's memorandum he grudgingly conceded that 5(b) offered "sufficient color of authority ... if [the president] felt that the emergency justified it."<sup>80</sup> Mitchell added, however, that he thought the legality of executive order rested on "only a 'shoe string'" and advised President Hoover not to invoke the act unless the incoming Democratic Congress would promise to uphold it.<sup>81</sup> But Senator Carter Glass (D-VA) doubted whether the Trading with the Enemy Act could be applied in peacetime.<sup>82</sup> Wary of being overturned by Congress, Hoover decided not to act.

Roosevelt had fewer scruples about presidential power. His administration issued executive orders at an unprecedented pace: 1,486 in the first term alone.<sup>83</sup> He often justified his actions by comparing the economic crisis to wartime. Indeed he first discovered Wyatt's memo and the potential of the Trading with the Enemy Act when he asked an aide to search out powers left over from the war that might be used to fight the depression.<sup>84</sup> And in his inaugural address, perhaps alluding to the act, he promised to "ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."<sup>85</sup>

Roosevelt hoped to fit his emergency actions into a constitutional framework. Upon learning of Wyatt's memo, he sought multiple legal opinions. The incoming attorney general, Homer Cummings, skipped most of the inauguration in order to read the legislative history of the act.<sup>86</sup> Roosevelt wrote in his diary that his advisers had considered and rejected "forty-eight different methods" of solving the banking crisis before "Attorney General Cummings reported favorably on power to act under the 1917 law."<sup>87</sup> These men deemed it important to provide a legal justification for their actions, and the presence of the Trading with the Enemy Act made that easier than it otherwise might have been.

Congress also legitimized the president's unilateral actions by passing the Emergency Banking Act just three days after Roosevelt's proclamation. The House acted in record time, voting unanimously after an abbreviated forty minutes of debate; the Senate approved the legislation three hours later before copies of the bill had even been printed.<sup>88</sup> "I am so impressed with the necessity of the case ... that I am not even going to mention those things to which I take exception," explained Senator David A. Reed (R-PA).<sup>89</sup>

The Emergency Banking Act both blessed Roosevelt's legal manipulations and transformed the Trading with the Enemy Act in consequential ways. Section one explicitly "approved and confirmed" the president's actions while section two amended section 5(b) of the 1917 measure to clarify that the president could invoke the act's powers "[d]uring time of war or during any other period of national emergency declared by the President."<sup>90</sup> The law now explicitly authorized peacetime use.

<sup>80</sup>Minutes of the Federal Reserve Board, Mar. 2, 1933, <https://fraser.stlouisfed.org/files/docs/meltzer/bog-sub030233.pdf> (accessed June 4, 2017).

<sup>81</sup>Wyatt to Moley, Mar. 16, 1966, in Moley, *First New Deal*, 147.

<sup>82</sup>Susan Estabrook Kennedy, *The Banking Crisis of 1933* (Lexington, KY, 1973), 145.

<sup>83</sup>Graham G. Dodds, *Take Up Your Pen: Unilateral Presidential Directives in American Politics* (Philadelphia, 2013), 24, 163.

<sup>84</sup>Freidel, *Franklin D. Roosevelt*, 190.

<sup>85</sup>Franklin D. Roosevelt, "Inaugural Address," Mar. 4, 1933, <http://www.presidency.ucsb.edu/ws/?pid=14473> (accessed Feb. 1, 2018). I thank Lloyd Ambrosius for bringing this to my attention.

<sup>86</sup>James E. Sargent, *Roosevelt and the Hundred Days: Struggle for the Early New Deal* (New York, 1981), 86; Freidel, *Launching the New Deal*, 215.

<sup>87</sup>Freidel, *Franklin D. Roosevelt*, 216.

<sup>88</sup>"Bank Bill is Enacted," *New York Times*, Mar. 10, 1933, 1.

<sup>89</sup>Committee on International Relations, Subcommittee on International Trade and Commerce, *Trading with the Enemy*, 243.

<sup>90</sup>An Act to Provide Relief in the Existing National Emergency in Banking, and for Other Purposes, Pub. Law No. 73-1, 48 Stat. 1 (1933), approved on Mar. 9, 1933. (Italics added.)

Within a few years the implications of this shift became clear. On December 12, 1937, during its war with China, Japan bombed and strafed the *USS Panay*, a U.S. Navy gunboat anchored in the Yangtze River above Nanking.<sup>91</sup> Hoping to “quarantine” the Japanese, Roosevelt asked secretary of the treasury Henry Morgenthau, Jr. to find a way to cut off the flow of funds to Japan. Morgenthau’s general counsel, Herman Oliphant, produced a secret memorandum holding that the Trading with the Enemy Act permitted the president to declare a “national emergency” and prohibit foreign exchange.<sup>92</sup> Oliphant, Harry Dexter White, and other advisers persuaded Morgenthau that such an action would enable a complete economic blockade of Japan.<sup>93</sup> When Morgenthau shared the memo with Roosevelt, the president was surprised to see the reference to the Trading with the Enemy Act: “My God, I completely forgot about it.”<sup>94</sup>

Roosevelt ultimately decided not to invoke the wartime law in 1937, but he remembered its potential from that point forward.<sup>95</sup> In April 1940 when Germany invaded Denmark and Norway, American officials worried that the Nazis might make use of Danish and Norwegian assets held in the United States. Morgenthau convinced the president to invoke the Trading with the Enemy Act, which he did in Executive Order 8389 on April 10, 1940.<sup>96</sup> Bernard Bernstein, an assistant to Oliphant at the Treasury, then took “the old documents that had been drafted [for Japan in 1937] and rewrote them to apply to Denmark and Norway.”<sup>97</sup> Some government lawyers believed that section 5(b) of the act only applied to bank transfers, and could not be used to freeze securities themselves. But Bernstein convinced Attorney General Robert Jackson of the law’s broader writ.<sup>98</sup> On May 7, Congress amended the Trading with the Enemy Act to ratify Roosevelt’s actions and make clear its application to securities. This marked the beginning of the Foreign Funds control system, administered by a new office in the Treasury Department.<sup>99</sup> The asset freeze would subsequently apply to every new country invaded by the Germans, and, by June 1941, to virtually all of Europe.<sup>100</sup>

Meanwhile the Trading with the Enemy Act loomed over U.S. negotiations with Japan. Concerned about Japanese plans to expand into Southeast Asia, as well as its continuing war in China, Washington turned to economic coercion. Mostly this took the form of export controls. Washington made it more difficult for Japan to obtain sufficient supplies of refined gasoline, scrap metal, and other strategic goods, for example.<sup>101</sup> But in July 1941, after Japanese forces invaded southern Indochina, Roosevelt invoked the Trading with the Enemy Act to

<sup>91</sup>Douglas Carl Peifer, *Choosing War: Presidential Decisions in the Maine, Lusitania, and Panay Incidents* (New York, 2016), 153.

<sup>92</sup>Herman Oliphant, memorandum for Henry Morgenthau, Jr., Dec. 15, 1937, in *Diaries of Henry Morgenthau, Jr.*, April 27, 1933–July 27, 1945 [hereafter *Morgenthau Diaries*], vol. 103, 262, Franklin D. Roosevelt Presidential Library & Museum, [http://www.fdrlibrary.marist.edu/\\_resources/images/morg/md0134.pdf](http://www.fdrlibrary.marist.edu/_resources/images/morg/md0134.pdf) (accessed Feb. 1, 2018).

<sup>93</sup>Morgenthau, diary entry, Dec. 17, 1937, *Morgenthau Diaries*, vol. 103, 20–21.

<sup>94</sup>Morgenthau, diary entry, Dec. 17, 1937, *Morgenthau Diaries*, vol. 103, 20–21. See also Miller, *Bankrupting the Enemy*, 13–14.

<sup>95</sup>President Roosevelt to the Secretary of State, Jan. 28, 1938, *Foreign Relations of the United States Diplomatic Papers* [hereafter *FRUS*], 1938, vol. IV (Washington, D.C., 1954), 250.

<sup>96</sup>Executive Order No. 8389, Apr. 10, 1940, text available at <http://www.presidency.ucsb.edu/ws/?pid=15931> (accessed Feb. 2, 2018).

<sup>97</sup>“Oral History Interview with Bernard Bernstein,” interviewed by Richard D. McKinzie, July 23, 1975, <https://www.trumanlibrary.org/oralhist/bernsten.htm> (accessed Feb. 2, 2018).

<sup>98</sup>*Ibid.*

<sup>99</sup>William Harvey Reeves, “The Control of Foreign Funds by the United States Treasury,” *Law and Contemporary Problems* 11, no. 1 (Winter–Spring 1945): 17–60.

<sup>100</sup>Samuel Anatole Lourie, “The Trading with the Enemy Act,” *Michigan Law Review* 42, no. 2 (Oct. 1943): 205–34, here 208; Carl F. Goodman, “United States Government Foreign Property Controls,” *Georgetown Law Journal* 52, no. 4 (Winter 1964): 767–99.

<sup>101</sup>David Reynolds, *From Munich to Pearl Harbor: Roosevelt’s America and the Origins of the Second World War* (Chicago, 2001), 88–92.

freeze Japanese assets.<sup>102</sup> Though the president hoped to maintain some flexibility—to license some shipments of goods in return for Japanese diplomatic concessions—mid-level officials led by Dean Acheson interpreted the president's orders so strictly as to make it impossible for Japan to use gold reserves it had amassed to purchase oil and other necessities. Japanese hard-liners cited these actions in convincing their colleagues to launch their attack on Pearl Harbor on December 7, 1941.<sup>103</sup>

After the U.S. declaration of war, Congress once again amended the Trading with the Enemy Act. This was necessary, as one observer pointed out, because “the legislative mind was in a state of great vagueness” about the status of the 1917 law. Section 5(b) certainly remained in effect, but was the rest of the law still applicable during wartime?<sup>104</sup> As part of the First War Powers Act (which passed within a week of being introduced), Congress amended section 5 (b) to grant the president vaster powers, including the ability to “vest” seized foreign property—meaning that such property could be licensed, liquidated, or sold. Importantly, the revised act clearly applied to all foreign countries (not merely enemy ones), and could be invoked “during the time of war or during any other period of national emergency declared by the President.”<sup>105</sup> Influenced by the transformation of governmental power during the New Deal, as well as the growing recognition of the value of economic warfare, Congress seemed comfortable granting this broad power to the executive.<sup>106</sup> Unlike the original act of 1917, this amended version was designed to continue to function in peacetime. As a lawyer noted in 1943, the amended act “looks far ahead, foreshadowing and forestalling events to meet not only wartime exigencies but national peacetime emergencies as well.”<sup>107</sup>

By 1945 there was little that U.S. presidents *could not* do, legally speaking, in the realm of economic warfare. By declaring the existence of a national emergency (the definition of which was left up to presidents themselves), they could regulate, or ban entirely, virtually all financial transactions. They could not only seize and hold foreign-owned property but dispose of it as they saw fit.<sup>108</sup> Wartime offices tasked with implementing sanctions and foreign funds control blossomed into a permanent bureaucratic apparatus, created with Trading with the Enemy Act authority, and now located primarily in the Treasury Department's Office of Foreign Assets Control (OFAC).<sup>109</sup>

During the Cold War the act underwrote an expansive program of economic warfare. In 1950, after the outbreak of hostilities in Korea, President Harry Truman declared a “national emergency” under the Trading with the Enemy Act to enforce sanctions against North Korea and China.<sup>110</sup> That emergency remained in place for twenty-five years, during which time section 5(b) also justified sanctions against Vietnam, Cambodia, and Cuba.

Sanctions disrupted existing trade relationships and took other concrete tolls. For instance, OFAC ensured that products of Communist China such as shrimp, tofu, and hog hair brush

<sup>102</sup>Executive Order No. 8832, July 26, 1941, text available at <http://www.presidency.ucsb.edu/ws/?pid=16148> (accessed Feb. 2, 2018). See also Lourie, “Trading with the Enemy Act,” 209.

<sup>103</sup>Miller, *Bankrupting the Enemy*, 191–241; David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945* (New York, 1999), 511–2.

<sup>104</sup>Bishop, “Judicial Construction of the Trading with the Enemy Act,” 725.

<sup>105</sup>First War Powers Act, 1941, Pub. Law No. 77-354, 55 Stat. 839 (1941), approved on Dec. 18, 1941; Bishop, “Judicial Construction,” 724.

<sup>106</sup>On how the New Deal transformations normalized powers previously exercised only in wartime, see Waxman, “Power to Wage War,” 681. On the value of economic warfare, see Dobson, *US Economic Statecraft for Survival*, 48–76.

<sup>107</sup>Lourie, “The Trading with the Enemy Act,” 233–4.

<sup>108</sup>“The International Emergency Economic Powers Act,” 1104.

<sup>109</sup>About: Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (accessed Feb. 2, 2018).

<sup>110</sup>Proclamation 2914, Dec. 16, 1950, text available at <http://www.presidency.ucsb.edu/ws/?pid=13684> (accessed Feb. 2, 2018); Malloy, *Economic Sanctions and U.S. Trade*, 195.

bristles did not reach American shores.<sup>111</sup> The law also had other unexpected outcomes. To take just three of many possible examples, OFAC prevented Williams College from retrieving a fourteenth-century Chinese painting it had loaned to a Canadian art exhibition; it sequestered Eldridge Cleaver's book royalties; and it barred philatelists from importing Chinese and Korean stamps.<sup>112</sup>

Sanctions programs authorized by the Trading with the Enemy Act also enhanced the reach of U.S. global power by instituting worldwide programs of economic surveillance and control. Enforcing the embargo on China proved particularly nettlesome, because it was difficult to determine whether goods exported from Hong Kong and other Asian countries had actually been produced in China. As one American official later recalled: "How about if the chicken comes from Communist China and is brought across the border into Hong Kong live and lays the egg on the Hong Kong side, is that then a communist product?"<sup>113</sup> OFAC responded by creating a category of "Chinese-type goods."<sup>114</sup> Any such items presumed to have Chinese origins were thus inadmissible to the United States without a special certificate of non-Chinese production. Indian lychee nuts and Japanese soy sauce fell victim to this designation.<sup>115</sup> In one case, these regulations stopped the import of paintings produced by Chinese refugees in Hong Kong, which the Anti-Communist League of America had hoped to sell in the United States to raise funds for its crusade against Red China.<sup>116</sup>

Sanctions formed part of a broader program of economic warfare that operated alongside military alliances, diplomatic initiatives, and covert operations during the Cold War. Ironically, notes Alan Dobson, it was "the free-market USA" that "looked most often to economic sanctions, embargoes, cold economic warfare and economic warfare as means of exerting influence in international affairs."<sup>117</sup> With the United Nations Security Council deadlocked between the United States and Soviet Union, virtually all U.S. sanctions programs functioned either unilaterally or with Cold War allies. Their effects were mixed. The vast majority of sanctions, scholars have found, failed to achieve their ultimate goals.<sup>118</sup> Embargoes on Cuba and China did not dislodge Communist governments. The strategic embargo on the USSR did little to hinder the Soviet military buildup. Yet sanctions did sometimes provide U.S. policymakers with leverage. Frozen assets could be exchanged for expropriated American properties. And sanctions might be loosened or tightened as part of larger negotiations. In the lead up to U.S. rapprochement with China in 1971, for instance, the Treasury Department gradually relaxed the Chinese embargo, allowing tourist purchases and even removing the "Chinese-type" goods designation from certain articles.<sup>119</sup>

<sup>111</sup>For examples, see Office of Foreign Asset Control Correspondence and Administrative Reference Files 1941-1960, boxes 1-3, Records of the Office of Foreign Assets Control, RG 265, NARA II. For context see Tucker, *The China Threat*, 121-37.

<sup>112</sup>"Chinese Art Loses in Economic War," *New York Times*, Feb. 25, 1953, 29; "Cleaver Is Writing a New Book and Charting 2 Legal Battles," *New York Times*, Dec. 27, 1973, 7; David Lidman, "Other Activity in the Stamp World," *New York Times*, Aug. 3, 1969, D26.

<sup>113</sup>Nancy Bernkopf Tucker, ed., *China Confidential: American Diplomats and Sino-American Relations, 1945-1996* (New York, 2001), 109.

<sup>114</sup>For example, see Importation of and Dealings in Certain Merchandise, 31 C.F.R. sec. 500.204 (1958).

<sup>115</sup>Elting Arnold to American Commerce Company, May 16, 1955; Elting Arnold to William F. Knowland, May 4, 1953, box 1, RG 265, NARA II.

<sup>116</sup>John K. Crippen to American Consul-General, Hong Kong, Dec. 17, 1959, box 1, RG 265, NARA II.

<sup>117</sup>Dobson, *US Economic Statecraft*, 25-6.

<sup>118</sup>For citations to some of this literature, see footnote 3, above.

<sup>119</sup>Statement of Professor Andreas F. Lowenfeld, in U.S. Congress, House, Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions: Hearings before the Subcommittee on International Policy and Trade of the Committee of International Relations*, 95 Cong., 1st sess. (Washington, D.C., 1977), 5.

Throughout the Cold War, the Trading with the Enemy Act's authority was exercised pursuant to the declared existence of a national emergency. In the early years, some doubts about unilateral executive control of these powers lingered. In 1950, while noting that the law granted the power to restrict Soviet imports, a State Department employee fretted that "Congress would not favor use of this act for the purpose now being discussed."<sup>120</sup> And as late as 1954 a legal adviser warned against deploying the Trading with the Enemy Act for anything other than "a most serious type of situation," because doing so might "result in curtailment of the authority itself."<sup>121</sup> The executive's emergency powers seemed reliant on at least implicit consent of Congress and the public.

Yet as the Cold War continued, public faith in executive power grew. A 1959 Gallup poll found 61 percent of respondents favoring the expansion of presidential authority, compared to only 17 percent who wanted Congress to have more power.<sup>122</sup> Academics and constitutional scholars argued that the nation needed a strong executive to organize and unify its people. Congress, as the political scientist Clinton Rossiter explained in 1956, was "no longer minded or organized to guide itself."<sup>123</sup> Truman's decision to use force against North Korea in 1950 without asking Congress to declare war stood as a new precedent, which generated surprisingly little second-guessing.<sup>124</sup>

By 1960, as the Eisenhower administration debated how to respond to Fidel Castro's Cuban revolution, officials worried more about the Trading with the Enemy Act's ramifications on relations with U.S. allies. Eisenhower balked at invoking the act because it would mean "designating Cuba as an enemy," which might undermine the administration's attempts to isolate Castro in the hemisphere. More importantly, while cancelling Cuba's sugar import quota could be justified as the defense of American property in response to Cuban nationalizations, invoking the Trading with the Enemy Act would constitute a clear act of economic warfare. A unilateral act of this sort would undermine the multilateral foundations of the Rio Treaty, a 1947 hemispheric mutual defense agreement, and might drive other Latin American states into Castro's camp.<sup>125</sup> Combined with the fact that Cuba had relatively little trade or property left to seize in the United States, the Eisenhower and then the Kennedy administrations resisted invoking the act until 1963.<sup>126</sup>

Concerns about international impacts persisted. In 1970, one State Department memorandum listed the Trading with the Enemy Act as a possible source of authority for economic measures to counter the rise of airplane hijacking. Yet diplomatic officials also cautioned against its use. Invoking the act was the "equivalent of economic war," warned a report prepared for

<sup>120</sup>Memorandum by the Director of the Office of International Trade Policy (Brown) to the Assistant Secretary of State for Economic Affairs (Thorpe), July 12, 1950, *FRUS*, 1950, vol. IV (Washington, D.C., 1980), 1216.

<sup>121</sup>Memorandum by the Assistant Legal Adviser for International Claims (English) to the Assistant Secretary of State for Inter-American Affairs (Holland), May 19, 1954, *FRUS*, 1952–1954, vol. IV (Washington, D.C., 1983), 1114–5.

<sup>122</sup>Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor, MI, 2005), 54.

<sup>123</sup>*Ibid.*, 54–6.

<sup>124</sup>Stephen M. Griffin, *Long Wars and the Constitution* (Cambridge, MA, 2013), 48.

<sup>125</sup>Memorandum of a Conference with the President, Oct. 13, 1960, *FRUS*, 1958–1960, vol. IV (Washington, D.C., 1991), 1085; Memorandum of Discussion at the 464th Meeting of the National Security Council, Oct. 20, 1960, *FRUS*, 1958–1960, vol. IV, 1099; Memorandum From Secretary of State Herter to President Eisenhower, Jan. 5, 1961, *FRUS*, 1961–1963, vol. X (Washington, D.C., 1997), <https://history.state.gov/historicaldocuments/frus1961-63v10/d12> (accessed Feb. 20, 2018).

<sup>126</sup>Morris H. Morley, *Imperial State and Revolution: The United States and Cuba, 1952–1986* (New York, 1987), 160; Michael Krinsky and David Golove, *United States Economic Measures Against Cuba: Proceedings in the United Nations and International Law Issues* (Northampton, MA, 1995), 93–4.

Henry Kissinger. “No major industrial power uses any instrument of this intensity.”<sup>127</sup> Still because the law offered broad emergency powers, it could be used as a backstop when other authorities lapsed. On four separate occasions between 1972 and 1976 Congress failed to reauthorize the Export Administration Act of 1969 (EAA) before it expired. The EAA had provided important statutory authority for banning strategic exports to the Soviet bloc. Declaring the loss of this authority as constituting an emergency, Presidents Nixon and Ford cited section 5(b) of the Trading with the Enemy Act to keep the EAA provisions in place.<sup>128</sup> This pattern became so routine that some observers blamed the existence of 5(b) for Congress’ inability to reauthorize the legislation in the first place. Confident in the Trading with the Enemy Act’s powers, “the administration had no incentive to press for [its] extension,” one Congressman observed.<sup>129</sup>

The Trading with the Enemy Act had become widely recognized—at least among career civil servants—as a ready tool of economic warfare.<sup>130</sup> During the 1940s and 1950s, presidents had used it as part of their larger strategy to expand U.S. power around the world. Yet after the late 1960s, as the nation’s international financial position deteriorated, they increasingly invoked it instead to shore up the U.S. economy. With the costs of the Vietnam War and the Great Society eroding the nation’s balance of payments, on January 1, 1968, Lyndon Johnson cited the Trading with the Enemy Act (and Truman’s 1950 declaration of emergency) in order to place controls on capital exports.<sup>131</sup> In 1971, Richard Nixon aimed to weaken the dollar, thereby making U.S. exports more attractive to foreign buyers. In August, he also unilaterally imposed a 10 percent tariff surcharge on many imports.<sup>132</sup> Nixon proclaimed the existence of an emergency and claimed authority under statutes “including but not limited to” the Tariff Act of 1930 and the Trade Expansion Act.<sup>133</sup> The president did not cite the Trading with the Enemy Act directly because he was scheduled to meet with Emperor Hirohito of

<sup>127</sup>Memorandum from the President’s Assistant for National Security Council (Kissinger) to the President’s Assistant (Flanigan), Oct. 31, 1970, *FRUS*, 1969–1976, vol. E-1 (Washington, D.C., 2005), <https://history.state.gov/historicaldocuments/frus1969-76ve01/d79> (accessed Feb. 2, 2018).

<sup>128</sup>Executive Order No. 11677, Aug. 1, 1972, 37 Fed. Reg. 15483 (1972); Executive Order No. 11796, July 30, 1974, 39 Fed. Reg. 27891 (1974); Executive Order No. 11810, Sept. 30, 1974, 39 Fed. Reg. 35567 (1974); Executive Order No. 11940, Sept. 30, 1976, 41 Fed. Reg. 43407 (1976); Carter, *International Economic Sanctions*, 187. Presidents also extended the EAA under the International Emergency Economic Powers Act, which will be discussed in more detail below. See Joel B. Harris and Jeffrey P. Bialos, “The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act,” *Vanderbilt Journal of Transnational Law* 18, no. 1 (Winter 1985): 71–108. On more recent developments, see Ian F. Fergusson, “The Export Administration Act: Evolution, Provisions, and Debate,” *Congressional Research Service*, Report RL31832, <https://fas.org/sfp/crs/secretary/RL31832.pdf> (accessed Feb. 2, 2018).

<sup>129</sup>Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 136.

<sup>130</sup>Early in Jimmy Carter’s presidency, administration officials discussed possible responses to an EAA lapse. Ed Sanders of the Office of Management and Budget noted that the president could invoke the Trading with the Enemy Act. Vice President Mondale erroneously replied, “But you would have to declare them an enemy.” See Minutes of a Policy Review Committee Meeting, Feb. 4, 1977, *FRUS*, 1977–1980, vol. VIII (Washington, D.C., 2013), <https://history.state.gov/historicaldocuments/frus1977-80v08/d3> (accessed Feb. 2, 2018).

<sup>131</sup>Executive Order No. 11387, Jan. 1, 1968, text available at <http://www.presidency.ucsb.edu/ws/index.php?pid=106173> (accessed Feb. 2, 2018); James P. Hawley, *Dollars and Borders: U.S. Governmental Attempts to Restrict Capital Flows, 1960–1980* (Armonk, NY, 1987), 90–1. On the broader context, see Diane B. Kunz, “Cold War Dollar Diplomacy: The Other Side of Containment,” in *The Diplomacy of the Crucial Decade: American Foreign Relations During the 1960s*, ed. Diane B. Kunz (New York, 1994), 80–114.

<sup>132</sup>Proclamation 4074, “Imposition of Supplemental Duty for Balance of Payments Purposes,” Aug. 15, 1971, 36 Fed. Reg. 15,724 (1971); Daniel J. Sargent, *A Superpower Transformed: The Remaking of American Foreign Relations in the 1970s* (New York, 2015), 113; Brendan Jones, “Sudden 10% Surcharge is Assailed by Importers,” *New York Times*, Aug. 17, 1971, 18.

<sup>133</sup>Proclamation 4074.



Japan, the nation most targeted by the surcharge. Discussion of the act at that meeting might have proved awkward.<sup>134</sup>

The surcharge was in place less than half a year; Nixon revoked it in December after other nations agreed to inflate their currency against the dollar.<sup>135</sup> But in February 1972, Yoshida International, Inc., a New Jersey based subsidiary of a Japanese firm that imported zippers, sued, alleging that Nixon had exceeded his authority and demanding a return of the extra 10 percent it had paid on its imports. This would be a test case of presidential powers, and one with important financial ramifications: a victory for Yoshida would result in refunds to all affected importers, totaling some \$500 million (nearly \$3 billion in 2016 dollars).<sup>136</sup> In 1974, a three judge panel of the U.S. Customs Court ruled for Yoshida. Neither the Tariff Act nor the Trade Expansion Act gave the president authority to set tariff rates without congressional approval, the court concluded. Administration lawyers raised the authority of section 5(b) of the Trading with the Enemy Act but the court rejected their argument. “To indulge in judicial rationalization in order to sanction the exercise of a power where no power in fact exists,” the judges wrote, “is to strike the deadliest of blows to our Constitution.”<sup>137</sup>

The government appealed, however, and in 1975 an appellate court reversed the lower court ruling. In passing and revising the Trading with the Enemy Act over the years, the court found, Congress had granted extremely broad power to the executive. Whereas the lower court imagined presidential authority to implement tariffs as a mere twig on the tree of the congressional power over foreign commerce, the appeals court contended that the Trading with the Enemy Act had, “Mendel-like,” created “a cross breeding which produced an economic emergency branch.”<sup>138</sup>

The *Yoshida* ruling preserved the executive branch’s expansive reading of the Trading with the Enemy Act. But elsewhere the 1970s witnessed challenges to executive power unprecedented since World War II. This formed part of a broader disaffection with the federal government in the wake of the Vietnam War and the social and cultural clashes of the late 1960s. In 1964, more than 70 percent of poll respondents said they trusted Washington “always” or “most of the time.” By 1972 less than half did, and by 1974, after the Watergate scandal, the percentage plummeted into the low thirties.<sup>139</sup> Revelations of domestic spying, foreign assassination plots, and other sordid CIA actions, along with Nixon’s claim of presidential immunity, enhanced fears of executive power. Arthur Schlesinger, Jr., who had made a career of writing histories that extolled the value of activist presidents, coined the phrase “Imperial Presidency” to warn the public.<sup>140</sup>

In this environment a “resurgent” Congress challenged unilateral executive power. A series of laws established new oversight for intelligence operations, expanded public access to executive documents, put limits on campaign financing, and defended legislative control of the budgeting process. In 1973 Congress displayed a new “solicitude for its own institutional honor” by passing the War Powers Resolution over Nixon’s veto in an attempt to limit the president’s ability to use unilateral military force.<sup>141</sup>

<sup>134</sup>Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 8; Robert B. Semple, Jr., “Nixon in Alaska to See Hirohito at U.S. Air Base,” *New York Times*, Sept. 27, 1971, 1, 13.

<sup>135</sup>Sargent, *Superpower Transformed*, 117–8.

<sup>136</sup>Brendan Jones, “Court Says Nixon Exceeded Power on Import Surtax,” *New York Times*, July 9, 1974, 7, 53.

<sup>137</sup>*Yoshida International v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974).

<sup>138</sup>*United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, here 575 (C.C.P.A. 1975).

<sup>139</sup>Gary Orren, “Fall from Grace: The Public’s Loss of Faith in Government,” in *Why People Don’t Trust Government*, ed. Joseph S. Nye, Jr., Philip D. Zelikow, and David C. King (Cambridge, MA, 1997), 77–108, here 81.

<sup>140</sup>Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston: Houghton Mifflin Co., 1973). On the genesis of the book and its title, see David J. Barron, *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (New York, 2016), 333–43.

<sup>141</sup>Rudalevige, *New Imperial Presidency*, 7, 101–38; Fisher, *Presidential War Power*, 128–30; Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton, NJ, 2013), 7.

It made sense in this context that presidential emergency powers would come under increasing scrutiny. In 1973, a Senate joint committee led by Frank Church (D-ID) and Charles McC. Mathias, Jr. (R-MD) began investigating ways to wind down Truman's 1950 proclamation of emergency.<sup>142</sup> Requesting to see copies of every presidential emergency declaration, committee members were shocked to discover that there were actually four states of emergency still in place, including Roosevelt's proclamation from 1933.<sup>143</sup> ("After 41 Years, The Depression Finally Ending," the *New York Times* cracked when the emergency was finally terminated.<sup>144</sup>) The committee identified 470 provisions of federal law that could be activated by a declaration of emergency and warned that "This vast range of powers ... confer enough authority to rule the country without reference to normal constitutional processes."<sup>145</sup> The *Washington Post* described the committee's report as "the blueprint for an American dictatorship." Alarmist statements from other newspapers followed.<sup>146</sup> The *Philadelphia Inquirer*, for instance, warned that it was perfectly legal for the president to "start seizing private property, take control of broadcast stations and issue orders restricting travel."<sup>147</sup>

Amidst public scrutiny and legislative assertiveness, Congress passed the National Emergencies Act in 1976, which ended all existing national emergencies (as of 1978) and implemented new oversight requirements. However, at the urging of the Ford administration, Congress explicitly exempted the Trading with the Enemy Act.<sup>148</sup> Rescinding section 5(b) would have cancelled numerous programs, including full or partial embargoes against North Korea, Vietnam, Cambodia, and Cuba; temporary regulations that backed up the Export Administration Act; and foreign funds control regulations that continued to block property of Czechoslovakia, East Germany, and Lithuania, "pending settlement with those countries for their illegal expropriation of private property following World War II."<sup>149</sup> Recognizing how deeply woven into the fabric of U.S. statecraft the Trading with the Enemy Act had become, Congress tasked the House with recommending revisions.<sup>150</sup>

At first it appeared that these revisions might be substantial. Representative Jonathan Bingham (D-NY), a critic of the continued embargoes against Vietnam and Cuba, chaired the subcommittee in charge of examining the matter.<sup>151</sup> In January 1977 Bingham introduced

<sup>142</sup>U.S. Congress, Senate, Special Committee on National Emergencies and Delegated Emergency Powers, *Final Report of the Special Committee on National Emergencies and Delegated Emergency Powers*, Report No. 94-922, 94 Cong., 2nd sess. (Washington, D.C., 1976), 2.

<sup>143</sup>Untitled memorandum, folder: "Emergency Proclamations," box 6, Senate Special Committee on National Emergencies and Delegated Emergency Power, Records of the United States Senate, RG46, National Archives and Records Administration, Washington, D.C. [hereafter NARA I]. In addition to Truman's 1950 proclamation, these included FDR's 1933 proclamation, Nixon's March 23, 1970 proclamation to deal with a Post Office strike, and Nixon's August 15, 1971 proclamation implementing currency restrictions and controls on trade.

<sup>144</sup>"After 41 Years The Depression Finally Ending," *New York Times*, Oct. 13, 1974, 214.

<sup>145</sup>U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency*, 93 Cong., 1st sess. (Washington, D.C., 1973), iii.

<sup>146</sup>"A Permanent State of Emergency" *Washington Post*, Oct. 7, 1973, C6. For copies of further press coverage, see box 15, Senate Special Committee on National Emergencies and Delegated Emergency Power, RG46, NARA I.

<sup>147</sup>"White House Has Powers It's Never Used," *Philadelphia Inquirer*, July 18, 1973, copy in box 15, Senate Special Committee on National Emergencies and Delegated Emergency Power, RG46, NARA I.

<sup>148</sup>Rita Mannheimer, "Amendments to the Trading with the Enemy Act Limit Presidential Power to Regulate International Economic Transactions," *Maryland Journal of International Law* 3, no. 2 (1978): 413–20, here 415. Congressman Jonathan Bingham recalled that section 5(b) was exempted from the National Emergencies Act "at the strong request of the administration." See Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 111.

<sup>149</sup>U.S. Congress, House, Committee on International Relations, *Revision of Trading with the Enemy Act: Markup before the Committee on International Relations*, 95 Cong., 1st sess. (Washington, D.C., 1977), 15–6.

<sup>150</sup>Committee on International Relations, *Revision of Trading with the Enemy Act*, 1.

<sup>151</sup>Committee on International Relations, *Revision of Trading with the Enemy Act*, 2.

a bill designed simply “To repeal section 5(b) of the Trading With the Enemy Act of 1917.”<sup>152</sup> When that failed, he introduced the Economic War Powers Act, which would have forced the president to “consult with the Congress before imposing any trade embargo on any country” and which would have automatically ended any embargo after sixty days unless Congress adopted a concurrent resolution authorizing its continuation. Embargoes mandated by international organizations like the United Nations would be exempt from this requirement.<sup>153</sup>

Bingham may have sensed an opportunity to use revision of the Trading with the Enemy Act to rein in the expanding use of unilateral sanctions. A memorandum preserved in the subcommittee files criticized the “total prohibition of economic and financial transactions with any foreign nation” for being “ineffective,” for impairing “the development of an open world economy” and the “principles of international law,” and for leading to the “undesirable and generally counterproductive” isolation of peoples from one another.<sup>154</sup> When Carter administration officials testified in favor of retaining most of the provisions of 5(b), Bingham exploded: “I frankly have not been as angry about anything done by the executive branch in a long time.”<sup>155</sup>

Yet inter-branch conflict quickly fizzled. The administration would compromise, representatives from the State and Treasury Departments promised. Rather than rely on outdated authorities like Truman’s 1950 emergency proclamation, the president was now willing to declare a new state of emergency whenever required. He would inform Congress and the public. “Under what we have proposed,” Treasury official C. Fred Bergsten promised, “there would never be a situation 20 or 25 years from now, where any Member of the Congress would make the charge which you now quite rightly raise.”<sup>156</sup>

Bingham accepted the peace offering and apologized for his outburst. “Perhaps I overstated it,” he admitted.<sup>157</sup> Instead of debating the merits of the U.S. global sanctions regime, discussion focused on abstract questions about the balance of power. It was not *what* the administration did that seemed to bother Bingham most, but whether or not the president informed Congress of its actions and whether or not the administration acted in the name of emergencies that no longer existed. Continuing embargoes on Cuba and China might be justified, he argued, but “I just don’t think it is right for us to base those actions on a false premise.”<sup>158</sup> So long as the executive declared new states of emergency when needed, Bingham reasoned, this problem could be avoided.<sup>159</sup>

Thus instead of the Economic War Powers Act, the subcommittee reported out what Bingham called a “procedural bill,” designed to “improve the policies and procedures which

<sup>152</sup>H.R. 1560, 95 Cong. (1977).

<sup>153</sup>H.R. 2382, 95 Cong. (1977).

<sup>154</sup>“Purposes and Policies,” undated and unsigned memorandum, box IEPT-95-1&2:15, Committee on Foreign Affairs, Subcommittee on International Economic Policy and Trade, Records of the United States House of Representatives, RG 233, NARA I. The handwriting in the memo is consistent with Bingham’s elsewhere.

<sup>155</sup>Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 112.

<sup>156</sup>Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 113.

<sup>157</sup>Ibid.

<sup>158</sup>Committee on International Relations, Subcommittee on International Economic Policy and Trade, *Emergency Controls on International Economic Transactions*, 119.

<sup>159</sup>The Ford administration had taken a similar position with regard to the National Emergencies Act. “The situation is frankly, I think, more embarrassing and undesirable to the President than it is to the Congress. It is really the President who is constrained to take action under the so-called emergency statutes which he knows and the Congress recognizes is simply normal day-to-day action,” explained Antonin Scalia, then an assistant attorney general in the Office of Legal Counsel. U.S. Congress, House, Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, *National Emergencies Act: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 94 Cong., 1st sess. (Washington, D.C., 1975), 95.

will govern future uses of emergency powers.”<sup>160</sup> Passed by voice vote in the House and Senate, and signed into law by President Carter on December 28, 1977, the act amended the Trading with the Enemy Act so as to limit its use to wartime—no longer would a mere declaration of emergency during peacetime suffice to activate the statute.<sup>161</sup> The amendment did, however, grandfather in existing sanctions programs, which is why every year the president must certify that Cuban sanctions continue to be in the “national interest.”<sup>162</sup>

At the same time, however, Congress passed a new law, the International Emergency Economic Powers Act (IEEPA), which reinstated most of the provisions of the old law’s section 5(b).<sup>163</sup> In other words, while presidents could no longer invoke the Trading with the Enemy Act during peacetime, they could now rely on the IEEPA for nearly all the same powers. Congress did add a few constraints. Under the IEEPA the president could “freeze but not seize” foreign property, could not target purely domestic transactions, had to consult with Congress before issuing new declarations of emergency, and could exercise powers only under a relevant declaration of emergency—no more relying on decades-old, unrelated proclamations.<sup>164</sup>

But in practice these restrictions amounted to very little. In three cases in the 1980s the Supreme Court invalidated many of the IEEPA’s limitations on executive power. *Dames & Moore v. Regan* (1981) granted the executive broad discretion to dispose of seized property.<sup>165</sup> *Regan v. Wald* (1984) held that the Reagan administration could expand Cuban sanctions to include activities that were not illegal when the Trading with the Enemy Act was grandfathered in 1977.<sup>166</sup> And *INS v. Chadha* (1983) found that the “legislative veto”—at issue in Congress’s ability to invalidate a president’s proclamation of national emergency—was unconstitutional.<sup>167</sup> Combined with the retrenchment of Congressional activism since its 1970s peak, these rulings mostly erased any limitations on executive discretion.<sup>168</sup> Once again by 1987 a legal observer could claim that “the President’s powers to impose economic sanctions on foreign countries under these statutes are practically unlimited.”<sup>169</sup>

Strikingly, while the executive had been reluctant to use the Trading with the Enemy Act outside of the most serious circumstances, presidents have used the IEEPA with abandon.<sup>170</sup> By formalizing the process of emergency rulemaking, Congress seems to have encouraged it. As of February 2018 there were twenty-eight active sanctions programs, nearly all based at

<sup>160</sup>*Congressional Record*, 95 Cong., 1 sess., July 12, 1977, H6869.

<sup>161</sup>An Act with Respect to the Powers of the President in Time of War or National Emergency, Pub. Law No. 95-223, 91 Stat. 1625 (1977), approved on Dec. 28, 1977.

<sup>162</sup>Congress allowed the “national interest” standard because it wanted to avoid forcing the executive to have to declare a new “national emergency” when such emergency might no longer exist. Krinsky and Golove, *United States Economic Measures Against Cuba*, 92–3. For a recent certification of Cuban sanctions, see Presidential Determination No. 2016-11, Sept. 13, 2016, 81 FR 64045, <https://www.federalregister.gov/documents/2016/09/16/2016-22555/continuation-of-the-exercise-of-certain-authorities-under-the-trading-with-the-enemy-act> (accessed Feb. 3, 2018).

<sup>163</sup>“The International Emergency Economic Powers Act,” 1106.

<sup>164</sup>Giraud, “Waging Economic Warfare,” 953–6; International Emergency Economic Powers Act, 50 U.S.C., sec. 1701(a) (1982). Full text of the act is available at <https://www.treasury.gov/resource-center/sanctions/Documents/ieepa.pdf>.

<sup>165</sup>*Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>166</sup>*Regan v. Wald*, 468 U.S. 222 (1984).

<sup>167</sup>*INS v. Chadha*, 462 U.S. 919 (1983).

<sup>168</sup>“The International Emergency Economic Powers Act,” 1102-20; Harold Hongju Koh, “Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair,” *Yale Law Journal* 97, no. 7 (June 1988): 1255–342.

<sup>169</sup>Giraud, “Waging Economic Warfare,” 935.

<sup>170</sup>Patrick A. Thronson, “Toward Comprehensive Reform of America’s Emergency Law Regime,” *University of Michigan Journal of Law Reform* 46, no. 2 (2013): 737–87, here 757–9; Jules Lobel, “Emergency Power and the Decline of Liberalism,” *Yale Law Journal* 98, no. 7 (May 1989): 1385–433, here 1414–7.

least in part on national emergencies declared pursuant to the IEEPA. Targets included terrorists, drug dealers, dictators, enemy/rogue/failed states, organized crime, and six justices of the Venezuelan supreme court.<sup>171</sup> As sanctions have become a normalized, permanent component of American foreign relations, corporations have designed internal company policies to enforce their proscriptions. Failing to do so—as when the Honda Corporation of America leased cars to Cuba’s Canadian embassy—can result in Treasury Department fines. Thus the legacies of the Trading with the Enemy Act stretch far and wide: for example, Iranian Zumba instructors have had their licenses revoked because U.S.-based Zumba Fitness fears running afoul of sanctions.<sup>172</sup>

Meanwhile the Trading with the Enemy Act remains on the books. In October 2016 a leading sanctions expert warned that, if elected president, Donald Trump could unilaterally impose a new tariff regime by citing, among other things, “the granddaddy law ... the Trading with the Enemy Act of 1917.”<sup>173</sup> Legal experts have disagreed, but given the twists and turns of the last century, it would be difficult to rule anything out.<sup>174</sup> In any case, sanctions became a key political flashpoint in the first year of the Trump administration. Alleged Russian collusion with the Trump campaign seems to have been motivated at least in part by desires to relax sanctions against Russian nationals, many of which were imposed under the IEEPA.<sup>175</sup> The Trump administration and Congress have since sparred over whether or not to impose additional sanctions on Russia for its attempts to interfere in the U.S. political system.<sup>176</sup> Presidential discretion over the implementation of sanctions gives these debates extra importance.

The authors who drafted the Trading with the Enemy Act in 1917 would no doubt be surprised to know that their creation shaped the politics of presidential scandal in 2017. But this should be less surprising in light of how succeeding administrations have woven the act into the fabric

<sup>171</sup>An updated list can be found at Sanctions Program and Country Information, Department of the Treasury, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (accessed Feb. 3, 2018). Note that some of these programs (such as Cuban sanctions) rest on grandfathered provisions of the Trading with the Enemy Act as well as additional Congressional legislation.

<sup>172</sup>Department of the Treasury, “Settlement Agreement between the U.S. Department of the Treasury’s Office of Foreign Assets Control and American Honda Finance Corporation,” June 8, 2017, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20170608.aspx> (accessed Feb. 3, 2018); Thomas Erdbrink, “Iran Bans Zumba, and Its Fans Fume,” *New York Times*, June 17, 2017, <https://www.nytimes.com/2017/06/17/world/middleeast/iran-zumba-haram.html> (accessed Feb. 3, 2018).

<sup>173</sup>Gary Clyde Hufbauer, “Trump the Trade Tyrant,” *U.S. News & World Report*, Oct. 3, 2016, <https://www.usnews.com/opinion/articles/2016-10-03/dont-under-estimate-the-threat-a-trump-presidency-would-pose-to-trade> (accessed Feb. 3, 2018).

<sup>174</sup>Clif Burns, “New White House Cannot Impose China Tariffs Under Trading With The Enemy Act,” *Export Law Blog*, Nov. 15, 2016, <http://www.exportlawblog.com/archives/8183> (accessed Feb. 3, 2018).

<sup>175</sup>Among the active programs authorized under the IEEPA are sanctions against Russian nationals involved in the annexation of Crimea in 2014 and in allegedly attempting to interfere with the 2016 U.S. presidential election. (The Magnitsky Act, passed by Congress in 2012, imposes additional sanctions.) Executive Order No. 13660, Mar. 6, 2014, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine\\_eo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_eo.pdf) (accessed Feb. 3, 2018); Executive Order No. 13757, Dec. 28, 2016, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cyber2\\_eo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cyber2_eo.pdf) (accessed Feb. 3, 2018). The Sergei Magnitsky Rule of Law Accountability Act was passed by Congress in 2012. Sanctions under its purview also draw authority from the IEEPA, according to the Treasury Department. See Magnitsky Sanctions, Department of the Treasury, <https://www.treasury.gov/resource-center/sanctions/Programs/pages/magnitsky.aspx> (accessed Feb. 3, 2018). See also Alex Horton, “The Magnitsky Act, Explained,” *Washington Post*, July 14, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/07/14/the-magnitsky-act-explained/> (accessed Feb. 3, 2018).

<sup>176</sup>Emily Tamkin, “Trump Administration Says No to New Russia Sanctions, Yes to Cribbing from Forbes,” *Foreign Policy*, Jan. 30, 2018, <https://foreignpolicy.com/2018/01/30/trump-administration-says-no-to-new-sanctions-yes-to-cribbing-from-forbes-kremlin-russia-state-treasury/> (accessed Feb. 26, 2018).

of twentieth-century U.S. foreign policy. This seemingly limited law, designed for early-twentieth-century wartime, went dormant rather than expiring at the end of World War I, only to reemerge to justify state authority for a widening array of powers. Seeking legal precedent and authority for their actions, presidents and their advisers found the act both highly useful and sufficiently malleable. And while the law was invoked in the context of presidentially declared emergencies, Congressional and judicial acquiescence have also been essential to the exercise of this executive power.

The secret and surprising life of the Trading with the Enemy Act reflects Americans' embrace of sanctions as part of a global strategy to construct and preserve an American world order. And the law provides one example of how the expansion of U.S. power has required the development of a new repertoire of legal techniques. Other statutes—many with secret lives of their own—deserve to have their stories told as well. Collectively they can help historians understand how the repurposing of laws designed for one goal often serves others—a process that has helped to construct the modern U.S. state and the American century. As peacetime has become a permanent wartime, the century-old legacy of wars past continues to shape the present.

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