

When Congress Passes the Buck: How Russia's Invasion of Ukraine Exposed Flaws in Granting the President Sanctioning Powers

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*There's a Cold War coming
On the radio I heard
Baby, it's a violent world*

—Coldplay, *Life in Technicolor II* (2008).¹

ABSTRACT

The United States (U.S.) Constitution provides few limitations on endowing the Executive Branch with powers to govern foreign trade, which was initially granted to the Legislature. In a world where global trade dominates, the power over foreign trade can be more important than the power over domestic matters. Leaving unrestrained trade authority to the Executive Branch may cause hazards for Americans and foreigners alike. Russia's war in Ukraine demonstrates the flaws in permitting the Executive Branch to unilaterally sanction foreign states. This Article

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1. COLDPLAY, *Life in Technicolor II*, on VIVA LA VIDA OR DEATH AND ALL HIS FRIENDS (Parlophone Recs. Ltd. 2008).

demonstrates how reactive Executive Branch policies infringed on the welfare and safety of American citizens and foreigners alike.

CONTENTS

INTRODUCTION	710
I. SANCTION POWERS.....	715
<i>A. When Congress Passes the Buck (but Not to the Consumer)</i>	717
<i>B. Restrictions on Foreign Investments</i>	729
<i>C. Economic Freedom and International Trade</i>	738
<i>D. The Need for Legal Limits to Executive Sanctioning Power</i>	741
<i>E. A Brave New World</i>	743
II. SLAVA UKRAINI!	748
<i>A. Sanctioning Russia</i>	750
<i>B. Are There Two Sides to the Conflict?</i>	754
<i>C. An Endless List of Foreign Entanglements</i>	760
III. BUT WHAT ABOUT THE AMERICAN PEOPLE?.....	763
CONCLUSION	769

INTRODUCTION

When the U.S. Sneezes, the World Catches a Cold

—A common saying, though not an official motto.²

For the past century, the U.S. has been one of the most influential nations on the world stage. America often uses its economic power and trade relationships with other nations to exercise a certain measure of control, nearly always at the sole discretion of the Executive Branch.³ This action often takes the form of economic sanctions, trade embargoes, funding certain parties, and when necessary, direct warfare.⁴ Because the

2. See, e.g., Howard Schneider, *When the U.S. Sneezes, the World Catches a Cold. What Happens When It Has Severe COVID-19?*, REUTERS (July 19, 2020), <https://www.reuters.com/article/us-global-economy-usa-analysis/when-the-u-s-sneezes-the-world-catches-a-cold-what-happens-when-it-has-severe-covid-19-idUSKCN24L0EO> [<https://perma.cc/8DP3-6ZZB>].

3. See generally Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

4. See, e.g., *Economic Sanctions Policy and Implementation*, U.S. DEP'T STATE, <https://www.state.gov/economic-sanctions-policy-and-implementation/> [<https://perma.cc/3RJX-FP9K>]; see also CONG. RSCH. SERV., *ECONOMIC SANCTIONS: OVERVIEW FOR THE 117TH CONGRESS*

U.S. Constitution has many limits on the President's powers on American soil, American Presidents frequently find themselves more powerful abroad than they are at home.⁵ When these politicians exercise that power over foreign nations, the horrors that often follow vindicate the Founding Fathers' restrictions against such actions on U.S. territory.⁶ Nevertheless, innocent civilians of lands invaded or otherwise controlled by the U.S. may suffer as a result of U.S. intervention, with no aid from the Bill of Rights and no access to the ballot.⁷ Hence, Americans unwittingly unleash forces to which they do not trust their own welfare upon the world without realizing the damage until years or decades later.

The war in Ukraine, consisting of a Russian invasion beginning in February of 2022,⁸ shows the importance of curtailing this exercise of Executive power. American trade restrictions imposed to punish Russia for the invasion may have had an effect completely unintended by the President who promulgated them: punishing the American people instead. The sanctions did not stop the war, they did little to reduce the bloodshed, and they had the unfortunate effect of impoverishing the average American voter in the midst of a looming recession, record-breaking inflation, and a bear market in stocks and bonds with a midterm election in sight.⁹ American citizens were directly harmed by the extraterritorial

(2021), https://www.everycrsreport.com/files/2021-01-15_IF11730_fd2be4c6e2fcf61b5d9ce988da60d2ee681e50b2.pdf [https://perma.cc/NJE2-LK89].

5. James M. Goldgeier & Elizabeth N. Saunders, *The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump*, COUNCIL FOREIGN RELS. (Aug. 14, 2018), <https://www.cfr.org/article/unconstrained-presidency-checks-and-balances-eroded-long-trump/> [https://perma.cc/BM9S-EBDP].

6. See, e.g., Charli Carpenter, *When U.S. Foreign Policy Went Wrong*, FOREIGN POL'Y (Jan. 15, 2021), <https://foreignpolicy.com/2021/01/15/worst-ideas-past-50-years-foreign-policy/> [https://perma.cc/LYG8-HHGB]; Doug Bandow, *Understanding the Failure of U.S. Foreign Policy: The Albright Doctrine*, CATO INST. (June 2, 2019), <https://www.cato.org/commentary/understanding-failure-us-foreign-policy-albright-doctrine> [https://perma.cc/77MM-TT9L].

7. Post-September 11, 2001, at least 929,000 individuals were killed by direct war violence in Afghanistan, Iraq, Pakistan, Syria, and Yemen. *Costs of War*, BROWN UNIV.: WATSON INST. INT'L & PUB. AFFS. (Nov. 2021), <https://watson.brown.edu/costsofwar/costs/human> [https://perma.cc/9P2S-ZSEP]. The wars also forcibly displaced at least thirty-eight million people in Afghanistan, Iraq, Libya, Pakistan, the Philippines, Somalia, Syria, and Yemen. *Id.* This number "exceeds the total displaced by every war since 1900, except World War II." *Id.*

8. Anna Qiang, *The Russian Invasion of Ukraine: Examining the Legality of US Interference*, COLUM. U. L. REV. (May 21, 2022), <https://www.culawreview.org/journal/the-russian-invasion-of-ukraine-examining-the-legality-of-us-interference> [https://perma.cc/CQV7-LS6H].

9. Phil Rosen, *America's Sanctions on Russia Are Hurting the US 'In a Profound Way,' and Taxpayers Will Bear the Cost, Says Citadel's Ken Griffin*, MKTS. INSIDER (Mar. 2, 2022), <https://markets.businessinsider.com/news/stocks/russia-sanctions-america-citadel-ken-griffin-ukraine-war-economy-dollar-2022-3> [https://perma.cc/G673-DVNH]; Quint Forgy & Alexander Ward, *Biden's Sanctions Red Line: Hurting Americans*, POLITICO (Feb. 25, 2022), <https://www.politico.com/newsletters/national-security-daily/2022/02/24/bidens-sanctions-red-line->

actions of the American Executive Branch at a time when they were least capable of weathering the blow,¹⁰ and it is precisely because of this series of unfortunate events that the American people on both sides of the political aisle might request an important change in legal policy in the years and decades to come.

We posit that the negative consequences affecting Americans as a result of a foreign war 6,000 miles away come from an unapologetic repudiation of free trade principles. Broad federal sanctions that are imposed by the President without a congressional vote restrict trade by all states and all individuals within those states.¹¹ In so doing, the sanctions directly restrict the liberties of every American to trade with the Russian Federation or any other sanctioned country.¹² By extension, trade sanctions frequently restrict Americans' rights to trade with other nations who continue to trade with the Russian Federation.¹³ If done at home, such trade restrictions would be unthinkable: Floridians can trade with New Yorkers regardless of the deeply held political differences between the two states.¹⁴ Yet when such restrictions are applied abroad, the American Constitution does little to guarantee the rights of Americans to trade with foreign nations if the President wills it otherwise.¹⁵ Given the existence of prior trade lanes, these trades were clearly beneficial for both sides from

hurting-americans-00011521 [https://perma.cc/7FMX-JS8E]; see Jeanne Whalen & Catherine Belton, *Sanctions Haven't Stopped Russia, But a New Oil Ban Could Cut Deeper*, WASH. POST (Feb. 15, 2023), <https://www.washingtonpost.com/business/2023/02/15/russia-sanctions-impact-ukraine-war/> [https://perma.cc/7RWP-WD54] ("Western sanctions have deeply wounded Russia's economy and military and caused friction among elites—but not enough to change Putin's calculus and end the war."). See generally Richard Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS INST. (June 1, 1998), <https://www.brookings.edu/research/economic-sanctions-too-much-of-a-bad-thing/> [https://perma.cc/83J7-BYP7].

10. Rosen, *supra* note 9; Forgey & Ward, *supra* note 9.

11. See Brian J. Egan, Eytan J. Fisch, Michael E. Leiter, Khalil N. Maalouf, Ariel V. Lieberman & Joe Sandman, *New US Restrictions Impact Russia-Related Imports and Exports, US Dollar-Denominated Banknotes*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Mar. 17, 2022), <https://www.skadden.com/insights/publications/2022/03/new-us-restrictions-impact-russia-related-imports> [https://perma.cc/6F9N-ETQ2].

12. See Egan, Fisch, Leiter, Maalouf, Lieberman & Sandman, *supra* note 11.

13. See Transcript: *US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and 'Friend-Shoring' Supply Chains*, ATL. COUNCIL (Apr. 13, 2022), <https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/> [https://perma.cc/9A2H-UCCJ].

14. See U.S. CONST. art. I, § 8, cl. 3.

15. See generally Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201 (2018).

an economic perspective and, given the elimination of these trade relationships, both sides are now worse off.¹⁶

In a fundamental way, limitations on where people can receive their products from strike at the very heart of American freedom. It is free trade that gave the American economy so much weight on the world stage, and when the Executive Branch deliberately restricts the ability of American citizens to drive a better bargain abroad, the harm is not limited to America's trade partners overseas.¹⁷ Given that there is no war between Russia and the U.S., and given that America has no alliance with Ukraine,¹⁸ one has to wonder: does it still make sense to ban trade outright, with the Executive Branch making a unilateral decision?

We argue for a historical solution to this problem: the President's unilateral power to sanction via Executive Order should be removed.¹⁹ Instead, return the power to sanction foreign trade to the Legislature, where it once resided before delegation to the Executive Branch.²⁰ Allowing free and open debate between a large number of politicians before making the drastic decision to curtail the trade rights of Americans is an important goal. Achieving that goal will serve two important purposes. First, politicians who have different sources of information could inform each other, as well as the American public, of the costs and benefits of sanctions. This kind of deliberative decision-making will allow a more reasoned, thoughtful approach, especially in situations where the Executive Branch and the Legislature are controlled by different parties and where the Legislature might more accurately represent the will of the American people.

The second advantage of reclaiming this power for the Legislature would be to allow politicians more time to come to a conclusion, which debate permits. When the Legislature vested in the Executive the power to

16. See Jared Coulter & Enrique Martínez-García, *Russia's War on Ukraine Will Leave Scars on U.S., World Economies*, FED. RESERVE BANK DALLAS (May 17, 2022), <https://www.dallasfed.org/research/economics/2022/0517> [<https://perma.cc/5B33-2T5F>]; Jennifer Hillman, Irina A. Faskianos & Carla Anne Robbins, *The Implications of Russia's Invasion on U.S. Trade*, COUNCIL FOREIGN RELS. (Mar. 22, 2022), <https://www.cfr.org/event/implications-russias-invasion-us-trade> [<https://perma.cc/U4T7-4B3U>].

17. See Coulter & Martínez-García, *supra* note 16; Hillman, Faskianos & Anne Robbins, *supra* note 16.

18. See *U.S. Relations with Ukraine*, U.S. DEP'T STATE (Aug. 27, 2021), <https://www.state.gov/u-s-relations-with-ukraine/> [<https://perma.cc/J4Y6-SBM8>].

19. Andrew Boyle, *Checking the President's Sanction Powers*, BRENNAN CTR. FOR JUST. (June 10, 2021), <https://www.brennancenter.org/our-work/policy-solutions/checking-presidents-sanctions-powers> [<https://perma.cc/P9LB-SLEJ>].

20. Brian O'Toole & Samantha Sultoon, *Sanctions Explained: How a Foreign Policy Problem Becomes a Sanctions Program*, ATL. COUNCIL (Sept. 22, 2019), <https://www.atlanticcouncil.org/commentary/feature/sanctions-explained-how-a-foreign-policy-problem-becomes-a-sanctions-program/> [<https://perma.cc/VE2E-FYND>].

unilaterally sanction foreign trade, the rationale might have been (in part) to allow for quick government actions in the event of a clear and present danger to national security.²¹ In reality, almost no trade sanctions require such swift action. In situations where sanctions are a result of direct warfare between the U.S. and a foreign nation, sanctions almost impose themselves: trade cannot continue where enemy combatants can easily seize the items traded. In instances where there is no direct American involvement, immediate sanctions may not be preferable to those that require at least some congressional debate. Curtailing the rights of Americans to trade with foreigners should be done with more thought, allowing the facts to be accurately interpreted and permitting businesses more time to adjust to the incoming economic restrictions.

Based on these rationales, we argue that Congress should reclaim its power from the Executive Branch via legislative act. This is a responsibility that Congress may be reluctant to assume, but it is nevertheless necessary to decrease the harm associated with unilateral Executive action that curtails Americans' rights to international trade. Moreover, even if Congress will not reassume this power, federal courts should be more reluctant in permitting the delegation of sanction authority. While the U.S. Supreme Court has generally permitted Congress to delegate some of its powers,²² it may be time to rethink this policy, as more and more delegation shifts the balance of power from the Legislature to the Executive, which is constantly expanding.²³ When it comes to international trade, a critical factor in the wellbeing of ordinary Americans,²⁴ the delegation from Congress should be closely scrutinized and even reversed.

The current use of delegated congressional power leaves some sanctions against the Russian Federation open to legal challenge as an improper delegation. Regardless of what one thinks about the invasion of Ukraine, Americans should welcome such challenges. It would not benefit the average American if a President, based on political preference, unilaterally shut off trade with much larger partners, such as China. The harm to the American people would be swift and tremendous, and if

21. See Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1137 (2021).

22. *Separation of Powers: Delegation of Legislative Power*, NAT'L CONF. STATE LEGISLATURES (Nov. 16, 2022), <https://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx> [https://perma.cc/D245-Z5WP].

23. Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 939 (2022).

24. *The Benefits of International Trade*, U.S. CHAMBER COM. (Jan. 15, 2021), <https://www.uschamber.com/international/trade-agreements/the-benefits-of-international-trade> [https://perma.cc/DT9M-NBSC].

Congress does not reclaim its power to sanction, any President can impose such hardships on a whim without any congressional debate or oversight. The sanctions against the Russian Federation reveal the great reach of the President's sanctioning power while also showing that this reach has grown too long for comfort.

Let us be completely clear: we do not condone Russia's violence against Ukraine or the Ukrainian people in any way. Certain Russian actions against Ukraine are atrocious and morally reprehensible.²⁵ We understand that the economic sanctions imposed against Russia are meant to punish Russia for its brutality, and we extol the motivation behind the sanctions. This Article is meant only to argue that the sanctions imposed may be doing more harm than good by harming American civilians, and that, given the powerful effect that economic sanctions can have on ordinary Americans, the Legislative Branch of the U.S. government should be required to approve such sanctions going forward.

Part I of this Article documents the laws and regulations that currently permit the Executive Branch to restrict the international trade rights of American citizens. Here, we will articulate potential alternatives to the present status quo by suggesting that the power to sanction return to Congress. Part II of this Article discusses the economic impact of Executive trade restrictions in the context of the war in Ukraine, demonstrating their impact both at home and abroad. Part III of this Article demonstrates that, if sanctions were more difficult to impose and required greater political maneuvering, the economic damage to American citizens from the trade restrictions imposed in 2022 might have been reduced. The Article concludes by suggesting limitations on rapid, unilateral sanctions by the Executive Branch, given the inherent costs of restricting Americans' right to trade with the rest of the world.

I. SANCTION POWERS

Americans lost every war.

—Peter Schiff, Senate Candidate and Libertarian Economist²⁶

The Executive Branch of the American government has relatively broad authority to sanction foreign nations, with such power ordinarily

25. Thousands of Ukrainian civilians have been killed by Russia's military. In addition, "Human Rights Watch has documented several cases of Russian military forces committing laws-of-war violations against civilians" in Ukraine. *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUM. RTS. WATCH (Apr. 3, 2022), <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> [<https://perma.cc/V56V-KF9D>]. These include rape, execution, unlawful violence, and looting civilian property. *Id.*

26. Peter Schiff, *Americans Lost Every War*, YOUTUBE (May 31, 2021), <https://www.youtube.com/watch?v=8nKh2I1WCDk> [<https://perma.cc/4743-2P6E>].

implemented through the Office of Foreign Assets Control (OFAC), which operates under the Office of Terrorism and Financial Intelligence (a component of the U.S. Treasury Department).²⁷ OFAC keeps a relatively long list of sanctions against a variety of nations, including Russia, Cuba, Ethiopia, the Democratic Republic of Congo, Iran, Libya, North Korea, Syria, and Zimbabwe.²⁸ These sanction programs have been updated quite recently, mostly in 2021, 2022, and 2023, to reflect the situation on the ground.²⁹ However, these programs all address instances arguably less dire than World War I, the event that triggered Congress to grant the Executive Branch the power to form OFAC through the Trading with the Enemy Act of 1917.³⁰

The fact that Congress passed such authorization in dire circumstances, but never revoked it after the conclusion of World War I, is important for several reasons. First, it is an example of a well-intended grant of congressional authority to the Executive Branch during a time of emergency: World War I, at the time, was the largest war the world had ever seen.³¹ Consequently, American politicians felt it would be important to grant the unified power to impose trade sanctions to the President, since the Executive Branch could, theoretically, wield this power more quickly and decisively than the Legislative Branch.³² In a war with world-changing stakes, where trade, supply of weapons, supply of fuel, and supply of food could change the fate of nations, giving this power to the Commander-in-Chief made political (and perhaps even logical) sense.³³ But why not retract the power after the war ended in 1918? If the U.S. Constitution required the Legislative Branch to transfer power to the Executive, would it not be sensible to return things to the constitutional status quo after the war? The answer was: apparently not.

Like many delegations of power from the Legislature to the President, this delegation remains in place to this day.³⁴ Although Congress can always pass yet another law revoking the relevant provisions of the Trading with the Enemy Act of 1917, no such law has been passed

27. *Sanctions Programs and Country Information*, U.S. DEP'T TREAS., home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information [https://perma.cc/9EQP-8HH2]; *Terrorism and Financial Intelligence*, U.S. DEP'T TREAS., [https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence#:~:text=%E2%80%8BThe%20Office%20of%20Terrorism,WMD\)%20proliferators%2C%20money%20launderers%2C](https://home.treasury.gov/about/offices/terrorism-and-financial-intelligence#:~:text=%E2%80%8BThe%20Office%20of%20Terrorism,WMD)%20proliferators%2C%20money%20launderers%2C) [https://perma.cc/VFB8-WMTC].

28. *Sanctions Programs and Country Information*, *supra* note 27.

29. *Id.*

30. 12 U.S.C. § 95; 50 U.S.C. §§ 4301–4302.

31. See generally Gabriela A. Frei, *International Law and the First World War: Introduction*, 29 EUR. J. INT'L L. 229 (2018).

32. *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1154.

33. *Id.* at 1132.

34. *Id.*

as of 2022 (and no proposals of this sort are currently being considered by Congress). American Presidents retained the power to form an office similar to OFAC, which itself was only formed *after* the conclusion of World War II, in 1950.³⁵

Similarly, the International Emergency Economic Powers Act (“IEEPA”), enacted in 1977, provides the President with broad authority to regulate a wide variety of economic transactions after a national emergency is declared.³⁶ Like the Trading with the Enemy Act, IEEPA has been frequently used by U.S. Presidents to restrict international transactions, and the frequency of its use and duration of emergencies have increased over time.³⁷ IEEPA allows the use of the emergency power to sanction in times of peace, and because the United States and Russia are not at war, IEEPA serves as the statute which gives the President power to restrict trade with the Russian Federation.³⁸

A. When Congress Passes the Buck (but Not to the Consumer)

*For several months during [Winston’s] childhood there
had been confused street fighting in London
itself. . . . But to trace out the history of the whole period,
to say who was fighting whom at any given moment,
would have been utterly impossible.*

—George Orwell³⁹

Delegation (or non-delegation) of legislative power has been a topic of contention and discussion since before the U.S. was formed.⁴⁰ In 1690, in his Second Treatise of Civil Government, John Locke, an English philosopher on whom the Founding Fathers heavily relied, wrote:

35. *Basic Information on OFAC and Sanctions*, U.S. DEP’T TREAS., <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501#:~:text=OFAC%20itself%20was%20formally%20created,assets%20subject%20to%20U.S.%20jurisdiction> [https://perma.cc/3Q2L-T2T5].

36. CHRISTOPHER A. CASEY, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* (2022).

37. *Id.* at 15.

38. Elizabeth Goitein & Benjamin Waldman, *How the Russia Sanctions Work and What Congress Needs to Know*, BRENNAN CTR. FOR JUST. (Apr. 11, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/how-russia-sanctions-work-and-what-congress-needs-know> [https://perma.cc/S7QP-MDLL]; *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, WHITE HOUSE (Apr. 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/06/p-rohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/> [https://perma.cc/5PHT-5PNY].

39. GEORGE ORWELL, 1984 43 (Penguin Classics 2021) (1949).

40. *Separation of Powers: Delegation of Legislative Power*, *supra* note 22.

The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.⁴¹

Article I, Section I of the U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁴² In the 1930s, the U.S. Supreme Court made a broad declaration that “the legislative power of Congress cannot be delegated.”⁴³ On other occasions, however, the U.S. Supreme Court has held that Congress may delegate “powers which [it] may rightfully exercise itself” but is forbidden from delegating powers that are “strictly and exclusively legislative.”⁴⁴ In more recent cases, the U.S. Supreme Court has made clear that delegation is permitted in the vast majority of cases, stating in a 1989 holding that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁴⁵ In the present day, it is clear that delegation of legislative powers is permitted in many scenarios, and the question becomes when the courts should permit delegation and when they should forbid it.

In the early 1800s, Chief Justice Marshall recognized that the “precise boundary of [the delegation] power is a subject of delicate and difficult inquiry” and “there is . . . difficulty in discerning the exact limits [of delegation].”⁴⁶ More than 100 years later, the U.S. Supreme Court attempted to further clarify the power to delegate, upholding Congress’s delegation to the Executive the power to impose tariffs equalizing

41. *Id.*

42. U.S. CONST. art. I, § 1.

43. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

44. *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

45. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

46. *Wayman*, 23 U.S. at 46.

production costs in the U.S. and foreign countries.⁴⁷ In this case, the Supreme Court held that delegations were permissible when Congress provides an “intelligible principle” to which the President or an agency must confirm.⁴⁸ Specifically, for delegations to be permitted, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] . . . is directed to conform.”⁴⁹

After defining the “intelligible principle” test, the U.S. Supreme Court failed to permit delegation in two rulings from 1935.⁵⁰ In these cases, which related to Congress’s attempted delegation to the Executive during the Great Depression, the Court held that Congress had inappropriately delegated its authority by authorizing corporations to create industry regulations on prices and wages.⁵¹ These cases, along with *Carter v. Carter Coal Co.*—struck down because Congress provided the Executive Branch with too much discretion—were the last major cases where the Court overturned legislation on non-delegation doctrine grounds.⁵² We could find only one other case, in the history of the Supreme Court, where the Justices, arguably, struck a law for improper delegation.⁵³ In modern times, the U.S. Supreme Court’s solution has been to reject delegation challenges in all but the most extreme of cases, permitting Congress to delegate broad powers to the President or administrative agencies.⁵⁴

Just one year after the Supreme Court forbid Congress from delegating its authority to President Franklin D. Roosevelt, the U.S. Supreme Court faced the issue of delegation of sanctions and foreign

47. See generally *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

48. *Id.* at 409.

49. *Id.*

50. See generally *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

51. See generally *Panama Refining Co.*, 293 U.S. 388; *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.

52. Stephen Wermiel, *SCOTUS for Law Students: Non-Delegation Doctrine Returns After Long Hiatus*, SCOTUSBLOG (Dec. 4, 2014), <https://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus/> [<https://perma.cc/XPN7-WJRP>]; see also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

53. See generally *Morrill v. Jones*, 106 U.S. 466 (1883).

54. *The History of the Doctrine of Nondelegability*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-1/the-history-of-the-doctrine-of-nondelegability#fn2art1> [<https://perma.cc/Z5XZ-355U>] (“Since 1935, the Court has not struck down a delegation to an administrative agency. Rather, the Court has approved, ‘without deviation, Congress’s ability to delegate power under broad standards.’ The Court has upheld, for example, delegations to administrative agencies to determine ‘excessive profits’ during wartime, to determine ‘unfair and inequitable distribution of voting power’ among securities holders, to fix ‘fair and equitable’ commodities prices, to determine ‘just and reasonable’ rates, and to regulate broadcast licensing as the ‘public interest, convenience, or necessity require.’”).

affairs power.⁵⁵ In this case, Congress authorized the “President to declare an embargo on the sale of arms to Paraguay and Bolivia if he found that doing so ‘may contribute to the reestablishment of peace,’” as the two countries were engaged in a war at the time.⁵⁶ Predictably, the President found that the embargo may “contribute to the reestablishment of peace.”⁵⁷ After the President imposed the embargo, a corporation and its officers were indicted for violating the embargo and challenged the Congressional authorization as an unconstitutional delegation of legislative power.⁵⁸ “[T]he Court treated its 1935 cases [forbidding Congress’ delegation of authority] as all but irrelevant to the delegation before it” because the prior cases “related solely to internal affairs.”⁵⁹ Here, the Court held that Congress can delegate more broadly in foreign affairs scenarios because of the President’s status as “the sole organ of the federal government in the field of international relations.”⁶⁰

The U.S. Constitution, however, offers no formal basis for Congress’ ability to broadly delegate its powers in foreign affairs scenarios.⁶¹ A 2021 Harvard Law Review article provided that:

Many foreign affairs-related delegations are made pursuant to powers that the Constitution vests exclusively in Congress such that the authority delegated to the President doesn’t necessarily overlap with Article II powers. For instance, when it comes to trade, the President has no independent power that would permit broader delegations in the area solely because of the subject matter. Congressional debate over early foreign affairs-related delegations supports this conclusion: the constitutionality of these delegations was assessed like that of all other delegations—not in terms of subject matter, but by reference to the amount of discretion conferred.⁶²

Sanctions are a foreign policy instrument explicitly entrusted to the Legislative Branch by the U.S. Constitution, which provides that Congress shall “regulate commerce with foreign nations.”⁶³ Unlike other areas of foreign policy, including military force and diplomacy, “over which the Constitution divides control between Congress and the executive—the President has no inherent power to impose sanctions or to refuse to

55. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

56. *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1133.

57. *Curtiss-Wright Export Corp.*, 299 U.S. at 312.

58. See *id.* at 311.

59. *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1133.

60. *Curtiss-Wright Export Corp.*, 299 U.S. at 320.

61. See U.S. CONST.; *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1134.

62. *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1134.

63. U.S. CONST. art. I, § 8.

implement congressionally mandated sanctions.”⁶⁴ Regardless, the Legislative Branch delegates to the President the power to impose sanctions on foreign nations.⁶⁵

The Legislative Branch, of course, has the power to revoke this delegation, and should strongly consider doing so. As the importance of global trade has greatly increased since Congress delegated its sanctioning power, the Legislature can undo its decision based on the changing amount of power the power to sanction carries. When the President received this power in 1917, global trade was not nearly as developed as it is today, and the power to sanction did not implicate the welfare of the average American nearly as much. Most of our products were made within our borders, and inability to trade internationally would not necessarily unwind the economy. In 2023, we are wholly dependent on world trade. If the sanctions against Russia caused moderate economic damage to the American consumer, just imagine what sanctions against larger trading partners, like China, would do. As it stands, the President can sanction such trade on a whim,⁶⁶ without congressional approval, and might even veto a bill returning the power back to the Legislature. With one stroke of a pen, an intemperate President can currently plunge our entire nation into economic turmoil with little input from the American people.

The winds of change are also blowing at the U.S. Supreme Court. In more recent years, the intelligible principle test’s broad deference “affords congressional delegations of authority to the other branches has [been] met with growing skepticism from some members of the [Supreme] Court.”⁶⁷ The composition of the Court has shifted to a decidedly more conservative (and originalist) perspective when it comes to constitutional interpretation, which is reflected in such radical departures from precedent as the recent reversal of *Roe v. Wade*.⁶⁸ Although jurisprudence on abortion and jurisprudence on congressional delegation are far apart in subject matter, the Court’s willingness to reverse long-standing precedent cannot be ignored.

Even before the appointment of conservative Justice Amy Coney Barret to the Supreme Court in 2020 (replacing a more progressive Justice

64. Benjamin Alter, *Sanctions Are Congress’s Path Back to Foreign Policy Relevance*, LAWFARE (Mar. 27, 2018), <https://www.lawfareblog.com/sanctions-are-congress-path-back-foreign-policy-relevance> [https://perma.cc/4MDH-WF8M].

65. Boyle, *supra* note 19.

66. As previously mentioned, the President’s power to restrict trade with Russia comes via the IEEPA.

67. *Agency Discretion and Chevron Deference*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-1/agency-discretion-and-chevron-deference#fn9art> [https://perma.cc/7FFA-GKT7]. See generally *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21.

68. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

Ruth Bader Ginsburg), the Court edged toward reconsidering some of its prior decisions on just how much power Congress could pass to the Executive Branch.⁶⁹ In 2019, the Court considered a case of delegation where Congress assigned to the Executive Branch the power to specify the conditions of the Sex Offender Registration Act.⁷⁰ Even though the deciding Court was less conservative and originalist than it is now, and even though Justice Kavanaugh took no part in the decision, only a plurality opinion could emerge on the delegation doctrine.⁷¹ Specifically, the Court affirmed the decision by a 4-1-3 vote, with Justice Alito concurring in the judgment but not in its reasoning and Justices Roberts, Gorsuch, and Thomas penning a dissent that underscored the need to review the delegation doctrine.⁷² Justice Alito also alluded to the need for a more clear rule, suggesting a desire to limit congressional ability to “pass the buck” to the Executive Branch.⁷³

Without Justice Kavanaugh, the 2019 vote represented the desire of at least 33% of the Court to make delegation more open to judicial scrutiny. Justice Alito could, theoretically, raise that number to 44%. Given a different case, Justice Alito might not concur in the judgment at all, creating a 4-4 split. What about Justice Kavanaugh? In a statement regarding another case where congressional delegation was at issue, Justice Kavanaugh took a stance quite similar to that of the dissent: the delegation precedent deserved a second look, and laws passing particularly important authority from Congress to the Executive Branch were likely at risk.⁷⁴ In fact, he spoke kindly of the dissenting opinion, considering it “thoughtful” and briefly echoed some of its arguments on the importance of curbing delegation. Even before the ascension of Justice Amy Coney Barrett to the Supreme Court bench, the vote could have stood at 5-4 *in favor* of striking down congressional delegation provisions if the right case presented such an opportunity.

With the addition of Justice Amy Coney Barrett to the U.S. Supreme Court, the possibility of curbing congressional delegation is even higher. A 6-3 vote striking down a particularly reaching delegation law is far from unlikely, as the Court has shown no sign of restraint in reversing course

69. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2116 (2019).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 2030–31.

74. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Justice Kavanaugh respecting the denial of certiorari). The Court did deny certiorari in the *Paul* case, but only because it raised a very similar challenge to the one in *Gundy*, 139 S. Ct. at 2118 (2019). Given a case that does not arise out of sex offender registry violations, the Court seems poised to reconsider the issue of congressional delegation in the twenty-first century.

on some highly consequential established precedent.⁷⁵ While Justice Barrett's opinions on delegation have not been stated quite as clearly as those articulated by Justice Roberts, Justice Thomas, Justice Gorsuch, Justice Alito, and Justice Kavanaugh, she has generally voted in the same way as these more conservative Supreme Court Justices. If this voting pattern continues, Justice Barrett is far more likely to place limits on legislative delegation than her predecessor. With the recent retirement of Justice Breyer, Justice Jackson is also a new addition to the Court.⁷⁶ While her stance on the delegation question has not been made clear, a 6-3 vote in favor of delegation could still materialize if Justice Jackson opposed a change in precedent as her predecessor did.

The possibility of a change in precedent on delegation seems increasingly likely given a case decided by the U.S. Supreme Court in June 2022. In *West Virginia v. Environmental Protection Agency*, the U.S. Supreme Court refused to permit the U.S. Environmental Protection Agency ("EPA") from devising emission caps from existing power plants, holding that Congress did not properly delegate to the EPA the authority to do so, by a 6-3 vote.⁷⁷ The Justices comprising the majority opinion in this case were Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett.⁷⁸ Although this case did not deal directly with a limitation by Congress to delegate its authority, it is possible that this case signifies that changes relating to Congress' broad grant of authority to delegate its responsibilities to the Executive Branch are brewing.

The general rule this new majority would craft is almost certain to take into account just how central a power is to the function of a Legislature. This might involve an analysis of Article I of the U.S. Constitution, and perhaps even the Declaration of Independence, to ascertain why the Founding Fathers formed the Legislative Branch the way that they did. Projections about how that analysis might go are difficult, but the more conservative justices seem intent on limiting the delegation of "major" powers that can have "great economic and political

75. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022) (reversing *Roe v. Wade*).

76. *Oath Ceremony: The Honorable Ketanji Brown Jackson*, SUP. CT. U.S., https://www.supremecourt.gov/publicinfo/press/oath/oath_Jackson.aspx [<https://perma.cc/LC28-P2C7>].

77. See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). In 2015, the EPA issued the Clean Power Plan, aimed to decrease greenhouse gas emissions by forcing power plants to shift from using coal to alternative sources of energy, such as wind and solar power. The U.S. Supreme Court held that the EPA did not have authority to issue the Clean Power Plan because the EPA did not have clear authorization from Congress to decrease greenhouse gas emissions from existing power plants. The Court determined that, without a clear delegation of power from Congress, the EPA could not implement the Clean Power Plan. See generally *id.*

78. *Id.* at 2596.

importance.”⁷⁹ While Congress would still be able to resolve the important matters itself and “pass the buck” to the Executive Branch for developing an enforcement methodology, allowing the Executive Branch to decide the major issues itself would be out of the question. This would leave to the Executive Branch the power to determine its own mechanisms of executing the laws passed by the Legislature, but it would not allow the President to speak for the entire country in the absence of popular debate.

This change would have important implications for general grants of congressional authority to the Executive Branch. Congress may not be able to pass sweeping laws, which remain active for decades (and even centuries), that allow the Executive to endlessly determine which international powers deserve sanctions. While broad laws passed for the general protection of the U.S. may be well-intended, they would require gradual reconsideration as times change. This would require congressional leaders to give some thought as to how the nation should be defended, to debate the issues openly on a regular basis, to consider the large costs of foreign policy and military budget, and to campaign on these issues in their respective elections. Congress has, for nearly a century, found a way to avoid these responsibilities by punting the general and largely unrestrained power to sanction foreign nations to the President. Once the delegation occurred, it no longer needed to be reconsidered: the President decided the trading rights of hundreds of millions of Americans (and billions of foreigners) at the stroke of his pen, even as the national needs changed within the U.S. and world geopolitics across the globe were altered. Contrary to the new rule the U.S. Supreme Court might fashion, Congress was no longer deciding “major political and economic issues of great importance” as they pertained to international trade; instead, the President both decided them and regulated them.

In order to better understand why the Executive Branch should have more limited authority to sanction foreign nations by returning the power to sanction to the Legislative Branch, it is helpful to examine the history of OFAC. OFAC combatted the spread of Communism by reducing (or eliminating) the right of nations politically influenced by the USSR to trade with the U.S. and many of its allies.⁸⁰ This was a crippling blow to many international economies due to the size and influence of the

79. *Paul v. United States*, 140 S. Ct. 342, 342 (2019).

80. See, e.g., Ed Augustin, *Sixty Years After U.S. Embargo, Its Imprint Affects Cubans' Daily Lives*, NBC NEWS (Feb. 4, 2022), <https://www.nbcnews.com/news/latino/sixty-years-us-embargo-imprint-affects-cubans-daily-lives-rcna14719> [https://perma.cc/3L8Z-49BN]; see Benjamin Coates, *A Century of Sanctions*, OHIO STATE UNIV.: ORIGINS (Dec. 2019), https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en [https://perma.cc/R2RX-RD6B].

American economy in the twentieth century.⁸¹ Without the ability to trade with America, and more specifically, with individual Americans and corporations owned by Americans, the people of foreign countries were undoubtedly harmed because American trade routes were difficult, if not impossible, to replace.⁸² Yet, the sanctions were not without a cost: American citizens and their corporations lost profits, the opportunity to form personal and professional connections, and the closeness that sometimes results between people engaged in mutually beneficial trade.⁸³

Even after the end of the Cold War, OFAC remained in place, continuing to sanction countries considered to be acting against the interests of the U.S.⁸⁴ In so doing, it also sanctioned American citizens and corporations who wished to trade with those countries. The Treasury Department has been sanctioning foreign nations since the War of 1812 (when it sanctioned Great Britain for invading the United States and burning the White House), but foreign sanction's effects gone beyond war efforts and spilled over the domestic sphere.⁸⁵ Sanctions are a natural consequence of direct warfare with an adversary, given the inherent difficulties and threat of violence associated with citizens of two warring nations exchanging goods or services. However, sanctions can seem less natural when conflict between the sanctioned nation and the U.S. appears more remote.

Political disagreements, alleged human rights abuses, global safety concerns, strategic resource concerns, and other considerations may make their way into deciding who to sanction and who not to sanction.⁸⁶ Nevertheless, American citizens and corporations become sanctioned as a

81. Leighton James Hughes, *Has American Imperialism Shaped the World in the 20th Century?*, E-INTERNATIONAL RELS. (Aug. 30, 2012), <https://www.e-ir.info/2012/08/30/has-american-imperialism-shaped-the-world-in-the-20th-century/> [<https://perma.cc/6UXD-XZRR>]; Dave Davies, *The History of American Imperialism, From Bloody Conquest to Bird Poop*, NPR (Feb. 18, 2019), <https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop> [<https://perma.cc/Q3AZ-FVQY>].

82. See Haass, *supra* note 9; e.g., “Maximum Pressure”: US Economic Sanctions Harm Iranians’ Right to Health, HUM. RTS. WATCH (Oct. 29, 2019), <https://www.hrw.org/report/2019/10/29/maximum-pressure/us-economic-sanctions-harm-iranians-right-health> [<https://perma.cc/55X2-U44G>] (explaining that broad U.S. sanctions against Iranian banks have drastically constrained Iran’s ability to finance humanitarian imports). Sanctions also frequently impose significant humanitarian costs on innocent civilian populations outside of U.S. borders. Studies have shown that sanctions have caused severe harm in Cuba, Venezuela, Iran, and Syria, causing innocent civilians to suffer from malnutrition and increased infant mortality, among other maladies. See, e.g., Boyle, *supra* note 19, at 15–16.

83. Haass, *supra* note 9.

84. See *Basic Information on OFAC and Sanctions*, *supra* note 35.

85. See *generally About OFAC*, OFF. FOREIGN ASSETS CONTROL, <https://ofac.treasury.gov/about-ofac> [<https://perma.cc/S42M-LBF2>]; Haass, *supra* note 9.

86. Haass, *supra* note 9.

result.⁸⁷ Sanctioned foreign entities cannot engage in profitable business, cannot hire American workers to carry out that business, and cannot provide investors (many of whom might be ordinary Americans and retirees) with the profits derived from such trade.⁸⁸ Those who violate sanctions are subject to stiff monetary penalties and face the possibility of a criminal conviction and a long prison sentence.⁸⁹

Unlike sanctioned foreign nations, Americans who are harmed by sanctions have at least some political resource: they can vote against the presidential administration that enacts the sanctions.⁹⁰ They can also vote in favor of legislators who wish to take back as many sanctioning powers as possible from the federal government.⁹¹ The latter efforts have politically failed to return sanctioning authority to Congress for the past hundred years, though Congress taking back some degree of responsibility should be wholeheartedly supported.⁹² Voting against a President based on foreign sanctions might be a better political remedy given the political scrutiny certain sanctions receive from the media.⁹³

The immediate question should be: is OFAC even truly necessary when the U.S. is not in direct armed conflict with another nation? Does it make sense to limit the market freedom of American businesses (and by extension citizens) under threat of criminal and civil penalties? In a country with a rich history of private boycotts, could the results that OFAC seeks to achieve be achieved on a private level? Although it is potentially less effective than OFAC's policies, individuals voluntarily choosing to avoid products from certain nations would preserve consumer freedom. Rather than adopting national policies, without a vote, via administrative mandate, the U.S. already provides its citizens the opportunity to take their business elsewhere. With products labeled based on their nation of origin, consumers can, without any mandate from the government, choose not to purchase goods from certain countries based on the conduct of those nations. On the other hand, consumers who do not feel that a nation should be sanctioned would be free to purchase goods therefrom.

87. Daniel Griswold, *Going Alone on Economic Sanctions Hurts U.S. More than Foes*, CATO INST. (Nov. 27, 2000), <https://www.cato.org/commentary/going-alone-economic-sanctions-hurts-us-more-foes> [https://perma.cc/EZ6K-FCUY]; Robin Wright, *Why Sanctions Too Often Fail*, NEW YORKER (Mar. 7, 2022), <https://www.newyorker.com/news/daily-comment/why-sanctions-too-often-fail> [https://perma.cc/3QXV-JM62].

88. See Griswold, *supra* note 87.

89. *Basic Information on OFAC and Sanctions*, *supra* note 35.

90. *Elections and Voting*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/elections-and-voting/> [https://perma.cc/D3ZW-XUDG].

91. See generally *id.*

92. See 50 U.S.C. § 1701.

93. See, e.g., Mehmaz Kheirandish, Arash Rashidian & Maryam Bigdeli, *A News Media Analysis of Economic Effects on Access to Medicine in Iran*, 4 J. RSCH. PHARM. PRAC. 199, 203–04 (2015).

This approach would benefit both sides. Consumers who wish to continue to purchase their goods of preference can continue to do so without restriction. On the other hand, consumers that feel strongly about a foreign nation's inappropriate conduct on the world stage could boycott goods from this nation as an act of their own free will. Permitting each consumer to make his or her own choices would allow for a more nuanced approach to international trade and would allow individual consumers to rely on their own private signals about where to shop. Just like businesses headquartered in the U.S., being located in a country like Iran does not guarantee that the business, its leadership, or its employees support the actions of the Iranian government (just as American businesses, leadership, and employees do not necessarily support the actions of the U.S. government). Hence, when OFAC paints with a broad brush and prevents all Iranian businesses from trading with Americans, it inherently punishes businesses that might actually oppose the Iranian regime just as much as the average American. By doing so, OFAC may actually weaken potential supporters of the U.S. in Iran while strengthening businesses that rely on their connection to the Iranian government rather than international trader routes. OFAC just does not have the budget to adequately distinguish every Iranian business and business owner, while individual consumers may actually have the time to do so if they are truly concerned about the support that business provides to the actions of the Iranian government.

A study confirms that customers react to the actions of individual firms toward the environment, their employees, and toward the consumer.⁹⁴ Customers do so without any government compulsion that would require a boycott.⁹⁵ While not every consumer takes the time to research the conduct of a particular business, its environmental footprint, and/or its political affiliations, a non-trivial number of consumers do support businesses based on these factors.⁹⁶ As a result, it is possible to influence a business without any OFAC involvement at all: consumers can simply object to a particular business practice, convince their family and friends to follow suit, and the business would be forced to either conform to consumer demands or risk losing loyal customers. Likewise, if a business is connected to the government of a foreign nation whose interests misalign with those of American citizens, American citizens can

94. Chastity Heyward, *The Growing Importance of Social Responsibility in Business*, FORBES (Nov. 18, 2020), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/11/18/the-growing-importance-of-social-responsibility-in-business/?sh=73ab93fb2283> [https://perma.cc/FYX2-NMEM].

95. *See id.*

96. *Id.*

easily vote with their wallets and demonstrate to the business that the government of its country is losing the company profits. Then, organically, firms from a country acting adversely toward the U.S. can influence their governments into adjusting their conduct to preserve business connections to their American customers.

Conversely, Americans who do not feel a particular vested interest in the boycott retain their freedom to shop where they wish. They can continue to derive positive utility from the goods they acquire, regardless of how American politicians view the nation from which the goods originate. For many Americans, foreign relations with Zimbabwe and the Democratic Republic of Congo may not matter: what matters is purchasing the best, least expensive goods available on the market in order to provide for their family in difficult economic times.⁹⁷ This is a perfectly reasonable disposition, and consumers should not necessarily be punished by OFAC simply because the source of their preferred products has committed a *faux pas* on the international stage. This is especially true when the *faux pas* had absolutely nothing to do with the goods being sanctioned by the American government (which is frequently the case).

Consumers who do not wish to purchase products from North Korea on account of its human rights record need not do so: they can easily shop for goods manufactured elsewhere, and they would have the right to boycott entire shopping centers, if they so choose, upon discovering that North Korean goods are sold there. On the other hand, some consumers may prefer to trade with foreign nations despite allegations of misconduct. For example, in a time of skyrocketing gas prices, rational Americans may choose to purchase gasoline from gas stations affiliated with Iranian oil purchases because the advantage of conserving money in the midst of a looming recession might be more important to ordinary Americans than punishing Iran for conduct 6,000 miles away from American borders. This choice, of course, is not possible, since the U.S. currently has sanctions against Iranian oil.⁹⁸

In fact, when it came to Russian goods, this is exactly what happened, even for products and firms that were not officially sanctioned by the federal government.⁹⁹ Some firms could legally continue doing business

97. Some Americans (maybe most Americans) may not even know all of the countries and individuals that OFAC currently sanctions.

98. See *Iran Sanctions*, U.S. DEP'T STATE, <https://www.state.gov/iran-sanctions/> [https://perma.cc/KA6T-M65U].

99. See *Doing Business with Russia? Exceedingly Difficult, but Still Doable*, AM. BAR ASS'N (Aug. 6, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/08/doing-business-with-russia-difficult/> [https://perma.cc/MRM3-NEVK]; see also Natasha Turak, *Goodbye, American Soft Power: McDonald's Exiting Russia After 32 Years is the End of an Era*, CNBC (May

in Russia despite sanctions.¹⁰⁰ Nevertheless, several companies chose to withdraw from Russia altogether for fear of the backlash from the American public.¹⁰¹ Hence, the mere threat of a boycott, by consumers, investors, or sometimes both, can be as much of a deterrent as sanctions without forbidding the Americans who want to continue foreign trade from engaging in that foreign trade.

Research in finance and marketing shows that consumers, employees, and shareholders are capable of imposing these types of “boycotts” on an individual level.¹⁰² Businesses can signal to consumers, investors, and other actors that they back popular political causes.¹⁰³ Privately and publicly held organizations frequently engage in Environmental, Social, and Corporate Governance (“ESG”) efforts, believing such efforts would positively impact how their business is viewed, ideally resulting in increased profits.¹⁰⁴ As such, leaving any “sanctioning” of foreign products to individual Americans and American firms may allow for more market freedom and an overall increase in utility for the average American. Letting the free market operate may be the best way to permit proportional punishment for another nation’s international or internal transgressions.

B. Restrictions on Foreign Investments

On the sixth day of Hate week, after the processions, the speeches, the shouting, the singing, the banners, the

25, 2022), <https://www.cnn.com/2022/05/20/mcdonalds-exiting-russia-after-32-years-is-the-end-of-an-era.html> [https://perma.cc/YSK7-YMJZ].

100. *Doing Business with Russia? Exceedingly Difficult, but Still Doable*, *supra* note 99.

101. *See, e.g.,* Turak, *supra* note 99.

102. *See generally* N. Craig Smith, *Consumers as Drivers of Corporate Social Responsibility*, in OXFORD HANDBOOK CORP. SOC. RESP. 281 (Andrew Crane ed., 2009); Mauricio Andrés Latapi Agudelo, Lára Jóhannsdóttir & Brynhildur Davíðsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT’L J. CORP. SOC. RESP. 1 (2019); Anne Elizabeth Fordham & Guy M. Robinson, *Mapping Meanings of Corporate Social Responsibility—an Australian Case Study*, 3 INT’L J. CORP. SOC. RESP. 14 (2018); Chih-Cheng Chen, Asif Khan, Tanaporn Hongsuchon, Athapol Ruangkanjanases, Yen-Tzu Chen, Ornlatcha Sivarak & Shih-Chih Chen, *The Role of Corporate Social Responsibility and Corporate Image in Times of Crisis: The Mediating Role of Customer Trust*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 8275 (2021); Archie B. Carroll, *Corporate Social Responsibility: Perspectives on the CSR Construct’s Development and Future*, 60 BUS. & SOC’Y 1258 (2021).

103. *See, e.g.,* Amelia Ahl, *The Risks of ‘Business as Usual’ Corporate Political Contributions*, UNIV. MICH.: ERB INST. (Mar. 26, 2021), <https://erb.umich.edu/2021/03/26/the-risks-of-business-as-usual-corporate-political-contributions> [https://perma.cc/K9LV-PKQ6]. *See generally* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT’L J. MGMT. REV. 85 (2010).

104. Jerome Gavin, *Balancing Profitability & Sustainability Through ESG Investments*, VISION HUM., <https://www.visionofhumanity.org/balancing-profitability-sustainability-through-esg-investments/> [https://perma.cc/2829-JX27]. *See generally* Heyward, *supra* note 94.

*posters, the films, . . . the rolling of drums and squealing
of trumpets . . . it had been announced that Oceania was
not after all at war with Eurasia. Oceania was at war
with Eastasia. Eurasia was an ally.*

—George Orwell¹⁰⁵

Another problem arises when the Executive Branch prohibits American investment in foreign capital markets.¹⁰⁶ Again, when the U.S. is directly involved in a military conflict with a foreign nation, bans like this may make sense: there is a risk that American foreign investments end up funding the military-industrial complex of a foreign opponent. Yet, when the conflict is indirect, the justification for preventing Americans from purchasing foreign stocks or making loans to foreign businesses becomes less straightforward. It is true that American investments in foreign firms could still fund the military-industrial complex of the aggressive nation, which is likely the justification for banning such investments.¹⁰⁷ On the other hand, citizens of the U.S., but-for sanctions on the targeted country, would have an opportunity to purchase stocks and buy bonds from a large variety of foreign firms (many having nothing to do with war profiteering) at discounted prices on account of the war.¹⁰⁸ Because conflicts frequently raise perceived business risks associated with warring nations, which sometimes result in reduced prices for consumers, American investors may be able to receive a bargain on their purchases.¹⁰⁹

There is, of course, no guarantee of profit when investing in foreign stocks and bonds, especially during wartime or other crises.¹¹⁰ Nevertheless, the freedom to do so should be of some value to American investors. At the very least, even if large capital or dividend gains are not guaranteed, the more international capital markets that are open to

105. ORWELL, *supra* note 39, at 120.

106. See *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, *supra* note 38; Haass, *supra* note 9. See generally DIANE E. RENNACK & ROBERT D. SHUEY, CONG. RSCH. SERV., ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW (1999), https://www.everycrsreport.com/files/19991101_97-949F_f92ab17c495b43af68ad4ca7c261fcd9ce6b8915.pdf [<https://perma.cc/6V7R-GTRP>].

107. See, e.g., *Frequently Asked Questions*, U.S. DEP'T TREAS., <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1501> [<https://perma.cc/XH86-FRJ7>].

108. See generally, e.g., Andrew Leigh, Justin Wolfers & Eric Zitzewitz, *What Do Financial Markets Think of War in Iraq?* (Nat'l Bureau Econ. Rsch., Working Paper No. 9587, 2003), https://www.nber.org/system/files/working_papers/w9587/w9587.pdf [<https://perma.cc/8AP2-99KT>]; Wayne Duggan, *How Do Conflicts and War Affect Stocks?*, U.S. NEWS & WORLD REP. (June 13, 2022), <https://money.usnews.com/investing/articles/how-do-conflicts-and-war-affect-stocks> [<https://perma.cc/SZ49-U4NU>].

109. See Leigh, Wolfers & Zitzewitz, *supra* note 108, at 36.

110. See *id.* at 37.

American citizens, the greater diversification they will be able to achieve in their portfolios.¹¹¹ Since diversification is an important risk reduction strategy, and since a large number of American investors are risk averse (which makes the ability to diversify more valuable), providing them the freedom to invest overseas has an important positive welfare implication.¹¹² Just like with consumer goods, investors who feel strongly about a foreign nation's transgression on the world stage can simply boycott stocks, bonds, and derivative investment instruments from that nation.¹¹³ On the other hand, Americans who do not believe the transgression is major, or who believe the benefit of profiting from investments in foreign nations is more important than international policing efforts, can still exercise their freedom to invest.

There is a massive amount of literature in law and finance regarding the importance of shareholder rights and shareholder control.¹¹⁴ Works discussing shareholder proposals, voting, and takeovers argue that shareholders can alter the way a company does business, the way a company interacts with foreign nations, and even the way a company interacts with the government of its home country.¹¹⁵ Shareholders, just like consumers, can punish a company for supporting a particular regime, business practice, or labor practice.¹¹⁶ Since shareholders are the outright owners of the firm, they can exercise their control rights and cause a firm from a hostile nation to act in less belligerent ways.¹¹⁷ The limits of

111. Amy C. Arnott, *Does International-Stock Diversification Still Work?*, MORNINGSTAR (Apr. 20, 2021), <https://www.morningstar.com/articles/1034112/does-international-stock-diversification-still-work> [https://perma.cc/2X28-3D9N].

112. *Id.* See generally Aaron Yuan, *International Diversification: Benefits and Costs from a Mutual Fund Perspective* (May 2004) (B.S. thesis, New York University), https://www.stern.nyu.edu/sites/default/files/assets/documents/con_043408.pdf [https://perma.cc/DQ3Y-EHT6].

113. Meghan McCarty Carino, *Russia Tries to Stop Exit of Western Businesses as Departures Accelerate*, MARKETPLACE (Mar. 1, 2022), <https://www.marketplace.org/2022/03/01/russia-tries-stop-exit-western-businesses-departures-accelerate/> [https://perma.cc/RFU8-R2HH].

114. See generally, e.g., Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407 (2006); Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. DAVIS L. REV. 605 (2007); Bernard Lui, Suet-Fern Lee & Chrystle Kuek, *The Shareholder Rights and Activism Review: Singapore*, L. REVS. (Aug. 18, 2022), <https://thelawreviews.co.uk/title/the-shareholder-rights-and-activism-review/singapore> [https://perma.cc/A69X-Y9DW]; HOLGER SPAMANN & GUHAN SUBRAMANIAN, CORPORATIONS 43–60 (2017); CAM HOANG, GARY TYGESSON & VIOLET RICHARDSON, DORSEY & WHITNEY LLP, SHAREHOLDER PROPOSALS: STRATEGIES AND TACTICS, <https://www.dorsey.com/newsresources/events/videos/2016/10/~media/0ee87bda7cc84b59824d6c786cff39b5.ashx> [https://perma.cc/JB68-WLDY]; Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Vicente Cuñat, Mireia Gine & Maria Guadalupe, *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value*, 67 J. FIN. 1943 (2012); Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405 (2017).

115. See *supra* note 114.

116. *Id.*

117. *Id.*

shareholder control vary from country to country and from capital market to capital market, but they nevertheless can exercise important influence both on a company and on the government of a country where the company does business.¹¹⁸

By forbidding investments in firms from sanctioned nations, the U.S. deprives its citizens, mutual funds, hedge funds, and banks of the power to control the operations of overseas organizations.¹¹⁹ If Americans with foreign investment holdings agree with their government that a nation should be sanctioned, they can use their control rights to help align the behavior of foreign corporations to the preferences of the U.S. Removing American investors from the equation actually lessens the ability of Americans to influence foreign behaviors.¹²⁰ If foreign firms begin to view American investors as mere fair-weather friends, then foreign firms are unlikely to prioritize the needs of these investors, might increase their cost of entry, and may otherwise prepare for their exit in the event of future conflict with the U.S. government.

Instead, the U.S. Executive Branch can unilaterally prevent American investors from purchasing firm shares and prevent them from sharing in the foreign firm's profits.¹²¹ In effect, the government punishes American citizens who could have at least profited from a foreign corporation despite the overall misconduct of that corporation's home country. The American investor is punished all the more when foreign stocks must be sold at a moment's notice due to sanctions: the market becomes flooded with shares of the stock, raising supply during a time of lowered demand, driving the stock price down and causing the investor to incur significant capital losses during the sale as well as the loss of future dividend income.¹²²

118. See, e.g., Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (Apr. 15, 2020), <https://lawreviewblog.uchicago.edu/2020/04/15/shareholder-driven-stakeholderism-hwang-nili/> [<https://perma.cc/VG4R-W4AH>]; *Shareholders' Ability to Manage a Company*, FRANCIS WILKS & JONES, <https://www.franciswilksandjones.co.uk/shareholders-ability-to-manage-a-company/> [<https://perma.cc/X98B-VVNH>].

119. See generally Velasco, *The Fundamental Rights of the Shareholder*, *supra* note 114.

120. See Rawan Shubita & Moade Fawzi Shubita, *The Impact of Foreign Ownership on Corporate Governance: Evidence from an Emerging Market*, 16 INV. MGMT. & FIN. INNOVATION 101, 101 (2019).

121. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T TREAS., <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [<https://perma.cc/D3DH-7GP8>]. See generally Haass, *supra* note 9.

122. See, e.g., John McCrank & Davide Barbuscia, *Analysis: Getting Rid of Russian Assets a Big Problem for U.S. Fund Managers*, REUTERS (Mar. 1, 2022), <https://www.reuters.com/markets/funds/getting-rid-russian-assets-big-problem-us-fund-managers-2022-03-01/> [<https://perma.cc/JGA2-33XU>]; see also Glen Biglaiser & David Lektzian, *The Effect of Sanctions on U.S. Foreign Direct Investment*, 65 INT'L ORG. 531, 531 (2011).

A similar problem exists in bonds: if an American individual, bank, hedge fund, mutual fund, or other investor believes a foreign bond is a profitable purchase, depriving that investor of the right to make the purchase carries with it economic harm and limits economic freedom.¹²³ Now, that person can no longer receive coupon payments and the principal at a profitable or otherwise desirable rate.¹²⁴ The money, instead of coming to the U.S., now remains with the antagonistic nation, and the investor can no longer diversify into bonds of the sanctioned foreign nation.¹²⁵ Since being labeled a nation that receives sanctions from the U.S. generally causes bonds, stocks, and derivatives therein to trade at a discount,¹²⁶ the American government may be depriving American investors of relatively lucrative deals. While profits from investing in a sanctioned nation's economy are far from guaranteed, American citizens, residents, and corporations should have the right to take the risk if they so choose.

Some might argue that bondholders, having no ownership rights in the firm, would not be able to control the firm in the way that shareholders can.¹²⁷ As a result, permitting bond trading may not be backed by the same sound reasoning that would justify permitting stock trades. While the average bondholder does not receive control rights when owning a bond, there are circumstances when bond ownership may actually lead to influencing the firm.¹²⁸ Some bonds are convertible, meaning that under some circumstances, they can be exchanged for stock (or options/warrants, which can lead to stock ownership upon exercise).¹²⁹ Then, bondholders can (and sometimes do) become owners who can influence firm decisions

123. See generally Debbie Carlson, *The Ultimate Guide to Bonds*, U.S. NEWS & WORLD REPS. (May 7, 2020), <https://money.usnews.com/investing/investing-101/articles/the-ultimate-guide-to-bonds> [<https://perma.cc/J6AX-54B3>].

124. See generally *id.*

125. See Phil Rosen, *Russian Bonds Are Back on the Market for a Week as Sanctions Are Temporarily Lifted—and Investors Have Already Put on Bids for Over \$1 Billion in Debt*, MKTS. INSIDER (Sept. 13, 2022), <https://markets.businessinsider.com/news/bonds/russian-bonds-sanctions-bids-europe-moscow-debt-investors-putin-goldman-2022-9> [<https://perma.cc/MCH9-CY29>]. See generally Carlson, *supra* note 123.

126. See, e.g., Herbert Lash & Dhara Ranasinghe, *Stocks Fall, Ruble Dives as Russia Sanctions Hit World Markets*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/markets/europe/global-markets-wrapup-2-2022-02-28/> [<https://perma.cc/Z2AV-5A5B>].

127. See e.g., Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1042–43 (2002).

128. See *id.*

129. PL Corporate & Securities, *Convertible Bonds: Overview*, THOMSON REUTERS PRAC. L. (2022), [https://1.next.westlaw.com/Document/I0f9fbf07ef0811e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&isplc=true&firstPage=true&bhpc=1](https://1.next.westlaw.com/Document/I0f9fbf07ef0811e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&isplc=true&firstPage=true&bhpc=1) [<https://perma.cc/K5UX-AALW>].

through these types of ownership rights.¹³⁰ At other times, a firm may become insolvent and ultimately bankrupt. In this instance, since bondholders collect prior to stockholders in the event of firm insolvency, they may end up with ownership rights to the firm.¹³¹ In either event, even bondholders are not excluded from the possibility of controlling a company's future or how that company relates to the confrontational government of its nation.

Bond financing is not the only type of financing that foreign firms can receive from the United States. American banking institutions can lend money directly to foreign businesses, and American venture capitalist firms can also fund start-ups overseas.¹³² Forbidding these institutions from investing in foreign businesses harms their ability to diversify and profit. Moreover, it impedes the moneymaking ability of Americans who own and/or work at these banks or venture capital firms. Even if an American is a mere depositor at one of the large American banks, the fact that the bank cannot make as much money due to the shuttering of its overseas lending business can reflect in the interest rates the depositor receives from the bank.¹³³ All of these negative effects of investment sanctions reverberate throughout the economy, potentially causing reduced wages, reducing investment yields, and harming the average American.¹³⁴

Another type of diversification that comes from allowing international trade with and investment in foreign assets is the diversification of currency inflows.¹³⁵ Owners of foreign bonds and stocks, as well as banks operating in foreign markets, can receive some (if not all) of their payments via foreign currency. Foreign firms operating in foreign markets ordinarily carry on business in the currency of the country in

130. *Id.*; see also *The Difference Between Stocks and Bonds*, ACCT. TOOLS (Jan. 27, 2023), <https://www.accountingtools.com/articles/what-is-the-difference-between-stocks-and-bonds.html> [<https://perma.cc/XB55-65UL>].

131. *Chapter 9—Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics> [<https://perma.cc/NZ63-WHYK>].

132. See David Teten, *Why International Startups Are Attracting U.S. Venture Capitalists*, FIN. POISE (Jan. 6, 2021), <https://www.financialpoise.com/international-startups-attracting-us-venture-capitalists-2/> [<https://perma.cc/R2KE-NNYQ>].

133. See Lananh Nguyen, *Goldman Sachs and JPMorgan Chase Are Winding Down in Russia*, N.Y. TIMES (Mar. 10, 2022), <https://www.nytimes.com/2022/03/10/business/goldman-sachs-russia.html> [<https://perma.cc/4PJJ-3884>].

134. Rosen, *supra* note 9; Forgy & Ward, *supra* note 9.

135. Vasileios Gkionakis, *The Benefits of Currency Diversification: Strategic FX Benchmarks, Tactical Allocation, and Tailor-Made Solutions*, LOMBARD ODIER (Jul. 7, 2021), <https://www.lombardodier.com/contents/corporate-news/investment-insights/2021/july/the-benefits-of-currency-diversi.html> [<https://perma.cc/R8Q4-PSYK>].

which they operate.¹³⁶ Consequently, these cashflows are passed on to stock and debt investors via dividend distributions and loan payments in foreign currency.¹³⁷ This creates another method of diversification for the investor: a diversification of currency cashflows that can protect the investor from the risk associated with holding all of the investor's assets in one currency that might experience declines in value.¹³⁸ Similar to diversifying stockholdings, diversifying currency holdings and currency cashflows can help individual and institutional investors alike to stabilize their wealth by diversifying the currency risk.¹³⁹

This cashflow of foreign currency can sometimes be a hindrance, too. While providing diversification generally reduces the volatility of any portfolio (so long as the assets therein are not perfectly correlated), sometimes diversification forces the investor into possessing non-lucrative assets or currencies.¹⁴⁰ If an American investor begins to receive cashflows in currencies that are falling against the dollar, that investor may be worse off if the foreign currency suffers a significant decline in value. This decline can happen even if there is an increase in the amount of dividend paid in foreign currency, so long as the decline in the value of the currency exceeds the increase in the dividend.¹⁴¹

Diversification in currency cashflows is important because not all currencies weaken against the dollar. The American dollar is currently the world reserve currency, which gives it a "preferred" status on the currency exchange compared to others.¹⁴² Nevertheless, this is no guarantee of permanent stability and strength.¹⁴³ Foreign currencies do, sometimes,

136. See *How Foreign Exchange Rates Impact a Firm's Future*, U. MINN. CARLSON SCH. MGMT. (Nov. 15, 2021), <https://carlsonschool.umn.edu/news/how-foreign-rates-can-impact-firms-future> [https://perma.cc/8532-5PS9].

137. *Stock FAQs: International Stock Trading*, FIDELITY, <https://www.fidelity.com/stock-trading/faqs-international> [https://perma.cc/W3YT-N6L9].

138. Gkionakis, *supra* note 135.

139. See *id.*

140. *How Foreign Exchange Rates Impact a Firm's Future*, *supra* note 136; *The Advantages and Disadvantages of a Diversified Portfolio*, NASDAQ (Jan. 7, 2016), <https://www.nasdaq.com/articles/advantages-and-disadvantages-diversified-portfolio-2016-01-07> [https://perma.cc/J3JA-EAWY] (explaining that currency fluctuations, political instability, and economic downturns are risks that may affect a single country and therefore an investor's investment in companies located in such country).

141. See *id.* See generally Haim Levy & Zvi Lerman, *The Benefits of International Diversification in Bonds*, 44 FIN. ANALYSTS J. 56 (1988).

142. U.S. DEP'T TREAS., APPENDIX 1: AN HISTORICAL PERSPECTIVE ON THE RESERVE CURRENCY STATUS OF THE U.S. DOLLAR, <https://home.treasury.gov/system/files/206/Appendix1FinalOctober152009.pdf> [https://perma.cc/GN9Y-XE9Q].

143. See Aisling Ní Chúláin, *Watch: Is the Dominance of the US Dollar as the World's Reserve Currency Being Eroded?*, EURONEWS (Mar. 8, 2022), <https://www.euronews.com/next/2022/05/04/watch-the-us-dollar-is-the-mightiest-of-all-world-currencies-but-is-its-position-under-thr#:~:text=Fo>

outperform the dollar (especially in the current market, with record-high inflation), and holding these currencies (or rights to cashflows in these currencies) can protect the investor in the event the American dollar loses its reserve currency status or suffers other declines associated with potential weaknesses in the U.S. economy.¹⁴⁴ Ironically, imposing sanctions on foreign nations can weaken the dollar's status as the world reserve currency because it signals to the world community that the U.S. is not a reliable trading ally.¹⁴⁵ As a result, both the sanctioned nation and its allies begin to look for alternative methods of exchange, alternative currencies, and alternative methods of trade.¹⁴⁶ In times when it might be most valuable to own foreign currencies, American sanctions on consumers and investors make it more difficult to obtain.¹⁴⁷

Hence, sanctions on foreign investments can weaken the American dollar, creating problems for all Americans and leading to the need to spend more dollars to purchase the same good.¹⁴⁸ In fact, Treasury Secretary Janet Yellen has recently stated that U.S. sanctions on Russia could threaten the dollar's hegemony.¹⁴⁹ This is not the uniform impact of sanctions, but it is at least one possible outcome (and it is difficult to predict what will transpire in the currency markets based on the different types of sanctions and the target(s) of those sanctions). As a result, sanctions create currency risk for Americans in a myriad of ways.¹⁵⁰ They reduce the ability of American investors to diversify their currency cash inflows, which can harm them by being overexposed to the dollar in the event the dollar declines in value.¹⁵¹ Likewise, the sanctions can cause the

r%20close%20to%2080%20years,exorbitant%20privilege%E2%80%9D%20in%20world%20affairs [https://perma.cc/P57B-M432].

144. Gkionakis, *supra* note 135; Rob Berger & Benjamin Curry, *How Diversification Works, and Why You Need It*, FORBES (Nov. 15, 2022), <https://www.forbes.com/advisor/investing/what-is-diversification/> [https://perma.cc/JS9B-U3FD].

145. See Juby Babu, *IMF Warns Russia Sanctions Threaten to Chip Away at Dollar Dominance*, REUTERS (Mar. 30, 2022), <https://www.reuters.com/business/imf-warns-russia-sanctions-threaten-chip-away-dollar-dominance-ft-2022-03-31/> [https://perma.cc/N56N-R76K].

146. *Id.*

147. *Id.*

148. *Id.*

149. Huileng Tan, *Sanctions Against Russia Could Hurt the US dollar as Countries Like Iran and China Seek Alternative Currencies for Trade: Treasury Secretary Janet Yellen*, YAHOO! NEWS (Apr. 17, 2023), <https://news.yahoo.com/sanctions-against-russia-could-hurt-092317937.html> [https://perma.cc/2ZTH-9T4G].

150. Karen Brettell, *Analysis: As Sanctions 'Weaponize' U.S. Dollar, Some Treasury Buyers Could Fall Back*, REUTERS (Mar. 28, 2022), <https://www.reuters.com/business/finance/sanctions-weaponize-us-dollar-some-treasury-buyers-could-fall-back-2022-03-29/> [https://perma.cc/C4VM-R922].

151. *Id.*; Abigail Ng, *Washington's 'Trigger-Happy' Sanctions May Push Countries Away from the Dollar, Says Think Tank*, CNBC (Mar. 21, 2022), <https://www.cnbc.com/2022/03/22/countries-may-want-to-diversify-away-from-the-us-dollar-think-tank.html> [https://perma.cc/QG3C-JFMF].

dollar to weaken on the world stage, harming all Americans (and any foreigners who depend on the dollar's strength), not just investors.¹⁵² Finally, if the U.S. sanctions enough nations with significant trade restrictions, the world may move to a different reserve currency, perhaps even the currency of a geopolitical adversary.¹⁵³ This can have drastic consequences, as foreigners who no longer desire the dollar as a reserve currency may be unwilling to purchase U.S. Treasury notes and fund U.S. debt, reducing the amount of services the government can provide to the American people.¹⁵⁴ Hence, sanctions on foreign investments can weaken America's position on the world stage and harm its citizens if administered at the wrong time.¹⁵⁵

Skeptics may argue that the American government protects the welfare of Americans by preventing investments overseas that might become (or which may already be) financially unsound. Yet, in a country founded on the concept of civil and economic freedom, American investors have the right to make that choice. At present, there are virtually no restrictions on Americans purchasing assets like cryptocurrency, which may or may not have any underlying value at all.¹⁵⁶ If an American citizen has the right to purchase one of the twenty thousand cryptocurrencies unbacked by any central bank (or any tangible asset such as gold and silver), surely investors should have the right to purchase part of a company with physical assets, such as factories, retail centers, and inventory.¹⁵⁷ In fact, this is where some investors thrive: they purchase high-risk assets and are rewarded with abnormally high returns.¹⁵⁸

152. Ng, *supra* note 151.

153. *Id.*

154. Fred Abadi, *Future of the World Reserve Currency—What Happens if the US Dollar Loses Its Status?*, GOLD ALLIANCE (May 26, 2021), <https://goldalliance.com/blog/market-insights/if-the-dollar-loses-its-status-as-the-worlds-reserve-currency/> [<https://perma.cc/UT49-5PHK>].

155. Ng, *supra* note 151.

156. Schlomit Azgad-Tromer, *Crypto Securities: On the Risks of Investments in Blockchain-Based Assets and the Dilemmas of Securities Regulation*, 68 AM. U. L. REV. 69, 72–73 (2018).

157. See generally *id.*

158. *Understanding High-Risk Investments*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/investors/understanding-high-risk-investments> [<https://perma.cc/RV96-D75L>].

C. Economic Freedom and International Trade

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop.

—President George Washington¹⁵⁹

Permitting American traders to trade foreign assets of belligerent nations permits American investors to combine their information with those from other nations and arrive at some market price that reflects the value of the company. Depriving American traders of this opportunity ends up depriving world markets of this information and depriving Americans of the opportunity to profit. Although the businesses in the foreign nation are also harmed as a result of this prohibition—they can no longer receive investment funding for their projects, or perhaps they cannot receive investment funding at the rates American banks, lenders, and investors previously offered—the same effect can be achieved via voluntary divestment from foreign firms. Yet, somewhat similar effects can be achieved via voluntary divestment from foreign firms. Just as consumers can avoid retailers who offer products made in sanctioned nations, investors can avoid investing in companies from these nations. In fact, significant efforts have been made across the U.S. to divest various endowment funds from companies that have poor ESG profiles.¹⁶⁰ There is no reason similar efforts cannot be successful in divesting from businesses in sanctioned nations.

The voluntary approach will have the advantage of preserving more economic freedom and will permit investors to make their own choices. Sweeping government action that requires everyone to alter their investments in unison may not fit the investment goals or preferences of some (if not most) Americans, so why not permit each individual to invest in a way that is tailored to their individual goals? Moreover, why not permit trusted financial advisors, banking intermediaries, hedge funds, and mutual funds to align themselves as they see fit with respect to some foreign conflict? It is not a sound policy in a country with supposed economic freedom to deprive citizens of their right to vote with their wallets. This point is especially true when the elected President does not receive overwhelming support for his presidency.

159. George Washington, Farewell Address (Sept. 17, 1796), in *GEORGE WASHINGTON'S FAREWELL ADDRESS* 28 (1999).

160. See generally Smith, *supra* note 102.

In times when the President's approval rating is high, when he has been elected by the vast majority of the voting base, and when his actions receive support from the vast majority of the country, economic sanctions and restrictions on investment may not inconvenience the average American. After all, the average American might take these actions independently, regardless, and so government interference is not life-changing in any way. In the U.S., however, such a unifying presidential figure has not emerged in a long time. In the 2000 presidential election, the vote count was so close that multiple recounts had to be initiated, and even these recounts did not put the issue of who won beyond doubt.¹⁶¹ The U.S. Supreme Court had to intervene, issuing a ruling that essentially awarded the election to George W. Bush over Al Gore, a ruling that has received its fair share of criticism.¹⁶²

George W. Bush's re-election in 2004 was also relatively close, without a runaway victory over the Democratic opponent.¹⁶³ President Obama put up solid numbers in both of his elections, but nothing close to a national consensus.¹⁶⁴ President Trump won the 2016 election in a monumental comeback after trailing in the polls the entire way.¹⁶⁵ Yet, given the number of protests and riots that followed this result, one can hardly call President Trump's election unifying (especially since he lost the popular vote).¹⁶⁶ President Biden, replacing President Trump in 2020, won both the electoral and the popular vote, but the margins of victory were far from overwhelming.¹⁶⁷ These presidential elections, for the past two decades, have highlighted the growing political, cultural, and economic divide in the U.S.¹⁶⁸ Given that, no matter the winner, a large number of American voters found themselves in the losing camp, having

161. Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1280 n.6 (2001).

162. *Id.* at 1282.

163. *Election Results*, CNN, <https://www.cnn.com/ELECTION/2004/pages/results/president/> [<https://perma.cc/JB9Q-N8NQ>].

164. *Election Results 2008*, N.Y. TIMES (Dec. 9, 2008), <https://www.nytimes.com/elections/2008/results/president/votes.html> [<https://perma.cc/C25G-2HS5>]; *Election 2012: President Map*, N.Y. TIMES (Nov. 29, 2012), <https://www.nytimes.com/elections/2012/results/president.html> [<https://perma.cc/P3DC-PYQ4>].

165. *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/President> [<https://perma.cc/BR2J-PZ5P>].

166. J.J. Gallagher, David Caplan & Stephanie Ebbs, *Tens of Thousands Protest Trump Election Victory, 124 Arrested*, ABC NEWS (Nov. 10, 2016), <https://abcnews.go.com/Politics/thousands-us-protest-president-elect-donald-trump/story?id=43427653> [<https://perma.cc/4LVT-X72J>].

167. *Presidential Results*, CNN, <https://www.cnn.com/election/2020/results/President> [<https://perma.cc/H56Z-YV36>].

168. Perry Bacon Jr., *How the 2016 Election Exposed America's Racial and Cultural Divides*, ABC NEWS (Nov. 11, 2016), <https://www.nbcnews.com/politics/white-house/how-2016-election-exposed-america-s-racial-cultural-divides-n682306> [<https://perma.cc/99N6-ZSYG>].

a one-size-fits-all policy for economic and investment sanctions makes little sense.

Almost inevitably, the economic sanctions or tariffs proposed by one President could (and probably would) displease the constituents who voted for the alternate candidate. Ideally, one would want to avoid this as much as possible. Moreover, winners of presidential races frequently have their approval ratings erode over time.¹⁶⁹ That is, while a presidential candidate might have some mandate from the masses on the first day of his rule, that mandate does not necessarily live on in subsequent years.¹⁷⁰ A President might have earned the majority of the electoral vote against some other candidate, but that only implies the President was preferred over his opponent, not that the President's actions are generally approved by the people.¹⁷¹ If anything, the President's enacted and proposed policies might not be the desired policies of the American public; they may be just slightly more desired than the poor policy proposals of the opposing candidate. In situations like this, the President's imposition of economic sanctions on the American people might receive even less support than before, potentially displeasing well over fifty percent of the population.

The constitutional answer, before the Legislature began to delegate its powers to the Executive Branch, was indeed the separation of powers. In order to sanction another nation, the President would have to seek approval from Congress.¹⁷² This would allow the process to be less immediate and would permit the decision to be put to debate. Yet, now that the President has that approval unconditionally in times of crisis, there are not as many limits on this power and fewer assurances that these sanctions indeed represent the best interests of the American people.¹⁷³ Of course, the problem compounds when the President does not have the backing of Congress, which happens when an opposing party holds at least one chamber.¹⁷⁴ In some instances, a President may become so unpopular that even members of the same party as the President do not align with him on foreign policy, which means the President does not even have the backing of Congress despite his party winning a majority in both houses in the prior election.

169. Olivia B. Waxman, *President Trump's Approval Rating Is at a Near-Record Low. Here's What to Know About the History of Those Numbers*, TIME (Jan. 24, 2019), <https://time.com/5511118/presidential-approval-ratings-history/> [https://perma.cc/6PJU-9756].

170. *Id.*

171. See, e.g., Allyson Waller, *The Electoral College Explained*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/article/the-electoral-college.html/> [https://perma.cc/R3Z2-QL4Q].

172. Boyle, *supra* note 19.

173. See *id.*

174. Chris Canipe, *Republicans Take Control*, WALL ST. J. (Jan. 20, 2017), <https://www.wsj.com/graphics/congress-control/> [https://perma.cc/V3UG-YYAB].

When the President makes international trading policy for the entire nation without consulting with senators and representatives, it creates the possibility that the President is not enacting the considerate will of the masses. Instead, he is enacting a trade policy that he might hope will improve his political position. Of course, improving the political position of a President and improving the economic well-being of the average American can be two very distinct goals. As a result, delegating to the President the power to immediately sanction a country where the U.S. has no direct military engagement can impose on foreigners and Americans alike an outcome that harms overall welfare and does not successfully address any meaningful goal.¹⁷⁵

D. The Need for Legal Limits to Executive Sanctioning Power

*You hate him. Good. Then the time has come for you to
take the last step. You must love Big Brother. It is not
enough to obey him: you must love him.*

—George Orwell¹⁷⁶

When the President of the U.S. exercises a power like imposing sanctions on the world stage, with little congressional oversight and virtually no avenue for a successful judicial appeal, he invokes a tremendous amount of power due to the size of the American economy and the value of the American consumer to overseas firms.¹⁷⁷ The President now has power over foreign nationals that we would not permit him to exercise over Americans.¹⁷⁸ That power can include the near destruction of entire business groups and national economies.¹⁷⁹ Ever since the Declaration of Independence, Americans have voiced the desire to be free from any person wielding such power over them from far away, arguing that the British Crown's exercise of such powers was intolerable.¹⁸⁰

Yet, the Legislature has given the President precisely this power to wield over others.¹⁸¹ In a sense, then, the American President cannot be a king in America, but he very well can be a king in other nations, using economic sanctions (or favors) to incentivize behavior that is beneficial to

175. Rosen, *supra* note 9.

176. ORWELL, *supra* note 39, at 355.

177. Boyle, *supra* note 19.

178. Goldgeier & Saunders, *supra* note 5.

179. Haass, *supra* note 9.

180. *Culture*, in "SO YOU'RE AN AMERICAN?": A GUIDE TO ANSWERING DIFFICULT QUESTIONS ABROAD 1, 1 (U.S. Dep't of State ed., 2021).

181. *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21, at 1132.

himself, to America, and sometimes both.¹⁸² Needless to say, it is the personal benefits derived by the President that might be concerning: by giving the President nearly unlimited power in foreign realms, the U.S. not only subjects the people of foreign nations to a rule Americans would not tolerate ourselves, but it also gives the President the ability to glean financial and political favors from the relationship, which, ironically enough, can impact American elections.¹⁸³ This power was better placed in the hands of the Legislature, where it would at least be diluted across a large body of elected officials.¹⁸⁴

Moreover, given the damage inflicted on the American people, the scrutiny trade restrictions receive might be raised in light of jurisprudence expanding the definition of the word “tax,” one of the few actions so critical to the Legislature that cannot be delegated by the Legislature.¹⁸⁵ In deciding whether President Obama’s healthcare bill could pass constitutional muster, Chief Justice Roberts broke the 4-4 tie on the Supreme Court by upholding the individual mandate as a tax rather than a regulation of commerce.¹⁸⁶ The Chief Justice concluded that the monetary penalty imposed on individuals who refused to purchase insurance qualified as taxation (despite the claim by legislators and the President that the bill was *not* a tax).¹⁸⁷ Because the bill originated in the appropriate house of Congress, and because it essentially collected money for government expenditures, the individual mandate (in combination with its punitive clause) was considered constitutional taxation.¹⁸⁸

Can sanctions on international trade be considered taxation? Under more traditional jurisprudence from the U.S. Supreme Court, probably not.¹⁸⁹ Yet, one has to admit that there is a touch of “tax” in a sanction. A sanction is merely a tax so high that no one dares to engage in the trade.¹⁹⁰ A penalty, much like that imposed by President Obama’s healthcare system,¹⁹¹ has a similar intent. In fact, firms and individuals do break sanctions from time to time, and they are penalized in very much the same

182. *Id.* at 1133.

183. *Russian Interference in 2016 U.S. Elections*, FBI, <https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections> [<https://perma.cc/DH2H-2CN8>].

184. Alter, *supra* note 64.

185. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 566–67 (2012).

186. *Id.* at 520.

187. *Id.* at 563.

188. *See id.* at 564.

189. *See id.* at 662 (Scalia, J., dissenting)

190. OFAC treats sanction violations as a significant threat to national security. Thus, offenders face significant monetary fines, up to several million dollars, and 30 years of prison time. *See, e.g., What Are the Penalties for Breaking OFAC Sanctions?*, DOW JONES, <https://www.dowjones.com/professional/risk/glossary/sanctions/ofac-sanctions-penalties/#:~:text=Penalties%20for%20breaching%20OFAC%20sanctions,time%20up%20to%2030%20years> [<https://perma.cc/34KH-RW2W>].

191. *Sebelius*, 567 U.S. at 519.

way (though to a greater extent) as under Obamacare: via payment of a fine.¹⁹² There are also criminal penalties in some instances, which unfortunately expand on the number of American individuals in the criminal justice system.¹⁹³ This, too, likens sanctions to taxes, the non-payment of which can lead to incarceration.

If courts were to tackle whether sanctions on international trade can be considered taxation in an attempt to return some power to the Legislature over the objections of the Legislators, they might exploit recent precedent by likening financial penalties to taxes. Courts can, and perhaps should, hold that the power to sanction, just like the power to tax, is the power to destroy.¹⁹⁴ It is, fundamentally, an economic power that just like taxes affects all Americans and requires them to be subject to restrictions on their trade.¹⁹⁵ The exercise of sanctioning powers imposes cost burdens on the American people, and while sanctions do not generate cashflows for the government, penalties for violating these sanctions do.¹⁹⁶ As a result, a sanction on foreign goods can be just as much a “tax” as the individual mandate is in the realm of healthcare.¹⁹⁷ If that is the case, the power to sanction must remain with Congress, under the fundamental concept of no taxation without representation.

E. A Brave New World

*The head of the statue was made of pure gold, its chest
and arms of silver, its belly and thighs of bronze, its legs
of iron, its feet partly of iron and partly of baked
clay. While you were watching, a rock . . . struck the
statue on its feet of iron and clay and
smashed them. Then the iron, the clay, the bronze, the
silver and the gold were all broken to pieces and became
like chaff on a threshing floor in the summer.*

—Daniel 2:32–35¹⁹⁸

192. *Civil Penalties and Enforcement Information*, U.S. DEP’T TREAS., <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information> [<https://perma.cc/DP7F-PMVN>].

193. *Basic Information on OFAC and Sanctions*, *supra* note 35. The United States has the highest incarceration rate of any country, with nearly two million individuals incarcerated at any given time. *See, e.g., United States Profile*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> [<https://perma.cc/9R7L-659T>].

194. *M’Culloch v. Maryland*, 17 U.S. 316, 327 (1819).

195. *See* Haass, *supra* note 9.

196. *Civil Penalties and Enforcement Information*, *supra* note 192.

197. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 589 (2012).

198. *Daniel* 2:32–35.

The sanctioning power of the President is strongest when the American economy is robust. Then, the President has a remarkable amount of power he can exert overseas without ever involving the military simply by way of trade sanctions. Americans will suffer setbacks in the event of any international trade sanctions,¹⁹⁹ but in a booming economy, the effect might be muted. Because the American economy has been one of the most robust economies in the world for the past hundred years, this has traditionally given the U.S. President a large amount of leeway with sanctions.²⁰⁰ But in the past twenty years, an important change has occurred: while the American economy has remained the world leader in many aspects, its comparative advantage has begun to wane.²⁰¹ The rising economies of China, for example, challenge American economic dominance.²⁰² The U.S. economic lead has decreased, giving countries sanctioned by the U.S. an outlet for their trade that does not require approval from the U.S. President.²⁰³

The ability to find trading partners similar to those in the U.S. that do not align with American policies creates a problem for the American power dynamic. Previously, the American consumer was king: depriving a foreign business of American customers would spell a significant setback for any enterprise. Yet, now, the business can find “replacement” customers in China, India, and much of Asia.²⁰⁴ There is also the potential for continued economic growth in Africa and South America, which would disrupt American hegemony in the world markets.²⁰⁵ As the rest of the world’s financial markets catch up to the U.S., American sanctions will have less and less effect on the sanctioned country.²⁰⁶ On the other hand, American consumers and investors will be deprived of beneficial

199. Rosen, *supra* note 9; Forgey & Ward, *supra* note 9.

200. See Boyle, *supra* note 19.

201. Tom McTague, *The Decline of the American World*, ATLANTIC (June 24, 2020), <https://www.theatlantic.com/international/archive/2020/06/america-image-power-trump/613228/> [https://perma.cc/EUA7-NFKA].

202. *Id.*

203. *Id.*; see also Dimitri Simes, *China and Russia Ditch Dollar in Move Towards ‘Financial Alliance’*, FIN. TIMES (Aug. 16, 2020), <https://www.ft.com/content/8421b6a2-1dc6-4747-b2e9-1bbfb7277747> [https://perma.cc/3A93-F553].

204. *Id.* See generally *Why Africa Is Becoming a Bigger Player in the Global Economy*, EY AMERICAS (Sept. 11, 2020), https://www.ey.com/en_us/tax/why-africa-is-becoming-a-bigger-player-in-the-global-economy [https://perma.cc/2UKK-CJDE].

205. See McTague, *supra* note 201.

206. See Chris Songchuan & Chu Shulong, *Is America Declining?*, BROOKINGS (Nov. 11, 2011), <https://www.brookings.edu/opinions/is-america-declining/> [https://perma.cc/Z8B7-XQBE]; see also David Mortlock, Britt Mosman, Nikki Cronin & Ahmad El-Gamal, *Sanctions: The US Perspective*, GLOB. INVESTIGATIONS REV. (Jan. 4, 2023), <https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2023/article/sanctions-the-us-perspective> [https://perma.cc/K9E6-QEFP].

opportunities to trade with that country while their competitors overseas will not suffer such a handicap, giving them an important advantage in the global market.²⁰⁷

Trading through other nations already happens to some extent. The U.S. can sanction a country, but it cannot stop that country from trading with the other 194 sovereign nations in the world.²⁰⁸ The best the U.S. can do is to also sanction any nation that trades with the sanctioned country.²⁰⁹ Yet, if an economy is large enough, the U.S. sanctions might sting just as much within America as they do for the country being sanctioned.²¹⁰ The U.S. does have another tool in its arsenal: the use of international trade law and its allies in Europe, Australia, and other parts of the world to impose joint sanctions on a belligerent nation-state.²¹¹ Unfortunately, this tool has also become less useful over the past few decades. Throughout the second half of the twentieth century, Europe, Australia, Canada, and Japan were indispensable allies to the U.S. both in war and in trade.²¹² Countries in Western Europe, such as England, France, Italy, and Germany, had relatively large economies, especially when scaled by population.²¹³ Likewise, Japan emerged as a powerhouse in Asia after the Second World War, rebuilt, in part, using the American economic model.²¹⁴ Due to the economic robustness of these nations, they were able to aid in the

207. See Rosen, *supra* note 9; Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS. (Aug. 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions> [<https://perma.cc/QHQ5-4UBV>].

208. Jason Shvili, *How Many Countries Are Recognized by the United States?*, WORLD ATLAS (Mar. 29, 2021), <https://www.worldatlas.com/articles/how-many-countries-does-the-united-states-recognize.html> [<https://perma.cc/B7S6-X9H6>]; *Sovereignty*, STAN. ENCYC. PHIL. (June 22, 2020), <https://plato.stanford.edu/entries/sovereignty/> [<https://perma.cc/4PHJ-W3EX>].

209. “Maximum Pressure”: *US Economic Sanctions Harm Iranians’ Right to Health*, *supra* note 82 (discussing how countries that trade with Iran are sanctioned by the U.S.). For a list of countries sanctioned by the U.S., see *Sanctions Programs and Country Information*, *supra* note 27.

210. Jayanta Kalita, *As American Weaponizes Economic Sanctions, They Could Prove Catastrophic in the Long Run*, EURASIAN TIMES (Mar. 17, 2022), <https://eurasianimes.com/as-america-prove-catastrophic-in-the-long-run-china-russia/> [<https://perma.cc/ND3U-UMPS>].

211. *FACT SHEET: United States and Allies and Partners Impose Additional Costs on Russia*, WHITE HOUSE (Mar. 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-united-states-and-allies-and-partners-impose-additional-costs-on-russia/> [<https://perma.cc/8UAR-BTM9>].

212. Craig Kafura, *Americans on Their Allies, Partners, and Rivals*, CHI. COUNCIL ON GLOB. AFFS. (Oct. 13, 2021), <https://www.thechicagocouncil.org/commentary-and-analysis/blogs/american-s-their-allies-partners-and-rivals> [<https://perma.cc/734A-CGLR>].

213. See NICHOLAS CRAFTS, WESTERN EUROPE’S GROWTH PROSPECTS: AN HISTORICAL PERSPECTIVE 23 (2011), https://ec.europa.eu/economy_finance/events/2011/2011-11-21-annual-research-conference_en/pdf/session012_crafts_en.pdf [<https://perma.cc/D6DU-WXF3>].

214. *Occupation and Reconstruction of Japan, 1945–52*, OFF. HISTORIAN, <https://history.state.gov/milestones/1945-1952/japan-reconstruction> [<https://perma.cc/D958-GCP6>].

American efforts of sanctioning “rogue” states.²¹⁵ Back then, if the world GDP is thought of as a pie, the American coalition held a large proportion of that pie.²¹⁶ The GDPs of Germany, France, Japan, South Korea, Australia, and other nations that ally closely with the U.S. have mostly stagnated.²¹⁷ Their economic growth has been slow compared to growth in countries like India and China.²¹⁸ This stagnation reduces the ability of the nations who take part in this alliance to join in every sanction proposed by the American government. The smaller the economy of the allied nation, and the more reliant it is on trade with a belligerent power, the more likely the nation will maintain trade with a country sanctioned by the U.S.

Other measures of economic strength (and weakness) suggest problems for the future of the American economy. Workers in the U.S. often struggle to save enough for emergencies, and they are not able to afford nearly the same bundle of goods that their predecessors could afford in prior years.²¹⁹ As a result, workers struggle, more and more, to afford price increases associated with sanctions, especially in times of

215. E.g., *EU Sanctions Map*, EUR. COMM’N, <https://www.sanctionsmap.eu/#/main> [https://perma.cc/L68S-UJCJ].

216. Mike Patton, *U.S. Role in Global Economy Declines Nearly 50%*, FORBES (Feb. 29, 2016), <https://www.forbes.com/sites/mikepatton/2016/02/29/u-s-role-in-global-economy-declines-nearly-50/?sh=3c55dc075e9e> [https://perma.cc/53LR-25YK]; see also Nikhil Sharma, *The New World Order: America in Decline*, MICH. DAILY (Mar. 29, 2022), <https://www.michigandaily.com/opinion/columns/the-new-world-order-america-in-decline/> [https://perma.cc/8LWB-5W26]; *U.S. History Primary Source Timeline*, LIBR. CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/post-war-united-states-1945-1968/overview/> [https://perma.cc/29ZB-4X22].

217. See, e.g., William Horobin & Jana Randow, *Euro Zone Barely Grows as Germany Dodges Recession: GDP Update*, BLOOMBERG (Apr. 28, 2022), <https://www.bloomberg.com/news/articles/2022-04-29/france-unexpectedly-stagnates-as-war-takes-toll-gdp-update#xj4y7vzkg> [https://perma.cc/F237-UZPM]; Kim Jaewon, *South Korea GDP Growth Slows to 0.7% on COVID Consumption Slump*, NIKKEI ASIA (Apr. 26, 2022), <https://asia.nikkei.com/Economy/South-Korea-GDP-growth-slows-to-0.7-on-COVID-consumption-slump> [https://perma.cc/YC6K-FAY7]; Peter Hannam, *Australia’s Economic Growth Slows in March Quarter Despite Rise in Household Spending*, GUARDIAN (May 31, 2022), <https://www.theguardian.com/business/2022/jun/01/australias-economic-growth-slows-in-march-quarter-despite-rise-in-household-spending> [https://perma.cc/GP4X-9PXL]; Graeme Wearden, *UK ‘Not Out of the Woods Yet’ After Economy Dodges Recession by a Whisker; Russia Cuts Oil Output—as It Happened*, GUARDIAN (Feb. 10, 2023), <https://www.theguardian.com/business/live/2023/feb/10/uk-gdp-report-growth-recession-fourth-quarter-december-2022-jeremy-hunt-business-live#:~:text=Today’s%20GDP%20report%20has%20shown,Paul%20Dales%20of%20Capital%20Economics> [https://perma.cc/4JNP-CNGL].

218. See, e.g., Derek Saul, *China and India Will Overtake U.S. Economically by 2075*, GOLDMAN SACHS ECONOMISTS SAY, FORBES (Dec. 6, 2022), <https://www.forbes.com/sites/dereksaul/2022/12/06/china-and-india-will-overtake-us-economically-by-2075-goldman-sachs-economists-say/?sh=4c1f878f8ea9> [https://perma.cc/WH78-MMP5].

219. See Jeanna Smialek, *Consumer Prices Are Still Climbing Rapidly*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/business/economy/april-2022-cpi.html> [https://perma.cc/7V6W-FBNU].

inflation.²²⁰ This creates desperation among the working class, and sanctions that deny them the opportunity to purchase cheaper goods for their families can hurt them significantly.²²¹

In contrast, workers in Asia enjoy higher wages than their predecessors.²²² Both India and China, for example, have seen marked improvement in the lives of their citizens over the past few decades.²²³ The population of China and India, independently of one another, exceeds the population of all North Atlantic Treaty Organization (“NATO”) countries, and the rate of improvement of the conditions in those populations exceeds those observed in Europe and the U.S.²²⁴ As a result, we live in a world where sanctions can negatively impact Americans more and more while negatively impacting the citizens of other nations less and less.²²⁵

The rise of the Asian economy provides ample trade alternatives for sanctioned countries.²²⁶ Now, both the sanctioned nation and its Asian trading partner can grow their economies together, while American citizens (as well as the citizens of countries acting in concert with the U.S.) suffer from the closing of a trade route.²²⁷ This actually heightens the economic advantage of America’s geopolitical adversaries while actively harming Americans. Hence, America’s adversaries grow all the faster, while America’s own growth sputters and stalls. This is in stark contrast to the (controversial) times when Western nations were at their most influential: a time when they opened the world to trade rather than closing it, even though this was sometimes against the wishes of foreign trading partners.²²⁸

220. *See id.*

221. *Id.*; Wright, *supra* note 87.

222. Dylan Loh, *From India to Indonesia, Wages to Rise Faster Alongside Inflation*, NIKKEI ASIA (Mar. 13, 2022), <https://asia.nikkei.com/Economy/From-India-to-Indonesia-wages-to-rise-faster-alongside-inflation#:~:text=A%20WTW%20survey%20of%20about,up%20from%205.6%25%20in%202021> [https://perma.cc/B3J6-F2NQ].

223. *See generally* Feng Li Lin & Mei-Chih Wang, *Longevity and Economic Growth in China and India Using a Newly Developed Bootstrap ARDL Model*, 8 FRONTIERS PUB. HEALTH 1 (2020).

224. *See generally id.* *See also* *Countries in the World by Population*, WORLDOMETER (2023), <https://www.worldometers.info/world-population/population-by-country/> [https://perma.cc/ZU5S-88A5].

225. *See* Rosen, *supra* note 9; Chris Isidore, *Here’s How Sanctions on Russia Will Actually Cost You More*, CNN (Mar. 1, 2022), <https://www.cnn.com/2022/03/01/economy/russia-sanctions-inflation/index.html> [https://perma.cc/FZG2-2R45].

226. *See, e.g.*, Daniel Turner, *Iran Eyes Opportunities in Central Asia*, NEWLINES INST. (Apr. 14, 2022), <https://newlinesinstitute.org/iran/iran-eyes-opportunities-in-central-asia/> [https://perma.cc/5SQB-E698].

227. *See id.*; Rosen, *supra* note 9.

228. *See, e.g.*, *Secretary of State John Hay and the Open Door in China, 1899-1900*, U.S. DEP’T STATE: OFF. HISTORIAN, <https://history.state.gov/milestones/1899-1913/hay-and-china> [https://perma.cc/SB8L-PXBY].

Nevertheless, the U.S. has persisted with its policy of sanctioning foreign powers like North Korea, Venezuela, and Iran: powers without large amounts of irreplaceable natural resources or intertwined trade routes throughout the world.²²⁹ Few Americans can feel or identify the economic impact of these sanctions. But in February of 2022—at one of the worst conceivable times in recent memory for the American people, due to the sharp rise in COVID-19, fueled by the Omicron variant, and the economic uncertainty that followed—the U.S. decided to expand its sanctions on the Russian Federation as a result of Russia’s military operations in Ukraine.²³⁰ What followed was a time of significant economic difficulty for American consumers and investors, who were already reeling after nearly a year of rising inflation, a thirty trillion dollar national debt, and the COVID-19 pandemic.²³¹ In short, the sanctions became the straw that broke the camel’s back.

II. SLAVA UKRAINI!

In contrast, Russian elections are rigged. Political opponents are imprisoned or otherwise eliminated from participating in the electoral process. The result is an absence of checks and balances in Russia, and the decision of one man to launch a wholly unjustified and brutal invasion of Iraq, . . . I mean of the Ukraine.

—President George W. Bush²³²

229. Jason Bartlett & Emily Jin, *How US Sanctions Are Pushing Iran, Venezuela, and North Korea Closer Together*, DIPLOMAT (Dec. 12, 2020), <https://thediplomat.com/2020/12/how-us-sanctions-are-pushing-iran-venezuela-and-north-korea-closer-together/> [https://perma.cc/X2LA-83JX].

230. Press Release, U.S. Dep’t Treas., U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov (Feb. 25, 2022), <https://home.treasury.gov/news/press-releases/jy0610> [https://perma.cc/YD8Q-YUA9] [hereinafter February 25, 2022, U.S. Treasury Press Release]; see *Weekly Epidemiological Update on COVID-19—22 February 2022*, WORLD HEALTH ORG. (Feb. 22, 2022), <https://www.who.int/publications/m/item/weekly-epidemiological-update-on-covid-19---22-february-2022> [https://perma.cc/UZJ8-L5FX].

231. Rosen, *supra* note 9; Alan Rappeport, *U.S. National Debt Tops \$30 Trillion as Borrowing Surged Amid Pandemic*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/us/politics/national-debt-30-trillion.html> [https://perma.cc/5QGU-TK94].

232. Associated Press, *George W. Bush Confuses Iraq with Ukraine in Gaffe*, YOUTUBE (May 19, 2022), <https://www.youtube.com/watch?v=eH3QqcUJnBY> [https://perma.cc/P94X-3MK6].

On February 24, 2022, the Russian Federation launched an invasion of Ukraine.²³³ This “special military operation”²³⁴ was widely decried in the Western world.²³⁵ Sources vary on the reason for the invasion, but many connect the dots to Russian concerns regarding the expansion of NATO closer and closer to its borders.²³⁶ Ukraine had made overtures to NATO and the European Union, signifying its intent to join both.²³⁷ If Ukraine did join, and NATO placed a significant military presence there, Russia would face a heightened military threat.²³⁸ For example, NATO missiles, including nuclear warheads, could potentially reach Russian population centers within minutes, creating significant difficulties for any anti-missile air defense systems and resulting in significant losses in the event of NATO aggression.²³⁹ On the other hand, several NATO countries already border the Russian Federation, and it was unclear how adding one more would significantly increase the threat level for Russia.²⁴⁰ Perhaps it had something to do with the relatively large size of Ukraine’s population or land area. The true reasons are difficult to uncover under the fog of war.

Nevertheless, the war began swiftly after the conclusion of the 2022 Winter Olympics in China, ending a time of world unity through sport with a time of world division through war.²⁴¹ Russian President Vladimir Putin was decried throughout the Western world as a warmonger, and the U.S. and Europe committed to funding the Ukrainian military during the war

233. *Conflict in Ukraine*, COUNCIL ON FOREIGN RELS. (Nov. 8, 2022), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukrain> [<https://perma.cc/M7GD-RDS9>].

234. Meetings Coverage, Security Council, Russian Federal Announces ‘Special Military Operation’ in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict, U.N. 8974th Meeting SC/14803 (Feb. 23, 2022).

235. Luciana Lopez & Rebecca Morin, ‘The World Will Hold Russia Accountable’: Leaders React to ‘Horrific Events’ in Ukraine, USA TODAY (Feb. 23, 2022), <https://www.usatoday.com/story/news/politics/2022/02/23/reactions-russia-invasion-ukraine/6919358001/> [<https://perma.cc/UU45-6FAU>].

236. Dan Bilefsky, Richard Pérez-Peña & Eric Nagourney, *A Year of War in Ukraine: The Roots of the Crisis*, N.Y. TIMES (Feb. 27, 2023), <https://www.nytimes.com/article/russia-ukraine-nato-europe.html> [<https://perma.cc/Y7RJ-8RHR>].

237. Anthony Faiola, *How Joining NATO and the E.U. Became Ukraine’s Unattainable Dream*, WASH. POST (Feb. 17, 2022), <https://www.washingtonpost.com/world/2022/02/17/ukraine-nato-eu-european-union-membership/> [<https://perma.cc/C5G4-56Q8>].

238. See Bilefsky, Pérez-Peña, & Nagourney, *supra* note 236; see also Oksana Myshlovskaya, *Understanding the Roots of the Russia-Ukraine War and the Misuse of History*, GENEVA GRADUATE INST. (Apr. 25, 2022), <https://www.graduateinstitute.ch/communications/news/understanding-roots-russia-ukraine-war-and-misuse-history> [<https://perma.cc/7R24-27QM>].

239. See, e.g., *NATO’s Nuclear Deterrence Policy and Forces*, NATO (Apr. 11, 2023), https://www.nato.int/cps/en/natohq/topics_50068.htm [<https://perma.cc/CT52-7TW2>].

240. See *NATO-Russia*, NATO (Sept. 21, 2022), <https://www.nato.int/cps/en/natohq/115204.htm> [<https://perma.cc/6AAW-W9BJ>].

241. Julian E. Barnes & Edward Wong, *China Asked Russia to Delay Ukraine War Until After Olympics*, U.S. OFFICIALS SAY, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/us/politics/russia-ukraine-china.html> [<https://perma.cc/93DV-TNGA>].

effort.²⁴² This was already a fairly onerous commitment (before adding in sanctions), given the economic problems already experienced by the Western world in the wake of the COVID-19 pandemic and some of the policies related thereto.²⁴³ To some, the commitment of American taxpayer dollars seemed excessive, but as we will point out, funding the Ukrainian war effort may have been less damaging than the sanctions that accompanied these funds.

A. Sanctioning Russia

No matter how much you feed a wolf, it still looks to the forest.

—A Russian saying

After Russia's invasion of Ukraine, the U.S., along with many European nations, restricted trade with the Russian Federation, sanctioning a large number of products, natural resources, and materials.²⁴⁴ The Russian Federation was already under a large number of sanctions due to its actions against Ukraine in 2014, when Vladimir Putin annexed the region of Crimea to Russia from Ukraine.²⁴⁵ These additional sanctions essentially destroyed any channel of trade between the U.S. and Russia.²⁴⁶ America's European allies followed suit, sanctioning a large number of

242. Charles Maynes, *Russia Sharpens Warnings as the U.S. and Europe Send More Weapons to Ukraine*, NPR (Apr. 29, 2022), <https://www.npr.org/2022/04/29/1095458518/russia-ukraine-us-military-aid> [https://perma.cc/9MKF-99GH]; Lopez & Morin, *supra* note 235.

243. See, e.g., Alfred Kammer, *War in Ukraine Is Serious Setback to Europe's Economic Recovery*, INT'L MONETARY FUND BLOG (Apr. 21, 2022), <https://www.imf.org/en/Blogs/Articles/2022/04/21/blog042222-eureeo-war-in-ukraine-is-serious-setback-to-europe-economic-recovery> [https://perma.cc/H84M-YJJG]; Artur Galocha & Ruby Mellen, *Breaking Down the Billions of Dollars in U.S. Military Aid to Ukraine*, WASH. POST (May 19, 2022), <https://www.washingtonpost.com/world/interactive/2022/biden-ukraine-military-aid-us/> [https://perma.cc/28TX-8YQA]; see also Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [https://perma.cc/K8CT-SRDV].

244. February 25, 2022, U.S. Treasury Press Release, *supra* note 230; Press Release, White House, United States, G7 and EU Impose Severe and Immediate Costs on Russia (Apr. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/> [https://perma.cc/SL64-WBWP] [hereinafter White House Press Release].

245. Eric R. Markus, *United States Adds to Economic Sanctions Against Russia Relating to the Conflict in Ukraine*, NAT'L L. REV. (Aug. 18, 2014), <https://www.natlawreview.com/article/united-states-adds-to-economic-sanctions-against-russia-relating-to-conflict-ukraine> [https://perma.cc/TH9M-4WPV].

246. See Press Release, U.S. Dep't Treas., U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs (Feb. 24, 2022), <https://home.treasury.gov/news/press-releases/jy0608> [https://perma.cc/SD8M-A8RH] [hereinafter February 24, 2022, U.S. Treasury Press Release].

Russian exports, including fossil fuels.²⁴⁷ None of these sanctions stopped the Russian invasion of Ukraine, so the U.S. and Europe continued to add to these sanctions periodically, eventually expanding the trade restrictions from fuels and consumer goods to investments in companies headquartered in the Russian Federation.²⁴⁸

The combination of sanctions and approximately \$56 billion sent to Ukraine in military and humanitarian aid²⁴⁹ were not costless for the U.S. At a time when shortages reverberated throughout the country—including shortages of something as fundamental as baby formula—and when most Americans felt the sting of spiking gas prices,²⁵⁰ politicians seemed intent to send money overseas rather than keeping it at home and to restrict access for Americans to cheaper foreign goods and fossil fuels. While many politicians suggested the military operation in Ukraine was the beginning of World War III, the conflict seemed less dire.²⁵¹ After all, there have been several thousand European wars throughout history.²⁵² The residents of Europe have been fighting each other for many centuries, with regions changing hands many, many times.²⁵³ While both World War I and World War II started in Europe, it cannot be stressed enough how many European wars *did not* turn into a world war of any kind.²⁵⁴ Perhaps this was why George Washington suggested the U.S. avoid European conflict: because the wars were frequent and destructive to the region and

247. *EU Sanctions Against Russia Explained*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> [https://perma.cc/84C8-SDRF].

248. *FACT SHEET: United States Takes Further Action to Counter Sanctions Evasion by Russia*, WHITE HOUSE (June 2, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/02/fact-sheet-united-states-takes-further-actions-to-counter-sanctions-evasion-by-russia/> [https://perma.cc/MM24-QR9F].

249. *U.S. House Passes \$56b Bill to Bolster Ukraine Against Russian Invasion*, STRAITS TIMES (May 11, 2022), <https://www.straitstimes.com/world/united-states/us-house-sets-vote-on-56-billion-ukraine-aid-package> [https://perma.cc/3DEE-V9KL].

250. Reade Pickert, *The Formula Crisis Takes an Economic Tool on Families in Gas Money and Wasted Hours*, BLOOMBERG (June 8, 2022), <https://www.bloomberg.com/news/articles/2022-06-08/baby-formula-shortage-exacerbates-gas-price-pain-for-parents> [https://perma.cc/6QU9-4EQA].

251. See Bret Stephens, *This Is How World War III Begins*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/opinion/russia-ukraine-world-war-iii.html> [https://perma.cc/C4M8-3N4V].

252. See, e.g., *Continuing Conflict: Europe After the First World War*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/continuing-conflict-europe-after-the-first-world-war> [https://perma.cc/5TBE-NHQL] (collecting wars); see also *European Wars & Battles*, THOUGHTCO, <https://www.thoughtco.com/european-wars-and-battles-4133312> [https://perma.cc/XN65-E2BL] (cataloguing “thousands of conflicts”).

253. See discussion *supra* note 252.

254. See *id.*

to the common people in European nations.²⁵⁵ Moreover, and perhaps more importantly, it is sometimes difficult to tell who is right in past European military conflicts: if prior ownership of a region gives some kind of right to owning it again, almost every European nation can lay vast claims to the lands of other European nations (and vice versa).²⁵⁶

Ukraine itself is an example of a region that has known many “masters.” It was once considered an integral part of Russia, with Ukrainian capital Kyiv serving as the capital of ancient Russia as far back as 1,200 years ago.²⁵⁷ Then, as the Russian capital shifted to Moscow, what was once Kievan Rus,²⁵⁸ or Russia, drifted farther away from Russia and more toward its European neighbors.²⁵⁹ Yet, Ukraine still found itself as part of the Russian Empire and the U.S.S.R. many years later.²⁶⁰ In fact, one of the U.S.S.R.’s most prominent leaders, Nikita Khrushchev, hailed from Ukraine and used his influence to assign lands which traditionally belonged to Russia to Ukraine.²⁶¹

In reality, though, it can be difficult to say which lands “traditionally” belonged to most countries in Europe. Regions changed hands so many times, ruling dynasties switched at the helm of empires, and new countries sprung up while old countries were sometimes utterly destroyed and disappeared from the map.²⁶² Many countries that existed in nineteenth century Europe do not exist there anymore.²⁶³ It is tremendously difficult, without at least living on the continent, to fully understand how many of these diplomatic and trade relationships functioned. Is the U.S. the best

255. Loren Thompson, *Remembering George Washington’s Advice About How to Avoid Wars*, FORBES (June 30, 2015), <https://www.forbes.com/sites/lorenthompson/2015/06/30/remembering-george-washingtons-advice-about-how-to-avoid-wars/?sh=5ec6f3db6fad> [https://perma.cc/NT63-DBCX].

256. See, e.g., *Continuing Conflict*, *supra* note 252.

257. Alexey Timofeychev, *6 Russian Capitals: How the Country’s Heart Changed Through the Ages*, RUSSIA BEYOND (Sept. 29, 2017), <https://www.rbth.com/history/326278-6-russian-capitals> [https://perma.cc/5MUL-RMB5].

258. Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43, 48 (2018).

259. Ali Rogin & Morgan Till, *Ukraine’s History and Its Centuries-Long Road to Independence*, PBS (Mar. 8, 2022), <https://www.pbs.org/newshour/show/ukraines-history-and-its-centuries-long-road-to-independence> [https://perma.cc/YG3N-YLS8].

260. Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WILSON CTR., <https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago> [https://perma.cc/925P-JJ4Q].

261. Chandrima Banerjee, *Story of Kyiv, the City That Survived 16 Putins*, TIMES INDIA (Mar. 15, 2022), <https://timesofindia.indiatimes.com/world/europe/story-of-kyiv-the-city-that-survived-16-putins/articleshow/90203460.cms> [https://perma.cc/SCZ3-ZXBS].

262. See *Continuing Conflict*, *supra* note 252.

263. See, e.g., Sophie-Claire Hoeller, *9 Countries that Ceased to Exist in the 20th Century*, BUS. INSIDER (Aug. 12, 2015), <https://www.businessinsider.com/countries-that-no-longer-exist> [https://perma.cc/8GFA-UECA].

arbiter of conflicts like this, given that the average voter struggles to recall basic American history?²⁶⁴ Can the American President be the best person to resolve these conflicts, without counsel from Congress and with swirling accusations that his son is involved in untoward dealings in the region? The answers to these questions are unclear.

When America involved itself in world affairs in the past, it was not obvious who would be a long-term friend and who would be a foe. European nations such as the United Kingdom and Germany are U.S. allies now, but they were America's bitter enemies in past historical confrontations.²⁶⁵ Russia was once an ally and now is an adversary.²⁶⁶ When Germany complains of Russian expansionism, it is difficult not to remember its own misconduct during the second World War. When the U.S. complains of the same, one cannot help but think of the murderous expansion westward that all but wiped out the majority of Native Americans on the continent and deprived them of almost all land.²⁶⁷ When the United Kingdom and France join the conversation, it is difficult to forget that they imperialized and enslaved much of the known world in centuries past (and might still hold those empires if not for the weakness suffered during the world wars of the twentieth century). When the United States throws its lot in with some nations against others, it risks being on the wrong end of a conflict. The damage of most of the above transgressions simply cannot be undone, and perhaps avoiding foreign conflicts economically and militarily would be the better choice.

Regardless, the U.S. proceeded with a variety of sanctions against the Russian Federation and dozens of specific Russian individuals in an effort to stop this international military conflict.²⁶⁸ American leadership sought to penalize Russia as much as possible for the sake of the national

264. See *Study: Americans Don't Know Much About History*, NBC L.A. (Jan. 26, 2009), <https://www.nbclosangeles.com/local/study-americans-dont-know-about-much-about-history/2096365/> [<https://perma.cc/2TMF-FMWK>].

265. See generally John W. Burgess, *Germany, Great Britain and the United States*, 19 POL. SCI. Q. 1 (1904); *U.S. Relations with Germany*, U.S. DEP'T STATE (June 21, 2021), <https://www.state.gov/u-s-relations-with-germany/> [<https://perma.cc/ZD2G-42HH>]; *U.S. Relations with United Kingdom*, U.S. DEP'T STATE (June 2, 2022), <https://www.state.gov/u-s-relations-with-united-kingdom/> [<https://perma.cc/5VPS-B9FR>].

266. See *U.S. Relations with Russia*, U.S. DEP'T STATE (Sept. 3, 2021), <https://www.state.gov/u-s-relations-with-russia/#:~:text=The%20United%20States%20has%20long,promote%20foreign%20investment%20and%20trade> [<https://perma.cc/824D-VCPM>].

267. *Genocide of Indigenous Peoples*, HOLOCAUST MUSEUM HOUSTON, <https://hnhm.org/library/research/genocide-of-indigenous-peoples-guide/> [<https://perma.cc/6Q4V-PYGK>]. Another evil in America's past is the prevalence of slavery across the country for roughly 250 years. Ironically, it was the Russian Empire that provided naval support for President Lincoln's fight to free the slaves. Great Britain, on the other hand, provided support for the pro-slavery Confederates.

268. February 24, 2022, U.S. Treasury Press Release, *supra* note 246.

security of the U.S.²⁶⁹ This national security interest is at the heart of most sanctions (or at least is used to justify most sanctions). Yet, the war in Ukraine is roughly 6,000 miles away from American borders.²⁷⁰ It is not immediately clear what the national security interest for the U.S. might be. To garner support for the sanctions, the U.S. government, aided by the media, painted a rather one-sided picture of the conflict, arguing that Russia had no case for an invasion, and that NATO and Ukraine posed no threat to the Russian Federation, whereas Russia viewed NATO as a threat.²⁷¹

B. Are There Two Sides to the Conflict?

*There glimpse a prince, and in his passing
He makes the dreaded tsar his slave;
Aloft, before the people massing,
Across the wood, across the wave,
A warlock bears a warrior brave;
A grieving princess in a cell,
And faithful wolf that serves her well*

...

*There droops Kashchey, on treasure bent;
There's Russian spirit... Russian scent!*

—Alexander Sergeevich Pushkin²⁷²

To better understand Russia's belief that NATO posed a threat to Russia itself, it is important to briefly summarize NATO's history. The U.S. has a military alliance with most of Europe under NATO (and membership in NATO roughly aligns with membership in the European

269. *See id.*

270. Distance from Ukraine to United States, DISTANCE.TO, [https://www.distance.to/Ukraine/Usa#:~:text=The%20shortest%20distance%20\(air%20line,5%2C601.70%20mi%20\(9%2C015.06%20km\)\[https://perma.cc/JLY4-NXB4\]](https://www.distance.to/Ukraine/Usa#:~:text=The%20shortest%20distance%20(air%20line,5%2C601.70%20mi%20(9%2C015.06%20km)[https://perma.cc/JLY4-NXB4]) (Put name of one country on "Start" and the name of the other country in "Destination." Then click on "Calculate Distance!"); *see also* Bilefsky, Pérez-Peña, & Nagourney, *supra* note 236.

271. *NATO-Russia Relations: The Facts*, NATO (July 22, 2022), https://www.nato.int/cps/en/natohq/topics_111767.htm [https://perma.cc/J22D-KYXH]. *See generally* Jim Garamone, *What Happens in Ukraine Matters to the World, Austin Says*, U.S. DEP'T DEF. (Mar. 15, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3330715/what-happens-in-ukraine-matters-to-the-world-austin-says/> [https://perma.cc/KLP9-JQ42]. *See also* Dan Bilefsky, Pérez-Peña, & Nagourney, *supra* note 236; Faiola, *supra* note 237.

272. Alexander Pushkin, *Ruslan and Liudmila* (1820), <http://ashvital.freesevers.com/ruslan%20and%20liudmila.htm> [https://perma.cc/TNJ5-842J] (writing about the mythical region, Lukomor'ye, commonly thought to be north of the Sea of Azov, in present-day Ukraine).

Union).²⁷³ Yet, Ukraine was not and is not a part of NATO and is not (and was not) a part of the European Union.²⁷⁴ In fact, the alleged point of contention with the Russian Federation was the presence of another NATO-member nation on Russia's borders despite Western promises to curb NATO expansion in 1991.²⁷⁵ These promises were critical, as Soviet Premier Gorbachev needed these assurances to safeguard Russia and to ensure a safe dissolution of the Soviet Union.²⁷⁶ Given the imperial past of NATO members, which includes violent conquests of entire continents, the Russian Federation had some cause to be concerned with NATO expansion right up to its borders.²⁷⁷ In fact, since a portion of Russia, the Kaliningrad region, is detached from the rest of Russia, much of that region is now surrounded by NATO states.²⁷⁸ This was not the case in 1991, because since then, NATO has continued to expand, adding several countries on the border with Russia (and currently seeking to add several more).²⁷⁹

The U.S., on the other hand, had no legal requirement under international law to sanction anyone over the Ukraine invasion.²⁸⁰ Nevertheless, politicians on the American home front maintained that sending aid to Ukraine and punishing a belligerent nation on Ukraine's

273. *See Relations with the European Union*, NATO (Jan. 12, 2023), https://www.nato.int/cps/en/natohq/topics_49217.htm#:~:text=30%20NATO%20member%20countries%3A%20Albania,Spain%2C%20T%C3%BCrkiye%2C%20United%20Kingdom%2C [https://perma.cc/K3Q6-ZVLY].

274. *See id.*

275. *NATO Expansion: What Gorbachev Heard*, NAT'L SEC. ARCHIVE (Dec. 12, 2017), <https://nsarchive.gwu.edu/briefing-book/russia-programs/2017-12-12/nato-expansion-what-gorbachev-heard-western-leaders-early> [https://perma.cc/A63W-8J39].

276. *Id.*

277. *See* Ivo H. Daalder, *NATO, the UN, and the Use of Force*, BROOKINGS (Mar. 1, 1999), <https://www.brookings.edu/research/nato-the-un-and-the-use-of-force/> [https://perma.cc/K2GA-UVD9]; Bilefsky, Pérez-Peña & Nagourney, *supra* note 236; Faiola, *supra* note 237; Janne Lahti, *Dierk Walter, Colonial Violence: European Empires and the Use of Force*, 124 AM. HIST. REV. 1430, 1430 (2019); Benedikt Stutchev, *Colonialism and Imperialism, 1450-1950*, EUR. HIST. ONLINE (Jan. 24, 2011), <http://ieg-ego.eu/en/threads/backgrounds/colonialism-and-imperialism> [https://perma.cc/K5HP-375Q]; Becky Little, *How Imperialism Set the Stage for World War I*, HISTORY (Mar. 7, 2022), <https://www.history.com/news/imperialism-causes-world-war-i> [https://perma.cc/ZTS4-3BXU]; Tom Reins, *Imperialism: European, American, and Japanese*, AM. HIST. ASS'N, <https://www.historians.org/teaching-and-learning/teaching-resources-for-historians/teaching-and-learning-in-the-digital-age/imperialism-european-american-and-japanese> [https://perma.cc/76JW-GGDB].

278. Sinéad Baker & Erin Snodgrass, *Map Shows How Russia's Border with NATO Would More Than Double with Finland and Sweden as Members*, BUS. INSIDER (May 18, 2022), <https://www.businessinsider.com/map-how-russias-nato-border-expands-with-finland-sweden-members-2022-5> [https://perma.cc/WD5Y-GB7X].

279. Latvia, Lithuania, Estonia, Poland, and Turkey are the members of NATO that border Russia. In addition, Sweden and Finland, which also border Russia, have applied to join NATO. *Id.*; Joshua R. Itzkowitz Shiffrin, *Op-Ed: Russia's Got a Point: The U.S. Broke a NATO Promise*, L.A. TIMES (May 30, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-shiffrin-russia-us-nato-deal-20160530-snap-story.html> [https://perma.cc/GVS7-Y2HY].

280. *See, e.g., Frequently Asked Questions*, *supra* note 107.

border was critical.²⁸¹ These assurances essentially reinvigorated the Domino Theory of the Cold War era: if Ukraine fell, so would the other countries on Russia's border.²⁸² The fact that many of those other countries were NATO members and would receive the full military protection of Europe and the U.S. did not seem to matter.²⁸³

The problem of Ukraine joining NATO was, conversely, believed by Russia to be a far more obvious problem.²⁸⁴ NATO is a large alliance, containing countries that in combination (and in some cases individually) greatly exceed the military and economic capabilities of Russia.²⁸⁵ For example, the U.S., perhaps the leading member of NATO, spends ten times more on its military than the Russian Federation and has an economy roughly ten times the size of the Russian economy.²⁸⁶ The U.S., on its own or with the aid of other NATO countries, has participated in a significant number of international armed conflicts, greatly exceeding any such participation by the Russian Federation.²⁸⁷ Recent examples include prolonged military conflicts (and prolonged American military presence) in countries such as Afghanistan and Iraq.²⁸⁸ Other less prolonged but still quite deadly American military operations include involvement in the bombing of Kosovo (a European state) in the 1990s, as well as incursions into Syria, and Libya.²⁸⁹

281. Nahal Toosi, *Perma-Sanctions: Biden Under Pressure to Punish Russia Until Putin's Gone*, POLITICO (Apr. 6, 2022), <https://www.politico.com/news/2022/04/06/biden-russia-putin-sanctions-00023429> [https://perma.cc/E78Z-D4VJ].

282. *Domino Theory*, HISTORY (Nov. 9, 2022), <https://www.history.com/topics/cold-war/domino-theory> [https://perma.cc/5RJQ-K2HZ].

283. Anatol Lieven, *Cold War Catastrophes the U.S. Can Avoid This Time*, ATLANTIC (June 1, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/us-russia-cold-war-containment-ukraine/661146/> [https://perma.cc/2CRA-DB4E].

284. See Joe Sommerlad, *Why Does Russia Want to Block Ukraine from Joining Nato?*, INDEPENDENT (Sept. 24, 2022), <https://www.independent.co.uk/news/world/europe/russia-ukraine-blocking-nato-b2070386.html> [https://perma.cc/UJF6-LWBJ].

285. *NATO-Russia Relations: The Facts*, *supra* note 271; see Arion McNicoll, *Nato vs. Russia: Which Side Would Win?*, WEEK (Apr. 4, 2023), <https://www.theweek.co.uk/news/defence/104574/nato-vs-russia-who-would-win> [https://perma.cc/38L2-6CQS].

286. *U.S. Defense Spending Compared to Other Countries*, PETER G. PETERSON FOUND. (May 11, 2022), https://www.pgpf.org/chart-archive/0053_defense-comparison [https://perma.cc/88JF-YKNN]; see *NATO Summit: What Does The US Contribute?*, BBC (June 14, 2021), <https://www.bbc.com/news/world-44717074> [https://perma.cc/T4CJ-BGUY].

287. See, e.g., DEP'T VETERANS AFFS., *AMERICA'S WARS* (2021), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf [https://perma.cc/VTG8-H5LK].

288. Doug Bandow, *The U.S. Role in Kosovo*, CATO INST. (Mar. 10, 1999), <https://www.cato.org/testimony/us-role-kosovo> [https://perma.cc/35G4-R5WJ]; Anthony H. Cordesman, *Afghanistan, Iraq, Syria, Libya, and Yemen*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 25, 2019), <https://www.csis.org/analysis/afghanistan-iraq-syria-libya-and-yemen> [https://perma.cc/5T79-XTRQ].

289. Cordesman, *supra* note 288; Bandow, *supra* note 288.

Some may differ whether these nations are worse as a result of military conflict, but given the disastrous American exit from Afghanistan in 2021, one has to wonder if the investment of American taxpayer resources in these military conflicts had any upside for American security interests or the Afghan people.²⁹⁰ For many Americans, the invasion of Afghanistan was viewed as the “good” war out of all American military conflicts in the twenty-first century, as there was a clear reason the U.S. entered the war with the aid of its European allies: the terrorist attack on American soil that took place on September 11, 2001.²⁹¹ Yet, while the objective for entering Afghanistan was clear, remaining there and spending trillions of dollars on the war effort was deemed by some to be excessive.²⁹²

The U.S. tried to build a nation in Afghanistan that would serve as a democracy in that part of the Middle East even after American soldiers left.²⁹³ Instead, this very expensive democracy for the American taxpayer collapsed within weeks of American exit, also destabilizing the regions around it and causing widespread famine.²⁹⁴ The Taliban took over the nation in the course of approximately one month, returning the same party to power that the U.S. displaced with its invasion in response to September 11, 2001, and equipping the Taliban with large amounts of American military equipment that the U.S. intended to leave behind for the Afghan Army (which America had trained to resist the Taliban for nearly two decades).²⁹⁵

290. See generally *A Disastrous American Exit*, WASH. POST (Aug. 16, 2021), <https://www.washingtonpost.com/podcasts/post-reports/a-disastrous-american-exit/> [https://perma.cc/6JAH-P3XQ].

291. David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/article/afghanistan-war-us.html> [https://perma.cc/2KY6-W3GL].

292. *Afghanistan War: How Did 9/11 Lead to a 20-year War?*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/afghanistan-war-how-did-911-lead-to-a-20-year-war> [https://perma.cc/9JUC-UPAH]; see Ellen Knickmeyer, *Longest War: Were America's Decades in Afghanistan Worth It?*, ASSOC. PRESS (Aug. 14, 2021), <https://apnews.com/article/joe-biden-middle-east-afghanistan-8d6d6d9e1e7cddb49caf0b52a40c2e8> [https://perma.cc/4C2E-3QAJ].

293. Knickmeyer, *supra* note 292; Steve Inskeep, *A Mission to Give Afghans Democracy Became a Bid to Repair America's Own*, NPR (Aug. 17, 2021), <https://www.npr.org/2021/08/17/1028481201/a-mission-to-give-afghans-democracy-became-a-bid-to-repair-americas-own> [https://perma.cc/8CTT-PK6S].

294. *A Disastrous American Exit*, *supra* note 290; Jane Ferguson & Zeba Warsi, *Afghanistan Sinks Deeper into Crisis as Sanctions Take Heavy Toll on Civilians*, PBS (Aug. 26, 2022), <https://www.pbs.org/newshour/show/afghanistan-sinks-deeper-into-crisis-as-sanctions-take-heavy-toll-on-civilians> [https://perma.cc/YJW3-8J2P]; *Economic Causes of Afghanistan's Humanitarian Crisis*, HUM. RTS. WATCH (Aug. 4, 2022), <https://www.hrw.org/news/2022/08/04/economic-causes-afghanistans-humanitarian-crisis#:~:text=Since%20the%20US%20withdrawal%20and,able%20to%20get%20enough%20food> [https://perma.cc/REE6-7BUY].

295. See discussion *supra* note 294.

While major media outlets in the U.S. and Europe covered the invasion of Ukraine as an unprovoked invasion that must be condemned in the strictest terms, a deeper dive into the geopolitical considerations in the region might provide some level of justification for the invasion from the perspective of the Russian Federation. The Russian Federation clearly does not trust NATO, and vice versa.²⁹⁶ NATO missiles are already close to Russian borders.²⁹⁷ Adding Ukraine to NATO, and placing those missiles even closer to Russian borders, may be construed by Russia as a military threat.²⁹⁸ Moreover, adding a country of almost 50 million people, not to mention a fairly large military with old Soviet technology, to NATO could be conceived by Russia as trouble. NATO, in the eyes of Russia, already had a hand in Ukrainian politics since (at least) 2014, when a pro-Russian, democratically elected Ukrainian President was forced to flee for his life only to have a pro-Western leader installed in his place.²⁹⁹

We do not mean to be so one-sided here: NATO had legitimate reasons to be concerned about Ukraine.³⁰⁰ Just as having Ukraine become a member of NATO posed a danger to the Russian Federation, having Ukraine controlled by Russia posed a danger to the easternmost NATO members.³⁰¹ But the troubling thing about Western news coverage of the event was the apparently irrebuttable presumption that the Russian Federation had little reason to act.³⁰² Any time an act of war can be

296. See *NATO-Russia Relations: The Facts*, *supra* note 271.

297. *Id.*

298. See Susan Page, Chelsey Cox & Rick Rouan, *Not a Distant War: U.S. Residents with Ties to Russia and Ukraine Unite Against Putin*, USA TODAY (Mar. 13, 2022), <https://www.usatoday.com/story/news/politics/2022/03/13/russian-americans-and-ukrainian-americans-united-against-putin-war/9413003002/> [<https://perma.cc/2VGT-54RV>] (“This is a serious problem from the perspective of Russians because obviously you don’t want your capital, not to mention some of your other major population centers, in close missile range to NATO.”).

299. Viktor Yanukovich: *The Former Ukrainian President Who Is Tipped to Replace Volodymyr Zelenskyy with Moscow’s Backing*, FIRSTPOST (Mar. 3, 2022), <https://www.firstpost.com/world/viktor-yanukovich-the-former-ukrainian-president-who-is-tipped-to-replace-volodymyr-zelenskyy-with-moscows-backing-10424071.html> [<https://perma.cc/Z9BY-G8WW>].

300. *NATO-Russia Relations: The Facts*, *supra* note 271.

301. Jim Garamone, *NATO Warns Russia of ‘Serious Consequences’ for Ukraine Actions*, U.S. DEP’T DEF. (Dec. 1, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2858633/nato-warns-russia-of-serious-consequences-for-ukraine-actions/> [<https://perma.cc/58C2-TSNU>]; Robert Pszczel, *The Consequences of Russia’s Invasion of Ukraine for International Security—NATO and Beyond*, NATO REV. (July 7, 2022), <https://www.nato.int/docu/review/articles/2022/07/07/the-consequences-of-russias-invasion-of-ukraine-for-international-security-nato-and-beyond/index.html> [<https://perma.cc/6PKJ-CYBE>].

302. See generally Melissa De Witte, *News About the Conflict in Ukraine Has Been Different—Stanford Scholar and Former War Journalist Discusses Why*, STAN. NEWS (Mar. 17, 2022), <https://news.stanford.edu/2022/03/17/reporting-war-ukraine/> [<https://perma.cc/NWZ2-WZP7>]; Jon Allsop, *The Biases in Coverage of the War in Ukraine*, COLUM. JOURNALISM REV. (Mar. 15, 2022), https://www.cjr.org/the_media_today/media_bias_ukraine_war.php [<https://perma.cc/9USL-B2M7>].

portrayed as so one-sided, NATO nations that are not in danger at all from a particular military action, such as the U.S., might be persuaded to take drastic actions. Yet, if the reality on the ground is more nuanced and complicated, one might argue that reporting on it should reflect that complexity. If instead, politicians and media figures alike rush to the bully pulpit to denounce the war in Ukraine as a completely unprovoked murderous, terrorist invasion, then the Executive Branch might exercise its authority in ways that would not be possible after a reasoned debate in the chambers of Congress, where cooler heads might prevail.³⁰³

At least some cooler heads did attempt to curb U.S. intervention in the conflict.³⁰⁴ Senator Rand Paul, a champion of responsible fiscal policy in the U.S., articulated several important points about American involvement in Ukraine.³⁰⁵ Senator Paul pointed out the inconsistency of NATO's position on admitting Ukraine in his *Courier Journal* Op-Ed in January of 2022:

We need not accept Putin's every demand, but if we dismiss them out of hand, we have no chance of ever finding lasting peace. For the neocons who insist that Ukraine become part of NATO, can you imagine our response had the Soviet Union demanded that Cuba be part of the Warsaw Pact?³⁰⁶

That last question cannot be more crucial. Too often in foreign policy, the U.S. may impose on other nations terms that America would never accept for itself, just like the President imposes sanctions on foreign trade we would never accept within our own borders. Of course, no two situations on the world stage are ever exactly the same, and placing missiles in Cuba by the Soviet Union is not the same as NATO placing missiles in Ukraine. The histories of the nations involved are different and the political systems in each respective country are different, but one cannot help but see some eerie similarities between what NATO membership would mean for Ukraine and what Cuba's membership would have meant as part of the Warsaw Pact during the Cold War. Both would pose a clear and present danger for the Russian Federation and the U.S.,

303. See, e.g., Rand Paul, *Here's How We Prevent War in Ukraine*, *COURIER J.* (Jan. 28, 2022), <https://www.courier-journal.com/story/opinion/2022/01/26/rand-paul-how-we-prevent-war-ukraine-opinion/9226398002/> [<https://perma.cc/5CQB-7ZM9>]. Even general monetary support for Ukraine does not have unanimous approval in Congress. Jack Dutton, *These 69 House Reps Voted Against Ukraine Military Aid*, *NEWSWEEK* (Mar. 10, 2022), <https://www.newsweek.com/these-69-house-reps-voted-against-providing-ukraine-aid-1686658> [<https://perma.cc/AQ7N-MQSR>]; Lexi Lonas, *Here Are the 11 GOP Senators Who Voted Against the Ukraine Aid Bill*, *HILL* (May 19, 2022), <https://thehill.com/homenews/senate/3495060-here-are-the-11-republican-senators-who-voted-against-the-ukraine-aid-bill/> [<https://perma.cc/H7JU-26QD>].

304. See discussion *supra* note 303.

305. See generally discussion *supra* note 303.

306. See Paul, *supra* note 303.

respectively. While many view NATO as a positive force in the world, they must acknowledge that in the eyes of Russians, Iranians, Chinese, and North Koreans (just to name a few arguably opposing governments), NATO might not seem like the benevolent force of world governance that it is portrayed to be.

C. An Endless List of Foreign Entanglements

Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real patriots, who may resist the intrigues of the favorite, are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests.

.....

Europe has a set of primary interests, which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence therefore it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

—President George Washington³⁰⁷

From the perspective of NATO's geopolitical rivals, NATO acts hypocritically when it involves itself in foreign conflicts, and many of its justifications for U.S. and European sanctions do not stand up to historical scrutiny. European nations comprising NATO have fought wars of conquest and colonialism all over the world.³⁰⁸ The British Empire, which had conflicts with several nations, only fell apart midway through the twentieth century after two brutal world wars that had far-reaching

307. *George Washington's Farewell Address, 1796*, GEORGE WASHINGTON PRESIDENTIAL LIBR., <https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/washington-s-farewell-address-1796/> [<https://perma.cc/RP4B-KXNQ>].

308. *Continuing Conflict*, *supra* note 252; Dierk Walter, Lahti, *supra* note 277; *see, e.g., Boxer Rebellion*, BRITANNICA (June 29, 2023), <https://www.britannica.com/event/Boxer-Rebellion> [<https://perma.cc/R76M-X3QA>]; *see also Crimean War*, BRITANNICA (June 20, 2023), <https://www.britannica.com/event/Crimean-War> [<https://perma.cc/M4YM-449G>].

consequences for everyone on the globe.³⁰⁹ Arguably, the mantle of the British Empire then passed to the U.S., which used a mix of military and economic intervention to achieve similar goals.³¹⁰ The U.S. also spread across the world, with a tremendous number of military bases worldwide, abandoning President Washington's advice to avoid foreign entanglements.³¹¹ The spread of NATO nations and NATO military bases across the world, and the involvement of NATO nations in a large number of military conflicts, can make NATO seem like the belligerent force to outsiders, with the U.S., unfortunately, leading the charge.³¹² When NATO member states sanction other nations for doing just a fraction of this empire-building, it is, at best, requiring others to play by rules that NATO itself eschews.

The idea behind NATO, the European Union, and more broadly the United Nations is (at least in part) to create some kind of unified cohesive world order that would prevent the outbreak of a world war.³¹³ Yet, the irony is that, historically, world wars became world wars through the triggering of various alliances and mutual protection agreements.³¹⁴ This is exactly how a military conflict in Estonia, for example, would implicate a nation as powerful as the U.S.³¹⁵ Estonia is a small country on the border of the Russian Federation that does little to help or aid in the security of the U.S. The potential loss of Estonia to NATO would be regrettable, but it should not implicate the security of the U.S. Yet, due to the way NATO operates via international treaties, military action in Estonia would trigger

309. Richard Halloran, *The Sad, Dark End of the British Empire*, POLITICO MAG. (Aug. 26, 2014), <https://www.politico.com/magazine/story/2014/08/the-sad-end-of-the-british-empire-110362/> [<https://perma.cc/8C6V-JBVL>]; *The End of The British Empire After the Second World War*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/the-end-of-the-british-empire-after-the-second-world-war> [<https://perma.cc/NS7H-5V2H>].

310. Bernard Porter, *British and American 'Imperialisms' Compared*, HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/27021> [<https://perma.cc/5V48-3R3M>].

311. Thompson, *supra* note 255.

312. Jonathan Masters, *What Is NATO?*, COUNCIL ON FOREIGN RELS. (May 4, 2022), <https://www.cfr.org/background/what-nato> [<https://perma.cc/GQZ4-B4JP>]; *see, e.g., NATO's Military Presence in the East of the Alliance*, NATO (Jun. 22, 2023), https://www.nato.int/cps/en/natohq/topics_136388.htm [<https://perma.cc/M9KN-EPNW>]; Aleks Buczkowski, *Top 14 Maps and Charts That Explain NATO*, GEO AWESOME (Jan. 22, 2017), <https://geoawesomeness.com/top-14-maps-charts-explain-nato/> [<https://perma.cc/2HSV-8WR3>].

313. *See* discussion *supra* note 312; *see History of the UN*, UNITED NATIONS, <https://www.un.org/un70/en/content/history/index.html> [<https://perma.cc/8ZMH-CJEH>]; Tsira Shvangiradze, *How Did the European Union Come into Existence?*, COLLECTOR (Feb. 17, 2022), <https://www.thecollector.com/how-did-the-european-union-start/> [<https://perma.cc/X7JA-5XV4>].

314. *See, e.g.,* Becky Little, *How a Regional Conflict Snowballed into World War I*, HISTORY (Feb. 4, 2022), <https://www.history.com/news/regional-conflict-world-war-i-beginning> [<https://perma.cc/NJY9-HT3P>]; *The Big Three*, NAT'L WWII MUSEUM: NEW ORLEANS, <https://www.nationalww2museum.org/war/articles/big-three> [<https://perma.cc/UU4H-7WLQ>].

315. *See, e.g.,* Little, *supra* note 314.

the military involvement of all NATO nations in order to help Estonia fight off a perceived oppressor, regardless of whether the military conflict that involves it is justified.³¹⁶

One could argue that the farther away an invasion is from U.S. borders, and the less risk it poses to the U.S., the less necessary American intervention might be, whether military or otherwise.³¹⁷ One can always fashion arguments that if Ukraine falls, so will the rest of Europe via some type of domino effect, but in reality, European nations have waged war with one another for millennia without the collapse of the continent or the long-term formation of some sinister world order.³¹⁸ By this very logic, American involvement in wars from Kosovo to Afghanistan to Iraq should be a concern because American influence might overshadow the interests of other nations in the world. Yet, at the end of the day, these types of domino theories just do not work out in practice.

These theories existed during the Cold War era, suggesting, for example, that the fall of Vietnam to Communist forces would relegate every nation in Asia to a Communist world order.³¹⁹ That has not happened despite the American withdrawal and ultimate victory by Communist forces.³²⁰ Thailand still has a monarchy.³²¹ South Korea has a democracy.³²² North Korea has a dictatorship.³²³ China has a form of one-party rule that enjoys widespread support from the masses, even when the masses do not have suffrage.³²⁴ India is the world's largest democracy.³²⁵ In fact, the U.S.S.R. *collapsed* less than two decades after Communist

316. See *Collective Defence and Article 5*, NATO (Apr. 14, 2023), https://www.nato.int/cps/en/natohq/topics_110496.htm [<https://perma.cc/G7U9-DV3K>].

317. See Constanze Stelzenmüller, *The West Must Reassess Its Record on Foreign Intervention*, BROOKINGS (Jan. 23, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/01/23/the-west-must-reassess-its-record-on-foreign-intervention/> [<https://perma.cc/LG3F-WPZL>].

318. See generally *Continuing Conflict*, *supra* note 252.

319. *Domino Theory*, *supra* note 282; *The Current Situation in Vietnam*, U.S. INST. PEACE (Apr. 20, 2022), <https://www.usip.org/publications/2022/04/current-situation-vietnam> [<https://perma.cc/U5V3-QMMG>].

320. *The Current Situation in Vietnam*, *supra* note 324.

321. *Thailand in Brief*, ROYAL THAI EMBASSY, WASH. D.C., <https://thaiembdc.org/about-thailand/thailand-in-brief/> [<https://perma.cc/T7L2-UMFS>].

322. Sook-Jong Lee, *The Contentious State of South Korean Democracy: Pitfalls and Hopes*, COUNCIL ON FOREIGN RELS. (Jan. 25, 2022), <https://www.cfr.org/blog/contentious-state-south-korean-democracy-pitfalls-and-hopes> [<https://perma.cc/CDG8-L2AE>].

323. Eleanor Albert, *North Korea's Power Structure*, COUNCIL ON FOREIGN RELS. (June 17, 2020), <https://www.cfr.org/background/north-koreas-power-structure> [<https://perma.cc/X66S-NYBM>].

324. See Elizabeth Economy, *China's Assertive Authoritarianism*, DEMOCRACY J., <https://democracyjournal.org/magazine/62-special-issue/chinas-assertive-authoritarianism/> [<https://perma.cc/PE25-NRDR>].

325. Constantino Xavier, *Interpreting India at the Summit for Democracy*, BROOKINGS (Dec. 6, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/12/06/interpreting-india-at-the-summit-for-democracy/> [<https://perma.cc/VK82-QFY4>].

victory in Vietnam, the opposite of what the Domino Theory predicted. Moreover, American sanctions on some of these countries did not change their form of government. How many times does the Domino Theory have to be empirically falsified until we stop using it as justification to deprive American citizens of their rights to trade internationally?

These examples are important to remember in times when we believe the world is ending just because two of 196 sovereign nations are involved in a military conflict. At the end of the day, the conflict will resolve itself one way or another, and there is little reason to believe American sanctions will improve things. Part of the reason the Founding Fathers objected to governance by an overbearing Great Britain was that Britain's politicians, monarch, and judges were physically distant from the U.S. (implying that geographical proximity may improve the abilities of politicians and jurists to more accurately assess the situation and reach more accurate conclusions about what should be done).³²⁶ The Founding Fathers also restrained the ability of American politicians to involve themselves in people's private affairs, even if those politicians happened to be in close proximity.³²⁷ Both principles are turned on their head when American politicians involve themselves in affairs 6,000 miles away with little to no restraint from the U.S. Constitution. If the Founding Fathers objected to such treatment from Great Britain (a country 3,000 miles away from the colonies), they might have objected all the louder to the interference of an unrestrained Executive Branch from 6,000 miles away.

III. BUT WHAT ABOUT THE AMERICAN PEOPLE?

'Attention! Your attention, please! A newsflash has at this moment arrived from the Malabar front. Our forces in South India have won a glorious victory [over Eurasia]' . . . Bad news coming, thought Winston. And sure enough, following on a gory description of the annihilation of a Eurasian army, with stupendous figures of killed and prisoners, came the announcement that, as from next week, the chocolate ration would be reduced from thirty grammes to twenty. . . . The telescreen—perhaps to celebrate the victory, perhaps to drown the

326. See Quincy Wright, *Territorial Propinquity*, 12 AM. J. INT'L L. 519, 547 (1918). See generally *The Declaration of Independence: How Did It Happen?*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/declaration/how-did-it-happen> [<https://perma.cc/R4YL-9HYR>].

327. See discussion *supra* note 326; see, e.g., U.S. CONST. amend. IV; U.S. CONST. amend. IX.

*memory of the lost chocolate—crashed into Oceania,
‘tis for thee.’*

—George Orwell³²⁸

In the U.S., politicians hailed the sanctions against consumer goods and investments in the Russian Federation (as well as Belarus) to be a victory for democracy.³²⁹ The Western world, disjointed with internal strife and conflicts about an uncertain economy, race, religion, sexuality, gender identity, and a crumbling social infrastructure, unified itself almost at once to confront a theoretical threat of a reunified Soviet Union.³³⁰ Tragically for the American people, no amount of money sent to Ukraine, and no amount of bans on natural resources from Russia, would actually help the bottom line of the average household or otherwise address any of the social issues of the day. What the bans did, instead, is prevent rational Americans from selectively engaging in trade, both as consumers and as investors, that reflected their own individual values.³³¹ With the stroke of a pen, and without consultation with Congress, a President carrying a roughly 42-point approval rating (and a higher disapproval rating)³³² committed every American to boycotting Russian fossil fuels at a time when gas prices were hitting all-time record highs.³³³

It was interesting to hear how, post-sanctions, the Biden Administration began to blame economic calamities such as inflation and recession on Vladimir Putin. After all, Vladimir Putin would not be causing these problems in the United States but-for the sanctions on Russian trade. Did it then follow, as a matter of logic, that removing the sanctions would erase inflation and lead to an economic recovery? If so, why did the Biden Administration not revoke the sanctions after polling

328. ORWELL, *supra* note 39, at 33 (emphasis added).

329. See, e.g., Jennifer Shutt, *U.S. House Moves to Revoke Russia, Belarus Trade Status; 8 Republicans Vote No*, KAN. REFLECTOR (Mar. 17, 2022), <https://kansasreflector.com/2022/03/17/u-s-house-moves-to-revoke-russia-belarus-trade-status-8-republicans-vote-no/> [<https://perma.cc/U59D-S9CX>].

330. See Vivian Ho, *Democrats and Republicans Agree on Plan to Suspend Trade Relations with Russia and Belarus—As It Happened*, GUARDIAN (Mar. 7, 2022), <https://www.theguardian.com/us-news/live/2022/mar/07/biden-us-ukraine-russia-latest-news-oil-ban> [<https://perma.cc/PGY6-N8RV>].

331. See generally White House Press Release, *supra* note 244.

332. Jason Lange, *Biden’s Approval Pulls Back from Record Low, but He Remains Unpopular*, REUTERS (June 1, 2022), <https://www.reuters.com/world/us/bidens-slumping-approval-rating-bounces-back-record-low-reutersipsos-2022-06-01/> [<https://perma.cc/9RNQ-XQPN>].

333. Jonathan Ponciano, *Gas Prices Surge to Record High Ahead of Russian Oil Ban—Americans Will ‘Feel the Pain’ for a While*, FORBES (Mar. 8, 2022), <https://www.forbes.com/sites/jonathanponciano/2022/03/08/gas-prices-surge-to-record-high-ahead-of-russian-oil-ban-americans-will-feel-the-pain-for-a-while/?sh=3fa7bf69339b> [<https://perma.cc/6NUD-N85A>].

showed that many more Americans cared about economic matters at home than foreign relations abroad?³³⁴

Moreover, President Biden, without consultation from the people's representatives, many of which would receive a report card from the voters later that year at the polls, took it upon himself to ban investments in the Russian Federation.³³⁵ Limiting investor choice at a time when the American stock market was volatile and the economy was heading into a recession deprived at least some Americans of an important choice of where to place their savings.³³⁶ This limitation also prevented American investment institutions from purchasing stocks in Russian firms and profiting from the expanding Russian economy.³³⁷ While Russian stocks (and economic forecasts) tanked upon news of its "military operation" in Ukraine, many stocks began a furious rebound.³³⁸ Hence, by banning the trade on Russian stocks on April 6, 2022, President Biden essentially prevented American individuals, mutual funds, hedge funds, banks, and other financial intermediaries from sharing in the recovery in parts of the Russian stock market.³³⁹ Depending on the investment, the returns could have been highly lucrative.³⁴⁰

For example, an investor properly timing trades could make a significant amount even from stocks that did not fully recover, potentially gaining significant profits from up-and-down volatility. Gains could be had from options betting on volatility or simply purchasing the security when it was down, selling it when it was up, and repeating the cycle over and over again in the subsequent months. Sure, there was the chance the investors might not guess the exact times to buy and sell, a problem for any trader, but the principle of free capital markets is that they should at least have the chance to guess correctly. It is not, after all, the job of the government to protect investors from poor bets on the stock exchanges.

334. See, e.g., Lydia Saad, *Economy Is Top Election Issue; Abortion and Crime Next*, GALLUP (Oct. 31, 2022), <https://news.gallup.com/poll/404243/economy-top-election-issue-abortion-crime-next.aspx> [<https://perma.cc/JRZ4-7G5D>].

335. *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, *supra* note 38.

336. Lewis Krauskopf, *Bear Market Beckons as Stock Volatility Continues in 2022*, REUTERS (May 20, 2022), <https://www.reuters.com/markets/europe/bear-market-beckons-us-stock-slide-deepens-2022-05-20/> [<https://perma.cc/WK2D-LWWG>].

337. *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, *supra* note 38.

338. *Russia Stocks Jump as Trade Resumes After Month-Long Break*, REUTERS (Mar. 24, 2022), <https://www.reuters.com/business/rouble-recovers-further-jittery-stock-trading-resumes-after-month-long-hiatus-2022-03-24/> [<https://perma.cc/ZC9L-ZMTX>].

339. *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, *supra* note 38.

340. *Russia Stocks Jump as Trade Resumes After Month-Long Break*, *supra* note 338.

Furthermore, the recovery of certain Russian stocks after the beginning of the military operation in Ukraine is understated because it is measured in the Russian ruble.³⁴¹ The de-listing of American exchange-traded funds (ETFs) that granted access to Russian investments for American investors means that we do not have a dollar measure for what transpired on the Russian markets. What we do know, though, is that the ruble, against all expectations, *rose* after the invasion of Ukraine against the dollar by a significant margin.³⁴² That means that, given the rising value of the ruble, a company whose value in rubles remains identical is actually worth more, since the value of the ruble has improved.³⁴³ Instead of turning the ruble to “rubble,” as President Biden promised, the value of the currency increased after the war in Ukraine began.³⁴⁴ This increase would have been beneficial for investors who could hold stock in Russian companies and receive cashflows associated with the ruble.³⁴⁵ Instead, they missed out on the diversification of their portfolio and the diversification of their cashflows in foreign currency.³⁴⁶

Again, much of this could not have been easy to predict, and we do not suggest that in every scenario a belligerent nation’s currency would rise post-sanctions. We cannot predict whether Russian stocks will rise in the future. Yet, it is independent individual investors who should be allowed to place their “bets” on this potential outcome. There is profit to be had in everything from investments in Russian firms to Russian currency to Russian commodities, even if the profit is just in brokerages making those investments available (such as by creating Russian industry ETFs or mutual funds and receiving revenue from individuals holding these securities). Instead, American banks, brokerages, mutual funds, and hedge funds are no longer able to engage in this profitable business, meaning that they cannot pass along the earnings to their stockholders or their depositors.³⁴⁷

341. *Rouble Extends Recovery, Stocks Slide on 2nd Day of Trade, Led by Aeroflot*, REUTERS (Mar. 25, 2022), <https://www.reuters.com/business/russian-stocks-edge-lower-volatile-trade-rouble-stabilises-2022-03-25/> [https://perma.cc/D5Y5-ABNC].

342. Paddy Hirsch, *How Russia Rescued the Ruble*, NPR (Apr. 5, 2022), <https://www.npr.org/sections/money/2022/04/05/1090920442/how-russia-rescued-the-ruble> [https://perma.cc/F529-4LKF].

343. *Id.*

344. Aimee Picchi, *Biden Mocked the Ruble as “Rubble.” But the Russian Currency Has Rebounded*, CBS NEWS (Apr. 8, 2022), <https://www.cbsnews.com/news/ruble-rebound-price-after-sanctions/> [https://perma.cc/SV3Z-HDL6].

345. Gkionakis, *supra* note 135.

346. *Id.*

347. *Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression*, *supra* note 38.

We cannot be sure if the political decision to impose sanctions would have been different if the sanctions were put to a vote in the U.S. Legislature. Both Ukraine and its President enjoyed an uncharacteristic amount of popularity among U.S. lawmakers.³⁴⁸ For example, Ukrainian President Vladimir Zelensky was invited to address both houses of Congress via video conference, an uncommon honor for any foreign politician.³⁴⁹ The authors believe this honor would never be extended to Russian President Vladimir Putin or many other foreign politicians. American Congressmen exhibited proudly the Ukrainian flag upon their attire.³⁵⁰ Not the American flag, curiously, but the Ukrainian flag.³⁵¹ This was a remarkable change in sentiment toward Ukraine since the country was considered one of the most (if not the most) corrupt countries in Europe prior to the Russian invasion.³⁵² In fact, there was a significant amount of speculation as to whether President Biden may have been used for business purposes by his son, Hunter Biden, during his dealings with Ukrainian firms.³⁵³ Nevertheless, the support for Ukraine, whether verbal or otherwise, became almost uniform in Congress.³⁵⁴ It is likely that, even if the sanctions were put to a vote in Congress, they would have passed.

The fact that there may have been no change in outcome with respect to the Ukrainian sanctions does not mean that there would be no benefit from leaving the decision to Congress rather than the President. First, congressional debate can likely change the outcome of a vote considered to be a foregone conclusion. When Representatives and Senators take the time to publicly debate a particular topic, they can share information

348. Olivier Knox, *Zelensky's Hugely Popular in the U.S. But There's a Catch.*, WASH. POST (Apr. 1, 2022), <https://www.washingtonpost.com/politics/2022/04/01/zelenskys-hugely-popular-us-theres-catch/> [<https://perma.cc/5AY5-MQMK>].

349. Clare Foran, *Ukrainian President Zelensky Will Give Virtual Address to Members of Congress*, CNN (Mar. 14, 2022), <https://www.cnn.com/2022/03/14/politics/ukraine-zelensky-virtual-address-congress/index.html> [<https://perma.cc/K8G4-DH5J>]; CONG. RSCH. SERV., FOREIGN LEADERS ADDRESSING CONGRESS (2023), <https://sgp.fas.org/crs/misc/IF10211.pdf> [<https://perma.cc/MYB4-KA9V>].

350. Aditi Sangal, Adrienne Vogt, Meg Wagner, Melissa Macaya, Helen Regan, Adam Renton, George Ramsay, Ed Upright & Maureen Chowdhury, *March 16, 2022 Russia-Ukraine News*, CNN (Mar. 17, 2022), https://www.cnn.com/europe/live-news/ukraine-russia-putin-news-03-16-22/h_79b163e61ec7fa08bc8cca01f3442c70 [<https://perma.cc/VG7P-M3J7>].

351. *Id.*

352. Ted Galen Carpenter, *Whitewashing Ukraine's Corruption*, CATO INST. (Apr. 6, 2022), <https://www.cato.org/commentary/whitewashing-ukraines-corruption> [<https://perma.cc/5LFT-WJ2F>].

353. Bruce Golding, *Classified 2016 Email Shows US Diplomat Warning of Hunter Biden Deals in Ukraine*, N.Y. POST (Feb. 2, 2022), <https://nypost.com/2022/02/02/us-diplomat-warned-about-hunter-biden-ukraine-deals-in-2016/> [<https://perma.cc/CD7K-XX6S>].

354. *U.S. House Passes Resolution for Ukraine with Near-Unanimous Support*, KLTA (Mar. 2, 2022), <https://ktla.com/news/nationworld/u-s-house-passes-resolution-for-ukraine-with-near-unanimous-support/> [<https://perma.cc/K3F5-BX7H>].

(among themselves and with voters) about rapidly unfolding events and discuss the inconsistencies of that information. Moreover, members of Congress can assess the costs of a particular measure, such as sanctioning consumer goods and investments. They can, more readily than the President, consider the desires of their individual constituents and exchange this knowledge on the House or Senate floor. Finally, all of the House of Representatives and a third of the Senate face the wrath of the voters for bad decisions every couple of years, and frequently, when the Legislature records each member's vote on a particular issue, have to answer for specific decisions to their constituents.³⁵⁵ This leaves the voters an important mechanism for expressing their displeasure with the outcomes. The President, on the other hand, might not face such pressures given that he only runs for reelection every four years, and does not run for reelection at all in his second term.³⁵⁶

We can see the importance of congressional discussion when it came to sending foreign aid to President Zelensky of Ukraine.³⁵⁷ While strong popular support existed for aid to Ukraine, and the measures ultimately passed, several members of Congress made strong points for why sending aid to Ukraine may not make sense for the citizens of the U.S.³⁵⁸ Senator Rand Paul pointed out that the U.S. found itself in a precarious economic position.³⁵⁹ He stated, correctly, that the money sent to Ukraine would have to be funded by debt, debt which was frequently sold to some of America's foreign geopolitical rivals, such as The People's Republic of China.³⁶⁰ Senator Paul also argued that the U.S. was grossly overspending its government budget, stating that unless cuts were made elsewhere, he had to oppose sending money overseas when so many unfunded liabilities existed at home.³⁶¹

Likewise, there was dissent in the House of Representatives.³⁶² A small minority of representatives pointed out the problem with funding overseas wars that did not involve American troops and that only

355. *Votes in the House and Senate*, CONGRESS.GOV, <https://www.congress.gov/help/votes-in-the-house-and-senate> [<https://perma.cc/96FU-G7DV>].

356. U.S. CONST. amend. XXII.

357. Paul, *supra* note 303.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. Katherine Fung, *Marjorie Taylor Greene Likens Ukraine Aid to 'Money Laundering Scheme'*, NEWSWEEK (May 16, 2022), <https://www.newsweek.com/marjorie-taylor-greene-likens-ukraine-aid-money-laundering-scheme-1706992> [<https://perma.cc/KJ82-CPNP>]; Paul Kane, *The List of Anti-Ukraine Republican Lawmakers Is Quickly Growing*, WASH. POST (May 14, 2022), <https://www.washingtonpost.com/politics/2022/05/14/antiukraine-republicans/> [<https://perma.cc/F59B-Q8Q9>].

tangentially addressed American interests.³⁶³ Some representatives argued that much of the money would not make its way to helping the Ukrainian people.³⁶⁴ Instead, it would be absorbed by the military industrial complex or non-profit organizations that might not always serve the best interests of the Ukrainian people.³⁶⁵ These representatives called for oversight to ensure the money made its way to intended recipients, claiming that the current scheme of non-supervised monetary donations from American taxpayers to an overseas sovereign nation might create a significant amount of moral hazard.³⁶⁶ These calls largely fell on deaf ears, but the ability to debate them on the congressional record was still important.

Debating sanctions on the Senate and House floors rather than leaving the decision to the President would help prevent rash actions. It would reduce the probability that an overzealous President inaccurately expresses the will of the American people. Moreover, it would ensure that the politicians who cast their votes express their reasoning (or at least their vote) on record, which would then allow punishment from a displeased base of voters if the sanctions result in sufficient damage to voters' way of life. The Founding Fathers were wary of a tyranny of the masses, but they were even more wary of the tyranny of a single President acting without restraint.³⁶⁷ Congress reclaiming the power to sanction would reduce the probability of the latter tyranny.

CONCLUSION

Does Big Brother exist?

*Of course he exists. The Party exists. Big Brother is the
embodiment of the Party.*

Does he exist in the same way as I exist?

You do not exist

—George Orwell³⁶⁸

363. Kane, *supra* note 362.

364. *Id.*

365. *Id.*

366. *Id.*

367. For example, during the Constitutional Convention of 1787, James Madison argued that the new government should be designed to prevent the accumulation of power in any one branch. In a letter to Thomas Jefferson in 1788, he wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

368. ORWELL, *supra* note 39, at 170.

The U.S. began with the Founding Fathers' desire for local governance and limiting government power.³⁶⁹ Two centuries later, their framework created an economic behemoth capable of great influence on the world stage.³⁷⁰ Despite the Founders' warnings to tend to America's own affairs and eschew foreign strife, the Legislature consolidated power in the hands of the Executive Branch to reign unrestrained by checks in balances over foreign states dependent on trade with the U.S.³⁷¹ This unlimited power has the double-edged effect of harming both foreigners and Americans alike, curbing their freedom of choice, freedom of trade, and ultimately their economic liberty interests. Because economic liberty ultimately provides the opportunity to exercise most other freedoms, we argue for greater checks and balances in the exercise of Executive authority abroad.

Our proposed solution is simple: either through constitutional or political means, we must encourage the Legislature to reclaim its authority over foreign trade from the Executive. The justifications for arming the Executive Branch with the power to sanction foreign nations might be sensible in theory but have failed in practice. Too often, sanctions limit the economic freedom of U.S. residents and hurt vulnerable Americans as well as foreign businesses and individuals without meaningfully altering how "rogue" international agents act.³⁷² Instead, Americans who are the most vulnerable to upward price swings of various commodities may suffer tremendously. When these sanctions create turmoil in capital markets (and harm the ability of Americans to diversify into overseas investments), even individuals without investment portfolios can suffer significant economic harm.

The U.S. currently extends extremely broad power to its Presidents regarding matters overseas.³⁷³ This broad delegation may harm both the foreign state and ordinary citizens in the U.S.³⁷⁴ In the end, giving nearly unlimited power to the Executive Branch in the economic realm, especially when coupled with significant war powers, exposes the U.S. to dire economic consequences as the comparative size of the world's economic power expands.³⁷⁵ In a world where Western Europe, the U.S.,

369. Tom G. Palmer, 2. *Limited Government and the Rule of Law*, CATO INST. (2017), <https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/limited-government-rule-law> [https://perma.cc/B5HE-2EXJ].

370. *See id.*

371. 12 U.S.C. § 95; 50 U.S.C. § 4301.

372. Rosen, *supra* note 9; Forgey & Ward, *supra* note 9.

373. *See generally* *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, *supra* note 21.

374. Rosen, *supra* note 9; Forgey & Ward, *supra* note 9.

375. Rosen, *supra* note 9; Forgey & Ward, *supra* note 9.

and Japan face the prospect of economic stagnation, the U.S. must be much more careful in its economic influence.³⁷⁶ A century of experiments in expanding the Executive's trade power shows that instead of using the power in emergencies to save the U.S., the Executive Branch frequently uses the power to address conflicts which only tangentially affect the average American.³⁷⁷

When the President exercises its sanctioning power the way it did against the Russian Federation, it raises the question of limits. What is to prevent another President from imposing such sanctions against China, Canada, or Japan? What is to prevent a President from harming the American people much more without any input from the Legislature by eliminating their trading counterparts on the other side of the world? The harm would be great indeed if sanctions involved a nation more involved in U.S. foreign trade than Russia. It only makes sense, then, to have Congress oversee the imposition of such sanctions so as to not harm Americans for the political ambitions of the Executive.

Giving the Executive Branch the power to empire-build overseas through economic means has, predictably, caused the U.S. to endure greater involvement in foreign affairs than in the first 150 years of its existence.³⁷⁸ The payoffs have been small while the costs are tremendous.³⁷⁹ To remain competitive on the world economic stage in the twenty-first century, Americans must be able to trade in the ever-growing global marketplace. Returning the power to sanction trade back to Congress, and requiring vigorous debate before ordinary Americans are deprived of their right to economic choice, are critical. Times have changed, the results of the experiment are in, and it is time to put unrestrained Executive power to sanction trade to rest.

376. Horobin & Randow, *supra* note 217; Jaewon, *supra* note 217.

377. See Marc Joffe, *Sanctions Are Ineffective and Could Jeopardize US Fiscal Health*, HILL (June 21, 2022), <https://thehill.com/opinion/finance/3530841-sanctions-are-ineffective-and-could-jeopardize-u-s-fiscal-health/> [<https://perma.cc/9ZRJ-WY3Y>].

378. *Costs of War*, *supra* note 7.

379. *Id.*