Foreign Affairs Powers and "The First Crisis of the 21st Century": Congressional vs. Executive Authority and the Stabilization Plan for Mexico

James D. Humphrey II
University of Michigan Law School

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INTRODUCTION

The United States now faces a new kind of national security crisis. While bearing many of the hallmarks of the familiar political or military emergency — vital interests and values at stake, with inaction threatening enormous consequences — this new threat originates in economics, specifically in international financial markets.

That economics is included in the concept of national security has long been recognized, but the immediate danger that can arise from this relationship is a relatively new phenomenon. Over one trillion dollars changes hands each day in financial markets worldwide, virtually free of any regulation other than market forces. This expansion of global finance today has produced new players and capabilities, but no new rules or institutional resources to deal with them. Meanwhile, technological advances allow financial power to penetrate borders effectively and immediately. In this new era, our territory might not be taken, but our pockets may be picked.

A series of events known collectively as the Mexican Peso Crisis recently revealed the economic and political stakes involved. What began as a risky gamble in Mexican domestic economic management soon developed into a severe liquidity problem with worldwide effects. As Mexico's illiquidity verged on default, Mexico faced not only economic damage, but also a reversal of years of economic progress and a fundamental challenge to the consolidation of hard won liberal political

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* J.D., University of Michigan Law School (1995); M.A.L.D., The Fletcher School of Law & Diplomacy (1994); B.A., University of Missouri (1988). The author would like to thank Professor John H. Jackson for his advice and encouragement in the preparation of this Note.

and economic reforms. The crisis risked a “meltdown” in international banking and financial sectors and the erosion of support for free market ideology, as investors increasingly perceived Mexico as a tombstone advertisement for emerging markets. These developments threatened to reach the developed countries with whom the developing world trades and interacts. The unprecedented scope, nature, and type of these events, combined with the strong likelihood that such difficulties may become frequent, caused several observers to label events in Mexico “the first crisis of the 21st century.”

This Note discusses whether the United States can meet such a crisis under current legal arrangements. Can officials respond quickly, forcefully, and effectively? The Mexican Peso Crisis was the first test of this ability, and therefore is examined as a case study. As the United States attempted to respond to the crisis on its border, several questions about the practical and constitutional propriety of the effort emerged. There is clearly no longer a basic consensus surrounding security issues as existed in the Cold War years. Indeed, for the first time since the end of the Cold War, circumstances forced a president to take unilateral action by executive order when his appeal for Congressional intervention to dissolve an imminent security threat was met by a bipartisan wall of resistance. Such foreign affairs situations cast doubt on venerable principles like separation of powers and official accountability. With immediate action necessary in this new kind of economic crisis, do these principles threaten paralysis? What alternatives are there to protect against such a result?

Part I of this paper begins the examination of these questions by setting out the developments related to the Mexican Peso Crisis and its aftermath. Part II then analyzes the responses of the United States, which progressed through many options of differing timeliness and effectiveness. Part III puts these developments into their legal context, drawing on applicable principles of constitutional, statutory, and customary law. Finally, Part IV concludes by addressing the broader significance of the crisis and possible reforms as we begin the difficult task of reconciling legal authority and practical necessity in the new and complicated area of integrated global finance.

I. THE MEXICAN PESO CRISIS

A. Background

The Mexican Peso Crisis developed suddenly, surprising many observers, and quickly assumed potentially severe proportions.Ironically, for several years preceding the crisis, economists, politicians, and
international financial institutions viewed Mexico as a model developing country. After the humiliation of the infamous debt crisis of 1982 and the resulting “lost decade” of the 1980s, the usefulness of extensive state intervention in the economy was finally questioned. Perhaps more critically, new leadership cultivated the necessary political will to attempt classical liberal economic reforms, despite their often harsh short-term effects on the domestic economy.

At the center of this reform program was a disinflation strategy with several elements. First, beginning in the late 1980s, Mexico privatized approximately 1000 state-held industries; improved and increased tax collections; and undertook a major deficit reduction program, bringing its budget into surplus by 1992. Second, the government, banks, union groups, and businesses negotiated wage and price agreements. Third, a “crawling peg” managed exchange rate system linked the peso to the dollar. This system forced the Mexican inflation rate to converge with the much lower U.S. rate, allowing for the slow, steady depreciation of the peso. These reforms combined to bring inflation down from a 1987 high of 180 percent to an average of around eight percent in 1994.

In addition to the pursuit of disinflation, Mexico also slashed barriers to foreign investment and sought to liberalize its international trading regime, resulting in General Agreement on Tariffs and Trade (GATT) membership and the conclusion of the North American Free Trade Agreement (NAFTA). These developments also imposed market discipline on prices and enhanced overall economic efficiency. Mexico also undertook political reforms to loosen the grip of the historically dominant Institutional Revolutionary Party (PRI) and improve election campaigns and procedures. These reforms produced notable changes and increased the attractiveness of Mexico as a trading partner and a destination for foreign investment.

4. These wage and price agreements were called social pacts, or pactos. For details of the pacto entitled “Agreement of Unity to Overcome the Economic Emergency,” see Ted Bardacke and Stephen Fidler, Pacto: The Terms of the Agreement, Fin. Times, Jan. 4, 1995, at 4.
5. See Moreno, supra note 3, at 2.
6. Id. at 1.
7. Id.
9. The fact that Mexico was the first and only developing country invited to join the Organization of Economic Cooperation and Development (OECD) attested to the impressive
B. What Went Wrong?

The causes of the Peso Crisis are fairly complex, but it is generally accepted that these center on the interrelationship between Mexico’s pegged exchange rate regime, a large current account deficit, and a risky method of financing that deficit. By 1990, Mexico had earned the confidence of the financial markets — enough to reenter them on a large scale and attract substantial amounts of foreign capital for the first time since 1982. In 1992 and 1993, the inflow of capital was so considerable that the Mexican central bank was forced to purchase dollars on a large scale to thwart the growing strength of the peso.

In part, investors’ zeal for emerging market opportunities created this inflow of capital. With interest rates in the United States and the developed world relatively low, as they were until 1994, investors sought higher returns in stable, developing countries like Mexico. Significantly, however, most of the foreign capital entering Mexico was portfolio capital rather than foreign direct investment. Foreign direct investment, which is often made in plants and equipment, tends to provide a stable and long-term commitment, while portfolio capital in stocks and bonds is highly liquid. While foreign direct investment in Mexico almost doubled from $2.8 billion in 1989 to nearly $4.9 billion in 1993, portfolio investment, which constituted eighty-five percent of total foreign investment, increased from $0.3 billion in 1989 to $27.9 billion in 1993.

Tied to increased investment in Mexico was the excessive use of the nearly-fixed exchange rate of the crawling peg system. While such a system has the advantage of allowing a country to import the lower inflation rate of the country to which it “ pegs ” its currency, such a strategy is only successful with close adherence to the host’s monetary policies. Mexico’s inflation rate, however, remained higher than that of the United States. In a floating exchange rate system, the peso would have depreciated accordingly, allowing prices to equalize between the scope of the country’s changes. Lawrence Summers, Remarks Before the Washington Exchange Regarding Mexico’s Economic and Financial Situation (Mar. 3, 1995) (available in LEXIS, Nexis Library, Curnws File).


11. Id. This stimulus resulted in an increase of Mexico’s international reserves from under $10 billion in 1990 to well over $25 billion at their peak in 1994. Id.

12. HORNBECK, supra note 2, at 8.

13. Id. at 7.
two countries. Since the bands within the crawling peg system insufficiently depreciated the peso, it became increasingly overvalued.14

The final, and perhaps the most important, cause of the crisis was Mexico's widening current account deficit. Throughout the 1990s, Mexico ran a large current account deficit, reaching a level between six and eight percent of the Gross Domestic Product (GDP) in 1994.15 While a current account deficit is not in itself troubling, the composition and magnitude of the borrowing necessary to finance Mexico's deficit became increasingly disconcerting.16 Mexican interest rates were stable, indicating capital was eager to enter and did not require a premium. Moreover, a low level of capital goods imports17 meant little investment in production, which hindered potential growth and future ability to meet debt service payments.18 With both consumption and import substitution for domestic goods increasing, an economic slowdown could be anticipated, which would further weaken Mexico's ability to make payments.

As long as Mexico successfully attracted foreign capital (especially to its short-term Treasury bills, called cetes), there was little pressure to depreciate the currency. Under the conditions described above, however, especially the dependence on volatile portfolio capital, the system had little capacity with which to absorb shocks or other indications of instability. When such indications appeared in early 1994, the favorable environment that sustained the peso began to decay. Furthermore, interest rates in the United States began to rise, offering more attractive returns in a relatively stable market. More importantly, however, a number of noneconomic developments plagued Mexico, including an armed uprising in the state of Chiapas,19 the political assassination of

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15. HORNBECK, supra note 2, at 8. Trade is broadly defined to include services and investment income and expenses. Bergsten Banking testimony, supra note 14, at 2. Observers agree that Mexico's basic strategy was viable, at least through early 1994. The International Monetary Fund (IMF) and the World Bank both supported Mexico's strategy before the crisis. Id.

16. HORNBECK, supra note 2, at 7.

17. Some leading academic economists, observing warning signs that the peso was overvalued, pointed to the size of Mexico's trade deficit and noted 80% of the deficit consisted of imports of consumption goods. See Rudiger Dornbusch & Alejandro Werner, Mexico: Stabilization, Reform and No Growth, BROOKINGS PAPERS ON ECON. ACTIVITY, 1, at 253 (1994).

18. HORNBECK, supra note 2, at 7.

19. Id. at 9.
presidential candidate Luis Donaldo Colosio, and a looming presidential election in an environment which portended political opening and change.

After the assassination of Colosio, speculative pressures on the peso, first seen in 1993, reappeared and capital flows slowed dramatically. Mexico responded by raising interest rates on cetes obligations and shifting its reliance from these bonds to tesobonos. This shift both reassured investors and lowered the interest cost to the government. Mexico also responded by using its supply of foreign reserves to defend its currency in foreign exchange markets.

Speculative attacks continued, and liberal use of reserves only increased the rate of their depletion. By the time Ernesto Zedillo took office as President on December 1, reserve levels had dropped by over half, to about $14 billion. With reserves lower than the $17 billion in foreign-held tesobonos that would be due in a matter of months, markets feared further capital flight and the eventual inability of Mexico to exchange pesos for dollars. With reserves precariously low at about $7 billion, Zedillo announced on December 20, 1994 that he was devaluing the exchange rate by thirteen percent. The markets viewed this skeptically, resulting in the peso immediately falling to its new lower limit.

Speculative pressures and capital flight continued. On December 22, Mexico announced that the peso would be allowed to float. These policy steps, undertaken by a new administration, were fairly rushed. No

20. Id. at 8.
21. Moreno, supra note 3, at 2–3. Tesobonos are short-term treasury securities which paid lower interest rates and eliminated the exchange risk for dollar purchasers by indexing the bond’s worth to the U.S. dollar. Id. at 3.
22. Id. at 3.
23. Id. In retrospect, the government “should have accelerated the crawl of its exchange rate and carefully husbanded its stock of almost $30 billion then held in reserves.” The Peso Crisis and Financial Support for Mexico: Hearings Before the House Int’l Rel. Comm., 104th Cong., 1st Sess. 55, 58 (Feb. 1, 1995) (testimony of C. Fred Bergsten, Director, Institute for International Economics) [hereinafter Bergsten Int’l Relations testimony]. At the time, however, the Salinas administration feared that faster devaluation would simply translate into higher inflation and not improved competitiveness. Id. Despite warnings from observers, Salinas insisted Mexico could ride out the market turbulence through the election, after which confidence and capital investment would again increase. See Tod Robberson, The Mexican Miracle Unravels, WASH. POST WKLY., Jan. 16–22, 1995, at 20. This was a false and unrealistic hope, given the unsustainable levels of investment which would have been required.
"flanking policies" were in place domestically, nor were foreign governments informed before the event. This was not yet the low point of the crisis, but it marked the failure of Mexico's macroeconomic policy gamble and indicated Mexico's inability to deal with the crisis alone on prevailing terms.

The same day the float was announced, the Mexican government activated the North American Swap Facility. This agreement, created in March 1994 to supplement the NAFTA, provides up to $6 billion (later increased to $9 billion) in short-term funds to the Bank of Mexico, loaned evenly by the U.S. Treasury and the Federal Reserve, together with an additional $1 billion from the Bank of Canada. The existence of this facility illustrates how the often implicit interdependence of today's world is sometimes expressed in explicit legal terms. The arrangement ensured at least some degree of U.S. involvement in any Mexican crisis, and served as the basis for initial U.S. and international efforts to assist Mexico.

II. THE RESPONSES OF THE UNITED STATES

As the Mexican crisis unfolded, following the devaluation of the peso, the United States responded with a progression of initiatives. After consenting to Mexico's use of its credit line through the swap facility of $9 billion, President Clinton proposed an ill-fated package of congressional loan guarantees totaling $40 billion, and, by his executive authority, eventually cobbled together a multilateral package totaling over $51 billion. The legitimacy of these actions — both in terms of their substance and authorization — were and continue to be criticized and questioned. Before turning to precise legal arguments, this Part provides an overview of the events leading to the final package.

A. Post-Devaluation Developments and Choices for Mexico

After the attempt to devalue the peso foundered and the currency was allowed to float, the attention of financial markets remained fixed

29. The Egg on Zedillo's Face, supra note 25, at 31.
30. IMF Says Mexico Acted Appropriately to Devalue Peso, J. COM., Dec. 23, 1994, at 2A.
on Mexico's debt service, or liquidity, problems. With $17 billion in \textit{tesobonos} coming due within six months — $3.6 billion of this amount due in January alone\textsuperscript{32} — investors were quite suspicious of the adequacy of Mexico's reserve holdings. Before the crisis, Mexico redeemed due \textit{cetes} or \textit{tesobonos} with the proceeds from sales of new issues, often made to foreigners. The collapse of foreign demand for these securities after the currency crisis, however, left Mexico with rather unpalatable domestic financing choices.\textsuperscript{33}

If Mexico could persuade a foreign country or an international institution such as the International Monetary Fund (IMF) to buy bonds or lend it several billion dollars until confidence returned, it could reenter private capital markets. The IMF — whose purpose was to assist countries experiencing a currency crisis — initially was unable to act because of its limited resources, Mexico's "share" of those resources, and its extensive procedural requirements. These limits, together with the presence of outstanding loans to Mexico and the lack of a comprehensive IMF-approved economic plan, prevented immediate IMF assistance. Although Mexico previously maintained a $5.4 billion credit line at the IMF, it allowed this, and its obligation to allow IMF monitoring of its economy, to expire in the heady days of 1993.\textsuperscript{34} In this situation, the United States remained the only actor with the resources and perhaps the will to assist Mexico.

\textbf{B. Administration Motivations}

From the beginning, Clinton Administration and Federal Reserve officials saw U.S. intervention as essential, and insisted from the outset that assistance should not be used to obtain leverage on specific policy issues, but rather to preserve larger, more important interests of the

\textsuperscript{32} The Egg on Zedillo's Face, supra note 25, at 31, 32.

\textsuperscript{33} Mexico could simply print more pesos, but this would likely cause high inflation with all its attendant economic effects. The country could also implement exchange controls, but this holds little economic promise and, as a reversal of free market principles, is viewed very negatively abroad. Mexico could also borrow the money at home, but this would send interest rates much higher and likely induce a severe recession. Moreover, as many borrowers would be unable to pay such high interest rates, this alternative would likely result in a default of several private banks throughout Latin America. Considering these options, the more likely course would have been a simple default by Mexico on current obligations, or the extension of payment terms into the indefinite future. This would have made Mexican obligations virtually worthless, and would have prevented Mexico from obtaining financing on international markets for years to come. Bergsten Int'l Relations testimony, supra note 23, at 59–60.

\textsuperscript{34} PATRICIA A. WERTMAN, CRS REP. FOR CONGRESS, No. 95-428E, MEXICO'S 1995 ECONOMIC PROGRAM AND THE IMF, passim (Mar. 23, 1995).
United States. President Clinton pointedly emphasized this in public addresses, stating that the Mexican crisis was "plainly also a danger to the economic future of the United States" and peppering his speeches with references to American strategic interests, the "national security" of jobs, borders, economic stability, and the principle of democracy and free markets. Speaking for his program during the crisis, Clinton reemphasized that:

Our goal — our vision — must be to create a global economy of democracies with free markets, not government-run economies; democracies that practice free and fair trade and that give themselves a chance to develop and become more prosperous while giving our own people the opportunity they deserve to reap the benefits of high-quality high-productivity American labor, in terms of more jobs and higher incomes.

This highlights the Administration's concern with the Mexican crisis' economic and political effects on the other emerging markets with which the United States would like to trade. Other concerns included the overall role of the United States in the world economy and its ability to handle financial crises. The relative weakness of institutions such as the IMF in the face of today's trillion-dollar-a-day markets led many observers to see the U.S. response as a test of its leadership in the new economic order.

Significantly, while Clinton was criticized at the grassroots level for acting to help Mexico, the financial community criticized the Administration for not doing enough. This criticism went well beyond the relatively simple issue of profits and losses. Recognizing the important relationship of leadership, speed, and signals to overall market expectations and confidence, the financial community was not as critical toward the fact of action as it was toward the manner in which it was undertaken. In today's world, markets and analysts are overly sensitive to signals of confidence — or the lack thereof — while the average voter,

37. Id.
and many in Congress, are totally insensitive to, or simply unaware of, the basic factors involved and their importance.

C. Domestic Arguments For and Against Assistance

Top policymakers decided Mexico had grown "too important to fail" in the 1990s. In addition to the concerns noted above, advocates for intervention pointed to Mexico's geographical position as America's neighbor with whom it shares a 2000 mile border and the possibility of severe immigration problems.\(^\text{40}\) Trade issues were also a major concern, since Mexico is America's third largest trading partner and supports several hundred thousand export-related jobs in the United States.\(^\text{41}\) Other bilateral issues, such as those related to the environment, narcotics control, and other law enforcement issues might also suffer from a lack of U.S. assistance.

Arguments against assistance were often emotional and connected not as much to the specifics of the situation in Mexico as to partisan and maverick politics in the United States. Interestingly, those individuals and groups opposing assistance largely paralleled those who opposed the NAFTA some months before, with some explicitly stating their goal of having U.S. participation in NAFTA reexamined in view of the Mexican crisis.\(^\text{42}\) Notable, too, was the opposition of several "freshman" Republicans in the House.\(^\text{43}\) These dissenters made four basic arguments. First, they asserted that assistance represented a "bail out" of Wall Street investors and questioned why the United States would not let the market take care of the problem and force the speculators to take their lumps. Second, they queried why taxpayers should pay for Mexico's prior mismanagement and perhaps political corruption. Third, they expressed concern regarding the size of the problem and whether NAFTA was a significant cause. Finally, dissenters identified the problem as one of "moral hazard." They asserted that rescuing Mexico was undesirable because it would encourage irresponsible future behavior. We can answer nearly all of these concerns simply on the facts.

The speed of liberalization and globalization of financial markets has hidden both their scope and importance to everyday investors and


the general citizenry. The often-heard criticism that assistance to Mexico was a “bailout” for Wall Street overlooks the fact that those who stood to lose were not a group of wealthy investment bank officers in New York, but “average Americans” whose pension or 401K plan was invested in emerging market funds. The argument that the United States should simply “let the market take care of the problem” overlooked the fact that there was no reasonable way to negotiate with this new and incredibly large group of creditors.

There was also much confusion over the sources of the potential funds involved. While a variety of schemes were considered, none ever contemplated a direct transfer of taxpayer funds. Early news reports perhaps provoked this confusion. The New York Times contained the headline “U.S. is Readying Further Billions to Rescue Mexico” and the article’s lead sentence stated that “[t]he United States is preparing to spend billions of dollars, possibly as soon as next week, to help Mexico in its financial crisis.”44 Lost in the details was the fact that only currency swaps or loan guarantees were contemplated, with Mexico paying hefty fees or offering collateral in return.45 Also unnoticed was that the United States would likely profit from the arrangement.46 Even the funds ultimately committed only indirectly threatened a charge to the taxpayers (if the Exchange Stabilization Fund were replenished, for example), and no proposal ever contemplated any budgetary effects.

In one area, however, the critics made a valid point: the issue of “moral hazard.” Treasury Secretary Rubin and others, while stressing that geography, history, and trade made the Mexico plan “unique,” also recognized that several developing countries face similar problems of current account deficits, low reserves, and added speculative pressure because of the Mexican crisis. While Mexico exhibits some special factors, nothing guarantees that other countries who lack these particular attributes will not have others that are equally appealing. After all,

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44. Bradsher, supra note 35, at A1 (emphasis added).

45. In a typical Exchange Stabilization Fund (ESF) swap transaction, a foreign country borrows dollars and agrees to repay them at a certain interest rate by a specified date. At the time of borrowing, the Treasury takes possession of a corresponding amount of the foreign country’s currency, which it then invests in that country’s government securities. When the foreign country fully repays the borrowed dollars (with interest), the Treasury returns the foreign currency. In order to ensure that these swap transactions function to maintain orderly markets and do not serve as financial aid, a source of repayment is secured. The Mexican support plan included as collateral revenues from oil sales. Other sources of security are also available. ESF swap agreements are frequently tied to an IMF stabilization program. See Op. Off. Legal Counsel, Dept. of the Treasury (Feb. 21, 1995) at 5 [hereinafter Treasury Op.].

security relationships of political or economic importance for the United States might make intervention compelling elsewhere. Secretary Rubin implicitly recognized this difficulty, remarking to a Congressional committee that "there is a line we cannot cross . . . just don't ask me where it is."47

D. Proposals for U.S. Assistance

1. Use of Existing Swap Facilities

The debate over whether the United States should assist Mexico interacted with events in financial markets, creating a variety of proposals for assistance. As the prior establishment of the North American Swap Facility indicates, some capacity already existed for dealing with crises. This facility, while significant, was only an extension of a common — if little known — policy tool. Indeed, the Wall Street Journal reported the establishment of the $6 billion swap limit with only a single sentence.48 This swap agreement was later "trilateralized" with the inclusion of Canada, thus recognizing the economic relationships brought about by the NAFTA, and creating the so-called "North American Financial Group."49 This new arrangement added a $1 billion swap facility between the Bank of Canada and the Bank of Mexico.50

Soon after the devaluation of the peso and the activation of the swap facility,51 President Zedillo sought to boost confidence in Mexican markets by accepting the resignation of his Secretary of Finance, Jaime Serra Puche, on December 29.52 On January 3, 1995, the U.S. Treasury and the Federal Reserve announced that an additional $3.5 billion would supplement the $6 billion swap facility, while President Zedillo also received commitments of $3 billion from private commercial lenders and $5 billion from the Bank for International Settlements (BIS).53 President Zedillo announced this package, totaling over $18 billion, together with a hastily negotiated economic emergency plan. It was

50. Id.
53. Id.
hoped these combined developments would reestablish investor confidence.\textsuperscript{54}

Even in its first day, however, the plan failed to prevent negative market reactions. While the plan proposed accelerated liberation from government control of several sectors of the economy and a pledge that the various loan packages would be used only to support the currency (and not to finance the current account deficit), its estimates of inflation rates, wage levels, currency exchange values, and the like were felt to be unrealistic while relations with labor groups were strained.\textsuperscript{55} Markets were not forgiving, as the peso plunged to 5.57 to the dollar from its December 19 level of 3.45, and rates for government bonds increased two points to the highest rate in five years.\textsuperscript{56}

On January 5, Zedillo requested assistance from the IMF, while finance ministry officials sought to create longer term bonds backed by oil revenues as an attractive alternative for tesobono holders.\textsuperscript{57} Yet the markets continued to be turbulent and distrustful, and the peso and the Mexican stock market continued to decline significantly. By January 10, stock markets across Latin America and abroad plunged in response to Mexico’s problems, arousing fears of a “domino effect.”\textsuperscript{58}

2. Mexico I

With markets clearly unimpressed with the responses to the crisis thus far, on January 12 President Clinton proposed to Congress a package of loan guarantees for Mexico totaling $40 billion.\textsuperscript{59} This announcement was the President’s first official response to the peso’s problems.\textsuperscript{60} The President announced the proposal with some fanfare, including an announcement of support from the new Republican congressional leaders, Newt Gingrich and Bob Dole.\textsuperscript{61} The White House described the agreement as “a significant test of bipartisanship in a foreign financial crisis.”\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} The Egg on Zedillo’s Face, supra note 25, at 31.
\item \textsuperscript{57} Mexico Can Meet Its Debts, Finance Chief Tells Brokers, N.Y. TIMES, Jan. 6, 1995, at DI.
\item \textsuperscript{58} Keith Bradsher, Mexico’s Financial Turmoil: The Assistance, N.Y. TIMES, Jan. 12, 1995, at DI.
\item \textsuperscript{60} Bradsher, supra note 58, at DI.
\item \textsuperscript{61} Sanger, supra note 59, at A1.
\item \textsuperscript{62} Id.
\end{itemize}
Interestingly, at this point no plan had in fact been drafted. Playing the delicate game of deterrence, officials hoped that the announcement of the package would be enough to restore the confidence of private investors and commercial banks, thus making the actual use of the guarantees unnecessary. Consistent with their goal of deterrence, the Administration refused to say at the time how much the guarantees would total, although word soon leaked out that the package contemplated $40 billion as the absolute outside figure. Such an announcement is troublesome because, on the one hand, the upper limit the Administration was willing to guarantee is precisely the signal for which the markets are waiting. To restore and increase confidence, this number must be as large, or larger than, the crisis demands; witness the unpersuasiveness of the original $18 billion package. On the other hand, with congressional approval necessary, there are political, practical, and psychological incentives for the commitment to be as economical as possible. Packages of an unprecedented size, then, invite a higher level of scrutiny by both the markets and Congress.

Immediately after the plan's announcement, Mexican currency and stock markets improved dramatically. The Mexican Treasury sold all new tesobonos offered at auction on January 17. Unfortunately, this improvement was short lived, as congressional voices began rising against the plan, or demanding the addition of a laundry list of exacting conditions. Importantly, skepticism of the plan had less to do with partisan divisions than the nature of the body considering it. Despite the support for the program by the Republican Party leadership, Republican opposition to the plan of a Democratic president with perceived weaknesses was significant. The "freshmen" Republican representatives, numbering seventy-three of the eighty-seven newly elected members of the House, were noticeably more isolationist regarding foreign affairs and were more single-minded in their focus on the domestic Contract with America. Opposition was noticeable in the President's own party as well. Especially vocal were left-wing Democrats, such as the House Democrat's Whip David Bonior (D-Mich.) who had previously teamed

63. *Id.* The scheme was not novel; it was based on $10 billion plan proposed by the Bush Administration in 1992 to guarantee borrowing by Israel to finance housing for refugees fleeing the former Soviet Union. *Id.* at D2.

64. *Id.*


with right-wing Republicans to oppose NAFTA in 1993 and the World Trade Organization (WTO) agreement in 1994.68

Congress also sought to extract concessions from Mexico in exchange for assistance, resulting in endless debates over issues as diverse as collateral, privatization, drug trafficking, the linkage of wages to productivity, labor rights, customs rules, and aid to Cuba.69 As a result of these demands, the Administration was never able to introduce a single bill for formal debate. Indeed, Congress discussed over thirteen different versions of the plan.70 Meanwhile, Mexican financial conditions continued to deteriorate. Noting widespread capital flight, Alan Greenspan, Chairman of the Federal Reserve, urged Congress to support the plan and even made a personal and ultimately unsuccessful plea to radio talk show host Rush Limbaugh for his support.71

By January 24, with the guarantee package in doubt, the Mexican government was unable to sell its entire allocation of tesobonos at its weekly auction, even at six month interest rates of nearly twenty-seven percent, an increase of over seven percent from the successful sale one week before.72 This indicated that Mexico, which had over $25 billion in short-term bonds due before the end of the year, had practically lost its ability to get credit on the private international markets.73

On January 26, the IMF announced it would loan $7.8 billion to Mexico, making it the largest loan in its history.74 With the $40 billion U.S. package still on the table, however, the markets greeted this loan, which was part of the original $18 billion package, unenthusiastically.75 Congressional support eroded further as the crisis wore on, with Bob Dole stating "I don’t want to cast my vote to expose the American taxpayer to any risk at all."76 He hinted, however, at another option. The

68. Id.
70. Id. Congressman Jim Leach (R-Iowa) called this "[t]he most ad hoc process of development of legislation I have experienced in my public life." Id.
President, he said, "needs to step up to the plate . . . [s]omething dramatic has got to happen." 77

Finally, on January 30, the peso tumbled nearly ten percent to its lowest level in history, now forty-five percent below its pre-devaluation level. 78 The Mexican stock market also fell to its lowest close since October of 1993. 79 Reserves were rumored to be as low as $2 billion, down from $5.5 billion on January 9, while over $1 billion in tesobonos were to mature later in the week. 80 At the White House the next morning, congressional leaders informed the President that prospects for the plan were dim; support could be gained, they told the President, but only though slow "in the trenches" work, literally vote by vote. 81 Mexico was now on the brink of default, and the Congressional loan guarantee plan was all but dead. With few alternatives, President Clinton turned to the possibility of unilateral action under executive authority — and produced his own plan of assistance. 82

3. Mexico II

On January 31, the President announced a new package would be implemented immediately, without congressional approval. 83 Citing the emergency nature of the situation, Clinton withdrew the $40 billion guarantee proposal from Congress, stating that, although Congress might eventually have passed the guarantee legislation, "it will not do so immediately and therefore will not do so in time." 84

This new approach, called Mexico II, offered multilateral assistance totaling over $50 billion, made up of several elements:

—$20 billion in swaps and securities from the United States (an increase from the $9 billion in short term swaps previously announced);

—$17.8 billion from the IMF (an increase from the $7.8 billion previously announced);

77. Id.
79. Id. at C6.
80. Id.
82. Id.
—$10 billion from The Bank for International Settlements (an increase from $5 billion previously announced);
—$1 billion from Canada (previously announced);
—$1 billion from a group of Latin American nations; and
—$3 billion from U.S. commercial banks (also previously announced).\(^8\)

While the plan anticipated that initial funds would be drawn from the IMF, the Federal Reserve would also provide short term swaps. For medium term financing, the U.S. Treasury would provide swaps with maturities of three to five years, and securities guarantees with maturities of five to ten years, from an account known as the Exchange Stabilization Fund (ESF).\(^6\) Significantly, rather than the laundry list of various conditions which the Congress sought to impose, the United States conditioned these resources solely on an economic adjustment program approved by the IMF with additional U.S. monitoring. The new plan, like the earlier one, required Mexico to pay substantial fees and to provide collateral from the proceeds of its oil exports.\(^7\) In order to announce the package quickly, precise details were left for later negotiation.

Time pressures resulted in little consultation with the G7 and led to hostility over what some saw as a *fait accompli* regarding the use of IMF funds.\(^8\) This hostility, combined with the fears of several European nations that the Mexican aid would jeopardize IMF loans to Eastern Europe and Russia, resulted in some nations’ abstentions during formal voting.\(^9\)

The additional commitment by the IMF was unprecedented, with the $17.8 billion “standby credit” equivalent to 688 percent of Mexico’s usual borrowing limit.\(^9\) The “exceptional circumstances” clause in the

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86. Id.
87. Id.
88. Id. A German official noted that nations are usually given two to three weeks to approve such aid packages, and two to three days in emergency situations. In this instance, the official complained “we had less than an hour.” Nathaniel C. Nash, *European Nations Abstain on Vote for Mexican Plan*, N.Y. TIMES, Feb. 3, 1995, at A1, A4.
IMF charter allowed Mexico to override normal borrowing limits.91 Karin Lissakers, U.S. Executive Director at the IMF, revealingly demonstrated that multilateral organizations encountered the same difficulties as the congressional process: "The problem the U.S. has been grappling with is the disjunction between the speed of the markets and the speed that deliberative bodies decide."92

Like Mexico I, Mexico II was announced with a statement of support from the congressional leadership. This statement, issued by the President together with Speaker Gingrich, Senate Majority Leader Dole, House Minority Leader Gephardt, and Senate Minority Leader Daschle, specifically committed the leaders to the ideas that a pressing crisis situation existed and that the President had full authority to act in these circumstances:

We agree that in order to ensure orderly exchange arrangements and a stable system of exchange rates, the United States should immediately use the Exchange Stabilization Fund to provide appropriate assistance for Mexico. We further agree that under Title 31 under the United States Code, Section 5302, the President has full authority to provide this assistance. Because the situation in Mexico raises unique and emergency circumstances, the required assistance to be extended will be available for a period of more than six months in any twelve-month period.93

The markets showed their approval of the new plan, as Mexican stocks soared to their biggest one-day gain since 1988 and the peso regained more than ten percent of its value.94 Nevertheless, several House Republicans continued loudly to oppose the plan, publicly challenging Speaker Gingrich to kill the package in what one newspaper called a "party rebellion."95

E. The Final Agreement

Meanwhile, the Administration turned to the negotiation of the precise terms and conditions of the package. On February 22, the two

countries signed four agreements. These included: (1) a framework broadly defining the terms for U.S. aid; (2) a medium term exchange stabilization record specifying the terms for swap transactions of up to five years; (3) an agreement specifying the terms and conditions of U.S. guarantees on Mexico's debt securities for up to ten years including the fee structure to cover the Treasury's risk; and (4) an oil proceeds facility to provide an assured source of repayment.

These agreements started from the base of Mexico's then-developing IMF economic stabilization plan and built upward. The Agreement terms provide that Mexico will observe strict fiscal discipline by meeting specific targets in terms of spending reductions, maintaining budget surpluses, and tightening credit to shrink the real money supply. Mexican Development Bank lending will be reduced, and structural reforms and privatization will be accelerated in the key sectors of transportation, telecommunication, and banking. The agreements established a financial plan to govern the use of U.S. resources in restructuring and refinancing Mexico's obligations.

To monitor the plan in an effective manner, unusual steps were taken to obtain data and to gain and maintain transparency: Mexico agreed to publish the weekly balance sheets of the central bank and to share with U.S. officials all the information necessary to monitor the status of developments in the Mexican economy; to set up and use a "tranche" or installment system, with prior approval necessary for each disbursement; and to include an acceleration clause for the event that the use of previous drawings is found to be improper. The administration assured Congress that it would share all information necessary for effective assessment and monitoring.

To provide an additional incentive for Mexico to turn to market sources for cheaper capital as rapidly as possible, the plan set interest rates and fees substantially higher than the level of risk; a 2.5 percent premium above the yield of five to ten year U.S. Treasury Notes is applied to the first $10 billion, increasing to over three percent for the

97. Rescue Package, supra note 96.
98. For details on the accords, see Treasury Dept. Documents Describing Terms and Agreements Surrounding Mexican Stabilization Package, Released Feb. 21, 1995, BNA DAILY REP. FOR EXECUTIVES, Feb. 22, 1995, at M35. Unless otherwise noted, the following discussion is drawn from this source.
second $10 billion.\textsuperscript{100} The revenues generated by the crude oil and petroleum products exports of Pemex, the Mexican state-owned oil company, back repayment of the loans. Foreign customers of Mexico are instructed to make payments to certain U.S. commercial banks, which then have "irrevocable instructions" to transfer the funds to the Bank of Mexico’s account at the Federal Reserve Bank of New York. Should Mexico fail to meet its obligations, the U.S. Treasury would be allowed to "set off" repayments against this account.\textsuperscript{101}

F. Denouement

The next few days were still uneasy for Mexico. While the legal structure of the stabilization agreements was now in place, markets awaited Mexico’s compliance. Mexico had yet to announce its program of fiscal austerity and reform measures — the precise terms related to IMF conditionality.\textsuperscript{102} On March 9, after several consecutive days of extremely volatile trading, the peso hit 7.7 to the dollar, its lowest level since the beginning of the crisis, before closing at 7.45, well over fifty percent below its level since the December 20 devaluation that triggered the crisis.\textsuperscript{103}

The new Mexican domestic recovery plan was announced later that evening, and fortunately appeared to address the concerns of financial analysts and investors. This revision projected an inflation rate of forty-two percent, an economic decline of two percent, and an exchange rate of 6.0 to 6.5 pesos to the dollar.\textsuperscript{104}

Although virtually all of the stabilization plan for Mexico was now in place, the views of some in Congress remained unsettled and loudly negative.\textsuperscript{105} Bills were introduced prohibiting any lending over $5 billion from the ESF in a twelve-month period in the absence of congressional approval\textsuperscript{106} and conditioning aid on a presidential certification that all

\textsuperscript{100} Id. at 1A.
\textsuperscript{101} Id. at 7A.
\textsuperscript{102} For details, see WERTMAN, supra note 34, passim. See also Craig Torres & Dianne Solis, Peso Hits New Low As Mexico Dithers Over Recovery Plan, WALL ST. J., Mar. 9, 1995, at A17.
\textsuperscript{103} WERTMAN, supra note 34, at 8; Paul B. Carroll & Craig Torres, Mexico Unveils Program of Harsh Fiscal Medicine, WALL ST. J., Mar. 10, 1995, at A3.
\textsuperscript{104} WERTMAN, supra note 34, at 7–8. The program also dealt with various other economic variables, especially budget levels, tax rates, and minimum wage increases. Id.
\textsuperscript{106} Chandler, supra note 105.
requested documents concerning the crisis had been provided. These measures were often unrealistic in terms of practicality and the public interest in confidentiality. Ultimately the Mexican Debt Disclosure Act of 1995 established several explicit reporting requirements, but these, compiled quietly later, contain little that could be considered unreasonable.

Despite these sometimes reckless attacks, evidence is now accumulating that the crisis has eased and that the U.S.-led stabilization effort has greatly contributed to Mexico's partial recovery. While affected countries have maintained often precarious free-market reforms, Mexico has successfully reentered private international capital markets and its economic indicators are generally well within the target ranges set by the March IMF plan. Significantly, these targets have been maintained without any major political or social unrest.

Yet the qualified success and optimism now surrounding the U.S. stabilization plan for Mexico should not obscure the fundamental issues and questions which linger about the rescue effort and the ability of the United States to meet such crises in the future. Given the likelihood of similar or related problems elsewhere in the world, and the speed and effectiveness with which markets now operate, these questions demand both understanding and answers.

### III. LEGAL AUTHORITY AND FINANCIAL DIPLOMACY

The Mexican Peso Crisis not only revealed the existence of a new kind of financial emergency; it also exposed fundamental doubts about the legal and normative ability of the U.S. government to respond to such a crisis in a quick and effective way, if at all. As the above analysis demonstrates, even in this unprecedented era of speed-of-light financial firepower, the President and the congressional leadership, cooperating across party lines and acting jointly for eighteen days, could

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not garner support for a package which both declared fundamental to U.S. interests and foreign policy.\textsuperscript{110}

To reply that this was the result of poor presidential or executive branch leadership, or that Congress is now "isolationist," misses the heart of the issue. These are important factors, to be sure, but the central questions raised by the Peso Crisis are more fundamental: Is congressional-executive cooperation appropriate or desirable to effectively respond to the new economic crises of the 21st century? If so, in what manner and to what degree? How should legal authority be distributed?

These questions clearly implicate the separation of powers principle, often involved in the foreign affairs field. This is also precisely the target of much criticism. Even after the practical advantages to the United States of assistance became clearer, arguments persisted that the President's use of his authority was "legally tenuous and totally unprecedented."\textsuperscript{111}

Much of the criticism was visceral, often overlooking or ignoring plain statutory authority and prior usage. While there was little, if any, notice or criticism of the President's decision to commit $9 billion on his own authority early in the crisis, the $40 billion and $50 billion plans aroused much opposition regarding the lack of specific congressional appropriation. The sheer size of these later plans is understandably somewhat unsettling, but $9 billion is also a considerable figure.

This Part seeks to examine the basis and precise legal authority for the President's action to assist Mexico, and to place that action and its authority in the larger normative and constitutional context of foreign affairs powers. This analysis will demonstrate that not only did the President have clear, delegated statutory authority for the action ultimately taken, but also that this type of response is consistent with other constitutional and legal norms, especially for emergency or crisis situations.

\textbf{A. The Normative Background: Separation of Powers and Foreign Affairs}

The U.S. Constitution's separation of powers principle has proved to be a cornerstone of American government, especially in the domestic field. In foreign affairs, however, the principle raises some troublesome issues in the most vital areas of domestic security and international rela-
tions. Before examining the specific constitutional issues raised by the effort to assist Mexico, it is helpful to review the broader normative context from which they arise.

In the foreign affairs field, both political branches of government command vast powers. However, in contrast to reasonably clear divisions of responsibilities in the domestic area, in foreign affairs the Constitution is "often cryptic, ambiguous and incomplete." The majority of foreign affairs powers are exercised at least to some degree concurrently, often with a blurring of function. While the president is the "sole actor" in foreign affairs, he is not the sole policymaker. Competition between the branches often results in skirmishes along the uncertain boundaries of responsibility, and the courts' reluctance to find such political questions justiciable means these disputes remain unresolved. Today the balance of power is uncertain. As the Mexican crisis demonstrated, Congress is still assertive and vocal, but it is also subject to criticism — even by its own members — for inaction and micromanagement in its oversight of the executive.

The classic justification for the executive's traditional role as the "sole organ" in foreign affairs is that only the president has the required expertise, secret information, and capacity for quick action. In addition to the president's responsibilities as Commander-in-Chief, he alone negotiates treaties, appoints and receives ambassadors, and effectively creates foreign policy through his conduct of foreign relations. The Congress, meanwhile, declares war, authorizes or approves agreements, regulates foreign commerce, authorizes spending, and can pass other foreign policy related legislation. These powers obviously overlap. The protections or "checks" they create are not so much the result of precise legal distinctions as the "institutional competition, accommodation and compromise" that they engender. Indeed, Phillip Trimble has persuasively argued that disputes over foreign affairs authority:

> are mostly about influence, not law, because under a detached and narrowly "legal" analysis, Congress has virtual plenary authority over all aspects of foreign policy. The presidential foreign affairs power, on the other hand, may be superficially broad and open-

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112. ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 2 (1973). Note that the phrase "foreign affairs" does not appear anywhere in the Constitution.
113. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-4 at 219 (2d ed. 1988).
115. THE FEDERALIST No. 64 (Alexander Hamilton).
ended in scope, but it is narrow in practice — its exercise is limited to unusual, particular contexts where executive initiative is required to deal with unexpected problems and congressional acquiescence seems likely.¹¹⁷

Trimble further argues that, as a result of the president’s sole power to officially communicate with foreign governments, a “constitutional common law” of presidential foreign relations powers has developed “centering on protection of presidential leadership and initiative, subject to congressional review.”¹¹⁸

This view, while appealing, leaves unanswered a central difficulty; namely, what if an unusual, unexpected problem requires immediate presidential initiative, but congressional acquiescence is not likely or immediately forthcoming? In the past, such problems were usually of a military nature, and represented more or less direct threats to American lives. In such circumstances even the most assertive congressional opposition could be counted on to immediately recognize the stakes and support “emergency” executive leadership, even if some grumbling could be expected afterward. As the Mexican crisis demonstrates, financial issues are neither easily understood nor emotionally evocative. Thus, the new type of economic and ideological security crisis is less likely to engender congressional acquiescence to an executive fait accompli, even when speed of response is critical.

The Mexican crisis avoided the issue of emergency powers in its extreme form because the President sought congressional approval for the loan guarantees of Mexico I and then acted pursuant to delegated authority to commit funds for Mexico II. Both plans encountered normative and constitutional opposition which delayed action and worsened the crisis. To understand the merits of these criticisms, the powers on which they are based are summarized below, as are their implications for future financial rescue programs.

B. Specific Constitutional Powers and Issues

1. The Power of the Purse

It is generally accepted that “Congress has power to determine the financial resources and to shape the economic and legal devices that are available for use in presidential action, whether in foreign affairs or

¹¹⁸ Id. at 755.
This power is based on the appropriations clause of the Constitution: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . ." This restriction, in conjunction with the familiar regulatory powers listed in Article I, Section 8, gives Congress tremendous power to determine which devices the president may use or to make use contingent upon compliance with Congress' foreign policy preferences. In modern practice, with Congress unable to anticipate precisely national security needs, "Congress has increasingly ceded the initiative to the President and then used its power of the purse after the fact to ratify or restrict the presidential initiative."

Presidents retain some power in this area. For example, it is doubtful that Congress can use its appropriations power to nullify an enumerated power of the president, such as that to negotiate treaties. Moreover, because they cannot anticipate with precision future events, Congress creates various contingency funds — including the ESF, which provided funds for Mexico II — for presidential use. Significantly, these funds often have been used for purposes Congress never considered when it appropriated the money. For example, President Kennedy established the Peace Corps through an executive order in 1961, but Congress did not appropriate funds for the agency until seven months later. In the meantime, Kennedy financed the program by using funds from the Mutual Security Act. Thus, such use is not constitutionally unprecedented.

Other creative theories have been suggested which might affect the president's spending authority in foreign affairs, but these have drawn much criticism. The Reagan Administration suggested that if Congress refuses to appropriate funds for the President's foreign policy objectives, the President can nevertheless pursue these objectives through the solicitation of funds from the private sector and from foreign coun-

119. Tribe, supra note 113, § 4-4, at 221.
120. U.S. Const. art. I, § 9, cl. 7.
121. Tribe, supra note 113, § 4-4, at 224.
123. Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1351 (1988). This has never been tested. Id. The Supreme Court has held that Congress cannot punish executive branch employees by refusing to fund their salaries. United States v. Lovett, 328 U.S. 303 (1946).
125. Id. at 113–14.
Such a theory holds a potential attraction for presidential financial diplomacy, since Federal Reserve funds can be considered private, and the central banks of other countries are eager to avoid any U.S. oversight of their activities. But while such solicitation is permissible with congressional authorization, doing so without it, in the name of the executive's role as "sole organ" or as Commander-in-Chief, has been harshly criticized.\(^{128}\)

Another potential avenue of executive authority involves funds created by income, such as the profits the Treasury and Federal Reserve make in open market operations. Such profits caused the ESF to grow from its original appropriation of $2 billion in 1934 to over $25 billion at the time of the Peso Crisis. Since these profits are not appropriated by Congress, they might not be included in Article I, Section 9's concept of "money drawn from the Treasury." This argument is, however, subject to the criticism that assets acquired or controlled by the president, "by virtue of his office, must be considered to be the property of the United States, since the President cannot hold them in any other character."\(^{129}\)

Even though the funds are "created" through the actions of the Treasury and the Federal Reserve, it is argued that

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\text{[i]his same rule must apply to the rest of the executive branch since its members cannot have any greater rights in property than the President would have by virtue of office. It follows from this that funds acquired, or over which control is exercised, by virtue of office, are public moneys and therefore covered by the Appropriations clause.}^{130}\]

Nevertheless, one need only consult the debates of the founders to see that Congress' spending control is not absolute in every circumstance, and that disputes about executive spending in emergencies are not new. Professor Wilmerding's classic 1943 study of the spending power recounts these debates and asks:

Are the laws of appropriation of higher obligation than the laws of necessity, of self-preservation, of saving our country when in danger? Must we — the language is Jefferson's — "lose our coun-
try by a scrupulous adherence to the written law" and so "lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means"?

... [T]o most of the founding fathers, to Jefferson as well as to Hamilton, this interpretation of the duties of public officers would have been utterly repugnant. By them it was recognized that in so complicated a government as that of the United States cases must sometimes, perhaps often, arise, where it would become the duty of the executive authorities, in the exercise of the discretionary powers vested in them, boldly to set aside the requirements of the Legislature, trusting to the good sense of Congress, when all the facts of the case should have been explained, to acquit them of all blame; and it was felt that it would be not a public advantage but a public calamity if the Executive were to be deprived of the means of so exercising its discretionary authority.131

National debate over presidential spending powers first arose in 1793, and centered on the Giles Resolutions. Giles argued that it was "essential" that congressional appropriation laws "be strictly observed by the administrator of the finances."132 Opponents, such as William Smith of South Carolina, argued that this proposition was unsound:

yet it must be admitted, that there may be cases of a sufficient urgency to justify a departure from it, and to make it the duty of the Legislature to indemnify an officer; as if an adherence would in particular cases, and under particular circumstances, prove ruinous to the public credit... 133

Even proponents of the Resolutions admitted that

an Executive officer, pressed by some urgent and unexpected necessity, may be induced to depart from the authorized path of duty, and have great merit in so doing. This may be the case with the General of an army or the Admiral of a fleet, and, though more rarely, even with a Financier. But in such emergency, the officer so acting will embrace the earliest opportunity to explain the matter and obtain a justification, whilst the recent feelings arising from the occasion advocates his cause in the public mind.134

132. Id. at 5–6 (quoting 3 ANNALS OF CONG. 900 (1793)).
133. Id.
134. Id. at 6 (emphasis supplied).
These debates establish no time frame for this "explanation" and "justification," and any such guidelines likely would be irrelevant today. It is notable, however, that in the Mexican crisis the congressional leadership informed the President that they could obtain the votes for the loan guarantee package with sufficient time.

Wilmerding finds that, even though the founding era Republicans were much more austere than their Federalist opponents in matters of appropriation, they did not deny the executive, in an emergency, the "right to transcend the laws of appropriation," even if constitutional scruples had to be disregarded.

While the willingness of the executive to determine at what point he will disregard these scruples and "throw himself on the justice of his country and the rectitude of his motives" for foreign affairs initiatives might vary, the principle nevertheless illustrates that the president has both political power and liability in such situations. This is one of the inherent checks on the office.

2. The Foreign Commerce Clause & Currency Valuation Clause

Though not directly implicated in the Mexican crisis, Congress also has broad foreign affairs power as a result of the allocation of the power "[t]o regulate Commerce with foreign Nations . . ." and the power "[t]o coin Money, regulate the Value thereof, and of foreign Coin . . . ." The former power, used mainly in the trade field, together with the latter, which has been largely delegated to the Federal Reserve System, support U.S. involvement in the worldwide network of finance and banking, and thus explicitly involve Congress in economic diplomacy in these areas. Nevertheless, the president retains the power to negotiate agreements in these areas, an especially important role when pursuing multilateral solutions.

3. Custom

Custom plays a special role in the development of foreign affairs law, especially in the realm of security, because of the practical limitations on Congress' ability to prospectively delegate authority. In such situations, the president acts subject to congressional ratification or

135. Id. at 11 (quoting 5 THOMAS JEFFERSON, WRITINGS 544 (H.A. Washington ed., 1853–54)).
137. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 71 (1972).
138. Raven-Hansen & Banks, supra note 122, at 848.
countermand. Yet when the president "acts with sufficient consistency over time and Congress knowingly acquiesces, this interaction may create customary national security law. The custom evidences the political branches' joint interpretation of the President's constitutional or statutory authority." Significantly for the Mexican assistance program, practice and acquiescence have been treated as a gloss on a statute: "When the Executive has consistently acted under a statute in a manner known to Congress, and Congress has acquiesced in the practice by inaction, rejection of contrary legislation, or reenactment, the statutory authority for the executive practice is implied into the statute."

If these requirements for customary law in the national security area are transferred to the economic security area, profound implications are created for financial diplomacy, and specifically for the President's action to assist Mexico. Regarding the "consistency over time" element, the United States has had a standing swap line with Mexico since 1941, which has been drawn upon several times. Moreover, there exists a vast $30 billion swap agreement, known as the General Agreement to Borrow, which major industrial countries set up in 1962 among central banks and which continues to function to support major currency interventions. These funds and agreements support the dollar by defending other currencies. Such uses continue to the present day, with the ESF specifically drawn upon at least forty times since 1982.

The knowing acquiescence of Congress is also present, as operations of the Treasury and Federal Reserve are reported on a periodic basis, either through the monthly Federal Reserve Bulletin, periodic reports to oversight committees, or even through regular monthly confidential briefings of committee members concerning the ESF. Acquiescence to

139. Michael J. Glennon, Constitutional Diplomacy 15–16 (1990). Glennon argues such Presidential initiatives are "contingently constitutional; their validity depends upon congressional inaction." Id. at 16.


141. Id. at 850. See Haig v. Agee, 453 U.S. 280, 300 (1980); Zemel v. Rusk, 381 U.S. 1, 17–18 (1965) (holding that foreign affairs delegation takes "its content from history").


144. Bergsten Banking testimony, supra note 14. This technique was especially common in the currency crises of the 1960s, when the U.S. government regarded sterling as "the first line of defense for the dollar" and "frequently engineered rescues for it in our own self-interest." Id.


executive leadership and practice in this area can also be shown by the
persistent rejection by Congress of legislation intended to provide more
intensive congressional review. Indeed, periodic hearings on the ESF
and legislation proposing "accountability" through General Accounting
Office audits or congressional reapproval have produced virtually no
action by Congress.147 Periodic oversight hearings (including those on
the Mexican crisis) also produced little or no change. By its inaction,
Congress has repeatedly recognized the advantages of the executive's
speed, flexibility, and resources for confidentially, efficiently, and effec-
tively carrying out emergency operations. This "customary" usage
indicates the existence of well-settled understandings between the
branches, as well as ample precedent in this area, arguably the equiva-
 lent of national economic security "law."

C. Statutory Issues: Loan Guarantees and
The Exchange Stabilization Fund

The assistance plans for Mexico raised several statutory issues.
_questions concerning the earlier plan of loan guarantees by Congress
generally revolved around propriety, while questions about the Presi-
dent's initiative involved both propriety and authority. This Part argues
that the ultimate presidential initiative had solid grounding in statutory
text, history, and usage. Moreover, the debate surrounding the plans and
their different authoritative bases, together with the nature of a financial
crisis like Mexico's, argues that choice is valuable for presidential
leadership.

1. Loan Guarantee Issues

Interestingly, leaders first considered sole executive action through
the ESF and publicized this as early as December 30.148 The Administra-
tion instead decided to seek congressional involvement and approval of
the loan guarantee package for several reasons. First, they felt that
unilateral executive action, which would necessarily be unprecedented in
size, would be politically unwise with President Clinton facing a new,
Republican-dominated Congress. Moreover, because of the congressional
leadership's early support of the loan program, quick approval seemed
likely. Officials also believed the Fund's resources, then at about $25

147. See Katherine Danzansky, More Treasury Oversight Sought, CHRISTIAN SCI. MONI-
tOR, Aug. 21, 1990, at 8.
148. See Anthony DePalma, Mexican President Outlines Rescue Plan, N.Y. TIMES, Dec.
30, 1994, at D1.
billion, insufficient to deal effectively with Mexico's problem.\textsuperscript{149} In addition, the administration had little confidence in the ability or willingness of the IMF or other industrialized nations to help.\textsuperscript{150} Finally, an established loan program existed that provided ample precedent and safeguards.

While the loan guarantee approach to financial diplomacy may be preferable in terms of congressional oversight, its legal development illustrates its disadvantages in crisis situations. For most of the post-World War II period, the United States subsidized foreign country borrowing through loan guarantees and low-interest loans without attention to their budgetary implications.\textsuperscript{151} After losses associated with the third world debt crisis of the 1980s, however, Congress became wary of these costs, and perhaps the uses to which the loans were put, and established a new system of regulation under the Federal Credit Reform Act of 1990.\textsuperscript{152} Under the Act, the budget of the U.S. government must fully account for the net present value of the loan or guarantee — the "subsidy cost."\textsuperscript{153} Congressional appropriations for this cost, then, are subject to the unpopular label of "foreign aid."

However, a loophole arguably remains. Subsidy cost is "equal to the share of the loan or loan guarantee for which the U.S. Government is not in any way reimbursed."\textsuperscript{154} Thus, when the Bush Administration proposed a $10 billion loan package to allow Israel to finance the building of houses for refugees from the former Soviet Union, they fixed a "fee" equal to the subsidy value of these loans to function as an insurance premium, and to eliminate congressional misgivings over foreign aid.\textsuperscript{155} This Israeli plan served as the model for the original Mexico plan, but invited drawn-out disagreements over the appropriate size of the fee and the risks involved for U.S. insurance. Congress also considered supplemental fees, which would make the guarantees so expensive

\textsuperscript{149} Id.


\textsuperscript{153} Wertman, supra note 152, at 3.

\textsuperscript{154} Id.

\textsuperscript{155} Bradsher, supra note 58, at D1. The Israel loan package was later dropped when Congress appropriated the funds for the fees on its own initiative. Id.
that Mexico would turn to private commercial banks as soon as possible. 156

As the experience with the Mexico plan indicates, loan guarantee programs can become so burdened with conditions as to make the plan not negotiable within the United States government, or unacceptable to the recipient country. These factors point to inefficiency and potential ineffectiveness in crisis situations, and indeed proved to be such in the effort to assist Mexico.

2. Exchange Stabilization Fund Issues

The President’s use of the ESF provided an antidote to the limitations outlined above. While the interbranch relationship governing the use of the ESF may be less than ideal, the fund is more effective in emergency situations and is subject to many external checks, including customary law, direct congressional oversight, and the overall discipline imposed by financial markets.

“The vast majority of the foreign affairs powers the president exercises daily are not inherent constitutional powers, but rather powers that Congress has expressly or implicitly delegated to him by statute.” 157 Often these delegations include extraordinary amounts of discretionary authority. Constitutional scholar Arthur Holcombe identified 1934 as the beginning of the era of broad executive authority. 158 Interestingly, that year also marked the enactment of the Gold Reserve Act, which established the ESF and bestowed upon the executive branch the broad authority typical of that era’s foreign affairs delegations. 159 While many in Congress were surprised to learn that an amount as large as $20 billion could be committed from the Fund on the authority of the president alone, such is the result of ordinary statutory interpretation, and, accordingly, the conclusion of legal opinions from the Department of Justice and the Department of the Treasury. 160

Section 20 of the Gold Reserve Act established the ESF. Its original purpose was to stabilize the exchange value of the dollar. 161 As amended, however, the legislation authorizes the Secretary of the Treasury,

156. Press Briefing, supra note 93; Bradsher, supra note 151, at 51.
158. ARTHUR N. HOLCOMBE, OUR MORE PERFECT UNION 280 (1950).
with the approval of the president, to "deal in gold, foreign exchange, and other instruments of credit and securities" the Secretary considers necessary" if this is "[c]onsistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates..." In addition, the statute provides that "a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months." In 1977 it was made clear that the presidential determination required for loans of greater than six months was "to assure that, in general, ESF loans and credits are short-term, are used to counter market disorder, and do not undercut the IMF's role as the principal source of medium-term balance of payments financing."

To carry out the provisions under this section, Congress initially appropriated $2 billion from the profits realized from the revaluation of the gold holdings of the United States. Originally established as a two-year fund, the ESF was reviewed periodically until it became permanent in 1945 under the Bretton Woods Agreement Act. At that time $1.8 billion of the Fund's holdings were paid to the IMF as part of the U.S. subscription. The $200 million remaining in the Fund was to be "extremely useful in supplementing the work of the International Monetary Fund with respect to those countries that have close economic ties with the United States, and particularly those with which we now have bilateral stabilization agreements." The Fund receives income from interest on investments and loans, as well as from net gains made in foreign exchange transactions. At the time of the Mexican crisis, the ESF held approximately $25–30 billion.

The statute is also clear that the ESF is under the exclusive control of the executive branch, subject only to certain monthly and annual reporting requirements. Section 5302(a)(2) states:

163. Id.
164. Id. at 5 (analyzing S. REP. No. 1295, 94th Cong., 2d Sess. 11 (1976)).
166. Id.
169. Id.
Subject to approval by the President, the fund is under the exclusive control of the Secretary, and may not be used in a way that direct control and custody pass from the President and the Secretary. Decisions of the Secretary are final and may not be reviewed by another officer or employee of the Government.\textsuperscript{170}

The basic challenge to the assistance plan for Mexico revolved around the duration and type of credit provided. Mexico II provided for short- and medium-term swaps, as well as securities guarantees with maturities of five to ten years.

The statutory authority providing for the type of assistance is broad.\textsuperscript{171} Furthermore, the statute specifies no time limit other than that requiring presidential certification of "unique or emergency circumstances" if loans or credits are to be for more than six months.\textsuperscript{172} Congress has never placed any term limits on any ESF loans, and indeed has recognized that longer-term efforts are sometimes necessary in "unique or exigent circumstances . . . includ[ing] natural disasters, trade embargoes, unforeseen economic developments abroad, political assassinations, or other catastrophic events."\textsuperscript{173} Indeed, Congress' certification requirement does not restrict presidential authority, but rather requests "only that the President recognize that extraordinary measures be reserved for extraordinary situations."\textsuperscript{174} In the Mexican situation, President Clinton submitted the required notification to Congress on March 9, 1995.\textsuperscript{175}

Oversight is always an issue of concern to Congress, but the explicit unreviewability language in the statute, together with customary practices stretching over sixty years, acknowledge the freedom and confidentiality the executive must have in the highly complex area of foreign exchange market stability. Congress also recognizes that expertise and perspective are necessary to determine whether and when particular circumstances are unique or sufficiently serious to warrant intervention.

It is clear that both approaches to the crisis were legally sound, and both had distinct advantages and disadvantages. The loan guarantee program ensures congressional cooperation, but that cooperation comes

\begin{itemize}
  \item \textsuperscript{170} 31 U.S.C. §5302(a)(2) (emphasis added).
  \item \textsuperscript{171} See 31 U.S.C. §5302(b).
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Treasury Op., supra note 45, at 11 (quoting S. REP. No. 1295, 94th Cong., 2d Sess. 11 (1976)) (emphasis added).
  \item \textsuperscript{174} Id.
  \item \textsuperscript{175} See President's Message to Congress on the Financial Crisis in Mexico, 31 WKLY COMP. PRES. DOC. 390 (Mar. 9, 1995).
\end{itemize}
at a high cost, especially in emergency situations. Similarly, while the use of the ESF ensures a faster, highly tailored response, it risks oversight disputes and places on the executive a high degree of political risk.

IV. RECONCILING AUTHORITY AND NECESSITY

A. Achieving Accountability Without Paralysis

Mexico's sudden and severe difficulties were labelled the "first crisis of the 21st Century" for the United States with good reason. The crisis demonstrated that, in contrast to the military security issues which dominated the Cold War era, the largest challenges we now face deal with economic security. International financial markets, at least for the present, have outrun the regulatory ability of national governments. But while markets are extremely large and diffuse, unilateral and multilateral power exist to meet the crises they create. The Mexican Peso Crisis questions whether governments can translate that power quickly into an effective response, and whether any particular response is appropriate.

Answering these questions requires a careful rethinking of the relationship of authority and necessity in economic security issues. Obviously, reconciling authority and necessity neatly is impossible in this "frontier" area of concurrent power; the tension results not so much from the subject matter or situation, as from the Constitution itself. Guiding this reconciliation are the twin principles of timely action and accountability, and the Mexican crisis provides lessons regarding both.

The new kind of crisis we face is not only economic, but also psychological; it is a crisis of market confidence. While Congress maintains control of foreign affairs largely through its appropriations power, and seeks to limit disbursements to both tighten control and maintain budgetary discipline, this new kind of crisis requires that vast resources will be committed. At least initially, the fact of the assistance is more important than its details. In such circumstances, large off-budget contingency funds and the broad executive authority to use them, subject to later congressional oversight and political and market risk, appear necessary and advantageous.

Such crises also require careful consideration of timing — specifically, the need for speed. To paraphrase Robert Bartley, we think of trade as it slowly splashes along in ships, while its inevitable complement — capital — now travels at the speed of light.176 Clearly, to cope with this reality, the government must be able to respond in a timely

manner, relative to the circumstances. The recent experience with Mexico demonstrates that these new crises require executive leadership and authority.

However unhappy it may be, under the Constitution's separation of power structure, democracy comes from the Congress, while security comes from the President.\(^\text{177}\) History provides a long list of the "undemocratic" actions of presidents taken in the name of national security, but such questionable unilateral actions in the economic field are clearly less desirable due to constitutional, political, and practical limitations. It is important to remember that "undemocratic" does not mean "unconstitutional." The framers believed the president could use military force "to repel sudden attacks"\(^\text{178}\) and an appropriate analogy could be made to economic emergencies, especially those, like Mexico's, that threaten global instability. Even though the president does not enjoy a Commander-in-Chief power over economic affairs, the key question is whether vital interests are implicated. Laurence Tribe has argued in the national security context that the fact that a measure deals with "security" does not justify unilateral action, but rather "[t]he key question should be whether waiting for congressional action would do irreparable harm to the vital interests that executive intervention is designed to serve."\(^\text{179}\)

While executive action may be a useful preventative to paralysis, the problem of accountability remains. Congressional acquiescence would restore the democratic element to the decision-making process. The Mexican crisis points to another difficulty: What if immediate acquiescence is not likely, or not forthcoming? Can the markets involved survive the delay until decision by Congress? These difficulties illustrate the value of statutes providing broad authority to act and carefully circumscribed review and oversight provisions for those cases in which the president is willing to risk political capital.

The existence of such broad authority rests on sound principles and policy considerations. First, the decision to take action, and to select the appropriate form of that action, is the heart of the executive function. Trimble argues that "[t]he foreign affairs prerogative protects the ability of the Executive, subject to ex post facto review by Congress, to deter-


\(^\text{179}\) Tribe, supra note 113, § 4-7, at 233, n.13.
mine within each particular instance what action to take or not to take in communicating and negotiating with foreign governments and other international actors to settle pressing international problems."\textsuperscript{180} Second, beyond the familiar justifications of \textit{The Federalist}, the structure of the presidency lends itself to providing better national leadership than the Congress\textsuperscript{181} in terms of information resources, bureaucratic structure, and electoral incentives. As Steven Calabresi recently argued, national foreign policy initiatives by the President necessarily have quite differentiated regional impacts\textsuperscript{182} which risk burdening one area. Normatively, then, these require the assent of Congress to counter the possibility that the president might "write off" one region to gain the support of the others.\textsuperscript{183} However, foreign policy implementation, those acts over which Congress has primary authority,\textsuperscript{184} involve a reversal of these risks, as regionally biased committee chairs and Members try to influence a nationally approved policy to benefit their own electoral districts.\textsuperscript{185} The president, with his national perspective, is called for as a check on this tendency. Financial assistance plans such as the one in Mexico involve national interests but congressionally controlled means, and thus argue for a broad presidential role despite the "plenary" spending authority of Congress.

The ESF statute provides for accountability in terms of periodic reporting requirements, although several other devices also exist to ensure effective oversight. In addition to normal channels of political accountability,\textsuperscript{186} the executive faces other disciplining factors because of the nature of the crisis. First, because of the nature and extent of international financial markets, management errors and attempts to "fool" them are punished with alacrity. The markets' thirst for information means that any attempt to conceal relevant information is usually short-lived. Thus the market plays an oversight role of its own, and presidents will pay a heavy price for ill-considered commitments. Second, because cooperation with Congress aids confidence and promotes deterrence, it is sought after. Third, spending plans associated with assistance efforts must be known publicly to be effective in promoting

\textsuperscript{180} Trimble, \textit{supra} note 117, at 757.
\textsuperscript{181} Nogee, \textit{supra} note 177, at 193.
\textsuperscript{182} Consider, in this regard, NAFTA, defense buildups, base closings, embargos and plant seizures.
\textsuperscript{184} A good example of this is Congress' spending power.
\textsuperscript{185} Calabresi, \textit{supra} note 183, at 87–88.
\textsuperscript{186} These include popular support, future cooperation of Congress, and the like.
confidence; that hidden or secret funds would be useless makes oversite easier. Finally, the multilateral character of assistance programs, which involve not only the IMF, but also other central banks and our own independent Federal Reserve and related bodies, provides accountability.

B. Reforms

A crisis presents opportunities in addition to dangers, and useful proposals for reform are beginning to emerge. Fundamental to reform at all levels is obtaining a better understanding of the factors that produced — and ameliorated — the crisis.¹⁸⁷

The main challenge of reform is to modernize institutions with something like an international bankruptcy or liquidity mechanism without creating an incentive for countries who know assistance will be forthcoming to persist with bad policies. In view of its original purposes, the IMF will likely be at the center of reform efforts. The G-7 included it in agreements concerning the bare outlines of a new “safety net.”¹⁸⁸ There is, however, much opposition to an increase of the Fund’s role.¹⁸⁹ Such international reform efforts, however, have the advantage of shared responsibility for financial assistance (thus lessening financial spheres of influence), a more broadly based leverage on principles (such as free market reforms), and even have a better record of receiving repayment than do individual countries.¹⁹⁰ Proposals include various forms of “deposit insurance” or the creation of an “International Bondholders Insurance Corporation” to monitor and value countries’ econom-

¹⁸⁷. Some countries view currency speculators as the cause of the crisis: Asian central bankers held meetings to share the identity of these persons, while Malaysia proposed to fine and even “cane” violators! Floyd Norris, *Mexican Shadow Falls on Emerging Markets*, N.Y. TIMES, Feb. 1, 1995, at C1, C6. Such efforts, of course, address the symptoms rather than the causes of the crisis.


ic policies. The presence of international facilities does not, however, guarantee their use, and the United States must be prepared to act or seek a coalition unilaterally, just as it does in the military context.

The ESF and its related statutory authority provide a flexible and effective method to respond to the crisis, and should be preserved. This alternative is not ideal, however, and congressional cooperation should be sought when possible. Thus, the loan guarantee mechanism should also be preserved as an alternative method of assistance, and the president should be allowed to choose the means best suited to the situation. This might also have a collateral benefit of decreasing the harsh conditions congress attaches to loan guarantees as the president could opt for the ESF alternative if these conditions were too burdensome.

Some substantive changes also can be suggested. To solve the problem of lack of initiative for an unpopular program, congress could require the president to make a more detailed showing of "unique or exigent circumstances," which could then be tested by an adversarial congressional review. Such a procedure, suggested for another emergency economic powers statute by Harold Koh, might serve an educational and leadership function, as well as provide for less biased and superficial "sound bite" type debate. Similarly, a core consultative group could be established, perhaps including Congressional or Federal Reserve officials with specific expertise, who could provide a balanced and broad-based opinion on whether an economic emergency existed and whether such warranted a response from the United States. The group would add a congressional or independent voice beyond the party leaders' to the executive branch choice-of-means discussion, and would promote a broader, more centralized congressional response. Such a group could also be the recipient of sensitive data from other central banks or multilateral institutions; its creation could thus supplement reforms recognizing interdependence and the need for shared information at the international level.

CONCLUSIONS

The Mexican Peso Crisis may have been the first economic emergency of its kind, but it almost certainly will not be the last. In the absence of international institutional capabilities equal to the task, the United States must stand ready to intervene immediately, forcefully, and effectively to protect its national interests when they are threatened by global financial developments.

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Confronting such emergency situations in an atmosphere of shared but separated powers is difficult, as the Mexican Peso Crisis demonstrated. In such circumstances, power sharing is implicit; the difficulty arises over when cooperation or oversight should begin, and over the scope of the executive's independent initiative. The Mexican crisis revealed that the executive branch was best suited, both structurally and politically, to determine the need for assistance in a timely manner. The crisis revealed the severe weaknesses of Congress, while emphasizing that body's important confidence building and oversight roles during the negotiation of framework agreements and the implementation of executive policies.

In sum, the flexibility inherent in having a choice of means allowed the President to respond to the crisis adequately, if somewhat belatedly, and to protect what he believed were politically defensible interests of the United States. Such a result is consistent with our "checks and balances" system of government. Congressional critics should appreciate the useful discretionary role of the executive branch and recognize its historical, normative, and legal justifications. Moreover, a better understanding by both branches of economic events and financial policy tools, as well as the development of an enhanced role for multilateral institutions, would be useful improvements. Such efforts and reforms will be necessary as the United States assumes its responsibilities for economic security and world leadership in the next century.