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Indiana Law Journal

Volume 52 | Issue 2 Article 7

1-1-1977

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United States Senate

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Recommended Citation
Sparkman, John (1977) "Checks and Balances in American Foreign Policy," *Indiana Law Journal*: Vol. 52: Iss. 2, Article 7.
Available at: http://www.repository.law.indiana.edu/ilj/vol52/iss2/7

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Checks and Balances in American Foreign Policy

JOHN SPARKMAN*

Belatedly, but with diligence and determination, Congress has been reclaiming its constitutional powers in the making of foreign policy. For some twenty years, the period roughly between the Second World War and the Vietnam War, Congress had permitted its authority to atrophy, acquiescing repeatedly in executive incursions upon its war and treaty powers. President Truman committed the Armed Forces to war in Korea without congressional sanction, and President Johnson sent American forces to Indochina with only the dubious and disputed authority of the Gulf of Tonkin Resolution.[1] So too, in instances ranging from the Anglo-American destroyers-for-military bases deal of 1940[2] to a series of military base agreements with Spain in 1953,[3] the Executive contracted significant foreign agreements without the advice and consent of the Senate or other form of congressional authorization. Until the late sixties, when the domestic controversy over Vietnam generated new and more assertive attitudes, only occasional, isolated voices were raised over executive incursions on congressional authority.[4]

The major cause, both of Congress' decline and also of its recent resurgence, has been the long series of crises in our foreign relations since the outbreak of World War II. When President Roosevelt circumvented the Senate's treaty power to provide Great Britain with fifty American destroyers, it was not, presumably, because he wished to usurp the power of the Senate but because the ships seemed essential to save Great Britain from an apparently imminent German invasion, and there was no time for a protracted debate in the United States Senate.[5] Similarly, when President Truman committed the armed forces to Korea in 1950[6] without congressional authorization and when President Kennedy proclaimed his "quarantine" on the shipment of offensive missiles to Cuba in October 1962,[7] having briefed the congressional leadership only two hours before announc-

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[1]Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

[2]3 DEP'T STATE BULL. 199 (1940)(letter of Attorney General Jackson deals specifically with the authority to use executive agreements in lieu of a formal treaty).

[3]The initial agreement can be found at 29 DEP'T STATE BULL. 436 (1953).

[4]*See, e.g., Bedtime Thoughts,* TIME, Dec. 1, 1967, at 14; *White House vs. Congress—Is Power Balance Shifting?,* U.S. NEWS & WORLD REP., Apr. 15, 1968, at 95.

[5]*See* note 2 *supra.*

[6]Radio and Television Report to the American People on the Situation in Korea, Sept. 1, 1950, HARRY S. TRUMAN, PUB. PAPERS 1950, at 609.

[7]Proclamation No. 3504: Interdiction of Offensive Weapons to Cuba, Oct. 23, 1962, JOHN F. KENNEDY, PUB. PAPERS 1962, at 809.

ing his decision on television, neither President was engaging in a deliberate power grab; each was acting urgently in what was judged to be a grave national emergency.

The constitutional mood of those years was perhaps best expressed by Secretary of State Dean Acheson in testimony before Senate committees in 1951 on the stationing of American troops in Europe.[8] Not only did the Secretary affirm the President's right to send American soldiers abroad, but he thought it inappropriate under the circumstances to belabor constitutional issues. He stated: "[W]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."[9]

REDRESSING THE IMBALANCE

There came in due course another critical hour which had a quite different effect. As the war in Indochina dragged on in costly stalemate and domestic controversy over American involvement increased, Congress became increasingly concerned, not only with its own role with respect to the war as symbolized by the Gulf of Tonkin Resolution, but also with those broader issues of "who has the power to do this, that, or the other thing. . . ."[10] Vietnam became the catalyst for an extended self-examination by Congress as to its own proper role in the making of foreign policy and for the subsequent reaffirmation of long neglected checks and balances.

The first, tentative act of reaffirmation was the hortatory National Commitments Resolution adopted by the Senate in 1969.[11] Expressing the sense of the Senate that a "national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute or concurrent resolution of both Houses of Congress specifically providing for such commitment,"[12] the National Commitments Resolution was adopted by the Senate by the overwhelming vote of 70 to 16.[13] It did not carry the force of law and was intended primarily as a warning to the executive branch.

That warning went unheeded. The Nixon Administration sent American military forces into Cambodia in 1970[14] and Laos in 1971

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[8]*Assignment of Ground Forces of the United States to Duty in the European Area: Hearings on S. Con. Res. 8 Before the Senate Comm. on Foreign Relations and Armed Services,* 82d Cong., 1st Sess. (1951).

[9]*Id.* at 93.

[10]*Id.*

[11]115 CONG. REC. 17,245 (1969).

[12]*Id.*

[13]*Id.*

[14]The President's Address to the Nation, 6 WEEKLY COMP. OF PRES. DOC. 596 (April 30, 1970).

without congressional authorization and also continued to make significant foreign commitments by executive agreements unsupported by congressional authorization. In 1970, for example, ignoring the urging of the Senate Foreign Relations Committee that a renewed military bases agreement with Spain be submitted as a treaty,[15] the Administration concluded an executive agreement containing specifications that seemed all but indistinguishable from those of a formal alliance.[16] The agreement committed each party, among other things, to "support the defense system of the other" and also established a Spanish-American joint committee on defense matters.[17]

In the wake of these and other events, Congress, in 1972, adopted the Case Act requiring the Executive to transmit all executive agreements to Congress for its *information,* but not for its approval or disapproval, within sixty days of their coming into effect.[18] The President was also authorized to place any such agreement, as he saw fit, under an injunction of secrecy.[19] The significance of the Case Act was perhaps best expressed by the historian Professor Ruhl J. Bartlett, who, testifying in support of the Act before the Senate Foreign Relations Committee, judged the measure to be "so limited in its scope, so inherently reasonable, so obviously needed, so mild and gentle in its demands, and so entirely unexceptionable that it should receive the unanimous approval of Congress."[20]

The next legislative affirmation of congressional authority, and the most important to date, was the War Powers Resolution of 1973.[21] Requiring the President promptly to report any unauthorized use of the Armed Forces, the War Powers Resolution limits such actions to sixty, or at the most ninety, days unless continuation is authorized by Congress. The Resolution also specifies that Congress may terminate unauthorized military actions earlier by concurrent resolution.[22] Adopted in 1973 over President Nixon's veto,[23] the War Powers Resolution has not yet been put to a major test, but it appears to be a sound, realistic and potentially effective codification for modern conditions of the congressional war power.[24]

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[15]*See* 116 CONG. REC. 26,968 (1970) (speech by Senator Fulbright).

[16]Finney, *U.S. and Spain Sign Accord on Bases,* N.Y. Times, Aug. 7, 1970, at 1, col. 7.

[17]*U.S. and Spain Sign Agreement of Friendship and Cooperation,* 63 DEP'T STATE BULL. 240, 241 (1970).

[18]1 U.S.C. § 112b (Supp. V 1975).

[19]*Id.*

[20]*Transmittal of Executive Agreements to Congress: Hearings on S. 596 Before the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess. 23 (1971) [hereinafter cited as *Transmittal of Executive Agreements to Congress*].

[21]50 U.S.C. §§ 1541-48 (Supp. V 1975).

[22]*Id.*

[23]119 CONG. REC. 36,198, 36,222 (1973).

[24]U.S. CONST. art. I, § 8, cls. 11-16 (basic source of congressional war power).

Congress has also acted to strengthen its hand in other areas. The Congressional Budget and Impoundment Control Act of 1974[25] gives Congress the ability, through new Budget Committees and a Congressional Budget Office, to determine total revenues, expenditures and debt, to relate and balance these with each other, and thus to determine our national budget priorities. In the spring of 1976, twenty years after legislation to oversee intelligence activities was first considered, and after an extensive inquiry by a special intelligence panel headed by Senator Church, the Senate established a permanent Select Committee on Intelligence with legislative and budgetary authority over the CIA and other agencies, including the Defense Department and the FBI, which engage in intelligence activities.[26] Jurisdiction over the FBI is to be shared by the new intelligence panel and appropriate Senate standing committees.[27] Another noteworthy, though scarcely noticed, step toward strengthened checks and balances in our federal system was taken on September 14, 1976, when President Ford signed legislation—the product of long and careful study by a special Senate committee—terminating by 1978 the four separate states of "national emergency" now in effect.[28] Going back to President Roosevelt's "bank holiday" of 1933, these accumulated and unrepealed "national emergencies" have conferred extensive and unusual powers upon the President, powers which will be relinquished.

Clearly, Congress has been on the move, too much so, no doubt, for all-out advocates of executive power.[29] Granting that there is some danger of Congress intruding upon the constitutional powers of the Executive in overreaction to recent crises such as Vietnam and Watergate, the initiatives described above seem to be, on the whole, sound. On the basis of testimony before the Senate Foreign Relations Committee by numerous constitutional scholars, that view appears to be shared by a majority, if not indeed a consensus, of the academic and legal communities.

There is one particular area in which further congressional action is necessary for the restoration of checks and balances in foreign policy making: the undefined scope of executive agreements as a means of contracting significant foreign engagements. The Case Act, as Professor Bartlett noted, was indeed "mild and gentle."[30] The Foreign Relations Committee commented in its report on that legislation that it "does not purport to resolve the underlying constitutional question of the Senate's treaty power. It may well be interpreted, however, as an invitation to further consideration of this critical constitutional issue."[31]

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[25]31 U.S.C. § 1301 (Supp. V 1975).
[26]S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. S7563 (daily ed. May 19, 1976).
[27]*Id.* §3b.
[28]National Emergencies Act, 50 U.S.C. §§ 1601, 1621-22, 1631, 1641, 1651 (Supp. V 1975).
[29]*See, e.g., Is It Constitutional,* NEWSWEEK, Sept. 4, 1967, at 36.
[30]*See Transmittal of Executive Agreements to Congress, supra* note 20.
[31]S. REP. No. 92-591, 92d Cong., 2d Sess. 5 (1972).

Since the adoption of the Case Act in 1972, it has been evident on several occasions that fundamental questions relating to the Senate's treaty power and the proper scope of executive agreements remain unresolved. In 1976, for example, the Ford Administration acceded to requests by senators that the latest renewal of our Spanish military bases agreement, which in all previous instances had been contracted by executive agreement, be submitted to the Senate as a treaty. This was of course most welcome, but the Administration's responsiveness may well have been influenced by the desire of the Spanish government for a treaty with its greater solemnity and further expectation that the required two-thirds vote for advice and consent could be readily obtained.[32] Whether the Administrtion would have submitted the Spanish agreement if its approval had been more doubtful is by no means clear. Even less clear is whether the Executive considered itself constitutionally obligated to submit the agreement. The most crucial question, however, to which I shall return, is who is the proper authority to decide upon the merits of such an agreement.

Another, perhaps even more striking, illustration of the prevailing uncertainty as to the proper scope of treaties and executive agreements arose in connection with the second Israeli-Egyptian Sinai disengagement agreement of 1975. Congress was asked at that time to authorize the assignment of American civilian technicians to surveillance duty in the Sinai.[33] As the Foreign Relations Committee deliberated on this request, it quickly became apparent that the proposal to station American technicians in Sinai, the only item submitted to Congress for authorization, was in fact an integral part of a broader package of agreements and proposals among Egypt, Israel and the United States. When asked whether the associated "memorandum of agreement" and statements of "assurances" by the United States — all pertaining to future aid and the American role in upholding the separation agreement and seeking further agreements— constituted binding agreements on the United States, the Secretary of State advised the Foreign Relations Committee that the undertakings involved should not be understood as commitments binding on the United States but rather as statements showing a "tendency, a mood, an attitude."[34] Further pressed on the matter, the State Department acknowledged that the two memoranda of agreement with Israel were "properly described under United States constitutional practice as 'executive agreements.' "[35]

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[32]The Senate did indeed approve the treaty by a vote of eighty-four to eleven. 122 CONG. REC. S9996 (daily ed. June 21, 1976).

[33]22 U.S.C. § 2441 (Supp. V 1975).

[34]*See* S. Rep. No. 94-415, 94th Cong., 1st Sess. (1975) (hearings with Secretary of State Kissinger were held in executive session).

[35]Letter from the State Department Legal Adviser to the House International Relations Committee dated September 18, 1975, reprinted at 121 CONG. REC. S17,964 (daily ed. Oct. 9, 1975).

Another factor contributing to the Senate's growing concern for its treaty power has been the accumulation of instances suggesting a reversal of the traditional distinction between the treaty as the proper instrument of a major commitment and the executive agreement as the instrument of a minor one. For example, the Sinai "memoranda of agreement,"[36] base agreements with Portugal and Bahrain in 1972,[37] and the succession of base agreements with Spain prior to 1976[38] were all contracted by executive agreements without direct congressional sanction. Yet, treaties have been submitted to the Senate recently on such matters as the regulation of shrimp fishing off the coast of Brazil,[39] the legal status of three uninhabited coral reefs in the Caribbean,[40] the revision of international radio regulations[41] and the conservation of polar bears.[42]

The foregoing are some of the events and incongruities which have persuaded members of the House and Senate that legislative guidelines are needed to define and restrict the scope of executive agreements. Accordingly, the Senate Foreign Relations Committee held preliminary hearings on a proposed "Treaty Powers Resolution"[43] which would affirm the sense of the Senate that "significant" foreign agreements should be submitted as treaties to the Senate for its advice and consent, and that in determining whether an international agreement properly constitutes a treaty the President should seek the advice of the Senate Foreign Relations Committee.[44] The resolution affirms that in the case of any agreement which has not been submitted as a treaty, the Senate may nonetheless make a finding that such an agreement should properly have been so submitted. Upon such a finding, the Senate's own rules would permit a point of order to be raised against consideration of any legislation which would provide funds to

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[36]73 DEP'T STATE BULL. 466 (1975).

[37]66 DEP'T STATE BULL. 279 (1972).

[38]*See* note 3 *supra.*

[39]Agreement Concerning Shrimp, March 14-Dec. 22, 1975, Brazil-United States, 74 DEP'T STATE BULL. 96 (1976). For the text of this treaty, see EXEC. DOC. D, 94th Cong., 1st Sess. (1975).

[40]*See* Message of transmittal of Treaty on Quita Sueno from President Nixon to the Senate, 68 DEP'T STATE BULL. 144 (1973) (this proposed treaty was not ratified by the Senate). For the text of this treaty, see EXEC. DOC. A, 93d Cong., 1st Sess. (1975).

[41]Partial Revision of the Radio Regulations, 1959, Geneva, for Radiotelephone Coast Stations, *entered into force* Jan. 1, 1976, 75 DEP'T STATE BULL. 759 (1976) (the treaty involved many parties, however, the agreement entered into force for the United States on Apr. 21, 1976). For the text of this treaty, see EXEC. DOC. G, 94th Cong., 1st Sess. (1975).

[42]Agreement on the Conservation of Polar Bears, *entered into force* May 26, 1976, 75 DEP'T STATE BULL. 743 (1976) (entered into force for the United States on Nov. 1, 1976). For the text of this treaty, see EXEC. DOC. A, 94th Cong., 1st Sess. (1975).

[43]S. Res. 486, 94th Cong., 2d Sess., 122 CONG. REC. S11568 (daily ed. July 2, 1976). *See generally Treaty Powers Resolution: Hearings on S. Res. 486 Before the Senate Comm. on Foreign Relations,* 94th Cong., 2d Sess. (1976) [hereinafter cited as *Treaty Powers Resolution: Hearings*].

[44]S. Res. 486, 94th Cong., 2d Sess., 122 CONG. REC. S11568 (daily ed. July 2, 1976).

execute the agreement in question, unless that agreement were subsequently submitted to the Senate as a treaty.[45]

The House International Relations Committee took testimony on a different proposal. Derived from a bill originally sponsored by Senator Ervin of North Carolina, and actually approved by the Senate in 1974, the "Executive Agreements Review Act"[46] would authorize Congress to invalidate or veto, by concurrent resolution, any executive agreement involving a "national commitment" within sixty days of its obligatory transmission to Congress. However, in situations judged by the President to be emergencies the limit for congressional disapproval of the agreement would be limited to ten days.[47]

Both of these approaches warrant careful consideration; neither should be embraced precipitously. Conceding, as I believe we must, the need for new legislation in this area, we must also take care not to act hastily on the basis of strong and bitter memories of recent events. Although it would not seem necessary to conduct another exhaustive review of issues which have been studied extensively over the last several years, there is much to be said for a careful, deliberate review of current legislative proposals dealing with treaties and executive agreements. Without haste, but without undue delay either, Congress must look toward a means of exerting its proper role in the contracting of international agreements which is both effective and flexible, one which will restrict but not incapacitate the Executive—a means which will weather the test of experience.

THE VIEW FROM FOGGY BOTTOM

Measured by the test of their *own* experience, executive branch officials tend to find little merit and much inconvenience in congressional assertions of prerogative. Invoking the "separation of powers" as though that term implied totally separated powers, executive branch officials sometimes seem indifferent to, or dismayed by, the closely related doctrine of checks and balances. The doctrine of checks and balances implies not total separation but limited, carefully defined and, from the standpoint of popular liberties, salutary intrusions by each branch of the government into the domains of the others.

Among State Department lawyers the favored concept is "flexibility," a term which to congressional ears often sounds like a euphemism for letting the President and his advisers do as they please. In testimony opposing the National Commitments Resolution in 1967, Under Secretary of State

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[45] *Id.*

[46] H.R. 4438, 94th Cong., 1st Sess. (1976), as reprinted in *Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations,* 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as *1976 House Hearings*].

[47] *Id.*

Nicholas deB. Katzenbach asserted that the President has "the responsibility for controlling and directing all the external aspects of the nation's power;" that Congress nonetheless "must be a participant in formulating the broad outlines of our foreign policy;" that controversies between legislative and executive branches over the proper division of power "have been settled in the end by the instinct of the nation and its leaders for political responsibility;" and that "history has surely vindicated the wisdom of this flexibility—of this essentially political approach to the conduct of our foreign affiars."[48] Again in 1971, testifying in opposition to what was to become the Case Act, the Legal Adviser to the State Department, John R. Stevenson, argued that a reliable flow of information to Congress could best be provided by "practical arrangements" of a non-legislative nature rather than by legally binding procedures.[49]

The most recently communicated position of the executive branch reflects two basic propositions: first, the President has independent constitutional authority to enter into international agreements; and second, the choice of instrumentality, whether treaty or executive agreement, lies exclusively with the President.

In a memorandum signed by the State Department's then Legal Adviser, Mr. Monroe Leigh, it was stated categorically that the President's authority to conclude international agreements solely on the basis of his "independent Constitutional powers" is "not open to question." The constitutional provisions cited as the bases of this presumed authority are those in article II which vest the executive power in the President, designate him Commander in Chief, authorize him to "receive Ambassadors and other public ministers," and commission him to "take care that the laws be faithfully executed."[50] These provisions, in the State Department's view, "empower the President to negotiate and conclude executive agreements without reference to treaty or statutory authority."

Equally noteworthy among the issues which have arisen in discussion of the Senate's pending "Treaty Powers Resolution"[51] is the question of *who* is to decide the form which an international agreement will take. The official view of the executive branch, as expressed by the State Department's Legal Adviser, is that the President alone has the authority to decide whether an international agreement will take the form of a treaty or an executive agreement. Conceding that the President's choice is "not completely unfettered," since he is expected to comply with established customs and practices, and that in our constitutional practice there is a "presumption that agreements of exceptional national importance will be

[48]*U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 72-73, 76-77 (1967).

[49]*Transmittal of Executive Agreements to Congress, supra* note 20, at 60-61.

[50]U.S. CONST. art. II, § 3.

[51]S. Res. 486, 94th Cong., 2d Sess., 122 CONG. REC. S11568 (daily ed. July 2, 1976).

treaties," Mr. Leigh averred that the final choice between treaty and executive agreement nonetheless lay with the President in his capacity as the nation's negotiator on foreign policy questions.[52] He stated: "To permit the Senate to designate what shall be a treaty is to remove these political issues from the province of the executive branch and to give them to a House of Congress not immediately involved in the negotiating process."[53]

The claim of executive authority to decide the form of international agreements is reiterated in the State Department's official guidelines for the making of international agreements.[54] Included in those guidelines is a section on "considerations" which are meant to enter into the selection of procedures for concluding international agreements. Fifth on the list of eight such "considerations" is "the preference of Congress with respect to a particular type of agreement."[55] Where there is any question as to whether a treaty or other means is to be employed, the question is referred through a chain of command to the Secretary of State. There may be consultations "as may be appropriate" with congressional leaders and committees, but the final authority is clearly understood to be within the executive branch.

If, as the executive branch claims, it alone has the authority to decide whether an international agreement will be made by treaty or some other means, serious questions arise as to the significance and scope of the Senate's treaty power. It taxes credibility to suppose that when the framers of the Constitution empowered the President "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur,"[56] they also intended to vest the President with power to nullify the Senate's authority simply by giving an international agreement a name other than "treaty." Under the doctrine put forth by the State Department the President would seem to be free in any given instance to assess the likelihood of a two-thirds majority being available and then decide whether to submit the agreement as a treaty or bypass the Senate with an executive agreement. Surely it is a misreading of doctrines of separation of powers and checks and balances to contend that the President's powers as Chief Executive or Commander in Chief extend so far as to enable him, at his pleasure, to nullify the Senate's advice and consent power. As Professor Arthur Bestor commented:

> The requirement of advice and consent is one of the checks that the Constitution provides against executive usurpation. It would be utterly unreasonable to allow the executive to decide for himself whether and

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[52] *Treaty Powers Resolution: Hearings, supra* note 43.

[53] *Id.* at 85.

[54] Circular 175 Procedures, 11 FOREIGN AFFAIRS MANUAL, ch. 700 (1974), as reprinted in *1976 House Hearings, supra* note 46, at 387-409.

[55] *Id.* at 393.

[56] U.S. CONST. art. II, § 2.

> when the check may be by-passed. It would be like allowing the prosecutor to waive the constitutional rights of the defendant.[57]

As to the contention that the President's independent constitutional power to conclude international agreements is "not open to question," a historical note seems pertinent. In the year 1817 the British Minister to the United States, Charles Bagot, and the Acting Secretary of State, Richard Rush, concluded an agreement by exchange of notes providing for the limitation of naval armaments on the Great Lakes. The following year President Monroe submitted the Rush-Bagot agreement to the Senate, requesting the Senate's opinion whether it "is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an one as requires the advice and consent of the Senate. . . ."[58] Recalling this occurrence in his testimony on the Case Act in 1971, Professor Bartlett suggested that "if one of the Founding Fathers was uncertain about the authority of the Executive in this instance, modern students should approach the subject with becoming modesty."[59]

It may be conceded that after the long use of executive agreements it is late to insist upon treaties as the sole means of making international agreements. Executive agreements have been employed many times since the beginning of our history, although almost all important ones, until recently, were made not on the basis of independent presidential authority but pursuant to treaties, legislation, or congressional approval by joint resolution.[60] The President's "independent Constitutional powers" to conclude international agreements would thus seem to remain very much open to question.

THE TEST OF EXPERIENCE

No party to the present discussion of executive-legislative relations in foreign policy, to the author's knowledge, has revived the old doctrine of "inherent sovereignty," which held that a government has certain powers,

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[57] *Treaty Powers Resolution: Hearings, supra* note 43, at 31.

[58] *Transmittal of Executive Agreements to Congress, supra* note 20, at 15 (quotation from Professor Bartlett's testimony).

[59] *Id. But see Treaty Powers Resolution: Hearings, supra* note 43, at 26 (stating that James Monroe was not a delegate to the Philadelphia Convention and voted *against* the adoption of the Constitution at the Virginia ratification convention).

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> The Constitution of the United States contains no explicit provision authorizing the conclusion by the President of executive agreements, but they began under the first President and have grown greatly in number in recent years. During the year 1930, 25 treaties and 9 executive agreements were concluded by the United States; but during 1968 more than 200 executive agreements were made in comparison with 16 treaties.

Transmittal of Executive Agreements to Congress, supra note 20, at 16.

notably the powers to conduct foreign relations and to wage wars, which are inherent in the nation's sovereignty and accordingly do not depend upon grants of authority in the nation's basic law. The Executive claims "independent Constitutional powers" to make executive agreements and for other purposes, but no recent President, except President Nixon in the Watergate affair, has invoked extraconstitutional powers that are said to inhere in sovereignty. Therefore, the proposition is that *all* federal government powers derive solely from the Constitution, and it is solely to the Constitution that one must look to determine both the scope and limitations of the powers of each branch of the federal government. Thus, specifically, the scope of the Senate's treaty power, the authority, if any, of the President to enter into international agreements by other means, and the authority of Congress to define or restrict presidential discretion in this area are determined by the Constitution.

Other than the definition of the treaty power itself,[61] the most pertinent constitutional provision would seem to be that clause which empowers the Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[62] This is, in the view of Professor Bestor, "the culminating grant of authority to Congress,"[63] authorizing it to pass laws governing the implementation not only of its own powers but also those of all other officers or departments of the government. Discretion in the choice of means of implementation belongs to the Congress and no one else. The meaning of the "necessary and proper" clause for foreign relations is that the President must carry out his assigned duties and rights in accordance with such legislative guidelines as Congress may choose to enact.[64] The intent of the Constitution, as former Senator Ervin noted, was that "the President should be the channel of communication between the United States and foreign nations, but, in fulfilling that function, he should be merely the executor of a power of decision that rests elsewhere, that is, in the Congress."[65] Lawyers can and do find ingenious ways to interpret constitutional provisions, but as Professor Bartlett stated:

> There is no way, no legal erudition, no sophistication in the language of construction, to alter or diminish the authority conferred on the Congress by [the "necessary and proper"] clause. No operation of the federal

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[61]"He shall have the Power, by and with the Advise and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. II, § 2.

[62]U.S. CONST. art. I, § 10.

[63]*Treaty Powers Resolution: Hearings, supra* note 43, at 21, 22.

[64]*Id.* at 22.

[65]*U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations,* 94th Cong., 1st Sess. 191 (1967).

> government could be carried into effect if the Congress wished to prevent it. Here is the seat of ultimate power under the Constitution, and it is unalterable save by Constitutional amendment.[66]

The Constitution itself specifies only two means of making international agreements: treaties made by the President "by and with the advice and consent of the Senate;"[67] and agreements or compacts between individual states and foreign powers, which may be made only with the consent of Congress.[68] No other procedures are specified or implied. To the extent that other procedures have been permitted or have evolved, they are indisputably subject to definition, regulation, or restriction by Congress under the plain language of the "necessary and proper" clause.[69] There is indeed what Justice Robert H. Jackson described as a "zone of twilight"[70] in which executive and congressional power may overlap or be uncertain, but as Professor Alexander M. Bickel commented:

> The 'zone of twilight' may be occupied at will; that is the significance of it. It exists, and independent Presidential power can exist within it, only by Congress' leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act.[71]

In its classical constitutional form, the treaty power of the Senate represented nothing less than the right of the Senate to full participation, including prior consultation, in the making of fundamental foreign policies. For reasons ranging from the effects of wars and crises to congressional quiescence and inertia, the classical powers of Congress have been much diminished. That Congress has the right under the Constitution to reassert these powers to the fullest would seem to be beyond question. Whether it would be wise to do so is another matter. Although it is true that the repetition of an unconstitutional action does not make such action constitutional, it is also true that there are gaps to be filled by custom and usage, as well as by legislative prescription, in Justice Jackson's "zone of twilight."[72] As Justice John Marshall wrote in *McCulloch v. Maryland*:[73]

> To have prescribed the means by which government should, in all future times, execute its powers . . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur.[74]

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[66] *1976 House Hearings, supra* note 46, at 131.
[67] U.S. CONST. art. II, § 2.
[68] U.S. CONST. art. I, § 10.
[69] U.S. CONST. art. I, § 8.
[70] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
[71] *Transmittal of Executive Agreements to Congress, supra* note 20, at 27.
[72] *See* note 70 *supra*.
[73] 17 U.S. (4 Wheat.) 316 (1819).
[74] *Id.* at 415.

Executive agreements have been employed since the early years of the Republic, although, as noted earlier, almost all important ones until recent decades were subject to one form or another of congressional approval.[75] In the course of the nineteenth century major acquisitions of territory were accomplished both by treaties and executive agreements.[76] President Jefferson made the Louisiana Purchase by treaties with France in 1803. Secretary of State Seward engineered the purchase of Alaska by treaty with Russia in 1867. Texas was annexed in 1845 and Hawaii in 1898 by executive agreements authorized by joint resolutions of the two Houses of Congress, in both cases after previously negotiated treaties had failed, and it had become apparent that two-thirds majorities in the Senate could not be obtained. It is pertinent to recall that the requirement of a two-thirds Senate majority was written into the Constitution less on the basis of considerations of posterity than because earlier that very year of 1787 John Jay would have concluded a treaty with Spain giving up the right of Americans to navigate the lower Mississippi River for thirty years but for the fact that approval of two-thirds of the states, as required by the Articles of Confederation, could not be obtained. This is not to suggest that the two-thirds requirement for treaties has not served the nation well, or that it should be changed, but only to invite that broader perspective which comes when the law is viewed in its political context.

The conclusion reached is that it is too late in our constitutional history for a purist insistence upon treaties as the exclusive means of contracting agreements with foreign nations. Nevertheless, it is surely not too late—indeed the need is greater than ever—for the Senate to insist upon treaties as the appropriate means of contracting far-reaching political, economic and military commitments to foreign nations and international organizations. Nor is it too late for Congress as a whole to "make all laws which shall be necessary and proper"[77] to regulate, define, and restrict the scope of the executive agreements.

For these purposes the two major legislative proposals cited earlier which are now pending in Congress, the "Treaty Powers Resolution"[78] and the proposed "Executive Agreements Review Act,"[79] will be deserving of careful consideration. Highly qualified witnesses, both historians and constitutional lawyers, have expressed confidence in the constitutionality of these two proposals and also in the wisdom of their broad intent, though not necessarily of all their specifications. As further study is given to these

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[75]*See* note 60 *supra.*

[76]*See generally* E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES (1960); W. HOLT, TREATIES DEFEATED BY THE SENATE (1933).

[77]U.S. CONST. art. I, § 8.

[78]S. Res. 486, 94th Cong., 2d Sess. (1976), 122 CONG. REC. S11568 (daily ed. July 2, 1976).

[79]H.R. 4438, 94th Cong., 2d Sess. (1976), as reprinted in *1976 House Hearings, supra* note 46, at 2.

bills or to other possible legislative innovations, the operative criterion for Congress to consider should not be only the technical compatibility of new legislation with the words of the Constitution but also the more general question of whether the legislation will tend to strengthen or weaken checks and balances between the two branches of government. The scale on which such enactments must be weighed is an extremely sensitive one. An insufficient or merely cosmetic assertion of power by Congress will leave the scale overweighted on the executive side. An excessive assertion by Congress, even one which is technically compatible with the Constitution, will overweigh the scale on the legislative side, possibly hobbling the President in his conduct of foreign relations.

Legislation must be devised which will bring the foreign policy of the United States under the direction and oversight of Congress while leaving the executive a reasonable measure of discretion. In devising such legilsation Congress would do well to try to apply the three basic tests suggested by Chief Justice John Marshall for the interpretation of the Constitution: (1) the interpretation, or in this case the legislation, must "depend on a fair construction of the whole instrument,"[80] not, that is, on clauses taken out of context; (2) most importantly, it must be consistent not only with the letter but also with the "spirit of the Constitution;"[81] and (3) it must be borne in mind "that the powers of the government are limited, and that its limits are not to be transcended."[82]

Another consideration, more of policy than of law, is the importance of taking care that Congress is not unduly influenced in its legislative enactments by strong and angry memories of recent events. For most of the nation's history there has been a broad national consensus on basic foreign policies, such as the Monroe Doctrine and noninvolvement in the conflicts of Europe during the nineteenth century, and the acceptance of world responsibilities after World War II, including membership in the United Nations and the NATO alliance. On the other hand, there have also been serious divisions among the American People from time to time, some notable instances being the War of 1812, the war with Spain and the subsequent acquisition of overseas possessions, the fight after World War I over the League of Nations, the Korean War, and most recently the war in Indochina, which generated perhaps the most embittered and protracted controversy over foreign policy in our history.

It would seem most important that Congress not permit new legislation relating to foreign military and political commitments to be excessively influenced by the single experience of Vietnam. It is possible—and desirable—that a renewed national consensus will soon emerge on the

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[80]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).
[81]*Id.* at 421.
[82]*Id.*

fundamentals of American foreign policy. Procedures are needed which will be equally adaptable both in times of harmony and disagreement between the political branches of government, procedures which will facilitate cooperation as readily as resistance. Congress, in short, is called upon to devise a bill "for all seasons," a bill which will meet the test of our national experience.

This is in no way to suggest that such a bill must be an instrument wholly pleasing to the Executive. If the Executive could have its way such "flexibility" would prevail as to allow it all but unimpeded latitude. In this respect it is well to emphasize, as Professor Bestor advises, the concept of "checks and balances" as against the concept of "separation of powers."[83] The latter defines the correct relationship between the judiciary and the political branches. But as between Congress and the Executive, the proper relationship is not one of separation but of the exercise by each of limited, carefully defined responsibilities in the domain of the other. As Professor Bestor notes, the President's power to veto an act of Congress is not an executive power but a legislative one, just as the right of the Senate to refuse to consent to a treaty is, in a sense, an intrusion upon the executive power.[84] These checks and balances, that is, mutual intrusions as between the political branches of government, have proven salutary to the nation. The test of their salutariness, however, for us as for the framers of the Constitution, is neither the convenience of those who conduct policy nor even the efficiency of the policymaking process. In the never-too-often quoted words of Justice Brandeis:

> The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the poeple from autocracy.[85]

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[83]*Treaty Powers Resolution: Hearings, supra* note 43, at 31, 32.
[84]*Id.* at 32.
[85]Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).