Winter 1977

Separation of Powers and International Executive Agreements

Arthur W. Rovine
United States Department of State

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj
Part of the Courts Commons, International Law Commons, Legislation Commons, and the President/Executive Department Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol52/iss2/6

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Separation of Powers and International Executive Agreements

ARTHUR W. ROVINE

INTRODUCTION

The past few years have witnessed an intense and profoundly important debate between the Congress and the executive branch on the subject of international executive agreements. Separation of powers issues have abounded as the Congress, in a mood strongly reminiscent of the Bricker Amendment conflict of the 1950's, has attempted to gain a greater measure of control over the executive branch capacity to conclude international agreements.

There are substantial differences, of course, between the two movements. The Bricker proposals took the form of constitutional amendments offered by conservative Senators who feared that a liberal administration might become a party to human rights agreements of which the supporters of the proposals disapproved. The effort of the 1970's has been headed by liberal Senators and Congressmen reacting to Vietnam, Watergate and the general development of presidential primacy in foreign affairs. The current drive attempts to limit the President's powers by statute, thus avoiding the practical difficulties of constitutional amendment but concomitantly raising certain complex constitutional questions.

The primary technique favored by the leaders of the 1970's drive is the "legislative veto" by concurrent or one-House resolution over executive agreements. Variants of this idea have been introduced in the Senate by

* Assistant Legal Adviser for Treaty Affairs in the Department of State. B.A., 1958, University of Pennsylvania; LL.B., 1961, Harvard Law School; Ph. D. 1966, Columbia University. The opinions expressed in this article are those of the author and are not necessarily shared by the Department of State.


2 For a convenient listing of the several versions of the Bricker Amendment, as well as the extensive literature on the Bricker proposals, see W. BISHOP, JR., INTERNATIONAL LAW 110-12 (3d ed. 1971).

3 See text accompanying notes 115-146 infra. President Ford directed the Department of Justice to find a suitable court case in which to challenge the constitutionality of legislative veto provisions. The department intervened before the Circuit Court of Appeals of the District of Columbia in a case brought originally by Ramsey Clark challenging the Federal Election Campaign Act, which contains such a provision. A decision is now pending. See Clark v. Valeo, No. 76-1825 (D.C. Cir. 1977).
Senators Bentsen and Glenn, and in the House by Congressmen Morgan and Zablocki.  

The viewpoint of the congressional sponsors of the measures, as expressed in the bills and in congressional hearings, has been that the executive branch has wrongfully abridged the role of the Congress by concluding, in the place of treaties or other congressionally approved agreements, international executive agreements which, in the majority of cases, are not submitted to Congress for approval. Statistics indicating a growing tendency on the part of the executive branch to use executive agreements rather than treaties were produced, and it was argued repeat-

<table>
<thead>
<tr>
<th>Year</th>
<th>Treaties</th>
<th>International Agreements Other Than Treaties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1946</td>
<td>19</td>
<td>139</td>
</tr>
<tr>
<td>1947</td>
<td>15</td>
<td>144</td>
</tr>
<tr>
<td>1948</td>
<td>16</td>
<td>178</td>
</tr>
<tr>
<td>1949</td>
<td>22</td>
<td>148</td>
</tr>
<tr>
<td>1950</td>
<td>11</td>
<td>157</td>
</tr>
<tr>
<td>1951</td>
<td>21</td>
<td>213</td>
</tr>
<tr>
<td>1952</td>
<td>22</td>
<td>291</td>
</tr>
<tr>
<td>1953</td>
<td>14</td>
<td>163</td>
</tr>
<tr>
<td>1954</td>
<td>17</td>
<td>206</td>
</tr>
<tr>
<td>1955</td>
<td>7</td>
<td>297</td>
</tr>
<tr>
<td>1956</td>
<td>15</td>
<td>233</td>
</tr>
<tr>
<td>1957</td>
<td>9</td>
<td>222</td>
</tr>
<tr>
<td>1958</td>
<td>10</td>
<td>197</td>
</tr>
<tr>
<td>1959</td>
<td>12</td>
<td>250</td>
</tr>
<tr>
<td>1960</td>
<td>5</td>
<td>266</td>
</tr>
<tr>
<td>1961</td>
<td>9</td>
<td>260</td>
</tr>
<tr>
<td>1962</td>
<td>10</td>
<td>319</td>
</tr>
<tr>
<td>1963</td>
<td>17</td>
<td>234</td>
</tr>
<tr>
<td>1964</td>
<td>3</td>
<td>222</td>
</tr>
<tr>
<td>1965</td>
<td>14</td>
<td>204</td>
</tr>
<tr>
<td>1966</td>
<td>14</td>
<td>237</td>
</tr>
<tr>
<td>1967</td>
<td>18</td>
<td>223</td>
</tr>
<tr>
<td>1968</td>
<td>18</td>
<td>197</td>
</tr>
<tr>
<td>1969</td>
<td>6</td>
<td>162</td>
</tr>
<tr>
<td>1970</td>
<td>20</td>
<td>183</td>
</tr>
<tr>
<td>1971</td>
<td>17</td>
<td>214</td>
</tr>
<tr>
<td>1972</td>
<td>20</td>
<td>287</td>
</tr>
<tr>
<td>1973</td>
<td>17</td>
<td>241</td>
</tr>
<tr>
<td>1974</td>
<td>13</td>
<td>230</td>
</tr>
<tr>
<td>1975</td>
<td>13</td>
<td>264</td>
</tr>
<tr>
<td>1976 (as of 12/15/76)</td>
<td>13</td>
<td>385</td>
</tr>
</tbody>
</table>

Figures above compiled by the Office of Treaty Affairs, Department of State.
edly that the executive branch is concluding far too many significant arrangements as executive agreements, reserving the treaty route for relatively minor technical arrangements.

Chairman Morgan of the House International Relations Committee contended that international agreements had been made without adequately notifying Congress, and that until the passage of the Case-Zablocki Act certain important agreements were kept completely secret from Congress. He also argued that too often Congress was notified of such agreements without any opportunity to influence their contents. He complained that the Congress "is expected to come up with the money to meet obligations which it had no voice in creating."9

Members of Congress have also asserted that the executive branch has fundamentally altered the constitutional scheme with respect to international agreements as originally established by the framers of the Constitution and that, in fact, the framers foresaw only treaties, as is indicated by the language of the Constitution, rather than executive agreements which are not submitted to the Congress for its approval.10 Others have contended that while executive agreements may be authorized by statute or prior treaties, the President has only the most limited independent power to conclude executive agreements pursuant to constitutional powers, and that this limited power has been abused by the executive branch.11

The Congress and the executive branch have also clashed sharply over the extent to which the President has discretion to decide whether any important international agreement should be a treaty or executive agreement.12

Under the bill13 introduced by Senator Bentsen on February 7, 1975, executive agreements would become effective only after a sixty day waiting

---

4 Hearings on S. Res. 486 Before the Senate Comm. on Foreign Relations, 94th Cong., 2d Sess. (1976). See also 1975 Senate Hearings, supra note 1, at 1-7 (statement by Senator James Abourezk, Chairman of the Subcomm. on Separation of Powers of the Senate Judiciary Comm.).
6 This issue was debated primarily through an exchange of memoranda between the Senate Office of Legislative Counsel and the Office of the Legal Adviser, Department of State, on the subject of the 1975 Middle East Agreements. The Senate memoranda took the position that certain of the agreements entered into by the United States with Israel were illegal and void ab initio because they were not treaties. See 121 Cong. Rec. S20102-14 1975); 122 Cong. Rec. S1687-92 1976.
period from the date of transmittal of such agreements by the executive
branch to Congress. Any agreement disapproved by a majority vote of both
Houses would not take effect. Curiously enough, however, one section of
the Bentsen bill provides that these requirements are not applicable to any
executive agreements entered into by the President “pursuant to a provision
of the Constitution or prior authority given the President by treaty or
law.” This clause would appear to vitiate the bill because almost all
agreements are authorized by prior statute, treaty or the Constitution. Only
a very few agreements are authorized by subsequent statutory approval.

The Glenn bill, introduced on March 20, 1975, is far broader in its
coverage and veto provisions. It contains the same sixty day waiting period
but provides for a veto by the Senate alone. The bill applies to:

any bilateral or multilateral international agreement or understanding,
formal or informal, written or verbal, other than a treaty, which involves,
or the intent is to leave the impression of, a commitment of manpower,
funds, information, or other resources of the United States, and which is
made by the President or any officer, employee, or representative of the
executive branch of the United States Government.

A more limited measure was introduced in the House of Representa-
tsatives on March 6, 1975, by Thomas E. Morgan, then Chairman of the
House Committee on International Relations, and Clement Zablocki, his
successor as Chairman. This bill requires transmittal to the Congress for
its review of all executive agreements concerning the establishment,
renewal, continuation or revision of a “national commitment” as defined
in the bill. The Morgan-Zablocki bill also requires a sixty day waiting
period and the legislative veto by concurrent resolution. The term
“national commitment” is defined to include any agreement or promise (1)
“regarding the introduction, basing or deployment” of United States
Armed Forces on foreign territory or (2) “regarding the provision to a
foreign country, government or people any military training or equipment

---

17H.R. 4438, 94th Cong., 1st Sess. (1975). For the full text of this bill, see 1975 Senate Hearings, supra note 1, at 267-71. Several variations were introduced in the House during 1975, including H.R. 1268, 1273, 5489, 5826, 6358, 6744, and 7745. H.R. 1268 required a concurrent resolution of approval by both Houses during a sixty day waiting period in order for any executive agreement to enter into force; H.R. 1273 called for a concurrent resolution of disapproval. H.R. 5489, 6358, 6744, and 7745 all permit the Senate alone, by a resolution of disapproval, to prevent the entry into force of any executive agreement. H.R. 5826 requires a resolution of approval by the Senate. For the full text of these bills, see 1976 House Hearings, supra note 1, at 277-95. For the reports of the executive branch on H.R. 4438 and on these similar bills, see id. at 296-810.
including component parts and technology, any nuclear technology or any financial or material resources." 18

A more unusual proposal was introduced on April 14, 1976, by Senator Clark in his proposed Senate Resolution 434 relating to the treaty powers of the Senate. 19 Under this resolution, the Senate would be permitted to express its opinion as to whether a particular executive agreement should be a treaty. Once that opinion was expressed, unless the Senate approved the agreement designated a "treaty" by a two-thirds majority, a point of order procedure would become applicable. Under this procedure, Senate consideration of any bill authorizing or appropriating funds to implement that "treaty" would be out of order. Thus, any single Senator raising the point of order could block the funding for an agreement so designated.

Before analyzing these legislative proposals, it will be useful to review certain underlying questions relevant to the executive branch practices in this area of foreign affairs and the fundamental issues raised by the critics of those practices.

DEFINING AN EXECUTIVE AGREEMENT

One of the more perplexing and surprisingly difficult issues in this area, and one which is at the foundation of all subsequent separation of power questions with respect to international agreements, is the question of how to recognize an international agreement. This is a matter of far more than academic importance since United States domestic statutes and international rules must be observed if the arrangement in question constitutes an "agreement" within the meaning of the law.

Federal law requires the Secretary of State to publish all treaties and other agreements to which the United States is a party. 20 It also provides that the United States Statutes at Large shall be legal evidence of, inter alia, treaties and international agreements other than treaties in all courts of the United States, the several states and territories and insular possessions. 21 The same status is also given to the Treaties and Other International Acts Series (TIAS). 22

The Case-Zablocki Act, 23 adopted in 1972, requires the Secretary of State to transmit to the Congress the text of any international agreement other than a treaty to which the United States is a party no later than sixty days after its entry into force. This is for the information of Congress

---

rather than its approval. The United Nations Charter also provides that every treaty and every international agreement entered into by any United Nations member is to be published and registered with the Secretariat as soon as possible.24

It therefore makes a good deal of difference to the Congress and to the world community whether a particular document does or does not constitute an international agreement. In political terms, the Congress is in a better position to exert some measure of control, whether through consultation, funding or subsequent regulation, if a given arrangement constitutes an agreement within the meaning of the law.

Yet United States law provides no definition of "international agreement." The most authoritative international law statement defines "treaty" as "[a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."25 For purposes of international law, there is no distinction between treaties and executive agreements. This has no effect, however, on domestic law distinctions between the two forms. Those distinctions remain legally valid under United States law.26

If, however, every international agreement is a "treaty" in the international law sense, the question remains, "What is an international agreement?" for purposes of both international law and domestic law.

The Treaties Office in the Department of State is confronted daily with documents embodying some form of international arrangement, many of

---

24U. N. CHARTER, art. 102. Classified agreements are transmitted to the two foreign relations committees of the Congress, but they are not, of course, published or registered with the United Nations. The United States enters into approximately ten to twelve classified agreements each year. The Case-Zablocki Act provides that:

[A]ny such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs [now International Relations] of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

251969 Vienna Convention on the Law of Treaties, art. 2(1)(a). The Convention was sent to the Senate by President Nixon on November 22, 1971, but has yet to be acted upon by the Senate. See S. Exec. Doc. No. L, 92nd Cong., 1st Sess. (1971). On September 7, 1972, the Senate Committee on Foreign Relations reported out a resolution of advice and consent to the ratification of the Vienna Convention, but subject to an understanding and interpretation which would, in the view of the executive branch, greatly weaken, if not eliminate, the distinction under United States domestic law between treaties and executive agreements. The Department of State opposed the understanding and interpretation, and the Convention has since remained in the Committee. For details of the Senate action and the Department of State response, see 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 195-98 (1975).

261969 Vienna Convention on the Law of Treaties, art. 2(2). This article states: "The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."
which are informal and routine transactions of a minor nature that are not thought suitable for publication, transmittal to the Congress and registration at the United Nations. Yet the great bulk of all United States agreements, even significant agreements, are silent as to governing law, but are nevertheless between States and are in written form. The central problem, then, is how to recognize an international arrangement which is something different from, or lesser than, an international agreement.

On March 12, 1976, the Legal Adviser of the Department of State sent a memorandum to key Department personnel and to the general counsels of the several government departments and agencies setting forth the criteria applied by the Legal Adviser in deciding what constitutes an international agreement for purposes of publication, Case-Zablocki Act transmittals and registration with the United Nations Secretariat. These criteria have also been transmitted to the Congress. There appears to be general agreement throughout the government that, in light of the statutory requirements, decisions on what constitutes an agreement, and the requisite determinations, are made by the Department of State.

The criteria are as follows:

1. **Intention of the Parties to be Bound by International Law.** The most fundamental requirement is that the parties intend their undertaking to be legally binding and to be governed by international law. Documents intended to be political or moral statements, or that are governed by another legal system, are not international agreements. The latter requirement is strictly construed. If, as is usually the case, an instrument is silent as to governing law, it is presumed that international law governs.

2. **Significance of the Arrangement.** It is agreed by the Congress and the Department of State that minor or trivial undertakings do not constitute international agreements. Senator Case excluded "trivia" from the coverage of Section 112b as did the House report on the Case-Zablocki Act.

There are no detailed guidelines to assist in deciding what level of significance must be reached; this must remain a matter of judgment, taking into account the entire context of a particular transaction. As the

---

27 The memorandum may be found in 1976 House Hearings, supra note 1, at 240-43.
29 Perhaps the most outstanding example of an agreement intended to have political and moral weight, but not legal force, is the Final Act of the Helsinki Conference on Cooperation and Security in Europe. One of the final clauses of the Helsinki pact provides that it "is not eligible for registration under Article 102 of the Charter of the United Nations . . . ." The Helsinki accord was, by agreement of the parties, not legally binding. In the United States it was therefore not separately published in the TIAS series and not registered with the United Nations. It was transmitted to the Congress but not under the terms of the Case-Zablocki Act.
Legal Adviser noted in his memorandum, it is frequently a matter of degree. A promise to sell one map to a foreign government is not an international agreement, while a promise to sell a million maps probably is an international agreement. A letter from Acting Secretary of State Kenneth Rush in September, 1973, to all government departments and agencies provides some guidance. It requires transmittal to the Department of State for possible transmittal to the Congress of any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment.\(^3\)

3. **Requisite Specificity, Including Objective Criteria for Determining Enforceability.** An international agreement must have a certain precision and specificity setting forth the binding undertakings of the parties. As in domestic contract law, a vaguely worded commitment may well be an unenforceable promise if there are no objective criteria that can be applied to enforce it. The Legal Adviser cited a promise “to help develop a more viable world economic system” as a statement lacking the specificity required to constitute a legally binding international agreement.\(^3^2\)

4. **The Necessity for Two or More Parties to the Arrangement.** Under international law, unilateral commitments may on occasion be legally binding, but they do not constitute international agreements even if the

\(^{31}\)The full text of the 1973 Rush Letter may be found in 1975 Senate Hearings, supra note 1, at 101-2.

\(^{32}\)Id. On the other hand, the Legal Adviser noted that “undertakings as general as those of Articles 55 and 56 of the U.N. Charter have been held to create internationally binding obligations (though not self-executing ones).” Id. Those Articles read as follows:

**Article 55**

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

**Article 56**

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.
other criteria are met. Care must be taken, however, to determine whether an undertaking is truly unilateral or is part of a larger bilateral or multilateral set of undertakings. As the Legal Adviser has pointed out, “parallel ‘unilateral’ undertakings by two or more states may constitute an international agreement.”

5. **Form.** Form is normally not a central factor, but it may reflect the intention of the parties to conclude an agreement or something less. Documents with formal final clauses, signature blocks, entry into force dates and the like probably reflect an intent to conclude an international agreement, while failure to use the customary form might evidence an intent not to conclude a binding agreement. Obviously, form is not decisive if the intention is otherwise clear.

These five criteria have proved very helpful in defining, at least in practical terms, an executive agreement. However, two types of arrangements which have caused difficulty in applying these criteria are agency-level agreements and implementing agreements. First, many international arrangements entered into with a foreign nation purport to bind only an agency of the government rather than the United States Government as such. It is common, for example, for the Department of Defense to enter into working level arrangements with the defense ministries of foreign countries. While there have been variations in prior practice, the Department of State view is that agency-level agreements are international agreements if they meet the criteria listed above. Agencies of the government do not have separate legal personalities, and they can and do bind the United States Government in international law. On the other hand, many agency-level agreements are routine technical working arrangements that frequently do not reach the level of significance required for an international agreement. The issue is important, however, as so

---

3In the Nuclear Tests Case, Australia v. France, [1974] I.C.J. 253, the International Court of Justice stated:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. . . . Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.

*Id.* at 267-68. The last phrase implies that a binding unilateral obligation is not regulated by the law of treaties.

31976 House Hearings, supra note 1, at 242 (memorandum from Monroe Leigh, Legal Adviser, Department of State).
many departments and agencies are currently signing agreements in their own name.\textsuperscript{35}

Second, if an arrangement with a foreign government implements an international agreement and is sufficiently identified in that agreement, the implementing arrangement will not be treated as a separate international agreement. The difficulty in most cases is the determination of whether an implementing arrangement is sufficiently identified in the umbrella agreement it is designed to implement. The Legal Adviser, in his criteria memorandum, gave the example of an underlying agreement committing the United States to sell 1,000 tractors, and a subsequent implementing arrangement requiring a first installment on this obligation by the sale of 100 tractors of the “brand-x” variety. In such a case the implementing arrangement would not be subject to the requirements of publication, transmittal and registration. But suppose the underlying agreement called for subsequent agreements for agricultural assistance in a general clause without further specificity. A particular argicultural assistance agreement in implementation of the general obligation, provided it met the criteria discussed above, would constitute a separate agreement within the meaning of the law.

A RESPONSE TO CERTAIN CRITICISMS

The Large Number of Executive Agreements

Most discussions of executive branch practices with respect to international agreements focus without discussion on the large number of executive agreements concluded since 1946 and the small number of treaties each year as evidence of a perceived abuse by the executive branch in a key area of United States foreign policy making. It is useful, however, to understand why there are so many more executive agreements than treaties and why this has been particularly true in the years following the Second World War.\textsuperscript{36} First and most obvious is the growth in the number of nations in the world community. In 1945 there were some fifty nations with which the United States concluded agreements, most of which were in Europe or Latin America where formal relationships required a substantial number of treaties as well as lesser agreements. Today there are closer to 150 nations in the world community, and in the great majority of cases the relationships are such that executive agreements are normally sufficient.\textsuperscript{37}

\textsuperscript{35}Clearly it is the substance of the arrangement that counts and not its form or its designation as an agency level or government level agreement. The 1973 Rush Letter was designed primarily to ensure that the Department of State is made aware of agency-level arrangements so that it is in a position to transmit to the Congress any that constitute agreements within the meaning of the law.

\textsuperscript{36}See note 6 supra.

\textsuperscript{37}For a complete listing of all bilateral and multilateral treaties and agreements to which the United States is currently a party, see TREATIES IN FORCE, an annual publication of the
Second, only in the period following World War II has the United States become a highly active participant in world politics; this too has resulted in an increase in the number of executive agreements. Our prior position in the international community required fewer but more formal relations with close friends and allies which resulted in a natural tendency toward treaties instead of executive agreements. This has changed in the last thirty years as United States activities have demanded a greater number of less formal arrangements.

Third, there are many more subjects today that are part of the international agreement making process than in years past. Topics such as cooperation in health, science, environmental affairs and education are all matters which today are frequently the subject of international agreements but were unheard of as international law topics in 1946.\(^3\) In most of these areas treaty relationships are not required, and executive agreements have generally been accepted as sufficient. Indeed in most cases the agreements have been authorized by statutory law. Once again the pressure is in the direction of an increased number of executive agreements, without a corresponding increase in the number of treaties.

Fourth, differences in definition have also resulted in an increase in the number of executive agreements. The inclusion of agency-level arrangements which satisfy the criteria discussed above\(^9\) as international agreements have obviously increased the number of such agreements. Thus, even definitional changes have contributed to the widening gap.

These factors explain far more about the rapid growth in the number of executive agreements than a notion that the executive branch has abused its discretion and has unfairly distorted the constitutional framework governing the conclusion of international agreements. Consequently, the charge that the executive branch concludes major agreements as executive agreements and minor routine technical agreements as treaties is criticism that does not bear scrutiny.

Significant and Routine Treaties

It is true that several multilateral treaties on routine technical questions have been concluded, but it is not true that all treaties have been limited to such matters. For example in the area of arms control,\(^4\) within the last five

\(^1\)See notes 29-35 supra & text accompanying.
\(^2\)See generally ARMS CONTROL AND DISARMAMENT AGREEMENTS (U.S. Arms Control and Disarmament Agency 1975).
years the Senate has approved and the President has ratified the Geneva Gas Protocol,\textsuperscript{41} the 1972 Biological Weapons Convention,\textsuperscript{42} the 1972 Treaty between the United States and the Soviet Union on the Limitation of Anti-Ballistic Missile Systems,\textsuperscript{43} and the 1971 Treaty Prohibiting the Emplacement of Nuclear Weapons on the Seabed and the Ocean Floor.\textsuperscript{44} In 1976 the Treaty with the Soviet Union Limiting Peaceful Nuclear Explosions Underground was signed and sent to the Senate,\textsuperscript{45} and the military bases agreement with Spain was concluded, approved and ratified as a treaty.\textsuperscript{46}

There are also a number of important agreements in other areas sent to or before the Senate including the Genocide Convention,\textsuperscript{47} the Vienna Convention on the Law of Treaties,\textsuperscript{48} the 1970 Hague Hijacking Convention,\textsuperscript{49} and the 1971 Montreal Sabotage Convention.\textsuperscript{50} In addition, even treaties on technical matters may be politically important depending upon the treaty partner and the general context. Thus, recent bilateral tax treaties with the Soviet Union\textsuperscript{51} and Romania\textsuperscript{52} may be characterized as important from a political perspective, as may recent consular treaties with Poland,\textsuperscript{53} Romania\textsuperscript{54} and Hungary.\textsuperscript{55}

\textsuperscript{41}Executed at Geneva on June 17, 1925; entered into force for the United States on April 10, 1975. T.I.A.S. No. 8061; 94 L.N.T.S. 65.

\textsuperscript{42}Executed at Washington, London and Moscow on April 10, 1972; entered into force for the United States on March 26, 1975. T.I.A.S. No. 8062.

\textsuperscript{43}Signed at Moscow on May 26, 1972; entered into force October 3, 1972. 23 U.S.T. 3435; T.I.A.S. No. 7508.

\textsuperscript{44}Executed at Washington, London and Moscow on Feb. 11, 1971; entered into force for the United States on May 18, 1972. 23 U.S.T. 701; T.I.A.S. No. 7337.


\textsuperscript{49}Entered into on Dec. 16, 1970. 22 U.S.T. 1641; T.I.A.S. No. 7192.

\textsuperscript{50}Entered into on Sept. 23, 1971. 24 U.S.T. 565; T.I.A.S. No. 7570.


\textsuperscript{53}Consular Convention, May 31, 1972, United States-Poland, 24 U.S.T. 1281; T.I.A.S. No. 7642.

\textsuperscript{54}Consular Convention, July 5, 1972, United States-Romania, 24 U.S.T. 1317; T.I.A.S. No. 7643.

\textsuperscript{55}Consular Convention, July 7, 1972, United States-Hungary, 24 U.S.T. 1141; T.I.A.S. No. 2641.
Consultation with Congress

A third basic criticism of the executive branch, according to congressional observers, has been its failure to consult with the Congress. It should be noted here that in the vast majority of cases, Congress does not wish to consult simply because most agreements are of a routine technical nature without political significance. In any given calendar year there are not likely to be more than half a dozen or so truly important agreements in which the Congress has a substantial interest. While judgments have clearly varied on this point, it seems that a serious effort has been made by the executive branch to consult with the Congress. The most recent and generally acclaimed successful example of this is the 1976 Spanish Bases Treaty. Despite the general charge no specific cases have been cited in which the Congress has been expected to fund obligations it had no voice in creating. There have been certain important agreements, such as the 1975 Sinai Accords, in which assistance was specifically made contingent upon the availability of funds. Such agreements, which are not uncommon, constitute a very limited United States commitment in which the foreign nation is obviously placed in the position of having to take its chances with the Congress. Under such circumstances, while the executive branch is obliged to seek the required funding, there is no obligation on the part of Congress to provide the funds.

On several occasions the Department of State has suggested to the Congress that the two branches develop more detailed rules with respect to an ongoing and mutually agreeable system of consultation. Consultation with whom, on what subjects and for what precise purpose and effect are complex questions which will require serious effort to resolve, but this effort and a system of close cooperation which may arise from it are the most promising approaches to a satisfactory system of international agreement making by the United States Government.

Fundamental Constitutional Issues

Intention of the Framers of the Constitution

Most of the arguments presented by or to the Congress in support of the proposition that executive agreements were not intended by the framers...
of the Constitution to be a proper mode of concluding international agreements have focused on the discussions at the Constitutional Convention.\textsuperscript{59} Indeed, the discussions at Philadelphia do indicate that the framers were thinking in terms of the necessity for Senate approval of all international agreements prior to their taking effect. Yet the practice of those framers of the Constitution who went on to become President indicates in striking fashion that at least those Founding Fathers quite clearly viewed the executive agreement as a constitutionally appropriate method for concluding international agreements, even on important subjects.\textsuperscript{60} In fact, even under the Articles of Confederation, which gave Congress far more control over international agreements than did the Constitution, important executive agreements were concluded.\textsuperscript{61}

In 1792, only three years after the adoption of the Constitution, Congress adopted legislation approved by President Washington authorizing the Postmaster General to conclude international agreements for reciprocal delivery of mailed matter.\textsuperscript{62} Clearly, if that statute and the countless others that authorize executive agreements are constitutional, then the Constitution must permit international agreements other than treaties. Today, Department of State figures show that fully eighty-six percent of all executive agreements of the United States are authorized by statute.\textsuperscript{63}

The early practice also indicates that the Founding Fathers viewed as appropriate certain executive agreements authorized not by statutory law, but solely by the Constitution.\textsuperscript{64} President John Quincy Adams concluded a claims agreement with the Netherlands in 1799 without benefit of statutory or treaty authority.\textsuperscript{65} President James Madison, a key framer of
SEPARATION OF POWERS

the Constitution and a strict constructionist, concluded an agreement with Great Britain in 1813 for an exchange of prisoners of war.66

President James Monroe concluded the famous Rush-Bagot Agreement with Great Britain in 1817, although the Senate believed the agreement should have been a treaty. One year after he concluded and implemented this highly important agreement to limit armaments on the Great Lakes, President Monroe inquired of the Senate whether it was “such an arrangement as the Executive is competent to enter into by the powers invested in it by the Constitution, or is such an one as requires the advice and consent of the Senate. . . .”67 The very language of this question reveals that Monroe believed that at least certain kinds of agreements might be concluded by the President pursuant solely to his independent constitutional powers. In a conversation with John Quincy Adams, Monroe said that it was “unnecessary” to communicate the Rush-Bagot agreement to the Congress.68

This early practice is obviously important as a “contemporaneous construction” by Presidents who were closer to the writing of the Constitution than those today, and who clearly approved and acted upon the conviction that executive agreements are permitted by the Constitution.69

and it is the earliest precedent for the practice later settled and now undoubted, that submission of such agreements to the Senate is unnecessary.

5 TREATIES AND OTHER INTERNATIONAL ACTS, supra note 61, at 1079.

66This agreement contains lengthy and detailed provisions on the treatment of noncombatants, the parole, safety, and sustenance of prisoners, and the methods for effecting the transfers. For the text and history of this executive agreement, see 2 TREATIES AND OTHER INTERNATIONAL ACTS, supra note 61, at 557-73.

671976 House Hearings, supra note 1, at 165 (contained in the memorandum from the Department of State).

68McClure refers to the Rush-Bagot agreement as “By far the most famous and significant of the early executive agreements.” INTERNATIONAL EXECUTIVE AGREEMENTS, supra note 61, at 49. It entered into force on April 29, 1817, and the Senate approved it almost one year later on April 16, 1818, after it had been implemented. In the Memoirs of John Quincy Adams there appears the following statement:

Met and spoke to Mr. Bagot this morning on my way to the President’s. He asked me if it was the intention of the President to communicate to Congress the letters which had passed between the Secretary of State and him (Bagot) containing the arrangements concerning armaments on the Lakes, which he said was a sort of treaty. I spoke of it to the President, who did not think it necessary that they should be communicated.

2 TREATIES AND OTHER INTERNATIONAL ACTS, supra note 61, at 647.

The Department of State memorandum also points out that the Rush-Bagot agreement was first proposed by President James Madison, who instructed Secretary of State Monroe to come to an “immediate” agreement. The instructions and Monroe’s letters, which use the phrases “immediate effect,” “immediate suspension,” and “an order will be issued immediately,” show that a treaty could not have been contemplated. There is no reference in the entire correspondence to advice and consent of the Senate. Even after the Senate approved the agreement almost a year after it had already been implemented, Monroe did not exchange ratifications with Great Britain, as is the normal procedure for bringing treaties into full force and effect. 1976 House Hearings, supra note 1, at 166-67 (memorandum from the Department of State).
Authority of the President to Enter Into Executive Agreements Pursuant to His Independent Constitutional Powers

Assuming that international agreements other than treaties may appropriately be concluded, the question arises concerning the precise legal authority for such agreements. As noted, Department of State records indicate that eighty-six percent of all executive agreements are authorized by statute. Such agreements are sometimes known as "Congressional-Executive agreements" and may be authorized by prior statute or by joint resolution of the Congress subsequent to negotiation. Other executive agreements are authorized by treaties or by some combination of treaty and statute. There are also a number of agreements authorized by a combination of statute and the Constitution. The category which has generated the greatest concern, however, is comprised of those agreements, numbering no more than two to three percent of the total, concluded by the President pursuant solely to his independent constitutional power. These agreements are sometimes characterized as "pure" or "sole" executive agreements.

While the Constitution does not specify that the President may enter into such agreements, it has been generally accepted that the several provisions which together comprise the basis for the foreign relations power of the President authorize international agreement making as part of that power. These provisions are:

1) "The executive power shall be vested in a President of the United States of America."
2) "The President shall be Commander in Chief of the Army and Navy. . . ."
3) "[H]e shall receive Ambassadors and other public Ministers [and] shall take care that the laws be faithfully executed. . . ."

The Department of State, in a report to the Congress in 1892 on the history of the Rush-Bagot agreement, said:
The arrangement thus effected seems not to have suggested at the time any doubts as to its regularity or sufficiency, or as to the entire competence of the executive branch of the Government to enter into it and carry out its terms.


Raoul Berger has written that "[R] espect for contemporaneous construction is deeply rooted in the past. In 1454 Chief Justice Prisot stated, 'the Judges who gave these decisions in ancient times were nearer to the making of the statute than we now are, and had more acquaintance with it.'" Several cases for this proposition are cited by Mr. Berger. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 145 (1974).

See note 63 supra.

These figures are compiled in a study by and available at the Office of Treaty Affairs, Department of State.

See L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173-84 (1972) [hereinafter cited as FOREIGN AFFAIRS].

U.S. CONST. art. II, § 1.

U.S. CONST. art. II, § 2.

U.S. CONST. art. II, § 3.
There are no Supreme Court cases or other authoritative rulings which list these provisions as empowering the President to conclude agreements, but these provisions have been accepted by authorities, such as the American Law Institute\(^7\) and other scholars,\(^7\) and by long and unchallenged practice.\(^7\)

It might be useful here to set forth illustrations of agreements concluded under these provisions. First, the "executive power" clause provides a wide basis of power for the making of executive agreements. Agreements to consult with another nation on a given subject may be authorized solely by the "executive power" clause.\(^7\) Agreements for a waiver of claims,\(^8\) payments on outstanding bonds,\(^8\) corrections of earlier agreements, and many other relatively minor technical agreements made necessary by the daily business of the United States Government could be listed.\(^8\)

\(^7\)Restatement (Second) of the Foreign Relations Law of the United States § 121, Comment a (1965). The American Law Institute lists these constitutional provisions and states that “[t]hese expressed powers afford the President a broad area in which to make international agreements. Under the ‘executive power,’ the President has authority to conduct the foreign relations of the United States; that power provides a broad constitutional basis for the making of executive agreements.” Id.

\(^7\)McDougal & Lans list the same articles of the Constitution as the basis for the President's constitutional authority to conclude international agreements without the benefit of statutory or treaty authority. McDougal & Lans, Treaties & Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 181, 246-48 (1945) [hereinafter cited as Treaties & Presidential Agreements]. These provisions are also listed in International Executive Agreements, supra note 61, chs. 9-10.

\(^7\)The Department of State has long referred to these provisions in Circular 175 Procedures § 721, 11 Foreign Affairs Manual § 721, reprinted in 1976 House Hearings, supra note 1, at 392-93, and has not been challenged by either the legislative or judicial branches of the government, or by scholars.

\(^7\)See, e.g., Consultations on Maritime Transportation, Sept. 18 & 20, United States-Brazil, T.I.A.S. No. 6559.

\(^8\)See, e.g., Claims Agreement, April 14, 1949, United States-Japan, T.I.A.S. No. 1911.


\(^7\)In 1905 John Bassett Moore wrote:

The conclusion of agreements between governments, with more or less formality, is in reality a matter of constant practice, without which current diplomatic business could not be carried on. A question arises as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice; the governments directly concerned exchange views and reach a conclusion by which the difference is disposed of. They have entered into an international "agreement"; and to assert that the Secretary of State of the United States, when he has engaged in routine transactions of this kind, as he has constantly done since the foundation of the government has violated the constitution because he did not make a treaty, would be to invite ridicule. Without the exercise of such power it would be impossible to conduct the business of his office.

Moore, Treaties & Executive Agreements, 20 Pol. Sci. Q. 385, 389-90 (1905). Moore's statement is descriptive of agreements of an informal nature. Moore also supported the right of the President to conclude agreements of a more formal nature pursuant to his independent constitutional powers.
The "executive power" clause may also authorize more significant agreements such as provisional boundary settlements, provisional arrangements pending final action on basic instruments of international organizations, and claims agreements. The "executive power" clause may authorize agreements to carry out a statutory or treaty provision which, while not expressly authorizing an executive agreement, nevertheless requires the President to take some action involving activity with another nation or a program of international cooperation.

The President has also concluded agreements under the "executive power" clause which are not inconsistent with legislation even in areas where the Congress has responsibility, such as the power to regulate foreign commerce. Of course, statutory authority may be necessary to give such agreements the force of domestic law.

The "Commander in Chief" clause has authorized a large proportion of "pure" executive agreements. Such agreements commonly provide for the conduct of military operations, but the "Commander in Chief" clause may also authorize agreements in peacetime. Perhaps the most famous example of the latter is the 1940 Hull-Lothian Agreement between the United Nations and the United States. It is accepted in U.S. law that:

The President, being entrusted with the right of conducting all negotiations with foreign governments, is the sole judge of the expediency of instituting, conducting or terminating them in respect of reclamations for injuries sustained by citizens abroad. Agreements for the adjustment or settlement of pecuniary claims of citizens against foreign governments, which meet with the approval of the claimants, and by which no obligations, except to relinquish the claim, is assumed on the part of the United States, are not usually submitted to the Senate.

The American Law Institute points out in its commentary to Section 121 of the Restatement that "[A] large proportion of the international agreements made under the powers of the President and intended to create legal relationships under international law have been based on his power as commander-in-chief and have provided for the conduct of military operations with allies of the United States." Restatement (Second) of International Law § 121, Comment at 379 (1965). See Tucker v. Alexandriff, 183 U.S. 424, 435 (1901).

8See Treaties & Presidential Agreements, supra note 77, at 246-47. 8

8It is accepted in U.S. law that:

The President, being entrusted with the right of conducting all negotiations with foreign governments, is the sole judge of the expediency of instituting, conducting or terminating them in respect of reclamations for injuries sustained by citizens abroad. Agreements for the adjustment or settlement of pecuniary claims of citizens against foreign governments, which meet with the approval of the claimants, and by which no obligations, except to relinquish the claim, is assumed on the part of the United States, are not usually submitted to the Senate. . . . S. CRANDELL, TREATIES, THEIR MAKING & ENFORCEMENT 108 (2d ed. 1916).

8For example, Section 3(a) of the Peace Corps Act, 22 U.S.C. § 2502 (Supp. V 1975), provides: "The President is authorized to carry out the programs in furtherance of the purposes of this Act, on such terms and conditions as he may determine." The statute does not explicitly authorize executive agreements, but clearly the President is obligated to implement a program requiring cooperation with foreign nations. This clause, in addition to the "executive power" clause of the Constitution, is the authority for the many Peace Corps agreements concluded by the United States.


8The American Law Institute points out in its commentary to Section 121 of the Restatement that "[A] large proportion of the international agreements made under the powers of the President and intended to create legal relationships under international law have been based on his power as commander-in-chief and have provided for the conduct of military operations with allies of the United States." Restatement (Second) of International Law § 121, Comment at 379 (1965). See Tucker v. Alexandriff, 183 U.S. 424, 435 (1901).

8See Treaties & Presidential Agreements, supra note 77, at 246-47. 8
United States and Great Britain under which, in return for a ninety-nine
year lease of certain sites for naval bases on British possessions in the West
Atlantic, the United States transferred to Great Britain fifty overage
destroyers. There was an option for the United States to use such bases but
no commitment or obligation to do so.90

The constitutional provision requiring the President to receive ambas-
sadors and other public ministers91 is the basis for the authority of the
President to recognize foreign governments and to enter into recognition
agreements. The recognition power supports the corollary power to enter
into agreements for settling outstanding problems, such as claims, at the
time of recognition.92

The constitutional provision obligating the President to “take care that
the laws be faithfully executed”93 overlaps to a great extent with the
“executive power” clause insofar as the latter provision authorizes agree-
ments to implement a statute or treaty which does not expressly authorize
an agreement, but which requires some program or activity of international
cooperation.94

While the scope of the President’s power to conclude such agreements
is a very difficult question which has not yet been settled, the legal right of
the President to enter into some agreements pursuant solely to his
independent constitutional powers is not open to question. That legal
right has been recognized by the Supreme Court, Congress, scholars and by
a long practice dating from the first executive agreements concluded by
those Founding Fathers who became President.95

Two leading cases in this context are United States v. Belmont96 and
United States v. Pink.97 The question before the Supreme Court in both
cases was whether a “pure” executive agreement, known as the Litvinov
Assignment, could override an inconsistent New York law. The answer
given by the Court in both cases was yes. The most striking statement of

90More recent examples of agreements concluded under the Commander in Chief power
include the Four Power agreement ending the Berlin Blockade, May 4, 1949, T.I.A.S. No.
1915; the Korean Armistice Agreements, July 27, 1953, T.I.A.S. No. 2781, 2782; agreements
with the Soviet Union relating to the prevention of incidents on and over the high seas, May
the War and Restoring Peace in Viet Nam, Jan. 23, 1973, T.I.A.S. No. 7542; March 2, 1973,
91U.S. Const. art. II, § 3.
92See notes 96-99 infra & text accompanying.
93U.S. Const. art. II, § 3.
94See Dean, The Bricker Amendment & Authority Over Foreign Affairs, 32 FOREIGN
Affairs 1, 2, 11 (1958).
95For the text of a memorandum dated October 31, 1975, by Monroe Leigh, Department
of State Legal Adviser, on the authority of the President to conclude executive agreements
pursuant to his independent constitutional powers, see 1975 Senate Hearings, supra note 1, at
306-11.
96301 U.S. 324 (1937).
97315 U.S. 203 (1942).
the legal efficacy of this executive agreement came from Justice Sutherland who held in *Belmont* that while the express language of the Constitution established that treaties could override inconsistent state law:

The same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. . . .

In the *Pink* case Justice Douglas said for the Supreme Court that "a treaty is a 'Law of the Land' under the Supremacy Clause (Art. VI, cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." The American Law Institute's *Restatement (Second) of Foreign Relations Law of the United States* indicates that "[a]n international agreement made by the United States as an executive agreement without reference to a treaty or act of Congress may, subject to the limitations indicated in § 117, deal with any matter that under the Constitution falls within the independent powers of the President." Furthermore, such an international agreement must deal with a matter "of international concern" and must not contravene any constitutional limitations applicable to all powers of the United States.

Scholars as well, without extended debate, have acknowledged the right of the President to conclude agreements upon subject matters within the scope of his independent constitutional powers. Even some congressional critics of executive branch practices in this area have not disagreed; the sponsors of the Morgan-Zablocki bill asserted that the bill should not deny the right of the President to conclude agreements pursuant to his independent constitutional powers.

98 U.S. at 331 (citation omitted).


100 *Restatement (Second) of Foreign Relations Law of the United States* § 121 (1965).

101 *Id.*, § 117.


103 For example, during the hearings before the Senate Committee on Foreign Relations on S. 596, which subsequently became the Case-Zablocki Act, Senator Case, in a discussion of armistice agreements made by the President pursuant to his independent constitutional powers, said: "I don't question that it is within the President's authority." *Hearings on S.596 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 74 (1971).

104 Chairman Morgan stated that the Morgan-Zablocki Bill (H.R. 4438) "should not be a blanket denial of a President's right to enter into some executive agreements solely on his own authority under the Constitution. Rather, it should assert the constitutional authority of Congress to have a voice in the making of certain agreements." *See 1976 House Hearings, supra* note 1, at 4.
Another of the complex problems involved in the law of international agreements is the choice between treaty or executive agreement. What agreements should be submitted to the Senate as treaties? What agreements may be entered into as executive agreements without prior or subsequent approval of the Congress? How is the executive branch to decide?

Guidelines published by the Department of State set forth the several legal and political variables examined by the executive branch in determining whether a particular agreement should be a treaty or an executive agreement:

a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
b. Whether the agreement is intended to affect state laws;
c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
d. Past United States practice as to similar agreements;
e. The preference of the Congress as to a particular type of agreement;
f. The degree of formality desired for an agreement;
g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
h. The general international practice as to similar agreements.105

It is clear that none of these factors standing alone are sufficient in any given case and that a particular agreement may involve conflicting considerations. Some variables may point to a treaty and some to an executive agreement. There are no hard and fast legal rules distinguishing between the two forms, and obviously, provided that an agreement is authorized by statute, treaty or the Constitution, the President has some discretion to choose between treaty and executive agreement.

This element of discretion should not be taken to imply a totally free choice on the part of the President. As the Legal Adviser of the Department of State has noted, the President "is expected to adhere to the customs and practices which have developed since the conclusion of the first executive agreements in the early years of the Republic."106 He has noted that the President's determination is shaped by general standards and usages that have evolved over the years and that the President will rarely disregard this "common law."

105Circular 175 Procedures § 721.3, 11 Foreign Affairs Manual § 721.3 (1974), reprinted in 1976 House Hearings, supra note 1, at 392-93. The Circular 175 Procedure is an internal Department of State regulation and does not have the force of law or of federal regulation. It is binding on the officials of the Department of State.

It is generally accepted in United States constitutional practice that agreements of exceptional national importance will be treaties rather than executive agreements, although history demonstrates that many important agreements were not submitted as treaties. Subject matters for which there is no statutory, treaty or constitutional authority to conclude executive agreements are dealt with through the treaty mechanism. Even in such cases, however, an executive agreement could appropriately be approved by a subsequent act of Congress. Subject matters within the competence of the states of the Union, and where an agreement will effect state law, are normally concluded as treaties, but as noted above, the Supreme Court has twice held that executive agreements may override inconsistent state law. Agreements requiring enactment of subsequent legislation by the Congress are most frequently submitted as treaties, although again it is appropriate in this context to conclude executive agreements subject to statutory authority or approval by joint resolution.

As part of the negotiating process, political considerations must often be taken into account by the President in making the decision; such considerations normally do not lend themselves to the formulation of precise rules of law. The degree of formality, for example, desired for any

---

107 In 1969 the Senate adopted the National Commitments Resolution, S. 85, 91st Cong., 1st Sess. (1969), which provides, in relevant part, 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.” It is clear from this Resolution that the Senate was not saying that a treaty is required for every national commitment, but rather that a statute or concurrent resolution may be appropriate alternatives. Statutes, of course, may authorize executive agreements. The Resolution does not eliminate the problem of choosing between treaty and executive agreement.

Important executive agreements are not a recent development in United States practice; it has been noted that the Rush-Bagot agreement of 1817 limited armaments on the Great Lakes. In a well known statement on the matter, Professor Quincy Wright said:

“Importance” and “dignity” are hard words to define, but the United States annexed Texas and Hawaii, ended the first world war, joined the International Labor Organization, the Universal Postal Union and the Pan American Union, settled over ten billion dollars worth of post-World War I debts, acquired Atlantic naval bases in British territory during World War II, acquired all financial claims of the Soviet Union in the United States, joined the United Nations pledging itself not to make separate peace in World War II and to accept the Atlantic Charter, submitted over a score of cases to international arbitration, and modified the tariff in numerous reciprocal trade agreements, by means other than the treaty-making process.

See Treasies & Presidential Agreements, supra note 77, at 237-38.

108 Professor Henkin has written:

Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress instead of two-thirds of the Senate only. Like a treaty, such an agreement is the law of the land, superseding inconsistent state laws as well as inconsistent provisions in earlier treaties, in other international agreements or acts of Congress.

Foreign Affairs, supra note 72, at 175. For a discussion of the Supreme Court cases, see notes 96-104 supra & text accompanying.
given agreement is a policy consideration which must weigh heavily in the President's final choice. This variable necessarily requires an appreciation of the relationship between this country and its agreement partner or partners which is not reducible to a clear legal norm. Speed is another important political consideration in ceasefire and other military or emergency agreements. Ceasefire agreements must be timed precisely to the hour and minute, and are therefore concluded as executive agreements rather than treaties even though they may be of exceptional international importance. Agreements dealing with the actual military conduct of war may be of crucial significance for the nation, and yet no one has seriously suggested that these agreements must be treaties.

It is notable that the choice of form in the United States has never been regulated by law. There are no judicial decisions on the matter, no statutes or federal regulations and only a few discussions of the issue in congressional debate or legal literature.

Indeed, congressional experts have agreed with the view that the executive branch has some discretion in the matter. Senator Sam Ervin's Subcommittee on the Separation of Powers of the Senate Judiciary Committee, after lengthy hearings in 1972 on this subject, wrote:

American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreement. First in order of importance is the treaty, an international bilateral or multilateral compact that requires consent by a two-thirds vote of the Senate prior to ratification. . . . Next is the congressional-executive agreement, entered into pursuant to statute or to a preexisting treaty. Finally, there is the

108 In 1952, Senator Bricker of Ohio, upon introducing a version of his proposed constitutional amendment, said:

I found it very difficult in my own mind to define an executive agreement, or what ought to be an executive agreement, and what ought to be encompassed by a treaty. . . . No attempt is made in the amendment to define the subject matter appropriate for an executive agreement. It is probably impossible to draw a satisfactory line of demarcation even in a statute. It would be unwise to make the attempt in a constitutional amendment.”

82 CONG. REC. S927 (1952).

110 Similarly, Arthur Sutherland, Professor of Law at the Harvard Law School, wrote as follows:

Two things are certain: they [executive agreements] have been used from the earliest days of the independence of the United States; and thoughtful men have during all that time been unable to supply what the Constitution lacks — a clear distinction between what is appropriate matter for executive agreement, and what should be handled by treaty with Senatorial concurrence. . . . We are as puzzled as President Monroe was in 1818. If we knew what was essentially treaty-like, we could define executive agreements by exclusion; but it is no more possible in our day than in his to define one unknown in terms of another.

Sutherland, Restricting the Treaty Power, 65 Harv. L. Rev. 1324, 1324 (1952). Professor Henkin has written that failure to obtain the consent of the Senate to an international agreement cannot be a manifest violation of the Constitution “since no one can say with certainty when it is required.” Foreign Affairs, supra note 72, at 427.
"pure" or "true" executive agreement, negotiated by the Executive entirely on his authority as a constituent department of government.

It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialog.\textsuperscript{111}

It is important to note here that the House of Representatives, not surprisingly, is somewhat less enthusiastic about treaties than the Senate. The House has a potentially far more significant role to play with respect to executive agreements since it may approve them as part of the legislative process either before or after their negotiation. For example, the pressure on the Department of State to conclude the 1976 agreement with Spain as a treaty came entirely from the Senate. Indeed, members of the House International Relations Committee viewed the choice of a treaty in this case as a usurpation of the role of the House since the treaty contains a multiyear commitment of funds. Representative Zablocki stated that H.R. 4438:

[responds to the fact that the executive branch has for the last two decades usurped the legislative powers of Congress. That has been demonstrated most recently in the Spanish base treaty in which the Executive included language constituting a multiyear authorization of appropriations. In effect, the Executive is legislating in a treaty.]\textsuperscript{112}

Representative Zablocki would have preferred an executive agreement subject to the approval of both houses.

On the other hand, the Senate is just as likely to prove jealous of its prerogatives. Senator Clark, upon introducing his treaty powers resolution\textsuperscript{113} on April 14, 1976, stated that the Morgan-Zablocki bill "represents a clear invasion of the treaty power of the Senate. The authority to advise

\textsuperscript{111}Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Congressional Oversight of Executive Agreements 6 (Comm. Print 1973) (emphasis added).


Over the years there have been many treaties which served as authorization for the payment of funds, including the Webster-Ashburton Treaty, Aug. 9, 1842, United States-United Kingdom, T.S. No. 119; the Treaty of Peace with Spain, Dec. 10, 1898, T.S. No. 345; and the Panama Canal Treaties: Harz-Banan Varilla Treaty, Nov. 18, 1903, T.S. No. 431; Treaty of Cooperation, March 2, 1936, T.S. No. 945; Treaty of Cooperation, Jan. 25, 1955, T.I.A.S. No. 5297. The latter is an authorization measure under which there is a permanent appropriation. See S. Rep. No. 1074, 84th Cong., 1st Sess. 41 (1955). Professor Henkin states simply that a treaty "can appropriately serve as legislation authorizing the subsequent appropriation." Foreign Affairs, supra note 72, at 406.

\textsuperscript{113}See note 19 supra & text accompanying.
and consent to international agreements—or to refuse to do so—is conferred by the Constitution only on the Senate, not on the House of Representatives.\footnote{114}{Cong. Rec. S5745 (1976).} This has always been, and will continue to be, an area of great difficulty. Since clear lines between treaty and executive agreement are not available, it is important that the executive and legislative branches, through consultation, seek common ground to the greatest possible extent in resolving these issues.

THE LEGISLATIVE VETO PROPOSALS

There are many proposals pending in Congress which would authorize the legislative veto. Of the bills providing for a legislative veto over executive agreements, the measure which at this writing appears to have the best chance of serious consideration is the Morgan-Zablocki bill. However, the following analysis applies in large measure to the Bentsen and Glenn bills described above.\footnote{115}{See notes 13-15 supra & text accompanying.}

The Legal Adviser pointed out in the House hearings on the Morgan-Zablocki bill that “[o]ne of the most disturbing features of these hearings has been the apparent assumption by several witnesses that a legislative role for the Congress in approving or disapproving executive agreements requires a legislative veto by one or both Houses.”\footnote{116}{1976 House Hearings, supra note 1, at 175.} Clearly agreements within the competence of the Congress may be appropriately invalidated by a subsequent statute or by joint resolution. While the joint resolution procedure, if based upon a sixty day waiting period, which not be desirable on policy grounds, it would not raise the central constitutional question of the Morgan-Zablocki bill. In addition, the power of the purse enables Congress to refuse funding for any executive agreement; this protection is very real since almost all significant agreements require funding. Thus, it is incorrect to assume from the outset that a legislative veto is the only method by which the Congress may assert a role in disapproving agreements.

All of the current legislative proposals contain the legislative veto, and that feature is their central constitutional defect. The relevant constitutional clause, the “presentation clause”, provides:

Every order, resolution or veto to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him or being disapproved by him, shall be repassed by two-thirds of the Senate and

\begin{flushleft}
\footnote{114}{Cong. Rec. S5745 (1976).} \\
\footnote{115}{See notes 13-15 supra & text accompanying.} \\
\footnote{116}{1976 House Hearings, supra note 1, at 175.}
\end{flushleft}
House of Representatives, according to the rules and limitations prescribed in the case of a bill.\textsuperscript{117}

It should be noted that the presentation clause is immediately preceded by the well-known requirements for the enactment of a "bill" into law.\textsuperscript{118} The intent of the presentation clause, according to James Madison, was to avoid precisely what the legislative veto entails — the circumvention of the possibility of a presidential veto by characterizing enactments intended to have the force of law as resolutions, votes, orders, or anything other than a "bill."\textsuperscript{119}

Unlike the long and judicially sanctioned practice of concluding executive agreements, the congressional enactment of legislative vetoes is recent, never judicially sanctioned and sharply controversial. Indeed, from 1789 until the early 1930's, although proposals were occasionally made for legislative vetoes, it was assumed that a concurrent or one-House resolution would not have the force of law. In 1897 a Senate Judiciary Committee report stated that concurrent resolutions were used for issues "in which both Houses have a common interest, but with which the President has no concern."\textsuperscript{120} In 1973 the Congressional Research Service of the Library of Congress said that the word "necessary" in the presentation clause means necessary if an order, resolution or vote is to have the force of law.\textsuperscript{121} Erwin Griswold, former Dean of the Harvard Law School and Solicitor General of the United States, said in recent congressional testimony:

Concurrent resolutions are fine for saying that the Congress will adjourn on January 18 at 12 noon or that the Congress will meet in joint session to hear an address by the President of the United States. But as far as making law is concerned, I don't have any feeling that a concurrent resolution has any more standing than any other statement by a group of fine citizens.\textsuperscript{122}

It is true that on occasion Presidents have acquiesced in the adoption of legislation containing the legislative veto, although this has normally been for political reasons or because of the felt necessity to have a particular statute passed. In his testimony before the Zablocki subcommittee, the Legal Adviser cited the best known example of this: President Roosevelt's approval of the 1941 Lend-Lease Act, in spite of his belief that one

\textsuperscript{117}U.S. Const. art. I, § 7, cl. 3.
\textsuperscript{118}U.S. Const. art. I, § 7, cl. 2.
\textsuperscript{122}Hearings Before the Senate Special Comm. on the Termination of the National Emergency, 95th Cong., 1st Sess. 746 (1973).
provision violated article I, section 7 of the Constitution. At the time of approval President Roosevelt wrote an internal memorandum setting forth his constitutional objection, and in 1953 this memorandum was made public by Attorney General Jackson.\textsuperscript{123} In sum, the short, controversial and untested practice that we have had since the 1930's, and far more recently in foreign affairs statutes, would not appear to match almost 150 years of practice which deemed the legislative veto to be constitutionally inappropriate.

Other arguments have been raised in support of the legislative veto technique. It has been suggested that such a veto is legitimate if provided for in a statute duly approved by the President or passed over his veto.\textsuperscript{124} But a constitutionally doubtful provision is not rendered less doubtful by reason of its inclusion in a statute, whether or not approved by the President. As the Legal Advisor argued: "Under this theory . . . the Congress might just as well pass a statute permitting it to veto by concurrent resolution Supreme Court decisions it did not approve of."\textsuperscript{125}

It might also be argued that since Congress may prohibit certain types of executive agreements by statute, it may appropriately take the lesser step of providing for a legislative veto of such agreements. But the right to prohibit a measure does not, of course, carry with it a right to attach unconstitutional conditions. This theory would permit Congress to grant the right of veto to a single committee, to a single member of Congress or even to a committee staff member. Clearly such veto rights would constitute less stringent measures than barring an agreement altogether, but clearly these would be unconstitutional measures.

One of the commonly heard arguments in support of the legislative veto is based upon a delegation of powers concept.\textsuperscript{126} The argument is that in areas over which Congress has jurisdiction, it may delegate its power to the President while retaining a measure of control through the legislative veto. But once again, delegating a power cannot carry with it a right to retain a lesser power specifically prohibited by the Constitution. The contrary argument is analogous to the viewpoint that the veto is justified as a lesser step than outright prohibition.

In any event, in the area of international agreements it is difficult to apply a theory of delegated powers. The Congress can neither negotiate nor conclude international agreements and there is, therefore, no such power to delegate to the President. These are executive powers, and the

\textsuperscript{123}\textit{See} Jackson, \textit{A Presidential Legal Opinion}, 66 \textit{HARV. L. REV.} 1353 (1953).

\textsuperscript{124}For example, Ann Holland, a witness at the 1976 House hearings, argued that "[W]hile the legislative veto has the force of law, it derives its force from the enabling act, in this case from a law such as that proposed in the form of H.R. 4438." \textit{1976 House Hearings, supra} note 1, at 111.

\textsuperscript{125}\textit{Id.} at 177.

\textsuperscript{126}\textit{Id.} at 112-13, 114-15.
Morgan-Zablocki bill does not and could not constitutionally involve a delegation by the Congress of such powers. As Professor John Bassett Moore wrote in 1921: "As Congress possesses no power whatever to make international agreements, it has no such power to delegate."\(^1\)\(^2\) Congress may, of course, authorize the President to conclude agreements in specific areas over which it has jurisdiction, but authorization and delegation are not the same.\(^1\)\(^8\)

It has been argued that the presentation clause is not violated by a one-House veto, since that clause refers only to orders, resolutions or votes to which the concurrence of both Houses may be necessary.\(^1\)\(^9\) This proposition appears to rest upon an assumption that Congress may do anything the Constitution does not specifically forbid. The best response to this argument was stated by H. Lee Watson in his outstanding study of the legislative veto:

It verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt.\(^1\)\(^3\)

The "necessary and proper" clause\(^1\)\(^3\)\(^1\) has been cited in support of the legislative veto.\(^1\)\(^9\) But clearly that general clause cannot appropriately supersede the very specific procedural requirement found in the presentation clause.\(^1\)\(^3\)

---

\(^1\)\(^2\)As quoted from *Treaties & Presidential Agreements*, supra note 77, at 201.

\(^1\)\(^8\)That is to say, while every delegation constitutes an authorization, the reverse is not true. If Congress does not authorize international agreements on a given subject within its competence, it cannot make the agreement itself. It may authorize agreements, but since it does not have the power to negotiate and conclude agreements itself, it has nothing to delegate in this area. In brief, it is necessary to distinguish competence over a given subject matter from competence over the process of negotiating and concluding international agreements. The latter are executive branch functions which cannot be delegated by a Congress which does not have such powers.

\(^1\)\(^9\)\(^1\)\(976\) *House Hearings*, supra note 1, at 116-17.

\(^1\)\(^3\)\(^1\)\(^3\)Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *CALIF. L. REV.* 983, 1066 n.428 (1975).

\(^1\)\(^3\)\(^1\)\(^3\)See *1976 House Hearings*, supra note 1, at 131 (statement of Professor Ruth Bartlett).

\(^1\)\(^3\)\(^1\)\(^3\)See Buckley v. Valeo, 424 U.S. 1 (1976):

[T]he claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

*Id.* at 135.
The argument was also advanced that the statute could stipulate that the Congress was required to approve executive agreements by resolution, rather than express disapproval, during the sixty day waiting period. It is submitted, however, that the presentation clause prohibits this procedure as well. Once again, a congressional resolution must have the approval of the President or be passed over his veto if it is to have the force of law. As the Legal Adviser noted, the President "is, after all, under the Constitution part of the legislative process."

Another obvious constitutional problem with the Glenn and Morgan-Zablocki bills is that they do not exclude from their coverage agreements concluded pursuant to the President’s independent powers. Such agreements may not be invalidated by concurrent resolution or even by statute.

The bills also entail serious practical problems. They appear to be applicable in war as well as in peacetime, and yet in the past the President, utilizing his Commander in Chief power, has concluded many agreements essential to the conduct of war or other armed conflict. Surely it is not practical for the President to submit such agreements to the Congress for a sixty day waiting period, nor is it constitutionally required, at least under circumstances in which Congress has approved a declaration of war. Similarly, armistice and ceasefire agreements appear to be covered, but as noted, they must be timed precisely and cannot reasonably be subjected to a sixty day or even a ten day period during which they would be subject to possible congressional disapproval.

These problems are compounded by the broad coverage of the bills, particularly the Glenn bill, which do not permit distinctions between agreements of significance and the great bulk of routine technical agreements that are of little interest to the Congress. Even the Morgan-Zablocki bill, while purporting to limit its application to "national commitments," defines such commitments so broadly that even the most trivial provision of economic assistance would fall within its ambit. The Department of State noted that:

The 60-day waiting period would greatly complicate the rapid resolution of everyday practical problems. Some of these are of a routine nature that require only a simple exchange of notes, perhaps to compose a small difference by adopting a minor amendment to a previously concluded executive agreement itself of a routine nature.

The President's authority as negotiator for the nation would also be eroded should any of the bills be enacted into law. The United States
would find it far more difficult to obtain concessions from other governments because it would be unable to give firm commitments. The risk of delicate compromises coming unravelled would increase. Indeed, the United States would become the only nation in the world unable to enter into international agreements by signature or on short notice. There is very little to be said in favor of this kind of unilateral restriction on the President's capacity to negotiate with foreign nations.

In addition, the Morgan-Zablocki bill would, if enacted, almost certainly generate confusion in the administration of legislation which regulates various national commitments of the United States. The bill appears largely superfluous in the sense that most, if not all, of what would constitute a "national commitment" under the bill is already regulated by separate statutory enactments, including the areas of military sales, arms control, atomic energy, foreign economic assistance, fishing agreements and trade. Legislative vetoes, while not approved by the executive branch, already exist in several of these areas. The Legal Advisor asked, in his testimony on the Morgan-Zablocki bill:

---

138 At the 1975 Senate hearings on the Glenn and Bentsen bills, the Department of State Legal Adviser, Monroe Leigh, made this point. In a reply, Senator Glenn said to Mr. Leigh: "In your prepared statement you indicated how much this would tie the President's hands, [sic] the United States would be the only nation in the world unable to enter into any international agreement whatsoever, either on signature or on short notice. You betcha, that is exactly the purpose of this." Senator Glenn then went on to defend the bills on the basis of "uncertainty" on the part of foreign nations as to what U.S. commitments are, and the need for a "partnership" with Congress on such commitments. See 1975 Senate Hearings, supra note 1, at 49.


140 Arms Control and Disarmament Act, 22 U.S.C. § 2551 et seq. (1970). Cf. Section 33 of the Act 22 U.S.C. § 2573 (1970) which provides, inter alia, that: no action shall be taken under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.


143 Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (to be codified at 16 U.S.C. § 1801 et seq.). Under Title II of the Act, Congressional oversight of fishing agreements is established by means of a requirement that fishing agreements are subject to a sixty day waiting period prior to entry into force and that the Congress may, by joint resolution (subject to veto by the President), prevent their entry into force. Id. §§ 201, 206 (to be codified at 16 U.S.C. §§ 1821, 1826).

144 See Trade Act of 1974, 19 U.S.C. §§ 2191 et seq., 2211 et seq. (Supp. V 1975), which establish a significant Congressional capability to override certain executive branch actions. Examples of actions that could be overridden by a majority vote of both Houses include decisions by the President not to provide import relief or import relief other than that
Would an atomic energy agreement be subject to veto by Congress under the terms of the Atomic Energy Act or under the terms of H.R. 4438? Which is the governing law? The differences between existing statutes and H.R. 4438 may be quite significant. Under the Arms Export Control Act of 1976, foreign military sales over $25 million may be vetoed by Congress within 30 days. Public Law 94-329 (22 U.S.C. 2776). But H.R. 4438 provides for 60 days in which Congress may veto. Which period is applicable? Even more anomalous, Congress has 30 days to consider and possibly veto sales in excess of $25 million pursuant to the Arms Export Control Act of 1976, but 60 days to consider and perhaps veto sales of less than $25 million under H.R. 4438. Logic would allow a longer time for Congress to consider the larger sale.\(^1\)

It would appear inevitable that the Morgan-Zablocki bill or any of the variations that have been suggested so far would introduce uncertainty and conflict on jurisdictional grounds, not only between the executive branch and the Congress but also among various committees of Congress. The bill either would have to be coordinated with all other statutes regulating foreign commitments or it would have to supersede them. It is submitted that the wiser approach is to proceed as Congress has to date by regulating each area in detail, rather than by subjecting every possible commitment to a very general procedure which is necessarily without specificity and which cannot constitute effective and meaningful regulation.

The Legal Adviser noted in his statement on the Morgan-Zablocki bill that this kind of legislation “fails, in my view, because it attempts too much.” He asserted:

It tries to regulate every commitment of any significance, but naturally does so without specificity, because it would be impossible to put the necessary detail into one statute. Congress has already regulated in great detail most areas of national commitment, and by treating each area separately, has been able to establish meaningful and effective rules. In our view, it is far better to proceed as Congress has done to date — that is, study each area carefully, and write detailed, specific regulations for its governance. That is a far better approach than an across-the-board attempt to reach everything in one law.\(^1\)

While the alternative of requiring detailed legislation may be more burdensome for the Congress, it is surely more consonant with the

---

\(^1\) 1976 *House Hearing*, supra note 1, at 180.

\(^1\) *Id.*
constitutional concept of separation of powers and in the end more likely
to prevent any possible abuse by the executive branch.

THE CLARK RESOLUTION

It is submitted that the resolution\textsuperscript{147} recommended by Senator Clark, while purporting only to establish an internal Senate rule of procedure, would also raise complex legal and policy questions if adopted.\textsuperscript{148} The Clark Resolution would constitute a very significant and unwise interference with the role of the House of Representatives. Since most international agreements are authorized by statutes approved by both Houses of Congress, it seems apparent that the statutory purpose would be frustrated in any case in which the Senate redesignated an executive agreement authorized by statute as a treaty. Further, since the Senate could designate individual or classes of agreements as treaties, any House judgment as to how existing statutory authority might be changed in the future could be rendered irrelevant by the Senate action contemplated in the Clark Resolution. The House role would be greatly weakened if not completely eliminated in particular cases.

Perhaps even worse from the House of Representatives' point of view are current statutes which specifically require the approval of both House of Congress before agreements concluded thereafter may enter into force.\textsuperscript{149} Should the Senate designate any of these arguments as treaties, the House role in this process would simply vanish. It is doubtful that the House of Representatives would accept this kind of diminished role for itself, and it is highly questionable whether the constitutional framework of the legislative process may be stretched this far.

In hearings on the Clark proposal before the Senate Foreign Relations Committee, the Legal Adviser pointed out that one possible House response might be to react in kind. The House of Representatives could simply establish a rule permitting it to give treaties another designation, which would in turn trigger a point of order procedure permitting any single House member to block the funding for that treaty. Such a House procedure would be equally objectionable since it would improperly interfere with the role of the Senate in approving treaties.

Even more clearly, the Clark Resolution raises constitutional questions with respect to agreements concluded by the President pursuant to his


\textsuperscript{148} The full text of the Department of State Legal Adviser's statement to the Senate Committee on Foreign Relations on the Clark proposal is available at the Office of the Legal Adviser or at the office of the Committee.

independent constitutional powers, such as ceasefire or recognition agreements. The Senate may not appropriately redesignate such agreements as treaties.

It is submitted that the Clark Resolution would also permit an unwise and legally questionable interference with the role of the President who, under the Constitution, "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties provided two thirds of the Senators present concur." The Constitutional Convention specifically granted the power to make treaties to the President, although with the advice and consent of the Senate. Senator Clark's proposal would appear to constitute a significant step backward to the system prevailing under the articles of Confederation.

Most fundamentally, the Clark Resolution would take from the President and grant to the Senate the final decision as to whether any particular arrangement with a foreign country should be in treaty form. Since the question of treaty or executive agreement involves not only legal questions but important political and negotiating variables touching on our relationship with foreign nations, a Senate redesignation of an executive agreement as a treaty would constitute a very significant and questionable interference with the negotiation process. As noted, even Senator Ervin, who introduced a bill proposing a legislative veto over international agreements and who was a strong critic of executive branch practices in this area, supported the statement of his Subcommittee on Separation of Powers that "it is the prerogative of the executive to conduct international negotiations; within that power lies the lesser albeit quite important, power to choose the instrument of international dialog." Within the limits noted above, that statement is correct as a matter of law and sound policy.

Senator Clark's proposal also presents a difficult legal issue concerning Senate rules of procedure. While the two Houses unquestionably have very broad discretion in deciding upon their own internal rules, it is clear that such rules must be consistent with the Constitution. Since it is required

150U.S. CONST. art II, § 2.
151See M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 171 (1913) (discussion of the Convention). Professor Henkin states that the Founding Fathers were "eager to abandon treaty-making by Congress which, under the Articles of Confederation, appointed negotiators, wrote their instructions, followed their progress, approved or rejected their product. . . . And so, the Constitution gave the power to make treaties to the President but only with the advice and consent of two-thirds of the Senators present." FOREIGN AFFAIRS, supra note 72, at 129.
152Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Congressional Oversight of Executive Agreements 6 (Comm. Print 1973). See also notes 106-111 supra & text accompanying.
153See Id.
154See United States v. Ballin, 144 U.S. 1, 5 (1892), in which it was held that each House "may not by its rules ignore constitutional restraints or violate fundamental rights, and there
that all legislation, including funding measures, receive a simple majority, a Senate rule requiring 100 percent approval of any type of legislation would be unconstitutional. The Clark Resolution is questionable because it establishes such a 100 percent rule on funding legislation to implement legally authorized executive agreements simply on the basis of a non-binding Senate resolution that a particular agreement should have been a treaty. If the Clark Resolution is appropriate, then the voting rules may always be changed, no matter how drastically, provided only that the Senate first expresses its non-binding opinion on any question. In constitutional terms, I believe this to be a very dubious proposition.

Perhaps the net effect and central purpose of the Clark Resolution is to compel the executive branch to conclude every agreement as a treaty. Surely a negotiator for a foreign government, if faced with the Clark procedure, would rightly insist that his government take no chances with an executive agreement since the Senate might redesignate it a treaty. The effect would be to compel the United States to negotiate all or most agreements as treaties notwithstanding statutory or other authority to conclude executive agreements. This is hardly conducive to the effective conduct of United States foreign policy or to the effective functioning of the government.

CONCLUSION

Despite his very critical analysis of the current American Presidency in *The Imperial Presidency*, Arthur Schlesinger nevertheless rejects the proposal of a legislative veto of executive agreements. He states: "Once again willful use of presidential power had caused excessive congressional

should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."  See also Powell v. McCormack, 395 U.S. 486 (1969).

It has been argued that the normal majority rule will still prevail since it requires a majority to adopt the Clark proposal to begin with, a majority to decide an agreement should be a treaty, and a majority to uphold the point of order procedure should it be challenged in the Senate.  See S. Res. 486, 94th Cong., 2d Sess., 122 Cong. Rec. S11415-S11417 (daily ed. June 30, 1976).

But as the Legal Adviser pointed out in his statement to the Committee:  
[I]f the proposed procedure for funding is really subject to majority rule, why have this unusual resolution at all? Why not continue with the normal and constitutionally mandated procedure under which all legislation, including funding measures, are subject to the normal majority procedure? The entire purpose of a point of order procedure is to permit fewer than a majority, even one Senator, to block a proceeding. It is quite misleading, in our view, to give the impression that S. Res. 486 is simply one more application of the normal majority rule.


It is clear that the Clark proposal provides for a majority at every point except the funding votes on agreements designated as treaties. At that point a 100% rule applies.
reaction [but] the answer lay less in the establishment of rigid procedures than in the re-establishment of comity." 156

Ultimately, if detailed regulation over specific areas proves insufficient for the Congress, then the current conflict between the two branches over international agreements will be resolved not so much by arriving at definitive legal solutions to complex separation of powers issues, but rather through an improved political process that entails an ongoing and cooperative system of consultation on issues of significance. Whether the question is the desirability of a particular agreement, or whether it should be concluded as a treaty or executive agreement, or what kind of implementation is necessary or desirable, the most appropriate avenue to an efficient and yet politically responsive method of international agreement making, like all areas of foreign policy, is close communication between the two branches.

The executive branch and the Congress should be engaged in a search for mutually agreeable rules on consultation. As noted above, 157 consultation with whom, on what issues, and for what purpose and effect are difficult issues, but they can be resolved. Perhaps more regularized briefings by high level officers of the Department of State including information on any contemplated agreements of significance would be helpful. The Department of State has repeatedly made such suggestions to the Congress.

Legislation which fails because it attempts too much, because it inhibits the President's essential power to negotiate for the nation, and because it generates resistance and substantial controversy over as yet unanswered constitutional questions, is not the answer. The nation does not need additional constitutional controversy. It does require assurances that the Congress and the executive branch are consulting and cooperating. Developing an improved and meaningful system of "comity" should be a central task of those responsible for the formulation and conduct of United States foreign policy.

157 See notes 99-102 supra & text accompanying.