Executive Agreements: Beyond Constitutional Limits?

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EXECUTIVE AGREEMENTS: BEYOND CONSTITUTIONAL LIMITS?

I. INTRODUCTION

The Constitution of the United States provides that treaties between the United States and foreign nations are to be made by the President with the advice and consent of two-thirds of the Senate. The Framers of the Constitution recognized the danger of allowing the President unilaterally to bind the nation to obligations with foreign countries. Thus, the important function of treatymaking was conferred jointly upon the executive branch and the Senate. Despite this express constitutional provision, "international" or "executive" agreements, have long been used to supplement treaties and, in

1. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2.
2. Alexander Hamilton, in referring to the treatymaking power, stated:
   The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States . . . . It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them.
3. Id. at 223-24.
4. A variety of terms are used to describe agreements not concluded pursuant to article II, § 2, cl. 2. In this note, the terms "executive agreement" and "international agreement" will be used interchangeably to describe the various categories of agreements other than treaties.
5. Executive agreements have been common from the nation's early history. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 173 (1972). For example, in 1790, Congress empowered the President to pay the Revolutionary War debt by borrowing money from foreign countries. Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138-39. Two years later, the Postmaster General was authorized to make arrangements with postmasters of foreign countries for the receipt and delivery of mail. Act of Feb. 20, 1792, ch. 7, § 26, 1 Stat. 232, 239. The Rush-Bagot Agreement, 8 Stat. 231 (1817), providing for the mutual limitation of naval armed forces on the Great Lakes between the United States and Great Britain, was concluded by an exchange of notes in April 1817. 5 J. MOORE, INTERNATIONAL LAW DIGEST § 752, at 214-15 (1906). Nearly a year later, on April 6, 1818, President Monroe submitted the correspondence to the Senate asking it to consider whether the agreement required Senate consent or was a valid exercise of the President's constitutional powers. The Senate gave its consent and the agreement was subsequently proclaimed by the President, 11 Stat. 766 (1818), although there
many instances, have replaced them. Thus, a critical question arises: To what extent does the Executive's use of the international agreement violate both the treaty-making clause of the Constitution and the Framers' intentions?

The President's power to conclude international agreements, with or without congressional authorization, is accepted today by many scholars, although the scope of this power remains unsettled.

was no formal exchange of ratifications, as is normally needed for a treaty. The President, however, had already taken action under the agreement prior to its submission to the Senate. 5 J. MOORE, INTERNATIONAL LAW DIGEST § 752, at 214-15 (1906); S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 102-03 (1916). Rush-Bagot may have actually been a congressional-executive agreement since Congress had earlier authorized the President to sell or lay up all the armed vessels on the Great Lakes by legislation. Act of Feb. 27, 1815, ch. 62, § 4, 3 Stat. 217.

From 1789 to 1939, the United States entered into nearly 2,000 international instruments of which only 800 were made by the treaty process. Wright, The United States and International Agreements, 38 AM. INT'L LAW 341, 344 (1944). As of January 1, 1972, of the 5,306 treaties and other international agreements in effect, 4,359 were executive agreements while only 947 were actual treaties. 66 DEP'T ST. BULL. 840 (1972).

6. Congressional-executive agreements, see infra text accompanying note 45, have been described as a "complete alternative to a treaty." L. HENKIN, supra note 5, at 175. Two well-known proponents of executive agreements claim:

The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate. The same decisive authorities have likewise made agreements negotiated by the President, on his responsibility and within the scope of his own constitutional powers, appropriate instruments for handling many important aspects of our foreign relations.

McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I, 54 YALE L.J. 181, 187 (1945) (footnote omitted). The McDougal-Lans article was written partially in response to Professor Edwin Borchard's position in Borchard, Shall the Executive Agreement Replace the Treaty? 53 YALE L.J. 664 (1944) [hereinafter cited as Borchard]. Borchard argues that a "traditional distinction in substance, form, and procedure between treaties and executive agreements affords no justification for a belief in their interchangeability." Id. at 671. Borchard then responded to the McDougal and Lans article, reasserting his earlier position, in Borchard, Treaties and Executive Agreements—A Reply, 54 YALE L.J. 616 (1945) [hereinafter cited as Borchard, Reply], where the author outlined ten differences between treaties and executive agreements which prevent them from being interchangeable. Id. at 628-29.

7. See, e.g., E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1789-1957, at 207-17 (1957); L. HENKIN, supra note 5, at 173-88; Goldwater, The President's Constitutional Primacy in Foreign Relations and National Defense, 13 VA. INT'L LAW 463 (1973); Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 YALE L.J. 345, 351-52 (1955); McDougal & Lans, supra note 6; Rovine, Separation of Powers and International Executive Agreements, 52 IND. L.J. 397, 415 (1977); Wright, supra note 5, at 341. These scholars espouse the view that the President may enter into executive agreements solely on the basis of his constitutional powers. But see Berger, The Presidential Monopoly of Foreign Relations, 71 MICH. L. REV. 1 (1972); Borchard, supra note 6; Sparkman, Checks
Congress, however, has expressed concern that its powers are being eroded by the extensive use of the international agreement by the executive branch and has stressed the need for a sharing of power in the field of foreign affairs.9

As the tool used to implement the nation's foreign policy decisions, the international agreement lies at the center of any discussion of the constitutional division of power with respect to foreign affairs. The basic and underlying concern, however, is the formulation of United States foreign policy and the processes that mold the results. Our constitutional system of checks and balances under the doctrine of separation of powers requires that policymaking not be concentrated solely in one branch of the federal government.

Exclusive executive control of foreign policymaking is unwise for a variety of reasons. A coherent, unified foreign policy based on a broad consensus rather than on unilateral decisions is in the best interests of the nation; this can only be achieved by striking a workable balance between Congress and the Executive. Greater congressional participation in foreign policymaking provides an opportunity for public debate of proposed programs and allows the people to be heard. Allowing input at the early stages of the process can engender congressional and popular support for government policy, avoid the cost to the Executive of having to "push" a program through Congress, and allow different viewpoints and expertise to mold a sounder policy.

Finally, increased concentration of the foreign policymaking power in the hands of the Executive is contrary to the spirit of the Constitution and is undemocratic.10 Presidential power in the area of

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8. Corwin views the essential question as not whether the President can constitutionally enter into executive agreements with other governments (a point he finds universally conceded) but rather what scope these agreements may validly take. E. Corwin, supra note 7, at 213.


10. Proponents of presidential primacy in the area of foreign affairs espouse other policy
foreign affairs should not be permitted to expand at the expense of Congress.11

The initial consideration in the analysis of the President’s power to conclude international agreements is one of constitutional interpretation. One subject of debate is whether the term “treaty” in article II12 was meant to encompass all international agreements made on behalf of the United States.13

The controversy arises from the language of article I, section 10 of the Constitution which states: “No State shall enter into any Treaty, Alliance, or Confederation”14 and further provides: “No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .”15 The differing interpretations of legal scholars serve to illustrate the conflicting theories regarding these provisions. Two scholars, McDougal and Lans, read these provisions as allowing for the conclusion of international agreements by the executive branch. Their position is that the reference to “agreements and compacts” demonstrates that the Framers recognized the existence of agreements other than treaties and would not deny to the federal government the power to use techniques made available to the states.16

While this theory may be used to authorize agreements made by Congress and the President together, it does not justify the conclusion of agreements by the Executive alone. Another scholar, Raoul Berger, espouses the countervailing theory that the Framers author-

reasons to justify their position. These notions are succinctly presented in Mathews, supra note 7:

The Presidency has possessed from the beginning inherent practical advantages which have enabled it to assume a large share of control over the foreign policy of the United States. Because the executive is relatively unified it is able to act more swiftly than a legislature divided in opinion. The President is in a position, as Congress is not, to keep negotiations and decisions secret at need. He possesses more adequate sources of information than does Congress in foreign matters. And he is always ready to act, unlike the legislature, which may be in recess or incapacitated by the parliamentary complications of other business.

Id. at 349 (footnote omitted). See also The Federalist No. 64 (J. Jay).

11. There are, of course, certain ways by which Congress may limit presidential action. One is to deny funding of presidential agreements; another is to pass legislation nullifying the presidential action. These drastic measures are rarely exercised, however, and would involve controversy which could be avoided by congressional input at an earlier stage.


13. See infra text accompanying notes 16-20; see also infra note 19.


15. Id. cl. 3.

16. McDougal & Lans, supra note 6, at 221.
ized the states to enter into agreements, but deliberately denied granting this same power to the President. According to Berger, since a state may only make "agreements" with the consent of Congress, it follows that allowing the President to make such agreements without congressional approval is contrary to the Framers' true intentions. Berger also notes that the word "treaty" had a very broad meaning at the time of the adoption of the Constitution and was meant to include all foreign commitments, while the terms "agreement" and "compact" referred chiefly to boundary line settlements and the regulation of matters connected with boundaries.

The interpretation of these constitutional provisions remains unsettled. It does seem clear, however, that a requirement that every international agreement be submitted to the Senate for approval would prove extremely impractical and cumbersome. Because the conclusion of non-treaty international agreements has been an established practice since the early days of the nation's history, justifica-

18. Id. at 40.
19. Id. at 35. Hamilton construed "treaty" in the broadest terms:
   [F]rom the best opportunity of knowing the fact, I aver, that it was understood by all to be the intent of the provision to give that power the most ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations . . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two thirds of the Senate, with the President, being required to make any treaty whatever.


20. Weinfeld, What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?, 3 U. CHI. L. REV. 453, 464 (1936). The author asserts that the phrase "agreements or compacts" as intended by the Framers of the Constitution included "(1) settlements of boundary lines with attending cession or exchange of strips of land" and "(2) regulation of matters connected with boundaries as for instance regulation of jurisdiction of offenses committed on boundary waters, of fisheries or of navigation." Id. The content of the word "agreement" is not, according to Berger, decisive; rather, the important factor is that the agreement itself must still be ratified by a consenting Congress. Berger, supra note 7, at 42.

21. See 1975 Senate Hearings, supra note 9, at 163 (statement of Prof. Richard A. Falk): "[T]he executive branch needs to have an efficient means to conclude executive agreements on routine matters. With respect to such routine subject-matter it would be a waste of time and energy to require the Congress to act on each and every executive agreement." Another example of the need for such agreements is provided by Henkin's comments on the difficulties surrounding passage of the National Commitments Resolution. Henkin notes that daily foreign relations inevitably involve "commitments" that "[n]o President could avoid if he wished; the constitutional system would not last a month if he sought Senate or congressional consent for every one of them." L. HENKIN, supra note 5, at 182.

22. See authorities cited supra note 5; see also infra notes 32-33, 45-52, 103-05 and
tions do exist for their continued use. Although these factors do not establish a constitutional basis for the agreement-making power, they are relevant considerations nonetheless. Moreover, the courts of this country, most notably the United States Supreme Court, have consistently recognized the existence and validity of agreements concluded by means other than those provided in article II of the Constitution. While the power of the President to enter into certain international agreements has been generally accepted, the limits on this power have created considerable controversy and require examination.

This note analyzes the international agreement-making powers of the President by examining the various categories of international agreements, the claimed authority for each, and the problems associated with each type of agreement. Relevant court decisions dealing with the parameters of presidential powers in foreign affairs are discussed and controversial agreements and the resulting tension be-

accompanying text.

23. The repeated use of executive agreements by Presidents does not automatically render the practice constitutional. McDougal and Lans, however, attach considerable weight to this fact and maintain that "the continuance of the practice by successive administrations throughout our history makes its contemporary constitutionality unquestionable." McDougal & Lans, supra note 6, at 291. In Memorandum on the Intention of the Framers of the Constitution with Respect to International Agreements other than Treaties, the Department of State claims that the practice of early Presidents (Washington, Adams, Madison, and Monroe) who "were all closer to the making of the Constitution than we are" reveals that they "clearly approved and acted upon the conviction that executive agreements are permitted by the Constitution." State Dep't Memorandum, reprinted in 1976 House Hearings, supra note 9, at 164, 167. This "adaptation by usage" argument is vehemently rejected by Berger, who claims it "is a label designed to render palatable the disagreeable claim that the President may by his own practices revise the Constitution." Berger, supra note 7, at 49.


25. See authorities cited supra note 7.
between Congress and the Executive are examined. The difficult issue of executive discretion in choosing the particular mode of agreement is explored, as are congressional attempts to exert control over the Executive in this area. Finally, the need for a system of greater consultation between the legislative and executive branches is discussed and a concluding proposal is suggested.

II. INTERNATIONAL AGREEMENTS: CLASSIFICATION

International agreements entered into by the President may be classified into three broad categories:26 (1) those concluded pursuant to treaty provisions (treaty-related agreements),27 (2) those authorized by prior congressional legislation or subject to subsequent congressional approval (congressional-executive agreements),28 and (3) those concluded by the President acting solely on the basis of his independent constitutional powers (presidential agreements).29

A. Treaty-Related Agreements

Agreements concluded by the Executive pursuant to treaty provisions present little difficulty since the authorizing treaty has been ratified previously by the requisite two-thirds Senate consent.30 All
though it has been asserted that there have been "relatively few" executive agreements made within the framework of treaty provisions without prior or subsequent legislation, by 1953 approximately 10,000 executive agreements had been concluded pursuant to the NATO treaty alone. Agreements concluded pursuant to treaties have taken a variety of forms.

Treaty-related agreements have created some controversy: One problem stems from the claim that the agreement is outside the scope of the subject matter encompassed in the treaty. A recent example of such a claim occurred in 1971 in regard to an agreement concluded with Portugal which established the stationing of American forces at Lajes airbase in the Azores. In exchange for the right to maintain the base, the United States agreed to provide over $400 million in credits and assistance to Portugal. The Senate expressed its concern over the agreement for various foreign policy reasons.

United States forces in Japan, Sept. 29, 1953, United States-Japan, 4 U.S.T. 1846, T.I.A.S. 2848, concluded pursuant to Security Treaty, Sept. 8, 1951, United States-Japan, 3 U.S.T. 3329, T.I.A.S. 2492, held valid. Henkin suggests that since treaties form part of the supreme law of the land under the supremacy clause (U.S. CONST. art. VI), agreements implementing treaties represent presidential fulfillment of the obligation to "take care that the laws be faithfully executed." L. Henkin, supra note 5, at 176 (referring to U.S. CONST. art. II, § 3).


32. In 1953, then Secretary of State Dulles presented this estimate before the Senate Judiciary Committee. This number probably included many routine understandings, since Dulles mentioned that "every time we open a new privy, we have to have an executive agreement." Hearings on S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong., 1st Sess. 877 (1953) (statement by Secretary of State Dulles).


35. This amount of assistance was agreed upon by the United States and Portugal in an exchange of notes. For the text of the notes, see 118 Cong. Rec. 11,449 (1972).

36. During the hearings before the Senate Foreign Relations Committee, it was contended that the agreement with Portugal committing the United States to furnish large
and concluded that the agreement should be submitted to the Senate as a treaty.\textsuperscript{37} The State Department, however, justified the use of an executive agreement to obtain the base rights by arguing that the agreement was concluded pursuant to article III of the NATO treaty\textsuperscript{38} which provides that "the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attacks."\textsuperscript{39} Rejecting the State Department’s claim that the NATO treaty served as the basis for the agreement with Portugal, the Senate Foreign Relations Committee expressed the view that "the committee does not believe that the use of the North Atlantic

amounts of assistance to a country involved in three colonial wars in Africa and involving the stationing of American forces abroad was a significant foreign policy move which could "ultimately lead to war." The agreement with Bahrain was criticized as providing for a permanent American base in an area where the United States had never had one before. A base in this area (the Persian Gulf), it was asserted, could potentially entangle the United States in disputes between Iran, Iraq, Saudi Arabia and other states. Hearings on S. 214, supra note 34, at 3-4 (statement of Senator Case).


39. Id. The State Department, in justifying the executive authority to conclude the agreement with Portugal, also cited existing foreign aid legislation (granting the President authority, subject to appropriations, to provide assistance to foreign countries) and the power of the President as commander-in-chief. Memorandum of Law by Dep’t of State, Hearings on S. 214, supra note 34, at 39. With respect to the Bahrain agreement, the State Department argued that agreements for military bases abroad were within the President’s power as commander-in-chief. Id. at 14 (statement of Hon. U. Alexis Johnson, Under Secretary of State for Political Affairs). Refuting the Senate Foreign Relations Committee’s claim that the agreements involved major foreign policy commitments, the State Department further argued:

Examination of the texts of the two agreements shows that neither involves any new policy on the part of the United States. Neither contains any defense or political commitments by the United States. To have concluded these agreements as treaties would have given them a formality which implied an importance and a U.S. commitment which are neither involved nor desired. Both agreements involve the granting to the U.S. of the right to use facilities for our vessels, aircraft or personnel and the governing of the status of our personnel. These matters have been traditionally handled by executive agreement.

Id. at 15-16.
treaty, ratified almost 23 years ago, entitles the executive branch for the duration of the treaty unilaterally to conclude any agreement it might wish with a NATO member. 40

The Portuguese agreement controversy highlights the problem of treaty interpretation: Agreements of considerable magnitude may be arranged under the guise of treaty implementation despite the assertion that the agreement itself requires the advice and consent of the Senate. Although the scope of agreements reasonably contemplated by a given treaty is difficult to determine, the underlying problem is that the executive branch is generally the body to decide this question, without consultation with the Senate. 41 A further complication is that the Senate’s expression of disapproval of the executive action takes the form of a non-binding resolution that may very well go unheeded by the Executive. In the Portuguese agreement controversy the Executive did not yield to the will of the Senate, which prompted the Senate to take more drastic measures. In June 1972, the Senate voted to cut off funds for the military base agreements with Portugal and Bahrain unless the agreements were submitted to the Senate as treaties. 42 The apparent failure to marshall the same support in the House of Representatives left the Senate powerless to assert its constitutional treatymaking prerogatives. This situation illustrates the struggle between the executive branch and Congress with respect to foreign policymaking and highlights the need for prior consultation to avoid such friction.

40. S. REP. NO. 632, 92d Cong., 2d Sess. 6 (1972). Senator Case asserted that under the NATO Treaty, the government of the United States assumed certain obligations and that this did not confer authority upon the President alone:
Because we have undertaken to do something as a nation, why does that give the President authority to do anything he wishes without coming to the Senate if it is a matter which ordinarily and by its nature apart from the agreement would have to be the subject of advice and consent?

Hearings on S. Res. 214, supra note 34, at 11. (statement by Senator Case).

41. Prior consultation might have avoided the controversy over the agreements with Portugal and Bahrain. The Chairman of the Senate Foreign Relations Committee, Senator Fulbright, was “disturbed” that the administration did not consult with the Senate when it concluded the agreements and stressed the value of consultation. Hearings on S. Res. 214, supra note 34, at 39, 41-42.

42. On June 19, 1972, the Senate rejected an amendment by Senator Sparkman which proposed that the provision in the Foreign Assistance Act, terminating assistance to Portugal and Bahrain, be stricken. 118 CONG. REC. 21,361 (1972). Senator Case originally introduced this provision (to cut off funding) to the Senate on April 4, 1972. S. 3447, 92d Cong., 2d Sess., 118 CONG. REC. 11,447 (1972).

43. The House of Representatives passed its version of the Foreign Assistance Act, H.R. 16029, excluding any provision to cut off funds to Portugal and Bahrain. 118 CONG. REC. 27,673 (1972).
Aside from applying direct political pressure on the Executive, the next question is how the Senate could have exercised its constitutionally delegated powers in this context. One answer may lie with the courts’ powers to decide such cases. The court should serve as the arbiter of claims of presidential usurpation of the Senate’s treatymaking power and provide a mechanism of enforcement for the Senate’s powers under the Constitution.  

B. Congressional-Executive Agreements

The problem of using broad language as the basis for an international agreement may similarly arise in the case of a congressional-executive agreement. This category encompasses two distinct situations: First, where the agreement is made by the Executive pursuant to prior authorizing legislation and second, where Congress subsequently approves the agreement by legislation or joint resolution.

1. Congressional Delegation of Authority.—Congress may enact legislation authorizing the President to conclude agreements related to the subject matter encompassed in the statute. This type of legislation is cited as the authority for the bulk of the international agreements concluded annually. This mode of agreement also has its roots in the early days of the republic. During the first administration of President Washington, an Act of Congress authorized the Postmaster General to make agreements with foreign postmasters for...
the reciprocal receipt and forwarding of mail.48 These "postal conventions" laid the groundwork for numerous grants of authority to the Executive.49 Although the postal convention legislation was fairly specific in the type of agreement contemplated, the converse is true of legislation enacted more recently which has granted extensive agreement-making power to the Executive. One example is the Lend-Lease Act of 194150 which authorized "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the government" to "sell, transfer title to, exchange, lease, lend, or otherwise dispose of" defense articles to "the governments of any country whose defense the President deems vital to the defense of the United States" and on any terms that the President deemed satisfactory.51 Pursuant to this statute, Mutual Aid Agreements were concluded which furnished approximately $40 billion worth of war supplies to the Allies.52

2. Judicial Recognition.—The courts have had little trouble upholding the constitutionality of this type of delegation and the resulting congressional-executive agreements. In Field v. Clark,53 the Supreme Court sustained the constitutionality of section 3 of the Tariff Act of 189054 which authorized the President to suspend import duty exemptions on specified articles unless reciprocity could be obtained with other nations.55 The Court rejected the claim that the statute unconstitutionally delegated legislative and treatymaking power to the Executive.56 It cited numerous precedents dating from the early days of the nation’s history under the Constitution to support its conclusion that the Act did not improperly delegate legislative authority57 and noted that "it is often desirable, if not essential

50. Lend-Lease Act, ch. 11, 55 Stat. 31 (1941).
51. Id. at 31-32.
52. 14 M. WHITEMAN, supra note 31, at 219.
53. 143 U.S. 649 (1892).
55. Id. at 612.
56. 143 U.S. at 694.
57. Id. at 683-89.
for the protection of the interests of our people, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations. The Court found no improper delegation of legislative power because the President was simply executing an Act of Congress, and was not exercising a law-making function. Further, the Court summarily dismissed the allegation that the treaty power was also unlawfully delegated.

In *Star-Kist Foods, Inc. v. United States,* where a specific agreement was before the court, the Customs Court sustained the validity of the Trade Agreements Act of 1934, which authorized the President to enter into foreign trade agreements with other nations. The court rejected the allegations that the statute was an unconstitutional delegation of legislative power and a violation of

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58. Id. at 691.
59. Id. at 693.
60. Id. at 694. On the issue of delegation of legislative power, see J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928), where § 315 (a) of the Tariff Act of 1922, 42 Stat. 941, authorizing the President to proclaim changes in duty rates, was challenged as being an unconstitutional delegation of power to the President. The Act was sustained by the Court since it provided an "intelligible principle" to which the Executive was directed to conform. 276 U.S. at 406-11. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court considered a joint resolution of Congress which gave the President power to prohibit arms sales to certain South American countries if he found that such prohibition would contribute to the re-establishment of peace between the countries. The resolution, attacked as an unconstitutional delegation of legislative power, was upheld by the Court in an opinion delivered by Justice Sutherland. Sutherland differentiated the powers of the federal government over foreign affairs from those over domestic affairs and further stated that "the power to make such international agreements as do not constitute treaties in the constitutional sense" was inherently inseparable from the conception of nationality. Id. at 318 (citations omitted). Justice Sutherland's opinion in *Curtiss-Wright* has been severely criticized. See Note, *The Foreign Policy Role of the President: Origins and Limitations,* 11 Hofstra L. Rev. 773, 783-89 (1983).
63. The statute authorized the President to enter into foreign trade agreements whenever he found that any existing duties or other import restrictions of the United States or any foreign country were unduly burdening and restricting the foreign trade of the United States. Act of June 19, 1934, ch. 474, § 350(a), 48 Stat. 943 (amending Tariff Act of 1930, ch. 497, 46 Stat. 590). Star-Kist unsuccessfully argued that a trade agreement with Iceland (TD 50956) negotiated under the authority of the Act was null and void because the Act itself was unconstitutional. 275 F.2d at 474-75.
64. 275 F.2d at 474-75. On the issue of delegation of legislative power, the court discussed *The Aurora v. United States,* 11 U.S. (7 Cranch) 382 (1813); *Field v. Clark,* 143 U.S. 649 (1892); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1927); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). On the issue of violation of the treaty clause (U.S. Const. art. II, § 2, cl. 2), the court again discussed United States v. Curtiss-
the treaty clause because there had not been Senate consent to the agreement. First, the court found the delegation of power to the president to be constitutional since the Act clearly pronounced congressional policy and prescribed specific standards confining presidential discretion. The court then decided that the trade agreement with Iceland was valid and did not require the advice and consent of the Senate, stating that "since the President has the responsibility of conducting the foreign affairs of this country generally, it gave to him the added responsibility of negotiating the agreements in pursuance of the spirit of the act. Such a procedure is not without precedent nor judicial approval." The court went on to discuss decisions in which the Supreme Court recognized the existence of agreements other than treaties. Trade agreements concluded under such acts have consistently been recognized and given force and effect by the courts, despite their non-submission to the Senate as treaties.


66. The court found many similarities between the Act in question and analogous Trade Acts upheld by the Supreme Court in prior decisions. Id. at 480-82.

67. Id. at 483.

68. Id. at 483-84.

69. E.g., La Manna, Azema & Farnan v. United States, 144 F. 683 (2d Cir. 1906); United States v. Luyties, 130 F. 333 (2d Cir. 1904); United States v. Julius Wile Bros., 130 F. 331 (2d Cir. 1904); Mihalovitch Fletcher & Co. v. United States, 160 F. 988 (S.D. Ohio 1908); Migliavacca Wine Co. v. United States, 148 F. 142 (N.D. Wash. 1905); Nicholas v. United States, 122 F. 892 (S.D.N.Y. 1900). These decisions upheld agreements concluded under § 3 of the Tariff Act of July 24, 1897 (30 Stat. 151, 203-04). For an extended discussion of trade agreements and their constitutionality, see 5 G. HAKWORTH, DIGEST OF INTERNATIONAL LAW 414-29 (1945). See also Louis Wolf & Co. v. United States, 107 F.2d 819 (C.C.P.A. 1939).

In B. Altman & Co. v. United States, 224 U.S. 583 (1912), the Supreme Court was faced with the issue of whether an act of Congress which gave the federal circuit courts of appeal jurisdiction over cases involving treaties encompassed a case involving a trade agreement made under the Tariff Act of 1897. The Court held:

While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3 was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and behalf of the contracting countries, and dealing with important commercial relations between the countries and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.
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3. Legislative Authorization.—Congress does have the power to delegate agreement-making authority to the President. However, as in the case of agreements made pursuant to treaties, a particular agreement may fall outside the scope of agreements contemplated by Congress in enacting the statute. Authorizing legislation has been used by the Executive as the basis for a large percentage of agreements. Congressman Thomas E. Morgan addressed this point when speaking of the "serious problems" created as a result of the move away from treaties to executive agreements:

[S]ometimes the authority of the President to make such agreements is in question. . . . White House and State Department lawyers are very good at digging up vaguely worded prior acts of Congress which they claim gives the President the needed powers. In the face of such claims, the Congress now is frustrated in its attempt to play its proper role.

The broad, general standards articulated in authorizing legislation encourages the formation of a large number of agreements covering a broad range of subject matter areas. While it may be difficult to foresee the types of agreements which will need to be made, Congress nevertheless should articulate more specific guidelines and standards to ensure that agreements reflect the legislators' intent. Additionally, Congress must monitor and review more closely the agreements the President purports to establish under authorizing legislation.

4. The Legislative Veto.—One technique employed by Congress in this area, which should be put to greater use, is the inclusion of a condition or stipulation in the legislation that reserves to Congress an option to approve or disapprove an agreement. Typically,
this condition would make a particular agreement, concluded pursuant to the authorizing legislation, subject to congressional action. Such a condition was incorporated into the Arms Export Control Act of 1976, the legislation that authorized the recent sale of Airborne Warning and Control System Radar planes (AWACS) to Saudi Arabia. The provision states that all international agreements providing for military sales in excess of $25 million may be disapproved by concurrent resolutions of both houses of Congress. This "veto" provision provides an effective check on the President's agreement-making power and allows Congress some influence in making foreign policy. However, the limitations of such a provision cannot be overlooked. One unanswered question is the extent to which the President could conclude the agreement on the basis of his own constitutionally delegated powers. Another relevant consideration is the prevailing political climate. In the recent AWACS controversy, Congress was unable to deliver the required concurrent resolution to defeat the sale largely because of the President's lobbying efforts in the Senate asserting the need for the United States and its newly-elected President to maintain credibility in the international arena. While these and other factors may hinder the effectiveness of a condition providing for disapproval by concurrent resolution, such a provision still remains a valuable tool for Congress.

5. Subsequent Approval. — Congressional-executive agreements have also been effectuated by submitting an already concluded agreement to Congress for approval. For example, Congress authorized the President to carry out the previously negotiated Headquarters Agreement with the United Nations and various other

75. Id.
78. See infra text accompanying notes 87-102.
80. See Restatement of Foreign Relations Law, supra note 26, § 307, comment a.
81. S.J. Res. 144, ch. 482, 61 Stat. 756 (1947); Headquarters Agreement Between the
agreements providing for United States participation in international organizations in this way.\textsuperscript{82} It has been maintained, however, that there is no constitutional warrant for allowing the President the option to submit an already negotiated compact to the full Congress as an executive agreement rather than to the Senate as a treaty.\textsuperscript{83} It has been argued, however, that this method is sound in the democratic sense; the assertion is that joint approval by Congress is tantamount, if not superior, to the two-thirds Senate vote normally required to ratify a treaty.\textsuperscript{84} Other scholars claim that, although two-thirds of the Senate vote is more difficult to obtain, the Framers of the Constitution specifically provided that all important agreements be concluded in this manner. This second view asserts that such a method is explicitly contrary to the Constitution.\textsuperscript{85} An additional

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\textsuperscript{82} E.g., The Bretton-Woods Agreement Act of 1945, ch. 339, 59 Stat. 512 (authorizing the President to accept membership in the International Monetary Fund); S. J. Res. 131, ch. 676, 48 Stat. 1182 (1934) (joint resolution authorizing the President to accept membership in the International Labor Organization). For an extended discussion of agreements negotiated subject to congressional approval or implementation, see 14 M. WHITEMAN, supra note 31, at 234-40.

\textsuperscript{83} Borchard, supra note 6, at 671. Professor Borchard, in his later article, claims that an agreement subject to approval by Congress "collides head on with the function of the Senate." Borchard, Reply, supra note 6, at 621. This reply refutes McDougal and Lans' belief in the interchangeability of congressional-executive agreements and treaties. See McDougal & Lans, supra note 6.

Borchard's criticism does merit consideration, especially in light of the fact that both Texas (5 Stat. 797 (1845)) and Hawaii (30 Stat. 750 (1898)) were annexed pursuant to joint resolutions passed by a majority of both Houses, but only after the executive unsuccessfully sought consent to each agreement as a treaty. See S. CRANDALL, supra note 5, at 95-98.

\textsuperscript{84} Proponents of this view claim that the required two-thirds Senate vote allows an obstructionist minority to thwart the will of the majority and that the House should be given an equal role in the process. See L. HENKIN, supra note 5, at 175; McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II, 54 YALE L.J. 534, 535, 573-75 (1945). For an historical account of the inadequacies of the two-thirds rule and the role of the Senate in treaty making, see Wright, supra note 5, at 350-54.

\textsuperscript{85} Borchard states that "the argument for 'democracy' " is invalid since “[a]ll constitutions require for important acts a decisive majority." Borchard, supra note 6, at 671. He finds no justification for joint approval by both Houses of Congress rather than by the Senate alone. Borchard, Reply, supra note 6, at 625. Alternatively, Wright concludes: Not only is it legally permissible to by-pass the two-thirds rule, but it is politically practicable. If the President can command a majority of both Houses the necessary appropriations and laws can be passed to implement any international agreement within the powers of Congress and a Senate minority is powerless to prevent it. Wright, supra note 5, at 355. Henkin posits another argument for congressional-executive agreements: "[T]ogether [the President and Congress] embody the national sovereignty in international relations and can exercise all the powers inherent in such sovereignty, including the
problem, already noted, is that Congress may in effect be “coerced” into approving an already concluded agreement when confronted with executive claims that failure to do so would damage the reputation and standing of the United States internationally. 86

C. Presidential Agreements

Agreements entered into by the President solely on the basis of his independent constitutional powers comprise the most troublesome category. 87 The President’s powers are governed by article II of the Constitution, yet the extent of these powers is far from settled. 88 Despite the lack of consensus in this area, the Executive has concluded numerous “presidential agreements” in reliance on his independent power to make international agreements.” L. Henkin, supra note 5, at 175 (footnote omitted). See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), where the Court stated that “the power to make such international agreements as do not constitute treaties in the constitutional sense . . . [is] inherently inseparable from the conception of nationality.” Id. at 318 (footnotes omitted). Yet another theory asserts that Congress, as the sovereign authority in the central government, has the authority to determine how international agreements are to be made apart from explicit grants to other bodies in the Constitution. See Wright, supra note 5, at 346-47. Wright also suggests that the treaty-making power of the President and Senate was never intended to deprive Congress of the concurrent power to give effect to international agreements or to authorize international agreements on subjects within its delegated powers. See Wright, supra note 5, at 346-47.

86. A witness at the House hearings mentioned this point:

[T]he President should not make executive agreements, present them to the Congress as a fait accompli and then say to Congress, “You will be damaging the standing and the influence and the reputation of the United States if you don’t take the measures which are required to give effect to the agreements already made.” 1976 House Hearings, supra note 9, at 135-36 (statement by Leonard C. Meeker, Center for Law and Social Policy).

87. Much of the controversy surrounding executive agreements has focused on this type of agreement, perhaps in response to the Vietnam experience. See 1975 Senate Hearings, supra note 9, at 108; Rovine, supra note 7, at 397; Sparkman, supra note 7, at 434. It should be noted that this category comprises the smallest percentage of international agreements concluded annually. For a chart of statistics categorizing international agreements made between 1946 and 1972, see International Agreements, supra note 47, at 22. However, it has been argued that

[it]o state that the number of agreements is small is not to give an accurate description of the problem because many of the agreements have been controversial both because of the nature of the subject matter dealt with and the continuing constitutional controversy as to the nature of the Presidential power. 1975 Senate Hearings, supra note 9, at 151 (statement of Dean Adrian S. Fisher, Georgetown University Law Center); for discussion of the agreements with Portugal and Bahrain, see supra notes 34-41 and accompanying text.

88. For example, Corwin has commented that the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an “invitation to struggle” for the privilege of directing American foreign policy. E. Corwin, supra note 7, at 171.
authority under the Constitution.89 The theory used to support this type of agreement holds that a presidential agreement is the procedure or mechanism necessary to implement the President's foreign affairs powers under the Constitution.89 Since there is no consensus with regard to the extent of the President's foreign affairs powers under the Constitution, there is necessarily no consensus with regard to the corollary agreement-making power. It is evident, however, that the subject matter of such agreements has varied widely and has covered the full range of United States foreign policy.91 Although some “presidential agreements” concern relatively trivial issues,92 others have had a major impact on foreign policy and have been the subject of controversy. A recent example is the controversy generated by the Nixon-Thieu “agreements.”93 In 1972, the Nixon Administration entered into negotiations with the Thieu government of South Vietnam resulting in a set of “understandings.”94 The

89. For example, the Hull-Lothian Agreement, Sept. 2, 1940, United States-United Kingdom, 54 Stat. 2405, E.A.S. 181, under which President Roosevelt exchanged over-aged American destroyers for the right to establish naval and air bases in British possessions. This agreement helped to transform the role of the United States from one of strict neutrality toward the European War to one of semi-belligerency. See 14 M. WHITEMAN, supra note 31, at 245. President Woodrow Wilson concluded the Lansing-Ishii Agreement in 1917, which recognized Japan’s special interests in China and pledged adherence to the open door principle for equal commercial opportunity in China. Lansing-Ishii Agreement, Nov. 2, 1917, United States-Japan, T.S. 630.

90. See E. CORWIN, supra note 7, at 213.

91. For a discussion of the wide range of agreements having significant foreign policy implications, see L. HENKIN, supra note 5, at 179-80 n.23.

92. One commentator has stated that “in the vast majority of cases Congress does not wish to consult [with the executive branch] simply because most agreements are of a routine technical nature without political significance.” Rovine, supra note 7, at 409. However, it is generally conceded that Congress is not troubled with “routine” agreements; rather, the criticism has been directed to the more significant foreign policy commitments, such as the United States’ involvement in Vietnam and Cambodia. See 1975 Senate Hearings, supra note 9, at 8-9 (statement of Senator Glenn).

93. The Nixon-Thieu agreements were made in an exchange of letters between then President Nixon and South Vietnam’s President Nguyen Van Thieu in 1972 and 1973. They were made public by a former Saigon Cabinet official in 1975. Portions of these controversial letters are reprinted in 1975 Senate Hearings, supra note 9, at 323-26. In one letter, President Nixon promised the Saigon government that the United States would “take swift and severe retaliatory action” and would “respond with full force” if North Vietnam violated the Paris cease fire accords. Id. at 324, 325-26. For a discussion of the agreements, see 1975 Senate Hearings, supra note 9, at 155-67 (statement of Professor Richard A. Falk). Professor Falk believed the secret pledges constituted a “bilateral agreement binding on the United States in its external relations with the Saigon government.” Id. at 165.

94. These “understandings” took the form of an executive agreement, according to Professor Falk, and contained six elements, including a United States commitment to intervene with military forces in the event of South Vietnamese need. Id. at 164-65.
promises made were considered by some to be Executive agreements concluded by the President in secret and without congressional consultation or authorization. Further, these agreements were allegedly inconsistent with the Paris Agreement on Ending the War and Restoring Peace in Vietnam and were never transmitted to Congress as required by law. Agreements of such magnitude appear to be at the center of the controversy surrounding presidential agreements since they present a substantial danger to a coherent foreign policy. The crucial question in this context is just how far the Executive should be permitted to venture when concluding this type of agreement since "the power to make them remains as vast and its constitutional foundation and limits as uncertain as ever."

1. The Relevant Constitutional Provisions.—The several constitutional provisions which together comprise the basis for the foreign affairs powers of the President are frequently cited as the authority for the presidential agreement-making power. From these provisions, broad powers have been inferred.

a. The commander-in-chief clause.—The commander-in-chief clause has been used as the justification for presidential agreements concerning the termination of hostilities, the control of military equipment and resources, the administration of liberated or conquered territory, and the commitment of armed forces to protect United States interests abroad. This power has also been used to

95. See 1975 Senate Hearings, supra note 9, at 163-67 (statement of Professor Falk); Id. at 15 (testimony of Senator Case); Id. at 9 (testimony of Senator Glenn).
96. Id. at 164 (statement of Professor Falk).
98. 1975 Senate Hearings, supra note 9, at 164 (statement of Professor Falk); id. at 15 (testimony of Senator Case).
99. Id. at 3 (statement of Senator Abourezk).
100. L. HENKIN, supra note 5, at 177.
101. The relevant provisions are:
3. "He shall receive Ambassadors and other public ministers and shall take care that the laws be faithfully executed." U.S. CONST. art. II, § 3.
102. E.g., Circular 175, supra note 26, § 721(2)(b)(3); RESTATEMENT OF FOREIGN RELATIONS LAW, supra note 26, § 308. Mathews, supra note 7, at 352-70; Rovine, supra note 7, at 412.
104. Examples include the Agreement Regarding the Military Armistice in Korea, July
support wartime commitments with postwar consequences, as in the Yalta agreement.\textsuperscript{106} Judicial sanction for presidential authority under the commander-in-chief clause could arguably be implied from the Supreme Court’s opinion in \textit{Tucker v. Alexandroff}.\textsuperscript{106} \textit{Tucker} presented the issue of whether a Russian Navy deserter came within a Russian treaty that called for the return of deserters from Russian ships. The Supreme Court noted that the President’s commander-in-chief power authorized the executive department to permit the introduction of foreign troops into the United States.\textsuperscript{107} The Court expressed doubt, however, as to whether this “power could be extended to the apprehension of deserters in the absence of positive legislation to that effect.”\textsuperscript{108} If this equivocation is “judicial recognition of executive agreements, the Court’s emphasis that return of deserters requires legislative assent confines it to the narrowest compass.”\textsuperscript{109}

\textit{b. The “receive” clause.—}The President’s delegated power to receive foreign ambassadors\textsuperscript{110} has been interpreted to encompass a substantial range of agreements. From this clause, the power of the President to recognize foreign governments has been implied.\textsuperscript{111} It

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106. 183 U.S. 424 (1902). McDougal and Lans rely on dicta in \textit{Tucker} to show that the President was “empowered to make agreements permitting passage of foreign troops through the United States and could thereby divest all American officials of jurisdiction over such a military force.” McDougal & Lans, \textit{supra} note 6, at 310. Berger refutes this conclusion, claiming that \textit{Tucker} provides frail support for judicial recognition of sole presidential agreements. Berger, \textit{supra} note 7, at 44.

107. 183 U.S. at 435.

108. \textit{Id.} (emphasis added).


111. “It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate
has further been asserted that this power must include the power to make international agreements if it is to be "rationally" implemented.\textsuperscript{112} While there is some truth to this statement, the need for limitations on this important power must be realized since "recognition" potentially includes a vast array of substantive measures.

In \textit{United States v. Belmont},\textsuperscript{113} the Supreme Court was presented with the issue of whether a claims agreement with the Soviet Union (the Litvinov Assignment), made by the President without congressional sanction pursuant to the recognition of the Soviet government, could override inconsistent state laws.\textsuperscript{114} The Court held that the agreement did supersede the conflicting state laws,\textsuperscript{115} and further concluded that the recognition and agreements were part of one transaction which was within the competence of the President to conclude without Senate approval.\textsuperscript{116} Six years later, in \textit{United States v. Pink},\textsuperscript{117} Justice Douglas, speaking for the Court, reaffirmed the President's power to conclude the same agreement, stating that "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations."\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{112} Mathews, \textit{supra} note 5, at 47. But see authorities cited infra note 123.
\item \textsuperscript{113} 301 U.S. 324 (1937).
\item \textsuperscript{114} In the Litvinov Assignment, the Soviet Union assigned claims to the United States that were held by Russia against American nationals. The purpose of the agreement was to bring about a final settlement of the claims and counterclaims between the Soviet government and the United States. \textit{Id.} at 326.
\item \textsuperscript{115} The Court stated that "[i]n 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." \textit{Id.} at 331.
\item \textsuperscript{116} In dicta, the Court stated:

\begin{quote}
The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted.
\end{quote}

\textit{Id.} at 330.
\item \textsuperscript{117} 315 U.S. 203 (1942).
\item \textsuperscript{118} \textit{Id.} at 229 (quoting \textit{United States v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 320 (1936)). For a discussion of the "sole organ" language in \textit{Curtiss-Wright}, see \textit{Note, supra} note 60, at 786-87. The Court's two dissenters disagreed stating: "[W]e are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate." 315 U.S. at 249 (Stone, C.J., dissenting). It must be noted that the Court found that Congress had tacitly recognized the executive policy by authorizing the appointment of a commissioner to determine the claims of American nationals against the Soviet government. \textit{Id.} at 226-28. Although the Court did not dwell on this
A federal district court in *Dole v. Carter*,119 in holding that an agreement returning Hungarian coronation regalia to Hungary120 was a valid executive agreement, adopted this rationale in its decision.121 The "'obstacle'" in that case which impeded "'rehabilitation of relations'" between the United States and Hungary was the United States' continued dominion over the Hungarian coronation regalia; the decision to remove this obstacle appeared to be within the "‘traditional’ powers of the President, according to the court.122 Although the agreement in *Dole* presented a limited foreign policy question, certainly some interests were affected. This is not the issue, in any case. The puzzling question is how broadly such "‘obstacles’" which hinder our relations with other countries may be interpreted.

It is unclear if the Supreme Court in *Belmont* and *Pink* validated the presidential agreement because it was an integral part of the recognition power, or because the agreement was valid under the President's broader foreign affairs powers.123 Adherence to the view that the claims settlement was part of the President's recognition powers is the better approach. In *Dames and Moore v. Regan*,124 the

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120. Id. at 1066. This agreement, concluded without the consent of the Senate, resulted from an exchange of diplomatic letters on December 13, 1977. Id. at 1067. Announcement of the proposed agreement caused public controversy among various sectors of society. Id. On December 23, 1977, Senator Robert Dole filed an action seeking to enjoin delivery of the coronation regalia to Hungary on the ground that the agreement constituted a violation of the treatymaking clause of the Constitution. Id.
121. Id. at 1070-71.
122. Id. at 1070.
123. Henkin posits the theory that Justice Sutherland found authority for the Litinov Agreement from the President's broad foreign affairs powers rather than exclusively from the recognition power. L. HENKIN, supra note 5, at 178-79. However, whether the President possesses broad inherent powers in the area of foreign affairs and the exact nature of these powers are unsettled issues. See Note, supra note 60, at 783-89. Raoul Berger asserts that the “receive” clause could not authorize the President to enter into the Litvinov settlement at all. Berger, a witness at the 1976 House Hearings, contended that the power to receive ambassadors from which the recognition power is derived was meant to be a purely ceremonial power and, therefore, “the idea of erecting a power to enter into an agreement which confiscated millions of dollars in American assets on the power to receive ambassadors is absurd.” 1976 *House Hearings*, supra note 9, at 97. This position is supported by Hamilton's interpretation of the power to receive ambassadors as “more a matter of dignity than authority.” *The Federalist* No. 69, at 195 (A. Hamilton) (R. Fairfield ed. 1966).
124. 453 U.S. 654 (1981). In *Regan*, the Supreme Court was faced with deciding the validity of various executive orders and regulations by which the President nullified attachments and liens on Iranian assets in the United States, directed that these assets be transferred to Iran, and suspended all claims against Iran that could be presented to an International
Supreme Court recently indicated support for this position in a decision dealing with the validity of presidential agreements with Iran. While the court recognized that the President did have "some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate," it limited its discussion of Pink to the fact that "the resolution of such claims was integrally connected with normalizing United States relations with a foreign state." Of course normalizing relations with another country could conceivably cover a wide range of agreements. Thus, the bounds of this power are still subject to definition. At the least, it may be inferred from Regan that the President may enter into claims settlement agreements with foreign nations.

It must be noted, however, that the Court rested its finding on a long history of congressional sanction of this type of agreement; the fact that Congress had given its tacit stamp of approval to claims settlement agreements was a decisive factor. The Court seemed reluctant to base its decision solely on some notion of the "independent" powers of the President in foreign affairs; thus, it found the "acquiescence" of Congress to be a source of executive authority.

2. Limiting the President's Authority.—The clause that vests

Claims Tribunal. Exec. Orders Nos. 12,276-12,285, 46 Fed. Reg. 7913-7932 (1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). This action was taken in an effort to comply with an executive agreement between the United States and Iran which provided for release of the Americans held hostage in that country. 453 U.S. at 660. Although the President's authority to suspend claims pending in American courts had no statutory basis, the Court nevertheless concluded that the executive action was valid due to Congress' tacit approval of this practice. Id. at 680-82. The Court also found the President did have "some measure of power" to conclude executive agreements on his own authority. Id. at 682.

125. Id.
126. Id. The court also cited with approval Judge Learned Hand's statement in Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951): The Constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between this nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations. 453 U.S. at 683.
127. 453 U.S. at 684-86.
128. Id. at 680. "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." Id. Compare United States v. Pink, 315 U.S. 203 (1942), where the issue of congressional approval was noted briefly and more emphasis was placed on the President's own power of recognition to effect the claims agreement.
executive power in the President\textsuperscript{129} arguably could support a wide range of presidential agreements,\textsuperscript{130} as could the clause obligating the President to faithfully execute the laws.\textsuperscript{131} However, if each of the President’s enumerated powers is read broadly enough, his power to conclude agreements solely on the basis of his independent constitutional powers becomes virtually limitless. An infinite number of powers could be implied from the enumerated powers so that in essence there would be no agreement considered outside the scope of presidential powers.\textsuperscript{132}

Once Congress exercises its powers and legislates in a certain area, however, presidential power to conclude executive agreements covering the same area is limited. In \textit{United States v. Guy W. Capps, Inc.},\textsuperscript{133} a presidential agreement regulating the importation of potatoes from Canada\textsuperscript{134} was invalidated because the agreement was inconsistent with provisions of a prior congressional statute.\textsuperscript{135} Declaring that the President had no constitutional power to regulate interstate and foreign commerce and that the agreement could not be upheld as an exercise of the President’s power to see that the laws be faithfully executed,\textsuperscript{136} the court stated that the President could not avoid complying with a congressional regulation by entering into the agreement.\textsuperscript{137} From the \textit{Capps} decision, it appears that a presidential agreement will not be given effect if it conflicts with federal legislation although the Supreme Court did not consider this issue when affirming \textit{Capps}. This result buttresses the position that at least some executive agreements are not effective substitutes for

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\item \textsuperscript{129} U.S. Const. art. II, § 1.
\item \textsuperscript{130} For some examples, see Rovine, supra note 7, at 413-14 and Mathews, supra note 7, at 369-70.
\item \textsuperscript{131} U.S. Const. art. II, § 3. For a discussion of this power, see Mathews, supra note 7, at 366-69.
\item \textsuperscript{132} A witness at the hearings on the Case Act expressed a similar view: “If the Executive possesses all the powers that have been claimed under direct grants broadly interpreted, the authority to make a great variety of executive agreements is almost unlimited.” \textit{Hearings on S. 596 Before the Senate Comm. on Foreign Relations}, 92d Cong., 1st Sess. (1971) (statement of Professor Ruhl J. Bartlett), \textit{reprinted in} M. GLENNON & T. FRANCK, \textit{UNITED STATES FOREIGN RELATIONS LAW} 13 (1980).
\item \textsuperscript{133} 204 F.2d 655 (4th Cir. 1953), aff’d on other grounds, 348 U.S. 296 (1955).
\item \textsuperscript{134} Agreement Regarding Export Permits for Potatoes, Nov. 23, 1948, United States-Canada, 62 Stat. 3717, T.I.A.S. No. 1896.
\item \textsuperscript{136} 204 F.2d at 659.
\item \textsuperscript{137} Id. at 660.
\end{itemize}
treaties. The *Capps* decision seems to venture even further, however, by taking a narrow view of presidential power, denying the President the power to make executive agreements on any subject matter within the realm of Congress' constitutionally delegated powers. If there had been no specific legislation involved, the court might have invalidated the presidential agreement nevertheless, by finding that the President was entering into Congress' zone of control over interstate and foreign commerce. The court in *Capps* also narrowly construed the President's power to faithfully execute the law, rejecting the contention that this clause authorized the presidential agreement.

By construing the relevant constitutional provisions narrowly, a court could conceivably limit the subject matter of presidential

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138. For example, treaties override conflicting state legislation and conflicting federal legislation, provided the treaty is later in time. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Treaty of Peace between United States and Britain voids state law confiscating British property); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (where a treaty and act of Congress are inconsistent, the one last in date will control, provided the treaty is self-executing). Both treaties and executive agreements are subject to constitutional restrictions, including the Bill of Rights. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court stated that "no agreement with a foreign nation can confer power on . . . any . . . branch of government, which is free from the restraints of the Constitution." *Id.* at 16. See also *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955) where the United States Court of Claims stated "there can be no doubt that an executive agreement, not being a transaction even mentioned in the Constitution, cannot impair constitutional rights." *Id.* at 606.

139. 204 F.2d at 659-61. The circuit court in *Capps* focused on the fact that regulations of foreign commerce fell exclusively within Congress' legislative jurisdiction thereby disabling the executive from concluding agreements in this area absent congressional sanction. *Id.* at 660. The court was confronted, however, with a specific act of Congress which already covered the subject matter of the agreement. *Id.* at 658-59. In a more recent decision, *Consumer's Union of United States, Inc. v. Rogers*, 352 F. Supp. 1319 (D.D.C. 1973), the court found the President did have some "independent authority" over regulation of foreign commerce, perhaps linking this authority to the President's broader foreign affairs powers. *Id.* at 1323. In *Rogers*, a consumer organization challenged the legality of voluntary restraint arrangements on steel by agreements made between certain foreign steel companies as a result of negotiations initiated by the Secretary of State at the direction of the President. *Id.* at 1321. Plaintiff argued that Congress preempted this field by enacting certain legislation and thus the Executive had no authority to act. *Id.* at 1322. The court ruled that the legislation, while narrowing the President's authority, did not totally prohibit the President from negotiating with private companies as to commercial matters. *Id.* at 1323. Declaring that the Executive is not preempted and may enter into agreements with private foreign steel concerns, the court added that these actions could only be taken "so long as these undertakings do not violate legislation regulating foreign commerce." *Id.* The *Capps* decision, denying the President power to regulate by agreement any matter dealing with foreign commerce, takes an extremely narrow view of presidential power. In *Rogers*, the court did not deny this power to the President, but, like *Capps*, found no room for presidential action where Congress has legislated on a specific matter under its power to regulate foreign commerce. *Id.* at 1322.

140. 204 F.2d at 659.
agreements concluded pursuant to these provisions. The willingness of the judiciary to determine the parameters of the President's foreign affairs powers certainly could have a tremendous impact on presidential agreement-making. The judicial branch should accept the task of deciding such questions, especially when Congress challenges presidential exercise of power.

### III. TREATY OR AGREEMENT: WHO DECIDES?

The power to choose between use of the treaty or agreement mechanism is a crucial issue in the analysis of presidential foreign affairs powers. It is this categorization that determines the extent of congressional participation. Traditionally, this discretion has rested with the executive branch alone rather than with both the Executive and Congress. Although the State Department has established guidelines regarding which commitments are to be considered "agreements" or "treaties," the basic problem is that the executive branch alone typically makes the initial determination, thus limiting Congress' role in the process.

#### A. The State Department Guidelines

Attempts to define the types of international agreements that must be concluded in treaty form have proven unsatisfactory and have created conflict. The State Department has outlined various criteria in its Circular 175 procedure to which it gives "due consideration" in determining whether to employ the treaty or executive agreement mechanism. It further provides that when questions arise as to whether a given agreement should be concluded as an

141. "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." Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 93d. Cong., 1st Sess. 6 (1972).

142. Circular 175, supra note 26, § 221, at 284-85.

143. See Sparkman, supra note 7, at 441. The author asserts that the State Department's discretion in this area leaves the President free to assess the likelihood of a two-thirds majority being available and then to decide whether to submit the agreement as a treaty or bypass the Senate with an executive agreement. Granting the President this authority, according to Sparkman, misinterprets the doctrines of separation of powers and checks and balances since it would enable the President to nullify the Senate's power of advice and consent "at his pleasure." Id.

144. See infra notes 165-71 and accompanying text.


146. Id.
international agreement other than a treaty, congressional consideration on the issue may be warranted. In practice, the effectiveness of the Circular 175 standards is inhibited due to its status as a purely "advisory" guideline. Moreover, serious problems have been identified in the procedures as reported in an analysis of executive practices prepared by the Congressional Research Service. The summary of findings in the analysis notes that, among other things, the State Department procedures fail to specify what kinds of international agreements should be handled as treaties and what kinds as executive agreements. The procedures also fail to provide for congressional approval or disapproval of some agreements where Congress has established that right by statute and allow extensive discretion with respect to consultation with Congress on proposed agreements. Although one factor in deciding whether the agreement will be considered a treaty is "congressional preference," this consideration has been outweighed by other criteria, most notably, international practice and precedent, desired formality of the agreement, past practices, and the need for implementing legislation.

Officials inside and outside the State Department were found to favor strongly the use of executive agreements over treaties. While State Department legal advisors are responsible for deciding between the treaty and executive agreement forms, all officials make either formal or informal recommendations on the basis of their personal views.

147. Circular 175, supra note 26, § 721.4 (b), at 285.
148. Id. §§ 710, 711.
149. See generally INTERNATIONAL AGREEMENTS, supra note 47.
150. See id. at 14.
151. See id.
152. See id. The Circular 175 procedure requires that Congress be informed of executive branch intent to seek an international agreement. Circular 175, supra note 26, § 723.1 (o), at 287. However, several executive officials rejected this notion, finding it better to notify Congress after the agreement had been virtually concluded. INTERNATIONAL AGREEMENTS, supra note 47, at 15.
153. INTERNATIONAL AGREEMENTS, supra note 47, at 17. International practice and preference were found to discourage the use of treaties due to the need for rapid action in the modern world of diplomacy. Id.
154. Id. at 16. Strong practical pressures to employ executive agreements have produced the bias in favor of such agreements. The author of the analysis concludes: "[S]o strong are the preferences for executive agreements and precedents justifying them that many agreements appear to go forward as executive agreements with no formal test as to whether they should be handled as treaties." Id. at 18.
155. Id. at 17. These findings suggest that, in practice, input by Congress is severely limited.
B. Extent of Commitment: A Useful Consideration?

One consideration also cited as a significant factor in the choice between executive agreement or treaty was the "extent of commitment" involved in a proposed agreement. This consideration is very similar to the view that the "significance" or "importance" of the subject matter of a particular agreement should be a controlling factor in deciding if it should be submitted as a treaty. Determining the importance or significance of a particular agreement is not an easy task, however, and these terms invite differing interpretations. The court in Dole v. Carter found that "substantial ongoing defense or political commitments on the part of the United States and substantial ongoing reciprocal commitments by co-signers" were fundamental characteristics of treaties. The court conceded, however, that "neither the Constitution nor the relevant case law offers significant legal guidance as to which kinds of international agreements should be concluded in 'treaty' form." In Dole, one of the claims was that the agreement was a treaty requiring Senate approval. Although the court did not consider this agreement a "trivial" matter, the court found it lacked the magnitude of a commitment requiring the advice and consent of the Senate under article II, section 2 of the Constitution. The criteria used by the court in determining the degree of commitment were based on "common practice" rather than on any constitutional or judicial standard. The usefulness of such an analysis is questionable because, in fact, pract-
tice has been too varied to admit of any uniform and consistent rules.163 It has been noted that "[i]t is not possible to conclude that 'important' international agreements, or those designed for extended duration must be concluded as treaties."164

In summary, the absence of clear, binding, and agreed upon criteria to distinguish between agreements and treaties results in a large degree of executive discretion. This "power" has been a source of friction in congressional-executive relations.

C. Battle of the Memos: The Sinai Agreements Controversy

The controversy over executive discretion to decide whether an agreement will be submitted as a treaty surfaced in the conflict between the State Department and the Senate regarding the Sinai Accords of 1975.165 Claiming that at least one agreement included in the Accords was of "exceptional national importance," constituted a "commitment" under the National Commitments Resolution, and qualified as a treaty under the Circular 175 provisions,166 the Senate Office of Legislative Counsel concluded that the submission of the agreement to the Senate as a treaty was warranted.167 It further concluded that Senate advice and consent to certain other agreements "may be" required, applying the same set of standards to all.168 The State Department's position throughout remained clear: "Within the

163. Dole is instructive, however, since the court actually decided a claim of executive usurpation of the treatymaking power brought by a United States Senator. See id. at 1067. It is questionable whether the United States Supreme Court would make such a determination, setting out its own standards defining the essential elements of a treaty, or would refuse to decide the matter, invoking the political question doctrine. See generally Note, supra note 44, at 517, 542-56 (discussing the origin and present status of the political question doctrine).

164. 1976 House Hearings, supra note 9, at 141 (statement of Leonard C. Meeker, Center for Law and Social Policy).

165. This conflict was evidenced in an exchange of memos between the Senate Office of Legislative Counsel and the State Department. The memos are reprinted in 1 M. Glennon & T. Franck, supra note 132, at 272-343.

166. These were the factors considered by the Senate Office of Legislative Counsel in reaching its determination. Memorandum of Senate Office of Legislative Counsel, reprinted in 1 M. Glennon & T. Franck, supra note 132, at 277.

167. Id. at 281. This agreement was the memorandum of agreement between the governments of Israel and the United States, (Sept. 1, 1975) (labeled "Agreement E"). Id. at 277-81.

168. Agreements G (assurances from the United States government to Israel) and H (assurances from the United States government to Egypt) were found to be properly "considered either a treaty or an executive agreement." Id. at 282-83. Due to this uncertainty, these agreements would still be of full force and effect under international law. See id. at 286. The same would not hold true for agreement E, according to the Senate memo, because of its "constitutional defectiveness." Id. at 286.
general framework of international agreements authorized by statute, treaty, or the Constitution, the President has the discretion to choose whether to conclude any particular agreement as a treaty or as an executive agreement . . . based upon his appraisal of the merits of each approach." Refuting this position, the Office of Legislative Counsel adhered to the view that "[u]nlimited presidential discretion to conclude any international agreement as an executive agreement would leave empty the requirement of Senate advice and consent for treaties . . . ." In this situation, a clear controversy arose in the exchange of memos. The Senate undertook the task of analyzing each agreement after it was concluded to determine if the subject matter of each was of such "exceptional national importance" so as to constitute a treaty according to the Senate's standards. The Senate's opinion on this matter clashed sharply with that of the executive branch, which had decided that Senate approval was not necessary. The ensuing political controversy might have been avoided had there been greater coordination between the two branches. While the Senate's disapproval might have raised the awareness of the Executive with regard to future transactions, the obvious effect was to undermine the broad support necessary for an effective foreign policy regarding the Middle East. This controversy highlights the need for prior consultation with the Senate, or both houses of Congress, in order to avoid such friction, and more importantly, to give Congress the input it deserves in this area. Well planned procedures should be established to ensure a shared decision-making process in the choice between executive agreements and treaties and to ensure greater consultation between the two branches.

IV. CONGRESSIONAL ATTEMPTS TO CURTAIL EXECUTIVE AGREEMENT-MAKING

Both the Senate and the House of Representatives have taken steps to assert greater control over the executive agreement-making process. Various congressional committees have considered legisla-

169. Id. at 297.
170. Id. at 312.
171. See infra text accompanying notes 214-17.
172. From 1952 through 1957, there was much controversy concerning various legislative proposals led by Senator Bricker of Ohio to amend the treaty provision of the Constitution. At the heart of the matter was the fear of United States participation in human rights agreements. See Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong., 2d Sess. (1953); see also Finch, The Need to Restrain
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173. See infra text accompanying notes 186-213.

174. These differing interests are discussed in T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 135-62 (1979). Rovine also notes that the House would prefer an executive agreement subject to the approval of both chambers rather than a treaty, especially where the treaty contains a multiyear commitment of funds. See Rovine, supra note 7, at 420. See also 1976 House Hearings, supra note 9, at 219-20, where Rep. Zablocki commented that the Executive was legislating in a treaty by including language in the Spanish base treaty constituting an authorization of appropriations. Id.

175. See, e.g., 1976 House Hearings, supra note 9; 1975 Senate Hearings, supra note 9.

content of executive agreements as opposed to advocating a cut-back on their use entirely. These different perspectives may have been one factor in the failure of certain introduced bills.

The one statute dealing exclusively with congressional oversight of executive agreements on which both houses were able to agree is the Case-Zablocki Act, enacted in 1972. The Act requires the Executive to transmit all international agreements to Congress within sixty days of their execution. Immediate public disclosure of any agreement which "in the opinion of the President" would be "prejudicial to the national security of the United States" results in the transmittal of that agreement to the foreign relations committees of the two Houses only, "under an appropriate injunction of secrecy to be removed only upon due notice from the President." These provisions, making the reporting of all international agreements to Congress mandatory, apparently were not satisfactorily complied with, prompting Congress to amend the Act in 1977 to require that any United States department or agency entering into an international agreement must transmit that agreement to the State Department within twenty days after it is signed. In 1978, the Act was further amended to provide for a more effective means of inducing executive compliance.

176. T. Franck & E. Weisband, supra note 174, at 149.
178. Id. § 112b(a) (Supp. V 1981).
179. Id.
180. For example, a 1976 report by the Comptroller General of the General Accounting Office identified 52 unclassified and 7 classified international agreements entered into by the governments of the United States and Korea since the enactment of the Case Act. Of these, 31 unclassified and 3 classified agreements had not been submitted to Congress. The report also identified a number of structural and procedural weaknesses within the Departments of State and Defense which hindered proper reporting to Congress. This report is reprinted in 1975 Senate Hearings, supra note 9, at 334-64. In a letter dated Feb. 27, 1976 from Senator Abourezk (Chairman of the Senate Subcommittee on Separation of Powers of the Senate Committee on the Judiciary) to Senator Sparkman (Chairman of the Senate Foreign Relations Committee), it was noted that "the Executive branch is not giving sufficient attention to the reporting requirements of the law." Id. at 333. Senator Abourezk urged that the Senate Foreign Relations Committee "give serious consideration to the need for enforceable sanctions, including criminal penalties if necessary, to ensure Executive branch compliance with the Case Act." Id.
181. Act of June 15, 1977, Pub. L. No. 95-45, § 5, 91 Stat. 221, 224. The purpose of this amendment was to ensure that the State Department receive all international agreements from other departments and agencies within a time period that would allow it to comply with the law. S. Rep. No. 842, 95th Cong., 2d Sess. (1978), reprinted in 1 M. Glennon & T. Franck, supra note 132, at 177, 178.
Requiring the Executive to notify Congress in this manner may resolve the problem of secrecy to some extent. However, the Case Act gives Congress no power to alter or reject foreign commitments since it was designed purposely to avoid the troublesome constitutional questions relating to the power of the Executive to circumvent the treatymaking process. Attempts to take "the next logical step" of requiring congressional approval of executive agreements by legislation have recently been made.

A. The Legislative Veto Proposals

Recent proposals to control the use of executive agreements have taken a number of forms. Measures have been introduced which would subject some executive agreements to a "legislative veto," i.e., a resolution of disapproval by one or both houses of Congress. Under such a provision, an agreement would fail to take effect if vetoed by Congress. A Senate bill, introduced "to help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements" would have allowed Congress to disapprove any executive agreement by concurrent resolution within sixty days of transmittal. The major problem with this particular bill was...
that it did not apply to those agreements "entered into by the President pursuant to a provision of the Constitution or prior authority given the President by treaty or law." Since any presidential claim of authority would undoubtedly fall into one of these categories, it is difficult to determine what types of agreements such a bill would encompass. Furthermore, it is precisely those agreements made by the President, allegedly pursuant to a provision of the Constitution, which have created the most controversy; this bill would not limit the use of this type of agreement.

A similar bill, introduced in the House of Representatives, would allow Congress by concurrent resolution to disapprove "any executive agreement concerning the establishment, renewal, continuance, or revision of a national commitment" within sixty days after it is transmitted. "National commitment" was defined as any agreement or promise—(1) regarding the introduction, basing, or deployment of the Armed Forces of the United States on foreign territory; or (2) regarding the provision to a foreign country, government, or people, any military training or equipment including component parts and technology, any nuclear technology, or any financial or material resources.

An exception for emergency situations was also included in the bill. If passed, this bill might have had a stronger impact than the Senate bill because it contained no exception for presidential agreements made pursuant to a constitutional provision. However, this omission may be one explanation for the unsuccessfulness of the bill; the claim is that Congress may not invalidate, by resolution or statute, a presidential agreement authorized by the Constitution. This situation presents a dilemma: A statute giving Congress the authority to disapprove presidential agreements may be viewed by members of Congress as an unconstitutional encroachment upon the President's independent foreign affairs powers under the Constitution, de-
spite the fact that these powers elude precise definition. Yet, a statute which excludes sole presidential agreements from its ambit leaves Congress with a very limited means of curtailing executive power. This dilemma seems to be the crux of the problem in formulating legislation aimed at limiting presidential power.

The legislative veto provision has been the subject of much controversy. The objections to such a provision focus on its constitutional defects. Aside from the claim of encroachment on the President's independent constitutional powers, one argument is that the legislative veto violates article I, section 7, clause 3 of the Constitution which requires that every order, resolution, or vote be presented to the President for approval or disapproval. This provision is im-


The Supreme Court of the United States is currently considering a case involving the constitutionality of a one house veto provision contained in the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1976). Immigration and Naturalization Serv. v. Chadha, 51 U.S.L.W. 3453 (Dec. 14, 1982). The Ninth Circuit held that the legislative veto provision violates the constitutional doctrine of separation of powers. Chadha v. Immigration and Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), prob. juris. noted, 102 S. Ct. 87 (1981). Should the Supreme Court decide that the legislative veto is constitutional, Congress may be willing to include this provision in broad legislation dealing with executive agreements, such as those previously before Congress. However, each type of legislative veto has different ramifications depending on the subject matter involved. In the case of executive agreements, there remains the argument that this measure encroaches on the President's independent constitutional powers.

196. See 1976 House Hearings, supra note 9, at 193, 195-96 (statement of A. Scalia, Asst. Att'y Gen., Office of Legal Counsel, Dep't of Justice); see supra text accompanying note 194.

197. U.S. CONST. art. I, § 7, cl. 3 (the presentation clause):

Every Order, Resolution, or Vote, 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 re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The legislative veto provision, as contained in legislation dealing specifically with executive agreements, has been attacked for a variety of reasons, the primary reason being that it violates the presentation clause. See Rovine, supra note 7, at 421-28; 1976 House Hearings, supra note 9, at 193-200 (statement of A. Scalia, Asst. Att'y Gen., Office of Legal Counsel,
mediately preceded by the clause setting forth the requirements for the enactment of a bill into law. It is claimed that the intent of clause 3 was to avoid an attempt to circumvent the possibility of a presidential veto by characterizing enactments intended to have the force of law as resolutions, votes, or orders, as opposed to "bills." Critics of the legislative veto maintain it thus violates the presentation clause by evading the requirement of a possible presidential veto.

Still another argument is that in areas over which it has jurisdiction, Congress cannot delegate its power to the President while retaining a measure of control through the legislative veto. The theory used to support this argument is that "Congress may withhold the delegation if it so desires" but once the delegation is made, "the Executive must be left to exercise the power on its own," subject only to the congressional controls of oversight or legislative enactment. The conclusion is that by permitting legislative control over the execution of laws passed by Congress, the doctrine of separation of powers is violated.

From a practical viewpoint, it is contended that, among other things, the President's authority as negotiator for the nation would be hindered should a legislative veto be passed, and that great confusion would result in the administration of already existing legislation. Critics of the legislative veto also disapprove of such a provision in a duly enacted statute, even though these statutes have been used in the past. While the constitutionality of the legislative veto

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199. See 1976 House Hearings, supra note 9, at 193, 196-97 (statement of A. Scalia, Asst. Att'y Gen., Office of Legal Counsel, Dep't of Justice).
200. See id.; accord Rovine, supra note 7, at 421-23. But see Buckley v. Valeo, 424 U.S. 1, 257 (1976) (White, J., concurring and dissenting). Justice White concluded that the power of either House of Congress to disapprove regulations promulgated by the Federal Election Commission was not violative of the President's veto power, since this power was not equivalent to an order, resolution, or vote under U.S. CONST. art. I, § 7, cl. 3; 1976 House Hearings, supra note 9, at 126 (statement of A. Holland in agreement with Justice White's interpretation).
201. 1976 House Hearings, supra note 9, at 193, 195 (statement of A. Scalia, Asst. Att'y Gen., Office of Legal Counsel, Dep't of Justice); Rovine, supra note 7, at 423-24.
202. 1976 House Hearings, supra note 9, at 193-95 (statement of A. Scalia, Asst. Att'y Gen., Office of Legal Counsel, Dep't of Justice).
203. See id.
204. See Rovine, supra note 7, at 425. But see 1976 House Hearings, supra note 9, at 126 (statement of A. Holland).
205. 1976 House Hearings, supra note 9, at 182, 187-88 (statement of A. Scalia, Asst.
has yet to be determined, the statutes currently in force containing legislative veto provisions provide Congress with a much needed means of checking executive power. The legislative veto provision should be put to greater use as a condition precedent in legislation authorizing the President to enter into executive agreements on a particular subject matter. It is difficult to regulate all international agreements with one general statute lacking specific definitions. The better approach is to attach a legislative veto provision to each piece of legislation dealing with a particular subject matter to avoid the problems associated with passage of an overly broad statute. In the case of legislation already enacted, amendments to the legislation would give Congress greater control over the conclusion of executive agreements.

B. Other Attempts to Exert Control

In addition to the bills containing legislative vetoes, Congress has made other attempts to exert control. Due to its preference for treaties, the Senate considered a proposal to block funding for any agreement it believes should be concluded in treaty form. Under this proposal, any executive agreement making a “significant political, military, or economic commitment to a foreign country” would fall within the definition of “treaty” and, if not submitted to the Senate as a treaty, would be denied funding. This proposal was opposed by the State Department and the House of Representatives; the latter viewed the proposal as an attempt to exclude it from the process of approving any major agreement. As the elected representatives closest to the people, the House views its role in the process as an important one, “providing the sense of consensus and pub-

Att’y Gen., Office of Legal Counsel, Dep’t of Justice); Rovine, supra note 7, at 423.

206. See supra note 195.

207. See supra notes 74-79 and accompanying text.


210. See id. § 2(b)(2). This resolution has been criticized for a variety of reasons. See Rovine, supra note 7, at 428-29. The author claimed that the resolution “would constitute a very significant and unwise interference with the role of the House of Representatives” and would raise complex legal and policy questions. Id.

211. See Letter from Department of State to the Senate Foreign Relations Committee (Dec. 30, 1977) (presenting views in opposition to S. Res. 24 and enclosure), reprinted in 1 M. GLENNON & T. FRANCK, supra note 132, at 453-58.
lic support which a sound policy requires."212 A resolution compelling the submission of a particular agreement to the Senate as a treaty would greatly weaken the House of Representatives' participation in the process. The stronger argument, however, is that agreements of great magnitude should be considered treaties and be submitted to the Senate as the Constitution requires. Again the question becomes one of defining which agreements are treaties and of deciding which branch should make the determination. The State Department and the House were opposed to the Senate making this important decision and presented insurmountable objections to the Senate proposal.

Indeed, the drafting of legislation which would significantly affect but not unduly restrict executive practices in this area and remain palatable to both houses of Congress is not a simple task. While legislation in this area is desirable, the constitutional problems associated with it present difficult obstacles. Assuming that such legislation did become law, other unanswerable questions arise: Could the President choose to violate such a law? If so, would the courts intervene to enforce it and thereby decide the proper constitutional boundaries of the legislative and executive branches of the government?213

V. ESTABLISHMENT OF A JOINT ADVISORY COUNCIL: A PROPOSED PLAN

Due to the reluctance of Congress to enact general legislation providing for the veto of executive agreements, other options for congressional action should be considered.214 A comprehensive system for the monitoring of executive agreements would be preferable. At the least, such a system should include stricter guidelines regarding transmittal to Congress of all executive agreements together with the precise authority claimed for each agreement. Other relevant information concerning the agreement's contents should also be included.215 Moreover, procedures for effective and meaningful consul-

214. Of course legislation providing for congressional oversight in the form of a resolution of approval or disapproval would be desirable if properly drafted legislation were introduced and the requisite support could be mustered.
215. These and other options are discussed in INTERNATIONAL AGREEMENTS, supra note
tation with Congress should be devised. Further, a joint advisory council, consisting of representatives from the State Department and the Senate Foreign Relations Committee should be instituted.\footnote{Cf. 1976 House Hearings, supra note 9, at 204 (statement of Prof. John Norton Moore) (recommending establishment of a "continuing congressional/executive working group on foreign policy cooperation.")} This council would perform the essential function of discussing all proposed agreements and would consider the desirability of concluding a given agreement as a treaty. All agreements would be evaluated along with the claimed authority for each. Minor technical agreements could be swiftly dismissed; the more serious agreements would become the subject of open debate. Thus, the judgments and opinions of both branches would be considered and aired. Detailed rules governing the procedures to be used should be devised and followed. In the absence of legislation, it is only through specific and workable consultation procedures that cooperation and harmony can be attained.\footnote{The need for consultation and cooperation was recently highlighted in an incident involving the Reagan Administration's plan to sell communications satellite equipment to an Arab consortium which included Libya and the Palestine Liberation Organization. Due to congressional criticism, the Administration was forced to withdraw the plan to avoid a potential confrontation with Congress, only a short time after the controversial AWACS sale was approved. Senator John Glenn, a member of the Senate Foreign Relations Committee, said that the proposal "came to us cold with no advance notice, no consultation whatsoever." N.Y. Times, Nov. 5, 1981, at A4, col. 3.}

Any such program would require the commitment of the executive branch to the improvement of relations with Congress. Since executive agreements are the instruments used to implement United States foreign policy, the problems they present are only part of the larger issue: The need for cooperation between Congress and the Executive in formulating American foreign policy. Presidential efficiency and freedom in the area of foreign affairs, while valid considerations, do not abrogate the need for an effective check on the Executive as intended by the Framers of the Constitution.

The essence of our nation, as a democracy, rests on the foundation of a representative form of government. Policy made unilaterally by the Executive is repugnant to the basic ideas underlying the Constitution. Our democratic system not only suggests greater congressional participation in foreign affairs, but demands it.

Sharon G. Hyman