EXECUTIVE AGREEMENTS AND THE INTENT BEHIND THE TREATY POWER

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Growth of the Executive Agreement in United States Foreign Policy

Throughout the history of the United States, the use of the executive agreement, in place of the treaty as a means of concluding formal arrangements with foreign countries and organizations, has increased dramatically.[1] As shown here, this development was not envisioned by the authors of the Constitution, and evades the process they established for the creation of binding obligations between foreign entities and the government of the United States. This situation is a subject of great concern to some members of Congress, and this note submits that it represents an unconstitutional expansion of the authority vested in the executive branch.

An executive agreement is distinguished from a treaty in that it does not require the "advice and consent" of two-thirds of the Senate under Article II of the United States Constitution.[2] Some contend that this is the only difference between the two;[3] however, the Department of State has recognized implicitly that the two instruments are not interchangeable.[4] "Executive agreement" is a vague term applied to three types of agreements concluded without Senate approval under Article II.[5] It applies to agreements entered into by the president under congressional

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1. *See generally* Hopson, *The Executive Agreement in United States Practice*, 12 A.F. JAG L. REV. 252 (1970) [hereinafter cited as Hopson].

2. "He [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.

3. *See, e.g.*, McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181 (1945) [hereinafter cited as McDougal & Lans], arguing that executive agreements and treaties are identical.

4. Hopson, *supra* note 1, at 255. Hopson cites State Department publications which state that an executive agreement should not be used where a treaty is more appropriate.

5. *See generally* 1 D. O'CONNELL, *International Law* 206 (2d ed. 1970) [hereinafter cited as D. O'CONNELL].

authorization,[6] such as the Reciprocal Trade Agreement Act of 1934,[7] the Lend-Lease Act of 1941,[8] and the statute authorizing United States membership in the International Labor Organization.[9] Secondly, the president may conclude an executive agreement under authority granted to him by a formal treaty;[10] for example, the agreements made pursuant to the United Nations Participation Act of 1945.[11] Finally, executive agreements may be concluded under the sole constitutional authority of the president, such as President Wilson's Lansing-Ishii Agreement with Japan in 1917 and the exchange of notes that initiated the "open door" policy in China.[12]

The range of subjects covered by these agreements is vast. One author has reported that executive agreements have been utilized for affiliation with international organizations, establishment of military missions, collective security and status of forces arrangements, military occupation and civil affairs, commercial aviation, communication satellites, weather stations, lend-lease settlements, guaranty of private investments, and development of peaceful uses of atomic energy.[13] The impact of the executive agreement on the conduct of United States foreign relations is best appreciated when this breadth of subject matter is compared with the increasing use of executive agreements as a foreign policy tool.

In the first half century of this country's existence, the United States was a party to sixty treaties and only twenty-seven published executive agreements.[14] Prior to World War II the United States was a party to approximately eight hundred treaties and twelve hundred agreements, a ratio of 1.5 agreements for each treaty.[15] Since World War II that ratio has changed drastically, climbing to forty-five executive agreements for every treaty during the 85th Congress and settling to an average of seventeen agreements for every treaty by 1968.[16] These figures only apply to published agreements, so the actual ratio might be far in excess of

6. *But cf.* Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 342 n.4.2 (1944).

7. 19 U.S.C. §§ 1351-54 (1934).

8. Act of Mar. 11, 1941, ch. 11 §§ 1-3, 55 Stat. 31.

9. 22 U.S.C. § 271 (1934).

10. *See* 1 D. O'CONNELL, *supra* note 5, at 206-10.

11. *See* A DECADE OF AMERICAN FOREIGN POLICY, S. Doc. No. 123, 81st Cong., 1st Sess. 126, 158 (1950).

12. CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 511-14 (1972).

13. Hopson, *supra* note 1, at 253.

14. E.M. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES vi (1960) [hereinafter cited as BYRD].

15. *Id.*

16. Hopson, *supra* note 1, at 253.

17:1. At one time Secretary of State Dulles stated that about 10,000 agreements had been entered into as a result of the North Atlantic Treaty Organization pact alone. He stated that "every time we open a new privy, we have to have an executive agreement."[17]

Commenting on this situation, with particular reference to executive agreements concluded under the presidents' sole constitutional powers, Senator J. W. Fulbright stated:

> Traditionally that authority [to conclude executive agreements without Senate advice and consent] was confined to matters of a a routine or administrative nature, while significant, substantive matters were thought to require treaties consented to by the Senate.
>
> As matters have developed in recent years, I think it no exaggeration to say that this distinction has been substantially reversed; matters of a routine, administrative or essentially non-political or significant nature—an agreement, for example, for the recovery of lost archaeological objects in Mexico—are regularly submitted to the Senate most solemnly for its advice and consent. Matters of weight and substance, on the other hand, such as the stationing of troops in a foreign country, or the conduct of clandestine warfare on another government's behalf have in recent years been contracted by secret executive agreement without the consent or even the knowledge of the Senate.[18]

The Effects of Executive Agreements and Treaties: A Trend Toward Equivalence

How does the preference for executive agreements over treaties as a tool for the conduct of United States foreign relations affect the operation of government? As far as this country's international obligations are concerned the binding effect of an executive agreement is the same as that of a treaty.[19] The distinction between the two instruments is purely a constitutional one.[20] It is only when dealing with the domestic effects of such obligations that the differences become apparent.

The domestic effect of a treaty is well-established. If either the proper implementing legislation has been passed, or if the treaty is self-executing, "[o]ur Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded . . . as equivalent to an act of the legislature . . . ."[21] As such, a treaty may supersede an act of Con-

17. *Hearing on S.J. Res. 1 and S.J. Res. 43 Before Subcomm. of the Senate Judiciary Comm.*, 83d Cong., 1st Sess. 877 (1953).

18. *Hearings before the Senate Comm. on Foreign Relations on S. 596*, 92d Cong., 1st Sess. (1971) (Opening remarks of the chairman).

19. *Draft Convention on the Law of Treaties, Text with comment by the Research in International Law of the Harvard Law School*, 29 AM. J. INT'L L. 657, 697- 98 (Supp. 1935).

20. *Id.*

21. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

gress[22] and may itself be superseded by a subsequent act of Congress.[23] The supremacy clause of the United States Constitution[24] insures that treaties will predominate over state laws in the same manner that a federal statute so predominates. A treaty cannot violate the Constitution,[25] but no treaty has been found unconstitutional by the United States Supreme Court.[26] The treaty power is viewed as a substantive one[27] in that it permits dealings with "all subjects arising under the law of nations."[28] Consequently, the 1920 case of *Missouri v. Holland*[29] upheld a treaty executed with Great Britain (acting on behalf of Canada) for the protection of migratory birds, and sustained the federal implementing legislation against an attack based on the Tenth Amendment reservation of all powers, not enumerated in the Constitution, to the states.[30] The Court ruled that, because of the substantive nature of the power, a treaty may deal with powers not delegated to the federal government by the states, and Congress may enact such laws as are necessary and proper to implement the treaty.[31] The practices of the "founding fathers" are in accord with this approach, as shown by the fact that treaties passed both before and after the adoption of the Constitution and the Tenth Amendment involved obligations which infringed on the powers reserved to the states.[32]

The domestic effect of an executive agreement is more difficult to define since few cases deal with it as a constitutional issue. Until the turn of the century, there was little support for the proposition that an executive agreement, as the equivalent of a treaty, would become the law of the land under the supremacy clause.[33] *B. Altman & Co. v. United States*[34]

22. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

23. The Cherokee Tobacco (Boudinot v. United States), 78 U.S. (11 Wall.) 616 (1870).

24. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST., art. VI § 2.

25. Reid v. Covert, 354 U.S. 1, 16-17 (1957); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

26. BYRD, *supra* note 14, at 86.

27. *Id.* at 65.

28. *Id.* at 45.

29. 252 U.S. 416 (1920).

30. *Id.* at 434-35.

31. *Id.* at 433.

32. BYRD, *supra* note 14, at 79.

33. This was felt to be the result of nonadherence to the treaty process. *See, e.g.*, Four Packages of Cut Diamonds v. United States, 256 F. 305, 306 (2d Cir. 1919); 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 589 (2d ed. 1929); 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 390 (1943).

34. 224 U.S. 583 (1912).

was the first step toward a reversal of that view. In *Altman*, the United States Supreme Court held that an international commercial agreement fell within the ambit of an 1891 statute which established appellate jurisdiction over cases involving *treaties*,[35] even though the agreement had not been ratified by the Senate.[36] The case was a significant step in establishing an equivalence between treaties and executive agreements.

In 1936, in *United States v. Curtiss-Wright Export Corp.*,[37] the Court held that congressional authorization of an executive agreement was not an unconstitutional delegation of powers.[38] Justice Sutherland's opinion for the majority included dicta which propounded a theory of inherent power in the federal government to conduct foreign affairs, a power which was derived wholly apart from the Constitution, as an essential concomitant of sovereignty.[39] Justice Sutherland remarked that this power was embodied in the president as the "sole organ" of the government in the area of international relations whether or not Congress made such a delegation.[40] Justice Sutherland argued that traditionally the royal sovereign had plenary powers to deal with other nations; that these powers of external sovereignty passed from the British Crown to the colonies in their collective capacity as the United States, because they acted as a unit and not severally, and subsequently were vested in the president as the chief executive of the nation.[41]

The following year, Justice Sutherland expounded on the theory of equivalence between treaties and executive agreements, and his own inherent power theory, in *United States v. Belmont*.[42] In *Belmont* the Supreme Court upheld an executive agreement, the Litvinov Assignment, which President F. D. Roosevelt had concluded without any action on the part of Congress or the Senate.[43] Justice Sutherland, in the majority opinion, sustained the agreement over contrary New York state policy.[44] He reasoned that the same rule that establishes the constitutional supremacy of treaties holds supreme "all international compacts and agreements from the very fact that complete power over international affairs is in the national government . . . and cannot be subject to any curtailment or interference on the part of the several States."[45]

35. Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826.
36. 224 U.S. at 587-88.
37. 299 U.S. 304 (1936).
38. *Id.* at 329.
39. *Id.* at 316.
40. *Id.* at 318-20.
41. *Id.* at 316-17; *see also* Penhallow v. Doane, 3 U.S. (3 Dall.) 53, 80-81 (1795).
42. 301 U.S. 324 (1937).
43. *Id.* at 330.
44. *Id.* at 331.
45. *Id.*

Five years later, Justice Douglas cited *Belmont* and *Curtiss-Wright* in the majority opinion for *United States v. Pink*.[46] Dealing with facts similar to those found in *Belmont*, the Court held that:

> [T]he Litvinov Assignment was an international compact which did not require the participation of the Senate . . . . Power to remove such obstacles to full recognition [of the U.S.S.R.] 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."[47]

The Court further held:

> A treaty is a "Law of the Land" under the supremacy clause . . . . Such international compacts and agreements as the Litvinov Assignment have a similar dignity. . . . [S]tate law must yield when it is inconsistent.[48]

Thus, in a period of just thirty years the executive agreement has moved from a position where it could have no effect on state law, to a position where its domestic effect is practically equivalent to that of a treaty. The cases above show that this result is based both on the constitutional requirements of Article VI, and on the inherent power theory which has no constitutional limitation.

The effect of an executive agreement on federal legislation is even less certain. It is suggested that in areas where Congress' powers are concurrent with those of the president, he "might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."[49] Thus, if Congress has yet to deal with a particular subject in such an area, the president has free rein; if Congress has passed a law in an area, the president must respect it. A corollary of this view is that Congress cannot terminate an executive agreement's international obligations if the agreement is based on the president's exclusive powers, unlike a treaty which may be terminated by legislation. The president might argue that such an act would be an unconstitutional invasion of his power[50] with the ironic result that an executive agreement, which has little basis in the Constitution, would be "exalted" over a formal treaty, whose basis is firmly established in Articles II and VI. However, the Court has yet to rule on this particular issue, and it remains to be seen if such a result would be sustained.

The executive agreement has become substantially identical to a formal treaty in both its international and national effects. The limits on

46. 315 U.S. 203 (1942).

47. *Id.* at 229.

48. *Id.* at 230-31.

49. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring); *see also* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

50. McDougal & Lans, *supra* note 3, at 317.

this "power" are ill-defined at best. They are determined solely by the president[51] and without the checks and balances inherent in the treaty process. Is this a result that would be countenanced by the authors of the Constitution?

The Intent of the Founders[52]

Executive agreements are not mentioned in the Constitution nor were they specifically considered in the Constitutional Convention or the Ratification Conventions.[53] However, the framers' knowledge of their existence can be inferred from the broad definition of the treaty power as used in Article II section 2. Alexander Hamilton stated in one of his Letters of Camillus:

> that it was understood by *all* to be the intent of the provision to give that [treaty] 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.[54]

Article 1 section 10[55] provides additional evidence of the founders' awareness of international agreements other than treaties. It prohibits the states from entering into treaties, alliances or confederations but permits international agreements or compacts with the consent of Congress. It may be inferred from this provision that agreements and compacts were considered inferior to the more politically oriented instruments (treaties) prohibited to the states. This is confirmed by the limited use of such instruments just prior to adoption of the Constitution as a means for regulating boundaries, navigation, fishing rights, etc.[56] This same interpretation underlies Senator Fulbright's remarks quoted earlier.[57]

Some authors have argued that since agreements could be considered to be within the Article II grant of the power of the president "by and with the Advice and Consent of the Senate, to make Treaties," that the president by implication is given the power to enter into executive

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51. Wright, *supra* note 6, at 349.

52. *See generally* Berger, *The Presidential Monopoly of Foreign Relations,* 71 MICH. L. REV. 1 (1972) [hereinafter cited as Berger].

53. *Id.* at 33.

54. 6 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 183 (H. Lodge ed. 1904) (emphasis added) [hereinafter cited as A. HAMILTON].

55. "No State shall enter into any Treaty, Alliance, or Confederation . . . . No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports . . . . No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." U.S. CONST. art. I, § 10.

56. Berger, *supra* note 52, at 42.

57. See text accompanying note 18 *supra.*

agreements, the lesser instrument. This argument is based on the view that "advice and consent" merely means that the Senate has the power to veto or amend a treaty that has been negotiated by the executive.[58] The president's ability to enter into executive agreements would then derive from his power to negotiate. This is not in accord with the scheme envisioned at the time the Constitution was written. The framers of Article II gave jointly to the president and the Senate the power to make treaties; their powers were to be coextensive.[59] In fact, the framers initially adopted the practice of the Continental Congress and granted the Senate the exclusive power to make treaties.[60] It was not until the debates after August 6, 1787, that Madison stated that "the Senate represented the States alone," and concluded that, "the President should be an agent [but not the exclusive agent] in Treaties."[61] Not until the closing days of the Convention was the president included in the treaty process by a proposal of the Committee of Eleven on September 4, 1787.[62]

The colonists feared strong executive power, their fear being inspired by their experiences with the English monarchy and the royal governors. Consequently, the founders introduced the president purely to provide checks and balances on the Senate power, and to facilitate a uniform foreign relations policy.[63] James Iredell's remarks at the North Carolina Ratifying Convention are illustrative of this point. He stated that:

> The power of making treaties is so important that it would have been highly dangerous to vest it in the Executive alone, and would have been the subject of much greater clamor. From the nature of the thing, it could not be vested in the popular representative. It must therefore have been provided for with the Senate's concurrence . . . or the power, the greatest monarchical power that can be exercised, must have been vested in a manner that would have excited universal indignation in the President alone.[64]

The founders assumed that the Senate would participate in the making of treaties, not just ratification. Charles Pinckney, a delegate to the convention from South Carolina, stressed that the president could not "take a single step . . . without [Senate] advice."[65] Hamilton expressed similar views in the Federalist No. 75:

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58. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 349 (1955).

59. Berger, *supra* note 52, at 6.

60. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 183 (1911) [hereinafter cited as M. FARRAND].

61. *Id.* at 392.

62. *Id.* at 498-99.

63. *Id.* at 538-41.

64. BYRD, *supra* note 14, at 25.

65. 4 J. ELLIOT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 258 (2d ed. 1836) [hereinafter cited as J. ELLIOT].

> [T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them . . . . It must indeed be clear to a demonstration that joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession of it by either of them.[66]

Senate participation was important to the framers for other reasons as well. The need for a uniform foreign relations policy required that treaties be made to predominate over state law by the supremacy clause. This domination would be unacceptable to the states unless they had some part in the drafting of the treaty. Participation was provided, on an equal basis, by their representatives in the Senate.[67] An executive agreement purporting to be the supreme law of the land, following the view of *Belmont*, would not provide this representation for the states.[68] According to the founders, any claim of authority to conclude presidential executive agreements based on the grant of the treaty power can be answered very simply. Patrick Henry stated, commenting on the treaty power, "the President, as distinguished from the Senate, is nothing."[69]

The founders regarded the power to enter into international agreements with great respect and recognized that it had to be "carefully guarded; the cooperation of . . . the Senate . . . being required to make any treaty whatever."[70] Further, since the use of the word "treaties" in Article II is construed broadly to cover "all the stipulations which . . . national affairs might require . . . and every other species of convention," it follows that Article II "covers the field."[71] As such, it becomes unimportant that "[t]he Constitution does not [expressly] provide that the treaty-making procedure is to be the exclusive mode."[72] The statements of the founders show that the treaty power was intended to be "carefully guarded" and the exclusive means of making international agreements. Justice Story reiterated this view over a century after the adoption of the Constitution when he stated that:

> [C]onsidering the delicacy and extent of the power, it is too much

66. THE FEDERALIST No. 75, 486, 488 (Mod. Lib. ed. 1941).

67. *See generally* BYRD, *supra* note 14, ch. 6.

68. Perhaps this would raise a Tenth Amendment problem not yet considered by the Court. Heretofore, federal laws encroaching on the area of reserved state powers have been upheld as necessary and proper to implement a treaty. This result was not intolerable because the states did have some representation, in theory, in the making of the treaty through their representatives in the Senate. It is submitted that an executive agreement should not be given the same effect in this area, because of the lack of state representation.

69. 3 J. ELLIOT, *supra* note 65, at 353.

70. 6 A. HAMILTON, *supra* note 54, at 183.

71. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

72. McDougal & Lans, *supra* note 3, at 216.

> to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties . . . . But however proper it may be in a monarchy, there is no American statesman but must feel that such a prerogative in an American President would be inexpedient and dangerous. It would be inconsistent with that wholesome jealousy which all republics ought to cherish, of all depositories of power . . . .[73]

In spite of the manifest view of the founders to the contrary, some authors have mentioned that the president may derive the authority to conclude executive agreements from his constitutionally granted exclusive or independent powers, such as the power to recognize foreign governments, appoint ambassadors, and the power to act as the chief executive and commander-in-chief.[74]

The founders' fear of executive power manifested itself in remarks such as those of Madison when he said it was necessary "to fix the extent of Executive authority" and added that such power should be confined and defined.[75] Alexander Hamilton stated in the Federalist No. 69 that the power of the commander-in-chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral . . . ."[76] At least one author has interpreted this as imparting no other powers to the president than those possessed by any other high ranking military officer.[77] The obligation to see that the laws are faithfully executed was construed by the founders as granting powers such as "those of the governors,"[78] which were to execute the laws of the commonwealth and "not, under any pretence, exercise any power or prerogative, by virtue of any law, statute, or custom of England."[79] This eliminates any transfer, from England, of the right to execute agreements by virtue of executive position. Finally, the power to receive ambassadors and recognize foreign governments was, according to Hamilton, "more a matter of dignity than of authority . . . . [W]ithout consequence in the administration of the government . . . ."[80] Thus, the president's independent powers were, in the view of the founders, limited in such a way that the treaty process of Article II would remain the exclusive procedure for entering into international agreements.

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73. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 341 (5th ed. 1891).

74. McDougal & Lans, *supra* note 3, at 244-52.

75. 1 M. FARRAND, *supra* note 60, at 66-67.

76. THE FEDERALIST No. 69, 448 (Mod. Lib. ed. 1941).

77. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 276 (3d ed. 1948).

78. 2 J. ELLIOT, *supra* note 65, at 128.

79. Berger, *supra* note 52, at 19 n.96.

80. THE FEDERALIST No. 69, 451 (Mod. Lib. ed. 1941).

Even if the president has no authority to conclude an agreement without Senate participation under the Constitution, there still remains a possible basis for such action in Justice Sutherland's dicta in *Curtiss-Wright* concerning the inherent sovereign powers of the chief executive.[81] Sutherland's theory, mentioned earlier, is that the president acquired sovereign powers in external affairs directly from England, totally apart from the powers enumerated in the Constitution.[82] This is based on a misconception of history in that he argues:

> [T]he states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source . . . . [T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States . . . . Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britian in respect of the colonies ceased, it immediately passed to the Union.[83]

The view he expresses was not the view of the colonies as reflected in various state constitutions and declarations.[84] The Articles of Confederation stated: "Each state retains its sovereignty, freedom and independence, and every Power . . . not . . . expressly delegated to the United States, in Congress assembled."[85] In direct opposition to the view advanced by Justice Sutherland, the states expressly granted Congress the power to make wars and treaties in Article IX of the Articles of Confederation.[86] The founders viewed sovereign power as being bestowed on the government by the people, not the Crown, and as having no existence of itself. Madison said "the people were in fact, the fountain of all power . . . ."[87] As such the government was created by the delegation of specifically enumerated powers in the Constitution, and nowhere else:

> A supra-constitutional "residuum" of powers not granted expressly or by necessary implication was not only furthest from their [the framers] thoughts, but avowal of such a "residuum" would have affrighted them and barred adoption of the Constitution.[88]

Since Justice Sutherland's inherent power doctrine is dictum, unsupported by historical fact and in opposition to the views of the authors

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81. See text accompanying notes 37-41 *supra.*

82. *Id.*

83. 299 U.S. at 316-17, *citing* Penhallow v. Doane, 3 U.S. (3 Dall.) 53, 80-81 (1795).

84. *See* Berger, *supra* note 52, at 28-29.

85. (Article II) H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

86. *Id.* at 113.

87. 2 M. FARRAND, *supra* note 60, at 476.

88. Berger, *supra* note 52, at 33.

of the Constitution, it should not be regarded as providing a valid basis for the president to conclude international agreements without the advice and consent of the Senate.[89] Further, it appears that there exists no constitutional basis for such an agreement concluded solely on the basis of executive authority. An attempt to conclude such an agreement would be an attempt to evade the Constitution. Quoting a New York Times editorial, Edwin Borchard suggested arguing that an executive agreement does not require Senate participation,

> "is merely to argue that we can get around the Constitution by conspiring with each other to call a spade by another name" . . . if this can be done "we can do away with the need for any approval of treaties"; in fact, we can "interpret" the Constitution entirely away.[90]

In addition to usurping Senate powers, such a process effectively precludes state or popular participation from the drafting of the agreement. It eliminates their representatives from the decision-making process, yet it binds individuals and states as the law of the land. This was a major concern at the time of adoption of the Constitution, and can be resolved properly only by the participation of a part or the whole of the legislative body.

Congressional Reactions

Some members of Congress have expressed concern over the present status of the executive agreement, particularly the potential for expansion of executive agreements concluded exclusively by the president. From 1952 through 1957 various attempts were made to adopt an amendment to the Constitution that would prohibit federal interference in the area of reserved state powers by either treaty or executive agreement.[91] Named the Bricker amendments because their chief proponent was Senator John W. Bricker of Ohio, the attempts were prompted both by fear that treaties would become superior to the Constitution,[92] and by isolationist sentiment directed at avoiding the United States involvement in the United Nations.[93] Although there were many versions, the amendments typically provided that:

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89. This is especially true in light of later cases with dicta totally opposed to the inherent powers view. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring).

90. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 38 AM. J. INT'L L. 637, 639 n.9 (1944).

91. *See S.J. Res.* 43, 83d Cong., 1st Sess. (1953); *S.J. Res.* 1, 84th Cong., 1st Sess. (1955); *S. Rep. No.* 1716, 84th Cong., 2d Sess. 22 (1956).

92. BYRD, *supra* note 14, at 85-86.

93. W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY 1932-1968, 224 (1970).

> Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.[94]

The relevant limiting provisions provided that the treaty or agreement "shall become effective as internal law in the United States only through legislation which would be valid in the absence of the treaty."[95] These amendments were directed at limiting the *Missouri v. Holland*[96] decision, preventing encroachment into the area of reserved state powers.

During the same period, the McCarran Resolution[97] attempted to limit the expansion of executive agreements. It provided that no executive agreement would be of any force or effect until published in the Federal Register and that all agreements would be subject to federal legislative veto.[98] This resolution was a direct outgrowth of the increasing number of secret executive agreements being concluded that were not subject to congressional inquiry.[99]

Although neither the Bricker Amendment nor the McCarran Resolution was adopted,[100] the recent manifestations of Senate and congressional concern have proven more effective. The National Commitments Resolution passed by the Senate in 1969[101] urged the use of treaties instead of executive agreements in the conduct of foreign relations.

Secrecy again prompted action in 1972 and led to the Case bill[102] which required that all agreements be sent to Congress for information, and in an addition sponsored by Senator Ervin, permitted congressional veto of an agreement within sixty days of transmission.[103] As enacted it provides:

> The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty . . . as soon as practicable after such agreement has entered into force . . . but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the

94. *S.J. Res.* 1 § 3, 83d Cong., 1st Sess. (1953).
95. *Id.* § 2.
96. 252 U.S. 416 (1920).
97. *S.J. Res.* 2, 83d Cong., 1st Sess. (1953).
98. Hopson, *supra* note 1, at 262.
99. It has been reported that the State Department has declined to reveal over 400 secret agreements, and that there are thousands of others concluded by other agencies of the government, which have not been disclosed, notably by the Department of Defense. See Berger, *supra* note 52, at 34 n.191.
100. Hopson, *supra* note 1, at 263.
101. *S. Res.* 85, 91st Cong., 1st Sess. (1969).
102. 1 U.S.C. § 112b (1972).
103. Berger, *supra* note 52, at 3.

> opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy . . . .[104]

These provisions are essentially the same as those proposed as a compromise during the Bricker amendment controversy in 1954 by Senators Ferguson and Knowland.[105] It required seventeen years for the Congress to pass such a bill, but having done so it recognized that its action represented "a long first step toward the recovery of that constitutional authority which we [the Congress] have allowed to erode away over the years."[106] The Case bill provides the needed information for Congress to "reexamine and then perhaps to reassert its proper constitutional authority in the area of treaties."[107]

Conclusion

That the executive agreement has come to predominate over the treaty cannot be denied. It is also evident that this subverts the intent of the founders by evading the participation of the legislative branch in the treaty process. Under the present laws, Congress is not informed of an agreement until after it has "entered into force."[108] Rather than being presented with a *fait accompli* by the executive branch, it is essential that Congress be given a role in the formation of international agreements and compacts, if the scheme envisioned in the Constitution is to be reaffirmed.

Informing either the Senate Foreign Relations Committee or the House Foreign Affairs Committee of *pending* negotiations would provide the needed opportunity for legislative input. This is not to suggest that Congress must act on every agreement, but merely provides an opportunity for Congress to express its views if it chooses. Agreements of a routine or administrative nature still may be concluded without specific congressional enactments[109] under general policy statements; yet the problem of determining which agreements are administrative and which are substantive, requiring legislative action,[110] would be circumvented. Since the congressional committees would be informed of all agreements, Congress could act on any individual agreement whenever it determined that action was necessary.

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104. 1 U.S.C. § 112b (1972).

105. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137 (1972).

106. *Hearings before the Senate Comm. on Foreign Relations on S. 596*, 92d Cong., 1st Sess. (1971) (Opening remarks of the chairman).

107. *Id.*

108. See text accompanying note 103 *supra.*

109. See text accompanying notes 55-57 *supra.*

110. See text accompanying note 18 *supra.*

A procedure such as this would not eliminate the executive agreement as a foreign policy tool, but would adapt it to meet constitutional requirements. It provides for legislative participation with a minimum of interference in the executive branch's routine functions and adapts the constitutional requirements to reflect current needs.

Although the Case bill was a beginning, more involvement of the legislative branch is needed. Congress should actively seek to reclaim the authority which it has allowed to erode away over the years.[111]

111. Since this note was written four bills have been proposed, by Senators Bentsen, Case, Glenn and Representative Morgan, which would permit the legislative veto of executive agreements. The proposals differ as to whether all agreements should be submitted to Congress, or just those entered into without specific prior authorization; and as to whether the Senate, the House, or both should review the agreements. However, each of the bills proposes some means by which Congress may veto an executive agreement submitted to it within sixty days, and before the agreement takes effect. The Nixon administration was able to defeat the Ervin proposal for a legislative veto of executive agreements, mentioned in the text accompanying note 103 *supra*, in 1972 and also when it was reintroduced in 1973 and 1974. In light of the reaction to events such as the Nixon-Thieu letter promising U.S. support to counter violations of the Vietnam Peace Accords, and the 1972 trade agreement with the Soviet Union which was later repudiated, it remains to be seen if the Ford administration's proposals for informal cooperation and its opposition to these bills will be sufficient to prevent their passage. *See* 33 CONG. QUARTERLY WEEKLY REPORT 1712 (1975).