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INTRODUCTION

ON FEBRUARY 11, 1945, President Franklin D. Roosevelt, without the prior authorization of Congress or the subsequent consent of the Senate, concluded an agreement with Marshal Joseph Stalin and Sir Winston Churchill. It provided that in exchange for an undertaking by Marshal Stalin, Russia would conclude a pact of friendship with China and assist that country to extricate itself from Japanese control, and that for this further undertaking, Russia would enter the Pacific War two or three months after Germany surrendered. The Prime Minister and the President pledged their countries' support to allot to Russia the Kuriles, the southern half of Sakhalin Island, and adjacent islands; to permit Russia to lease Port Arthur as a naval base; to internationalize the port of Dairen; and to permit Russia to operate the Manchurian Railroad jointly with China. Where the interests of China were affected by this agreement, President Roosevelt agreed to obtain the consent of the Chinese Government. Such was the Yalta Agreement.[1] When its terms became known, it precipitated a controversy which continues to the present day and which gives rise to the central thesis of this paper: first, "by what authority may the President make internationally binding agreements without the authorization of Congress or the consent of the Senate?"; and, second, "what is the scope of the President's power when he acts without such authorization and/or consent?".

THE AUTHOR: ALFRED P. KNOLL (B.A., San Diego State College; J.D., University of California, Hastings College of Law); Research Officer, British Institute of International and Comparative Law; Member, Max Planck Institute, Munich.

The Constitution provides that the President "shall have the power, by and with the advice and consent of the Senate, to make treaties . . . ."[2] However, this has never been interpreted to mean

[1] Yalta Agreement, February 11, 1945, 59 Stat. 1823.

[2] U.S. CONST. art. II, § 2, cl. 2.

that a treaty is the only kind of agreement that the President may make with a foreign government. It is only a permissive grant, for it does not preclude the making of international agreements which are not treaties, but which are equally binding in international law.[3] Therefore, any study of the source and scope of the President's authority to conclude such agreements, absent a clause in the Constitution explicitly granting and limiting such authority, must be made by determining the extent of his substantive powers in the field of foreign affairs; the President's authority to make international agreements without the consent of the Senate must be co-extensive with these substantive powers and exist as a necessary concomitant to their exercise. The most realistic gauge in this determination is derived from the study of both historical precedents and case law, the former carrying the greater burden as the problems posed in this area have rarely reached the courts. Thus, for the most part, both the source and the scope of the President's authority to conclude international agreements is what common consensus has authorized in the past.

The making of international agreements has constituted one of the most important techniques to the general conduct of diplomacy by which the Executive has sought to make the nation's foreign policy effective. Its need is more than apparent; its abuse is more than real. "The nature of foreign negotiations requires caution, and their success must often depend on secrecy . . . ."[4] Interference by the Senate would many times diminish the effectiveness of the President, as the nature of the transactions with foreign nations requires expediency and unity of design.[5] Other nations, either through the vesting of authority in the Executive or by virtue of the parliamentary system which insures the Executive of legislative support, have the power to act promptly.[6] Thus, as the importance of this country has grown internationally, the use of the executive agreement has increased.

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[3] 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 397 (1943).

[4] 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 194 (1896).

[5] COMM. ON FOREIGN RELATIONS, 29 ANNALS OF CONG. 20 (1815) [1789-1824].

[6] *See*, U.S. TARIFF COMMISSION, REGULATION OF TARIFF IN FOREIGN COUNTRIES BY ADMINISTRATIVE ACTION (1934). In the 14-month period prior to the consideration by Congress of the Trade Agreements Act, foreign countries had entered into more than 60 bargaining agreements relating to customs treatment. Since that time executive agreements have continued to be concluded in great numbers. *See, Hearings Before the Comm. on Ways and Means on H.R.* 8430, 73rd Cong., 2d Sess. 361-62 (1934).

> "During the first fifty years of the government under the Constitution, the President is known to have entered into some 27 international acts without invoking the consent of the Senate, while 60 became law as treaties; for the second half of the century the figures appear to be 238 executive agreements and 215 treaties; and for the third similar period 917 executive agreements and 524 treaties."[7]

On hearings for the proposed Bricker Amendment before the Senate Judiciary Committee, Secretary of State Dulles stated that since 1928 there have been listed in the State Department Publications some 1527 executive agreements compared to 299 treaties.[8]

However, the scope, need, or effect of an agreement is not the test of its constitutional validity. Yet no one has been able to give a realistic explanation of its consitutional nature. That there should be as yet no precise or even general limitations on the exercise of such an important power is remarkable in a constitutional system which professes limitations of power as its keystone. There is no doubt that executve agreements possess the same vitality as do treaties; they are thus the "supreme law of the land."[9] It is therefore conceivable that this power could be used to alter or destroy rights guaranteed to our citizens by the Constitution without the safeguards inherent in the treaty making process. The proposed Convention on Genocide,[10] the proposed Convenant on Human Rights,[11] and the suggested adherence of the United States to the jurisdiction of the proposed International Court of Criminal Justice,[12] whereby constitutionally guaranteed rights would have been altered by its adoption, brought to light the potential misuse of the power of executive agreements and prompted the introduction of the controversial Bricker and other related amendments to the Constitution.[13]

As noted above, the purposes of this article are two-fold: first, to discuss the source of the President's power to make international agreements without the consent of the Senate; and second, to en-

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[7] W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 4 (1941).

[8] Statement of the Department of State before the Senate Judiciary Committee, annexed to Department of State Press Release No. 174 at 9 (April 6, 1953); the publications referred to are the Executive Agreements Series (E.A.S.), Treaty Series (T.S.), and Treaties and other International Acts Series (T.I.A.S.).

[9] *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

[10] 78 U.N.T.S. 278.

[11] 27 DEPT. STATE BULL. 23 (1952).

[12] 7 U.N. GAOR, Committee on International Criminal Jurisdiction, Supp. 11, U.N. Doc. A/2136 (1952).

[13] S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 130 as amended, 82d Cong., 2d Sess. (1952).

deavor to determine the scope of this power. The former is subdivided into the President's authority as derived from his independent powers as President of the United States and that which is delegated to him by congressional legislation. The latter topic is analyzed from four points of view. These are: his power as limited by affirmative grants of power in the Constitution; as limited by treaty power; as limited by specific prohibitions in the Constitution; and, as limited by the practical safeguards inherent in the political process.

It might also be noted that the term "executive agreement" has a variety of other titles such as treaty, convention, protocol, declaration, agreement, covenant, statute, or charter. The choice of one title over another often results from considerations that have no legal significance. The title of an agreement between states does not, therefore, determine whether it is an "international agreement." The latter is defined as ". . . an agreement between states or international organizations by which there is a manifested intention to create, change or define relationships under international law . . . ."[14] The relevancy of the title of any given instrument should merely be used in determining whether it is the intention that the instrument should have such effect.[15]

INDEPENDENT POWERS OF THE PRESIDENT

The power of the President to conclude internationally binding agreements presupposes a vital issue: that is, his power to act at all in the field of foreign affairs. Congress has the power to regulate foreign commerce; to declare war; to provide, maintain and regulate the armed forces; to exercise the taxing power in order to provide for the common defense and general welfare; and to implement through the necessary and proper clause, all of the powers possessed by the Federal Government.[16] Similarly, Article II, confers upon the President several powers essential to the conduct of foreign affairs: he is authorized to receive representatives from foreign governments;[17] to make treaties with the advice and consent

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[14] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115 (a) (1965).

[15] *Id.* Comment to § 115 (a).

[16] U.S. CONST. art. I, § 8. Other powers of less obvious utility have been frequently employed in foreign affairs: for example, congressional power to establish post offices has been used to conclude agreements regarding international regulation of the mails.

[17] U.S. CONST. art. II, § 3.

of two-thirds of the Senate;[18] he is Commander in Chief of the Army and Navy;[19] and he is invested with executive power.[20] Finally, Article II, section 2, grants to the Senate the power to approve or disapprove all treaties submitted to it by the President. Thus, when the question is asked, in whom does the Constitution vest the authority to determine the foreign relations of the United States, we are at once beset with confusion. Most would be inclined to answer "in the President"; but they would be hard put, if challenged, to point out any definite statement to this effect in the Constitution. One of the best known commentators has said:

> "What the Constitution does, *and all that it does*, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on the Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve. [T]he Constitution, considered only for it affirmative grants of power capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."[21]

However, the president's office has by a slow process of "aggrandizement" come to the point where it controls, for the most part, the foreign affairs of the United States.[22] Three relevant factors have been the keynote of this process. First, the presidency has possessed from the beginning inherent practical advantages, which are pointed out by Jay in *The Federalist*: unity of the office; its capacity for secrecy and dispatch; and its superior sources of information. A further advantage is that the President is always ready to act, unlike the legislature, which may be in recess or incapacitated by the parlimentary complications of other business.[23] The second factor is the Hamiltonian conception of "executive power." This concept — that the President possesses certain constitutional powers not subject to the will of Congress or the Senate — made its debut in a series of debates between Hamilton and John Marshall as "Pacifius" and "Helvidius" respectively. Hamilton's contention, one which has prevailed, was briefly that the opening sentence of Article II is an affirmative grant of power and not merely declaratory; that the

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[18] U.S. CONST. art. II, § 2, cl. 2.

[19] U.S. CONST. art. II, § 2, cl. 1.

[20] U.S. CONST. art. II, § 1.

[21] E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 171 (4th ed. 1957).

[22] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[23] A. HAMILTON, J. MADISON & J. JAY, THE FEDERALIST No. 64 (B. Wright ed. 1961) [hereinafter cited THE FEDERALIST].

succeeding grants of power, except where coupled with specific restrictions or limitations, specify the principal articles implied in the general grant and hence serve to interpret it; and finally, by inference, that the direction of foreign policy is inherently an "executive" function.[24] The third factor is that the President is the Commander in Chief of the Army and Navy and upon him rests the duty to "take care that the laws be faithfully executed" — a part of which is international law. As Corwin points out,

> "From the first, therefore, it has devolved on him to protect American rights and to discharge American duties under the law of nations; and, as commonly happens, the path of duty became in time a road to power. The 'laws' to which the 'faithfully executed' clause referred, . . . comprised not only the Constitution, statutes, and treaties, but also those general laws of nations which govern the intercourse between the United States and foreign nations. The United States, having become a member of the Society of Nations, was obliged to respect the rights of other nations under that code of laws, and the President, as the chief executive officer of the laws and the agency charged with the superintendence of the nation's foreign intercourse, was bound to rectify injury and preserve peace."[25]

Thus by virtue of these three factors — the natural advantages of the office, the broad grant and "inherent" powers of the President as "Chief Executive," and the idea that the President is the "Consitutional Executor" of the laws—there is today no doubt that he has exclusive power and is ". . . the sole organ of the Federal Government in the field of international relations."[26]

Article II, section 1, of the Constitution provides that the "Executive power shall be vested in the President . . . ." The President's power to act as sole representative for the United States in foreign affairs is necessarily attributable to the "Executive Power." However, nowhere in the Constitution can an explicit provision be found which allows the President to conduct the foreign affairs of the country by executive agreement without the authorization of Congress or consent of the Senate. On the other hand, there is no doubt that the Constitution recognizes that forms of international agreements other than treaties exist. Article I, section 10, states that "No State shall enter any Treaty, Alliance, or Confederation;" and that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign

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[24] *Supra* note 21, at 179, citing WORKS.

[25] *Id.* at 194, citing 1 OP. ATT'Y. GEN. 566, 570 (1922).

[26] *Supra* note 22.

Power. . . ." Since the power to make these agreements with congressional consent was accorded to the states, it would be difficult to conclude, in fact has never been concluded, that this power was denied to the Federal Government.[27] And, in order to prevent his substantive powers from being in large measure ineffectual, the President must share in this federal power. Thus, it can and has been argued[28] that the President's authority to make an agreement which is binding internationally on the United States is so indispensable to his power to conduct foreign affairs of the country, that it may be reasonably derived by implication from the language of Article I, section 10, of the Constitution.[29] There may also be said to reside in the Presidency an inherent power to make decisions in the field of foreign affairs comparable to that possessed by the national government as a whole.[30] This is closely akin to the constitutional theories of Taft,[31] Roosevelt,[32] and Locke,[33] in supposing that the President is limited only by specific restrictions contained in the Constitution.

In light of the foregoing then, it would seem that the President may use the device of an executive agreement wherever he is authorized to act as the chief executive of the United States in foreign affairs. In a sense, this may be said to be the ultimate authority from which his power to make executive agreements arises.[34] By virtue of this constitutional provision the President has always been recognized as the sole representative of the United States in conducting negotiations with other nations. In addition to controlling

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[27] Monaco v. Mississippi, 292 U.S. 313, 331 (1934); *See also*, McDougal & Lans, *Treaties and Congressional — Executive or Presidental Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 221 (1945).

[28] *Supra* note 9, at 330, where the *Belmont* Court notes, "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 . . . . And in respect of what was done here, the Executive had authority to speak as the sole organ of that government."

[29] *See*, Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 289 (1953).

[30] REPORT ON THE POWERS OF THE PRESIDENT 1.

[31] W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 16 (1925).

[32] "That the President is the 'steward' of the people and therefore has a duty to carry out any action which the needs of the nation demand unless such action is specifically forbidden by the Constitution or laws of the United States," CORWIN, *supra* note 21, at 131.

[33] "[A]ny act for the public good is authorized without any explicit provision needed," J. LOCKE, TWO TREATIES OF GOVERNMENT § 160 (1689).

[34] HACKWORTH, *supra* note 3, at 402.

negotiations, the President, as "Chief Executive," possesses a number of other broad powers, some of which by their nature may not often require implementation by international agreement. The "Chief Executive" power affords a basis for the use of force to protect American interest abroad.[35] Employment of force has frequently been in furtherance of general statements of United States policy such as the Monroe Doctrine, which was promulgated under the authority of the President as Chief Executive. This was the case when Teddy Roosevelt, after being delayed by the Senate, seized the customs house in Santo Domingo to prevent its being taken over by European creditors.[36] Similarly, the Chief Executive power has been invoked to authorize the President to settle claims held by private citizens against other nations[37] and to grant commercial rights to foreign businesses.

"The President shall be Commander in Chief of the Army and Navy of the United States. . . ."[38] By the above provision of the Constitution there was conferred upon the President ". . . his most formidable powers with respect to the external relations of the United States."[39] And although the fulfillment of the President's powers as commander in chief in the field of foreign relations doesn't necessarily require the use of executive agreements, such agreements may be essential to the efficient execution of this duty in appropriate circumstances. Therefore, the agreement making technique must be as available to the President for the discharge of this obligation as for the implementation of his substantive powers.

The conflict here arises from the fact that Congress alone is empowered: "To declare War . . . raise and support Armies . . . provide and maintain a Navy. . . ."[40] Thus it would seem that where the President acts ostensibly as commander in chief and commits American forces abroad or promises American military aid, he may only do so under the authorization of Congress or pursuant to a treaty.[41] This question first arose in 1801 when American vessels

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[35] McDougal & Lans, *supra* note 27, at 250.

[36] E. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 39 (1944).

[37] McDougal & Lans, *supra* note 27, at 249, 251.

[38] U.S. CONST. art. II, § 2, cl. 1.

[39] W. MCCLURE, *supra* note 7, at 321.

[40] U.S. CONST. art. I, § 8, cls. 10, 11, and 12.

[41] It should be noted that the President is not limited in the use of force to the authority which he possesses as commander in chief. As the initiator of American foreign policy, he often determines the interests of the United States which the Constitution permits him to defend. Thus, the use of force to protect these interests is in effect supported by his authority as Chief Executive.

stationed in the Bay of Tripoli were attacked and Jefferson asserted that until Congress had formally declared war, the ships had only the internationally recognized right of self defense. Hamilton, writing as "Lucius Crassus," heaped scorn on Jefferson's views and held that the plain meaning of the Constitution was,

> ". . . that it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy or provocation, or injuries received, in other words it belongs to Congress only, *to go to war.* But when a foreign nation declares war upon the U.S., they are then by that very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unnecessary."[42]

This doctrine is also recognized in international law, that is, when the action is in protection of rights of persons and property and is not excessive, it is not an act of war of a legitimate cause, but a warlike retort by the country suffering from it.[43] Furthermore this view has received the highest judicial sanction. Justice Nelson, writing in *Durand v. Hollins*,[44] said,

> "As Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign governments, in matters concerning the interests of the country or of its citizens. It is to him, also, that citizens abroad must look for the protection of person and property. . . For this purpose, the whole executive power of the country is placed in his hands, under the Constitution, and laws passed in pursuance thereof. . . [N]ow as respects the interposition of the executive abroad, for the protection of the lives or property of the citizens, the duty must of necessity, rest on the discretion of the President. Acts of lawlessness anticipated and provided for; and the protection to be effectual or of any avail, may, not infrequently, require the most prompt and decided action."[45]

In the *Prize Cases*[46] the Supreme Court upheld the power of the President to use force to defend the Union against Confederate attack, despite the fact that Congress had made no formal declaration of war. Consequently, over the course of time, the constitutional responsibility for initiating and conducting military action has come to rest on the President. Invocation of the term "war" has been

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[42] WORKS 442-43 (A. Hamilton ed.)

[43] *See* J. RODGERS, WORLD POLICING AND THE CONSTITUTION 92 (1945).

[44] 8 F. Cas. 111 (No. 4186) (S.D.N.Y. 1869).

[45] *Id.* at 112; *See also*, In Re Neagle, 135 U.S. 1, 63-64 (1890); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872).

[46] 67 U.S. (2 Black) 635 (1862).

limited to a very few situations,[47] while there have been numerous instances of so-called "manuvers"[48] carried out under the constitutional authority of the President alone.

Aside from the power to commit the American military abroad and the use of the executive agreement as a necessary concomitant to this power, the President's power as commander in chief has other implications in the field of foreign affairs where agreement making is often an essential and coextensive technique. The conclusion of an agreement of peace is one way by which the exercise of military force may be terminated and, as such, may be regarded as a natural incident of the President's power as commander in chief. Aside from its use in the past,[49] the Supreme Court, *obiter dicta*, has held that war may be terminated by various methods, including "presidential proclamation."[50] Other areas in which the device of international agreement has been used by the President under his commander in chief powers have been: in regard to the control of military equipment and resources;[51] the conclusion of armistice agreements with defeated enemies and regarding the administration of liberated or conquered territories;[52] and disposition of financial claims of allied and hostile powers.[53]

The President's power to negotiate treaties arises out of paragraph 2, section 2 of Article II, which reads "He shall have the power to make treaties, provided that two-thirds of the Senators present concur. . . ." Upon close and literal interpretation of the above passage the apparent meaning is that the Senate, throughout the entire process of treaty making, is associated with the President. Jay also notes this in article #64 of the *Federalist Papers*, where it is his thesis that the association of the President and Senate in both negotiation and ratification holds true, but for one exception — that being where the negotiation requires dispatch and great secrecy. He concludes,

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[47] J. RODGERS, *supra* note 43, at 87.

[48] 96 CONG. REC. 9647 (1950) (Statement of Mr. Douglas); 111 CONG. REC. 24903 (1965) (Memorandum of Law by Lawyers Committee on American Policy Toward Vietnam).

[49] *See* C. ROSSITER, THE SUPREME COURT AND THE COMMANDER-IN-CHIEF 78-79 (1951).

[50] Ludecke v. Watkins 355 U.S. 160, 168-69 (1948).

[51] BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 234.

[52] *Supra* note 49, at 120-25.

[53] Agreement with the United Kingdom respecting claims for damages resulting from acts of armed forces personnel, March 28, 1944, 61 Stat. 2728, T.I.A.S. No. 1602.

"Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other."[54]

However, the sad truth is that this magnanimous theory broke down at its first test. Corwin notes a humorous incident:

"[T]he importance of which for American Institutions and for the development of American foreign policy has rarely been appreciated, is narrated from the point of view of the Senate by Senator William Maclay of Pennsylvania in his celebrated Journal:

> 'August 22d, Saturday (1789).— Senate met, and went on the Coasting Bill. The door keeper soon told us of the arrival of the President. The President was introduced, and took our Vice-President's chair. He rose and told us bluntly that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians. . .Seven Heads. . .were stated at the end of the paper which the Senate were to give their advice and consent to. They were so framed that this could be done by aye or no.'

"It speedily transpired, however, that the Senate was not inclined to stand and deliver forthwith, and presently Robert Morris also of Pensylvania, rose and moved that the papers communicated by the President be referred to a committee of five, a motion promptly seconded by another member. To continue Maclay's narrative:

> 'Several members grumbled some objections. Mr. Butler rose; made a lengthy speech against commitment; said we were acting as a council. No council ever committed anything. Committees were an improper mode of doing business; it threw business out of the hands of the many into the hands of the few, etc.

"Maclay himself now spoke at length in favor of commitment 'in a low tone of voice.' 'Peevishness itself,' he asserts, 'could not have taken offense at anything I said.' Nevertheless, he continues:

> '[T]he President of the United States started up in a violent fret. '*This defeats every purpose of my coming here*,' were the first words that he said. He then went on that he had brought his Secretary of War with him to give every necessary information; that the Secretary knew all about the business, and yet he was delayed and could not go on with the matter.

"Maclay then adds his own interpretation of the event in these words:

> 'I can not now be mistaken. The President wishes to tread on the necks of the Senate. . . . Form only will be left to us. This will not do with Americans. But let the matter work; it will soon cure itself.'

This prophecy has been amply verified by history. [N]o President. . .has since that day ever darkened the doors of the Senate for the purpose of personal consultation with it concerning the advisability of a desired negotiation."[55]

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[54] THE FEDERALIST, *supra* note 23, at 423.

[55] *Supra* note 21, at 209-10.

Thus, from the very beginning, despite the constitutional provisions and intent to the contrary notwithstanding, the Senate's role in treaty making was put at that of merely a legislative chamber. Its power consists of a veto, and its role is only that of saying whether a treaty shall be ratified.

This historical incident was given judicial recognition in 1936, when the Supreme Court held that:

> "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as the representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[56]

Thus, by the very treaty clause of the Constitution, the President is necessarily invested with the power to act without the consent of the Senate, to conduct negotiations and, where necessary, conclude agreements which the exigencies of the situation may call for.

Although this widely used power of the President has been the basis of relatively few executive agreements, it has provided the President with the authority for some of the most important exercises of his power to make international agreements. Due to the fact that there is "an immense latent authority in his power of recognition,"[57] the President may, at his discretion, recognize or sever relations with a foreign power.[58] And the President has established himself as the exclusive medium through which all communication addressed by the outside world to the United States is directed.[59] Thus if the President is not to be stymied in the exercise of this power in the many contexts noted, it must by implication include the power to make international agreements.

This argument was recognized by the Supreme Court in *United States v. Pink*,[60] which centered around the controversial Litvinov Agreement.[61] The Agreement was an assignment of certain Russian claims against American nationals in return for American rec-

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[56] *Supra* note 22, at 319.

[57] H. LASKI, THE AMERICAN PRESIDENCY 174-75 (1940).

[58] "In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the President." J. MOORE, DIGEST OF INTERNATIONAL LAW 243-44 (1906); *see also*, United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

[59] *See* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 72 (1917).

[60] *Supra* note 9.

[61] For a series of notes culminating on November 16, 1933 in the Litvinov Agreement, *see* 28 AM. J. INT'L L. SUPPL. 1-11 (1934).

ognition of the Soviet Union. The trial court held the agreement invalid on the grounds that it contravened local and state laws and therefore was beyond the competence of the presidency to so act without the consent of the Senate. The Supreme Court, however, held that the agreement made by the President under his exclusive power to grant diplomatic recognition to foreign states was valid without the consent of the Senate and could be made without regard to state law or policy.

The constitutional obligation imposed upon the President to see that ". . . He shall take care that the laws are faithfully executed . . ."[62] provides another basis for independent executive action in the sphere of foreign relations. Writing in 1890, Justice Miller put the question with regard to the President's duty to "take care that the laws are faithfully executed:"

> "Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?"[63]

The answer is obviously in the affirmative, as "Pacifius" had written nearly 30 years before.[64] Not only does the President's obligation to execute the laws extend to the laws of nations and international agreements, but "incident to the power to see that the laws are faithfully executed [the President] has power to enter into agreements with foreign countries necessary to their enforcement."[65] It follows then, that because treaties are considered the "supreme law of the land,"[66] the President may enforce the provision of treaties under the same constitutional authority.[67] Several of the instances noted before, pertaining to the use of force abroad under the President's power as commander in chief, might be equally justified under this constitutional provision.[68] Justice Sutherland extended this even further. He held that where the President makes an executive agreement it is as binding as a treaty despite the argument that a strict construction of the supremacy clause ostensibly holds only

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[62] *Supra* note 17.

[63] *Supra* note 45, at 64.

[64] *Supra* note 21, at 179.

[65] *Hearings on S. J. Res. 1 and 43 Before the Subcommittee of the Senate Comm. on the Judiciary*, 83 Cong., 1st Sess. 62 (1953).

[66] U.S. CONST. art. VI, cl. 2.

[67] *Supra* note 7, at 316-17.

[68] *Supra* note 21, at 194-200.

treaties as "laws."[69] The net result, if not on rather tenuous grounds, is that by equating treaties with executive agreements on a constitutional basis the President is obligated to execute the latter as part of the "law of the land" and is provided with still another basis for independent executive action in foreign affairs.

POWER TO MAKE EXECUTIVE AGREEMENTS PURSUANT TO CONGRESSIONAL AUTHORITY

Thus far our discussion has been limited to the power of the President to conclude executive agreements solely on the basis of the constitutionally delegated authority vested in him by virtue of the fact that he is the President of the United States. Another equally pertinent source of authority to conclude international agreements is that of congressional legislation that so empowers him to act.

It is no doubt today a truism that Congress is invested with sole legislative power in the United States,[70] that the scope of this legislation is governed by the enumerated powers expressly conferred by Article I, section 8, and those implied under the necessary and proper clause of subsection 18, section 8 of Article I.[71] Thus, where Congress has delegated to the President power to make internationally binding agreements without the subsequent consent of the Senate, two vital issues are presented: first, is the legislation that which is within the competence of Congress to enact; and, second, may Congress constitutionally delegate this power to the President?

Most of the litigation in this area stems from legislation by Congress under its power to "regulate commerce with foreign nations."[72] The constitutionality of the McKinley Tariff Act of 1890[73] was attacked on the ground that in authorizing the President to suspend free importation of certain products the Congress had delegated to him both legislative and treaty-making powers. Under the authority of this legislation some twelve executive agreements were concluded binding the United States to admit, free of duty, articles coming from other agreeing countries. However, in *Field v. Clark*, Mr. Justice Harlan, speaking for the court, upheld the validity of the legislation and the agreements made in pursuance thereof. He said,

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[69] United States v. Belmont, *supra* note 9.

[70] U.S. CONST. art. I, § 1.

[71] McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[72] U.S. CONST. art. I, § 8, cl. 3.

[73] Act of October 1, 1890, ch. 1244, 26 Stat. 567.

> "That Congress cannot delegate legislative power to the President is a principle universally recognized. . . . The Act of October 1, 1890, in the particular consideration is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . [W]hat has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power."[74]

In the Fordney-McCumber Tariff Act of 1922,[75] Congress authorized the President to conclude reciprocal trade agreements with other governments, and further allowed the President to modify existing tariff rates, when "in his opinion" a country was "discriminating in fact against the commerce of the United States, directly or indirectly." Mr. Chief Justice Taft, in *Hampton and Company v. United States*, upheld its constitutionality and laid down the principle that has become the test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[76] The thrust of the above opinion and its subsequent adherence by the courts and Congress is that Congress may constitutionally delegate to the President power to make executive agreements, provided Congress so limits the scope of the President's authority by an intelligible principle.

In more recent times, as the influence and involvement of the United States has grown internationally, the scope of permissable powers that may be delegated has also broadened. The landmark case of *United States v. Curtiss-Wright Corp.* held that, in providing for the carrying out of legislation affecting the foreign relations of the United States, Congress may constitutionally vest in the President far greater discretion than would be normally permissible in the case of enactments which relate solely to domestic matters. The court declared:

> "Practically every volume of the United States Statutes contain one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."[77]

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[74] Field v. Clark, 143 U.S. 649, 692, 694 (1890).

[75] Act of September 21, 1922, ch. 356, 42 Stat. 858.

[76] Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

[77] *Supra* note 22, at 324.

The Court finally concluded that:

> "The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb it."[78]

What this line of precedents establishes is that if the subject matter legislated upon is within the scope of the powers of Congress, they may authorize the President constitutionally to deal with it by executive agreement, the treaty making power to the contrary notwithstanding.[79]

SCOPE OF INDEPENDENT INTERNATIONAL EXECUTIVE AGREEMENTS

From the foregoing it is apparent that the President does possess the power to make internationally binding agreements without the consent of the Senate. However, this statement ignores the essential question, which is not whether the President can constitutionally enter into executive agreements, a point universally conceeded, but what is the scope that these agreements may validly take?

It should be pointed out that the President has the "power"[80] to bind this country internationally in matters over which he may have no constitutional authority.[81] It is the position of most countries, including the United States, that the rule announced by the International Court of Justice is binding and may be relied on by another country in making an agreement with the United States. The court held that, ". . . where there exists a conflict between state and treaty law, a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under International Law or treaties in force."[82] It is of no concern what another nation must go through in order to give effect to an agreement or legalize it under its own constitution. However, it does not follow that because the President has the "power" to bind the United States internationally that *a priori* he possesses the "right" or that it is constitutional for him to do so. This position has been argued

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[78] *Id.* at 329; *see also*, South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622 (1964).

[79] *Supra* note 21, at 213-14.

[80] *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTS (1919).

[81] *Supra* note 3, at 156.

[82] Advisory opinion on the Treatment of Polish Nationals in Danzig, [1932] P.C.I.J., Ser. A/B, No. 44.

from the broad dicta in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936), ". . . the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."

Ostensibly it would seem that the scope of the constitutional right of the President to conclude internationally binding agreements is limited by the grants of executive power in Article II of the Constitution or where he acts pursuant to a valid delegation of power from Congress. This is the position of the Restatement of United States Foreign Relations Law, section 121. This position is supported by no authority.[83] It is also unsound in light of past usage and holdings by the Supreme Court where the President has concluded agreements that have neither been pursuant to a congressional grant of power nor within his independent executive powers.[84]

The inference is that the President may make *any* international agreement that is not expressly prohibited or expressly reserved to Congress (i.e., to declare war, regulate foreign commerce, etc.) under the Constitution.

It would seem that all international agreements are limited in scope by the guarantees of private rights in the Constitution. Although the First Amendment is by its terms limited only to Congress, it has been interpreted to apply to all of the other branches of the Federal Government including the President.[85] The applicability of the First Amendment to all other branches of the Government is confirmed by the Fifth Amendment:

> "Read literally, the First Amendment of the Constitution forbids only 'Congress' to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all state action, the due process clause of the Fifth must extend to all Federal Action."[86]

In *Seery v. United States* it was held that an executive agreement could not supersede the constitutionally guaranteed rights of the plaintiff under the Fifth Amendment. There the President had made an agreement with the Austrian Government whereby they would settle all claims against the United States for damages result-

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[83] *Supra* note 14, at 12.

[84] In 1941 the President undertook to defend Iceland without expense to the latter and promised compensation for damages occasioned by the military activities of the U.S. *See* Agreement with Iceland respecting defense, July 1, 1941, 55 Stat. 1547, E.A.S. No. 232.

[85] *Hearings*, *supra* note 65, at 247.

[86] Joint Anti-Fascist Refugee Committee v. Clark, 177 F.2d 79, 87 (D.C. Cir. 1949) (dissenting opinion).

ing from the American occupation. An American whose property had been "taken" by the United States forces brought suit to recover damages in the United States and not in the Austrian Court. The defense of the United States, that the rights of Mrs. Seery were governed by the agreement and not the Constitution, was overturned. The court concluded that:

> "Whatever may be the doctrine as to treaties that conflict with the express provisions of the Constitution, it does not hold that an executive agreement can impair the constitutional rights of the plaintiff to just compensation for property taken by the United States."[87]

And in *Best v. United States*, a federal court of appeals held that an executive agreement could not abridge the rights of American citizens in Austria to be free from unreasonable search and seizure.[88]

Moreover, it would seem that the President is limited in the use of the agreement device in areas that are expressly reserved to Congress in Article I, section 8. To what extent is left for events to determine! The power to declare war is exclusively within the province of Congress. However, the controversy evoked by American participation in Korea and Viet-Nam illustrates the confusion and possible perils resulting from the use of the out-moded concept of what constitutes "war." Both actions would seem to be justified under the United Nations Charter and the S.E.A.T.O. treaties. Secretary of State Dulles recognized that the power of the President to take military action can be broadened by the ratification of a treaty; he stated that "one result of the North Atlantic Treaty is to enlarge somewhat the area within which the President can make war, as against the so-called declaration of war."[89] Congress also possesses the exclusive power to support and regulate the armed forces[90] and thus can control the size of the military by appropriations. The President may exhort, but cannot control the Congress, except that he may force the legislature to meet his demands by committing the armed forces to action under his independent authority.[91] Article I, section 8, also empowers Congress to "regulate commerce with foreign nations." This section would seem to be unequivocal in hold-

[87] Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955).

[88] Best v. United States, 184 F.2d 131 (1st Cir. 1950).

[89] *Hearings*, *supra* note 65, at 62, 887.

[90] U.S. CONST. art. I, § 8.

[91] "Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force, Congress cannot take away from the President the supreme command." Swain v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897).

ing that Congress possesses "all" power to regulate foreign commerce. However, a shadow of doubt has now crossed on the foregoing statement in light of the Supreme Court's holding in *United States v. Guy W. Capps, Inc.*[92] The case involved an executive agreement with Canada respecting the importation of certain types of potatoes.[93] Not only did the agreement encompass the regulation of commerce, it also contravened a prior act of Congress dealing with the same subject matter.[94] In a suit by the United States for breach of the agreement, the Fourth Circuit held the agreement invalid on the grounds that it was not within the consititutional powers of the President to regulate commerce. The court said, "The Power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements . . . ."[95] However, on appeal, the Supreme Court reversed. The Court held simply that the agreement was not breached and did not pass on the question of the constitutionality of the agreement.[96] The conclusion is that the President does possess some plenary powers in the field of foreign commerce.

As noted in the above, Congress may validly delegate its reserved powers to the President and the scope of delegable powers may be very broad.[97] The ultimate question then becomes whether the device of executive agreement can be used interchangeably with the treaty power as an instrument of foreign policy, or does it act as a limitation upon it? It has been forcefully argued that presidential agreements are to some degree more limited in scope than treaties or congressional-executive agreements.[98] However, there have also been assertions that the two are completely interchangeable, and that the executive agreement is the preferable of the two.[99] But whatever the sentiments are on this issue, the Supreme Court has never held an

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[92] 348 U.S. 297, 75 S. Ct. 326 (1955).

[93] Agreement with Canada, November 23, 1948, 62 Stat. 3717, T.I.A.S. No. 1896.

[94] Agriculture Act of 1948, Ch. 827, 62, Stat. 1247 (codified in scattered sections of 7 U.S.C.).

[95] United States v. Guy W. Capps, Inc., 204 F.2d. 655, 658 (4th Cir. 1953).

[96] United States v. Guy W. Capps, *supra* note 92.

[97] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[98] "We do not think that executive agreements should ever rise or were ever intended to rise to the dignity of treaties, . . . there is a legitimate area for executive agreements, but executive agreements should not be used to by-pass the treaty powers . . . ." *Hearings on S. J. Res. 130 before a subcommittee of the Senate Comm. on the Judiciary*, 82d Cong. 2d Sess. 44 (1952); *cf.* H. LASKI, THE AMERICAN PRESIDENCY 177 (1940); Hyde, *Constitutional Procedures for International Agreement by the United States*, 31 PROC. AM. SOC'Y. INT'L L. 45, 52, (1937).

[99] *See* McDougal & Lans, *supra* note 27; and W. MCCLURE, *supra* note 7.

executive agreement unconstitutional on the grounds that it usurped the treaty making function of the Senate. Therefore, we are without any clear guidelines as to its outer limits. In hearings before the House Judiciary Committee on the proposed Bricker Amendment, Secretary of State Dulles summed up the difficulty involved. He said:

> "[I]t has been long recognized that difficulties exist in the determination as to which international agreements should be submitted to the Senate as treaties, which ones should be submitted to both Houses of Congress, and which ones do not require any congressional approval. . . . [I]t would be extremely difficult, if not impossible, to fit all agreements into set categories. . . . [T]he executive cannot surrender the freedom of action necessary for its operations in the field of foreign affairs."[100]

Whether the President chooses to submit an agreement to the Senate for its approval, has little, if any, effect on the binding nature of the agreement internationally. In terms of the domestic effect of the international agreement upon the United States, however, there may be a substantial difference. Treaties are the "Supreme Law of the Land" under the Constitution. In addition, it is clear that according to what the Court held in *Missouri v. Holland*,[101] a treaty can have the effect of authorizing congressional action otherwise impossible. Whether the same is true of executive agreements is open to speculation;[102] there have been very few cases which considered the question of whether an executive agreement is a treaty within the meaning of the Supremacy Clause. However, in light of the broad dicta in *United States v. Belmont*[103] and *United States v. Pink*[104] dealing with the validity of the Litvinov Agreement, it would seem that an executive agreement is fully within the meaning of a treaty under the Supremacy Clause. In *Belmont* the Court implied that the executive agreement made by the President alone, under his exclusive power to grant diplomatic recognition to foreign states, was valid without the consent of the Senate and that the external powers of the United States were to be exercised without regard to

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[100] Note 65 *supra*, at 65.

[101] 252 U.S. 416 (1920).

[102] It is probably also true in the case of the executive agreement, for the necessary and proper clause gives Congress the power "[T]o make all laws which shall be necessary and proper for carrying into execution the . . . Powers vested by this Constitution in the Government of the United States, or in *any Department or Office* thereof." [emphasis by the author] U.S. CONST. art. I. § 8, cl. 18.

[103] 301 U.S. 324 (1937).

[104] 315 U.S. 203 (1942).

state laws or policies.[105] In the *Pink* case, the Court held unequivocally that state policy must yield to the federal policy announced in the executive agreement. The Supreme Court overruled the holding of the state court that state law and property rights thereunder could not be altered by the agreement with the Soviet Government. The Court said, "[A] treaty is a 'Law of the Land' under the Supremacy Clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."[106] In *Etlimar Societe Anonyme v. United States*,[107] the Court of Claims held that an executive agreement will prevail over a federal statute. The Court in this case was concerned with the Byrnes-Blum Agreement under which all claims against the United States arising from the Moroccan campaign were to be submitted to a French commission and paid by the French Government. On the dismissal of his claim by the United States, the plaintiff appealed to the Court of Claims. The Court dismissed his plea holding, "[T]he Byrnes-Blum Agreement between the United States and France is the type of agreement which has been recognized as a treaty within the meaning of Article VI, Clause 2 of the Constitution and thus is a part of 'the Supreme Law of the Land.' "[108]

The President has also terminated prior treaties by executive agreement and this right has been, by implication, recognized by the Court. *Charlton v. Kelly*[109] held that since the Executive Department had elected to waive any right to free itself from the obligations of the treaty, the Court was bound to recognize the obligation.

Another assumption that executive agreements are not equal in status to treaties rests upon the misconceived theory that executive agreements last only as long as the administration that concluded them.[110] Although it is true that the substance of many executive agreements is of a temporary nature, this does not mean that an agreement cannot be, and has not been, of longer duration. The Lansing-Ishii Agreement and the Gentlemen's Agreement with Japan are two of the better known examples of long-term presidential agreements. Moreover, the actual effect of an executive agreement

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[105] *Supra* note 103, at 330.

[106] *Supra* note 104, at 230.

[107] 106 F. Supp. 191 (Ct. Cl. 1952).

[108] *Id.* at 195.

[109] 229 U.S. 447 (1913).

[110] *See Hearings*, *supra* note 98, at 439.

on the foreign policy of the United States may be as extensive as if it had been a treaty. For example, the Fifty Destroyer Deal, although its immediate effect was accomplished with the end of the fighting of World War II, has nevertheless created a lasting relationship between the United States and Great Britain in the form of a regional defense alliance that has outlived the War and is still with us today, as the leases for the bases and facilities are for 99 years.[111]

Thus, as can be readily deduced from the above, the legal consequences, the international effect, the domestic ramifications, and the duration of treaties and executive agreements are substantially the same. There seems to be nothing inherent in the treaty making power that limits the President's scope or authority to make international agreements without the consent of the Senate.

Despite the fact that there seems to be no constitutional bar to the making of international agreements by the President, instead of submitting them to the Senate for their ratification in the form of treaties, and despite the fact that the two are used interchangeably, many writers and statesmen feel that there ought to be such a dichotomy.

Attorney General Jackson felt that no executive agreement should be concluded by the President if it required the exercise of congressional powers for its fulfillment.[112] However, this test has been criticized as being much too broad, since most executive agreements require at least funds appropriated through congressional action for its purposes to be carried out.[113]

Equally ideal and unrealistic is the suggestion that executive agreements should encompass only "adjudicative" matters, while all "legislative" matters should be left to treaties or congressional action.[114] However, any attempt to define and delineate what is "adjudicative" and what is "legislative" would result in hopeless confusion and would rob the President of his power in a number of areas where the constitutional basis of such power is scarcely open to question.

The most common theory put forth is that executive agreements should only be used to conduct the day-to-day operations of the Ex-

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111 Naval and Air Bases Agreement with Great Britain, (September 2, 1940), 54 STAT. 2405, E.A.S. No. 181. Subsequently the two countries entered into supplementary agreements with respect to the status of Newfoundland.

112 *See* 39 OP. ATT'Y. GEN. 484 (1940).

113 Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1954).

114 *Id.*

ecutive Department and entail only "unimportant" matters.[115] However, this seems to obscure the issue and invite quibbling over what is and what is not "important." As noted above, the President is charged with being the sole organ of foreign affairs for the United States. Thus, to reduce him to being concerned with matters of little importance would be to deny him his constitutionally invested rights as well as his status in the field of international affairs.

At this point the reader might be convinced, and justifiably so, that there is no real limit to the scope of the President's authority to make international agreements. However, it should be kept in mind that the President must function within the framework of a political structure that limits power by practical safeguards as well as constitutional divisions of power. It may be recalled that Congress has the power to limit the effectiveness of presidential agreements in areas in which its own powers of legislation do not extend. The Senate can refuse the necessary appropriations or implementing legislation. They may limit the size and disposition of the armed forces, with the effect of inhibiting the President's power to take military action.[116] Although an agreement may bind the United States internationally, Congress can nullify any domestic effect by passing legislation to that effect if the subject matter is within their legislative power.[117]

The validity of presidential agreements is reviewable by the courts and to date no agreement by the President has been held unconstitutional. This can be cause for confidence as well as concern and must be construed in light of the practices and attitudes of the Supreme Court. Decisions which raise the question of the President's authority to execute international agreements are rare, largely because of the procedural difficulties in raising the constitutional issue.[118] Very few international executive agreements have a sufficient domestic effect (e.g., the Litvinov Agreement) to qualify a petitioner's raising the constitutional issue that he has suffered or may suffer a direct impairment of his own constitutional rights as a result of the agreement.[119] To the procedural difficulties must be

[115] Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751 (1939).

[116] RODGERS, WORLD POLICING AND THE CONSTITUTION 89 (1940).

[117] There is substantial authority to support the view that where an act of Congress and a treaty conflict, the one latest in time prevails. The leading case is Sanchez v. United States, 216 U.S. 167 (1910); Chae Chan Ping v. United States, 130 U.S. 581 (1889); and the Head Money Cases, 112 U.S. 580 (1884).

[118] Ashwander v. T.V.A., 297 U.S. 288 (1936).

[119] Tyler v. Judges, 179 U.S. 405 (1900).

added certain presumptions indulged in by the courts when dealing with acts of the President, such as the following: When the President acts he is presumed to do so within the scope of his constitutional authority;[120] when the President makes a determination that an emergency exists and takes action based on this determination, it is assumed that his determination is not open to judicial review;[121] and, that the President cannot be enjoined from acting in his capacity as President of the United States.[122] Further, it must be kept in mind that should the Supreme Court hold a presidential agreement unconstitutional, it may be virtually impossible to enforce such a decision.[123] Therefore, the courts are reluctant to review such issues.[124]

In addition to the various legal controls possessed by Congress and the power of review exercised by the courts, purely practical considerations are customarily effective in limiting the President's power to formulate the foreign policy of the United States in disregard of Congress. The Senate possesses incidental control over the activities of the President by virtue of its power to refuse consent to the appointment of various important subordinates. And no President who expects to see his programs carried into effect can ignore the wishes and the sensitivities of the legislature. To these indirect political limitations of Congress must be added the power of public opinion and the ballot box. These two have proved the most effective in the past and will probably continue to serve us adequately in the future.

CONCLUSION

It is often said that our Constitution, by its system of legal checks and balances on discretionary powers given to our officials, ensures a government of laws and not of men. The power to conduct our foreign affairs is unusual because of the absence of any express limitations on presidential discretion. The conclusion from the foregoing is inescapable: The President's scope in making executive agreements is not governed by any express grants of executive power

120 United States v. Chemical Foundation, 272 U.S. 1 (1926).

121 The Oronu, 18 F. Cas. 830, (No. 10,585) (C.C.D. Mass. 1812).

122 Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

123 Korematsu v. United States, 323 U.S. 214 (1944).

124 Ex parte Merryman, 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861) (The Court held unconstitutional an executive order by President Lincoln in which he suspended a writ of *habeas corpus*. Lincoln ignored the decision and the defendant was subsequently tried by a military tribunal.)

in the Constitution. Nor is it limited by the treaty making power of the Senate. For as long as the President does not abrogate any expressly guaranteed rights of the Constitution he may act at his discretion in the field of foreign affairs.[125]

The possibility of a presidential *coup d'etat* or abuse of this discretion stemming from the rapid expansion of the executive power under the Roosevelt administration, gave impetus to the controversial Bricker Amendment designed to check any presidential expansion of this power in conducting foreign affairs.[126] The effect of the Amendment would have been to transfer to the legislative branch of the government a large share of the responsibility for the conduct of foreign affairs and to prohibit the President's making any international executive agreements that had any internal effect on the country without subsequent legislation by Congress. The Amendment was submitted twice to Congress and both times failed. The reasons for its failure, however, rested not upon the lack of desire of Congress to limit and define the scope of the President's authority and therefore prevent abuse of this power. Rather, its failure rested upon the inability to draft an amendment that would eliminate the risk of abuse and still give the President enough power to carry out his executive duties. Senator Bricker admitted that he could not draw the line.[127]

Few would object to constitutional limitations which would prevent abuse of presidential power without eliminating that power itself. The very subject matter of the power bespeaks of the dif-

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[125] The best statement by the Supreme Court to this effect appeared in Geofroy v. Riggs, 133 U.S. 258 (1890). The Court there spoke in terms of the limits on the treaty making power which by implication applies to executive agreements under the rulings in the Belmont and the Pink cases. The Court said that a treaty could not exercise a power which was expressly excepted from those granted to the Federal Government, or reorganize the political relationships of the government, or cede any portion of any state to a foreign power without the consent of the State.

[126] After extensive maneuvering, the following version of the Bricker Amendment was voted upon in the Senate:

> "1. A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect.
>
> 2. An international agreement other than a treaty shall become effective as internal law in the United States only by act of Congress.
>
> 3. On the question of advising and consenting to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.
>
> 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States with 7 years from the date of its submission."

The resolution failed by one vote — 60 for the resolution, 31 against, and 5 abstentions. 100 CONG. REC. 2358, 2374 (1954).

[127] 98 CONG. REC. 907 (1952).

ficulty of saying what those limitations should be. Our foreign relations are an essential aspect of this country's politics and there is no question but that the executive agreement is an extremely important instrument in the conduct of our foreign relations. Our present preeminence in world affairs promises to make the executive agreement even more important. No one has been able to give an exact exposition of its constitutional nature; nor can anyone say with certainty what things the President alone or the President and Congress together may do with an executive agreement and what they may not do. It is true that the effects of executive agreements are often legal as well as political and that where there is power to make law there should be legal limitations on that power. But in the past the most effective checks on presidential abuse of discretion in this field have been political, not legal.

Any meaningful answer to the quest for a delineation of the scope of the President's power to conclude internationally binding agreements has not been, and very probably cannot be, formulated in terms of constitutional doctrine. It must be based, rather, on a realistic appraisal of this country's needs in the domain of international relations. In this sense it is not incompatible with constitutional principles for the President to be accorded a broad degree of discretion over foreign affairs. He is in a better position to act more expediently than Congress, whose members are elected on the basis of their competence and knowledge of local issues. An isolationist may be chagrined at this statement, but we are not living in an isolationist world.