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SEPARATION OF POWERS IN CLASSIFYING INTERNATIONAL AGREEMENTS

CORE COURSE III ESSAY

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INTRODUCTION

While the Constitution empowers the President “by and with the Advice and Consent of the Senate, to make treaties provided two thirds of the Senators present concur,”¹ it does not provide that treaties are the exclusive means by which the United States assumes an international commitment. Through the use of executive agreements, presidents have concluded a large variety of international commitments without submitting them to the Senate for its advice and consent. Executive agreements are frequently identical in scope and cover the same subject matter as treaties. Under international law, moreover, no distinction is made between treaties and executive agreements.² The international community views both forms of agreement as interchangeable and equally binding.³

In his role as “the sole organ of the nation in its external relations and its sole representative with foreign nations,”⁴ the President makes the decision on whether to classify an international agreement as a treaty or executive agreement.⁵ This decision has the effect of determining the degree of congressional involvement in the accord. Consequently, Congress has repeatedly expressed concern that the use of executive agreements might prove an effective means of subverting its role in foreign affairs.⁶ This tension has led to the enactment of a limited set of restrictions on the President’s flexibility in entering into such agreements.

This paper postulates that, while the exercise of presidential discretion in classifying international agreements is potentially a fertile ground for a struggle between the executive and legislative branches, the classification process that has developed is characterized more by comity than conflict. This spirit of cooperation is the result of practical convenience and political expediency. It arises not only from the President’s desire to avoid roadblocks in implementing agreements, such as funding constraints, but also from Congress’ desire to avoid being bogged down in having to take action on a multitude of minor agreements. In general, these counter-balancing interests interact to produce general harmony in the international agreements classification process.

CHECKS AND BALANCES IN CLASSIFYING INTERNATIONAL AGREEMENTS

Categories of executive agreements From the earliest days of the country,⁷ two distinct categories of executive agreements have been used to make international commitments (1) congressional-executive agreements -- those agreements expressly or impliedly authorized by prior legislation, by a valid treaty, or by subsequent legislation, and (2) sole executive agreements -- those agreements concluded solely on the basis of the President's independent constitutional powers without congressional authorization or subsequent approval. The Supreme Court has recognized the validity of both types of executive agreement. It has held that congressional-executive agreements, like treaties, are the supreme law of the land, second only to the Constitution of the United States in the hierarchy of laws.⁸ The Court has also held that, as long as the subject matter of the agreement falls within the President's foreign affairs powers, sole executive agreements are binding with respect to domestic law,⁹ superseding prior inconsistent state and local laws.¹⁰ However, since sole executive agreements are not approved by congressional action, they cannot contravene an existing Federal statute or treaty.¹¹

Sole executive agreements The President's authority to conclude sole executive agreements is derived from various provisions in Article II of the Constitution, namely, section 1, clause 1 -- "[t]he executive Power shall be vested in the President," section 2, clause 1 -- "[t]he President shall be Commander in Chief of the Army and Navy," section 2, clause 2 -- "[h]e by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls," and section 3, clause 1 -- "[h]e shall take Care that the Laws are faithfully executed." Based on these expressed powers, presidents have concluded executive agreements on all types of international affairs, e.g., arms control, military basing rights, trade, postal cooperation, claims, telecommunications, and so forth.¹² These agreements vary substantially in significance. The lack of significance of many executive agreements is illustrated in the following example

Secretary of State Dulles estimated in 1953 that about 10,000 '[executive] agreements' had been entered into under the North Atlantic Treaty since it was ratified in 1949, and cited for example an agreement he made on behalf of the President that the next meeting of the North Atlantic Treaty Organization would take place in Paris on a certain date. He asserted that "every time we open a new privy, we have to have an executive agreement"¹³

Decisiveness, secrecy, and dispatch are noteworthy advantages of sole executive agreements.¹⁴ By avoiding congressional delays, possible disapprovals, or attempts to modify particular provisions in an agreement or treaty, the President's position in negotiating international agreements is enhanced. These interests, however, are off set by concerns that international agreements are contracts with foreign nations with "force of law" which generally warrant legislative consideration.¹⁵ In Federalist No. 75, Alexander Hamilton noted that, while hereditary monarchies are vested with exclusive authority to make international commitments, "it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years duration."¹⁶ To balance these opposing interests, the legislative and executive branches have placed controls on the use of executive agreements. These controls are discussed in the following sections.

Congressional controls on sole-executive agreements The Case Act,¹⁷ which merely requires the Secretary of State to transmit the text of executive agreements to Congress within 60 days after they become effective, is the only statute that universally controls executive agreements. It was the result of a refusal by the Nixon administration to comply with a Senate resolution requesting that executive agreements extending the rights to station U.S. military forces in Portugal and Bahrain be referred to the Senate for consideration as a treaty.¹⁸ In light of the nature of the events which precipitated this legislation, it is surprising that this act was not more broadly written to constrain the President's authority to make sole executive agreements. A plausible explanation for this timid response, however, is Congress' recognition that "approximately 200 executive agreements are made each year without referral to either the House or the Senate and [they] did not wish to be besieged with the additional workload or 'mundated with trivia'."¹⁹ Avoidance of minutiae may also explain Congress' failure to pass bills which would have established more comprehensive restrictions, such as

a The Morgan-Zablocki Bill that would have required the President to submit any proposed national commitments to Congress for a 60-day review period. During that period, the proposed agreement could be disapproved by a concurrent resolution of both Houses.²⁰

b The Treaty Power Resolution that was intended to reaffirm the Senate's prerogative in the treaty-making process. Under this proposed resolution, if the Senate designated an agreement as properly constituting a treaty, a point of order could be brought against consideration of any appropriation or implementing legislation for the agreement, unless it was subsequently submitted to the Senate for their advice and consent.²¹

In two specific areas, Congress has passed legislation restricting the President's discretion in entering into sole executive agreements. The first is the War Powers Resolution (WPR) that prohibits the President from making agreements that commit the United States to introduce armed forces into hostilities or into situations where involvement in hostilities is likely.²² While the WPR has, at times, been a contentious issue, it does not provide any useful examples of executive-legislative disputes on sole executive agreement restrictions. Arguments over the validity of the WPR, instead, have centered on the actual deployment and employment of forces.²³ The second major legislative restriction is Section 33 of the Arms Control and Disarmament Act of 1961, which states

[N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.²⁴

Under this provision, treaties or congressional-executive agreements are acceptable instruments for limiting arms, but the President is forbidden from making such commitments through sole executive agreements.

"The validity of [such] restrictions on Presidential powers, and of attempts to control and limit sole executive agreements generally, has not been authoritatively determined and may differ according to the character of the restriction and the circumstances of its application."²⁵ The restriction on sole

executive agreements in the arms control arena, however, has not resulted in significant confrontations between the President and Congress. A Congressional Research Service study, for example, indicated that the United States was a party to eighteen nuclear arms control agreements as of 1986. of these, twelve were treaties, five were sole executive agreements, and one was a congressional-executive agreement.²⁶ Of the five sole executive agreements, none could be described as major commitments (three hotline agreements and two nuclear-accident agreements) in comparison to the treaties (e.g., Limited Test Ban Treaty, Outer Space Treaty, Nuclear Non-proliferation Treaty, Seabed Arms Control Treaty, Anti-Ballistic Missile Treaty, and Environmental Modification Treaty) or the congressional-executive agreement (Strategic Arms Limitation Talks (SALT) I Interim Agreement).²⁷ Since 1986, this practice of deference has continued. Presidents have decided to send to Congress all recent significant arms control agreements, such as Strategic Arms Reduction Talks (START) I and II, SALT II, Chemical Weapons Convention, and Conventional Forces in Europe Treaty.²⁸ In doing so, they have avoided separation of power confrontations.

Executive Branch controls on sole executive agreements The Executive Branch does not contend that its authority to conclude sole executive agreements is unlimited. It recognizes that certain international agreements are beyond the President's constitutional powers. State Department's Circular 175 establishes guidelines to be considered in classifying an international agreement.²⁹ The pertinent criteria for making the classification decision include

- a The extent to which the agreement involves commitments or risks affecting the nation as a whole,
- b Whether the agreement is intended to affect State laws,
- c Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress,
- d Past U.S. practice as to similar agreements,
- e The preference of Congress as to particular types of agreement,
- f The degree of formality desired for an agreement,
- g The proposed duration of the agreement, and the desirability of concluding a routine or short-term agreement, and
- h The general international practice as to similar agreements.³⁰

Another noteworthy mechanism for avoiding executive-legislative confrontations is the requirement in Circular 175 that those responsible for negotiating significant new international agreements advise appropriate congressional leaders and committees of the President's intention to negotiate such an agreement, to consult them during the course of negotiations, and to keep them informed of developments, including whether any legislation is considered necessary or desirable for implementing the agreement.³¹ These self-imposed consultation procedures reduce the likelihood of contentious separation of power conflicts and assist in avoiding "any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, and the President."³²

Congressional-executive agreements Interestingly, congressional-executive agreements have created more controversy than sole executive agreements.³³ This is apparently the result of the Senate's concern about protecting its elevated position over the House of Representatives in foreign relations matters.

The scope of congressional-executive agreements, unlike sole executive agreements, is virtually unlimited. An authoritative source on foreign relations law indicates that "[s]ince any agreement concluded as a Congressional-Executive agreement could also be concluded as a treaty, either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."³⁴ Theoretically, therefore, the President has the option to submit any international agreement to Congress for approval by joint resolution or to the Senate as a treaty. Unlike a treaty which requires the consent of two-thirds of the Senate, a joint resolution only requires the approval of a majority in both houses of Congress. Consequently, when it is apparent that two-thirds of the Senate will not approve a proposed international agreement, the President may attempt to gain congressional approval of it through passage of a joint resolution. The two most famous examples of this approach are the annexation of Texas and Hawaii. In 1844, the Senate, by a vote of 35 to 16, rejected a treaty that would have incorporated Texas into the United States.³⁵ A year later, however, both houses of Congress approved

the annexation of Texas when the President resubmitted the same negotiated accord as a joint resolution³⁶ Similarly, a treaty providing for the annexation of Hawaii was withdrawn from the Senate in 1897 when it became apparent that two-thirds of the Senators would not support it³⁷ Four years later, Congress approved Hawaii's annexation by passing that agreement as a joint resolution³⁸

Some commentators advocate the use of congressional-executive agreements because they believe that participation of the House in the approval of international agreements promotes the cause of greater democracy³⁹ They attack treaty-making procedures "as fundamentally anti-democratic, because of both the exclusive involvement of the Senate as well as the difficulty in attaining a super-majority vote of approval"⁴⁰ Regardless of its appeal, this argument runs counter to the intention of the framers of the Constitution Congressional-executive agreements are not mentioned anywhere in the Constitution Based on its explicit constitutional grant of authority, the Senate has occasionally flexed its muscles to protect its treaty-making prerogatives⁴¹

An example of the Senate's concern over its constitutional role in foreign relations is highlighted by the decision on how to classify the SALT II accord that was signed in June 1979 by President Carter and Soviet Leader Leonid Brezhnev⁴² Prior to the signing of that document, the U S delegation at the SALT talks informed Soviet negotiators that the President desired to maintain his options in classifying the agreement and succeeded in altering the draft text to read "Draft joint treaty/agreement"⁴³ Later, in response to statements by President Carter and the Director of the Arms Control and Disarmament Agency, Paul Warnke, that the SALT II would be submitted to Congress as a congressional-executive agreement, Senate Majority Leader Robert Byrd warned that "the administration should not resort to an end-run around the Senate"⁴⁴ Fearing that SALT II would fail in the Senate as a congressional-executive agreement, the Carter administration reconsidered its strategy and submitted the accord to the Senate for approval as a treaty⁴⁵ While the Senate never gave its consent for the President to ratify SALT II, this example illustrates the Senate's institutional ability to insist upon the use of the treaty-making process in concluding particular international

agreements The Senate's ability to disapprove a congressional-executive agreement on such procedural grounds must be thoughtfully considered by the Executive Branch in classifying international commitments

CONCLUSION

By exercising his discretion in classifying an international commitment as a treaty, congressional-executive agreement, or sole executive agreement, the President determines the degree of involvement Congress will have in approving that accord Since the potential for a separation of powers dispute in making such a decision is great, legislative and executive controls have been placed on the classification process to lessen the likelihood of discord Specifically, Congress has identified particular types of agreements that must be referred to them for approval While the validity of such restrictions have not been authoritatively determined, the Executive Branch has generally honored these restraints Additionally, the Executive Branch's internal procedures for classifying international agreements have been an extremely effective mechanism for avoiding legislative-executive disputes In these procedures, the need of congressional participation in implementing the agreement through legislation or appropriations is appropriately weighed before making the classification decision More importantly, Congress is consulted whenever there is the possibility of a significant disagreement on how to classify a particular accord Through consultation, differences of opinion may be aired and resolved

While the classification of an international agreement may occasionally result in a dispute, cooperation between the executive and legislative branches is the norm The President's interest in avoiding congressional roadblocks in implementing agreements is counter-balanced by Congress' desire to avoid becoming involved in a multitude of minor agreements In essence, the checks and balances in the constitutional framework and domestic political process provide each institutional

actor the opportunity to protect its prerogatives and this interaction works to produce general harmony

¹ U S Const art II, sect 2, cl 1

² Moore, Tipson, and Turner, National Security Law, (1990) 807

³ Department of the Army Pamphlet 27-161-1, Law of Peace Volume 1 (1979) 8-15

⁴ United States v. Curtiss-Wright Export Corporation, 299 U S 304, 319 (1936) (Quoting Chief Justice John Marshall' remarks in 10 Annals of Cong 615 (1800)

⁵ See generally, Feinstein, American Cetacean Society v. Baldrige Executive Agreements and the Constitutional Limits of Executive Branch Discretion in American Foreign Policy, 12 Brooklyn J Int'l L 209 (1986)

⁶ In 1972, Senator Clifford Case stated that the unrestrained use of executive agreements was "an unconstitutional assumption of power" 118 Cong Rec 4088-89 (1972)

⁷ The first legislative grant of authority for concluding congressional-executive agreements was enacted in 1792 and authorized the U S Postmaster General to executive international postal agreements. Most commentators identify the Rush-Bagot Agreement of 1817 which demilitarized the Great Lakes, as the first sole-executive agreement. See Kennedy, Congressional-Executive Tensions in Managing the Arms Control Agenda -- Who's in Charge?, 16 N C J Int'l L & Com Reg 24 (1991)

⁸ Altman & Co. v. United States, 224 U S 583 (1912) and U S Const Art 6, cl 2

⁹ United States v. Belmont, 301 U S 324 (1937) and United States v. Pink, 315 U S 203 (1942)

¹⁰ Moore, Tipson, and Turner, supra note 2 at 814

¹¹ United States v. Guy W. Capps, Inc., 205 F 2d 655 658 (4th Cir 1953)

¹² Wendel, Constitutional Authority for Executive Agreements Pertaining to the Armed Forces, 20 Air Force L Rev 71, 79 (1978)

¹³ Moore, Tipson, and Turner, supra note 2, at 809

¹⁴ These were factors the framers of the Constitution had in mind when they excluded the House of Representatives from the treaty-making process. See, Wills, The Federalist Papers by Alexander Hamilton, James Madison, and John Jay, (New York, Bantam Book, 1982), John Jay's Federalist Paper No 64

¹⁵ Fisher, Presidential War Power, (Lawrence University of Kansas Press, 1995), 5

¹⁶ The Federalist Papers, supra note 14

¹⁷ 1 U S C section 112b

¹⁸ Wendel, supra note 12, at 79

¹⁹ Id. at 80

²⁰ Congressional Review of International Agreements Hearings Before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong. 2d Sess (1976). See Fryer and Levengood, Arms Control: SALT II-- Executive Agreement or Treaty?, 9 Ga J Int'l & Comp L 123, 131 (1979)

²¹ Treaty Powers Resolution Hearing on S Res 486 Before the Senate Committee on Foreign Relations 94 Cong, 2d Sess 1 (1976) See, Fryer and Levengood, supra note 21, at 132-3

²² 50 U S C sections 1541-1548

²³ See generally, Ellen Collier, War Powers Resolution: A Brief Summary of Pro and Con Arguments, CRS Report for Congress, Nov 12, 1993, Louis Fisher, Presidential War Powers, (Lawrence University of Kansas Press, 1995), Robert F. Turner, Repealing the War Powers Resolution (Washington Brassey's, 1991), Ch 3 and 5, Abraham D. Sofaer, "The War Powers Resolution," U S Department of State Bureau of Public Affairs, Washington, D C Current Policy, No 11107

²⁴ 22 U S C section 2573

²⁵ Restatement (Third) of the Foreign Relations Law of the United States, section 303, comment j (1986)

²⁶ House Foreign Affairs Comm, Subcomm on Arms Control, International Security and Science, 99th Cong, 2D Sess, Fundamentals of Nuclear Arms Control 394-95. See also, Weiss, The Approval of Arms Control Agreements as Congressional-Executive Agreements, 38 UCLA L Rev 1533, 1568 (1991)

²⁷ Id.

²⁸ See generally, Weiss supra note 26 at 1568

²⁹ Dept of State Foreign Affairs Manual Vol 11 Chapter 700

³⁰ Id at para 721 3

³¹ Id at para 721 4

³² Id at para 721 3

³³ See Weiss supra note 26

³⁴ Restatement (Third) of the Foreign Relations Law of the United States section 303 comment e (1986)

³⁵ Fryer and Levengood, supra note 20, at 128 Schmitt, Executive Agreements and Separation of Powers A Reconsideration 28 Am J Juris 189 224 (1979)

³⁶ Id

³⁷ Id.

³⁸ Id.

³⁹ Weiss supra note 26, at 1563 See also, McDougal and Lans, Treaties and Congressional-Executive Agreements or Presidential Executive Agreements Interchangeable Instruments of National Policy, 54 Yale L J 181 (1954) and Bouchard, Treaties and Executive Agreements -- A Reply, 54 Yale L J 616 (1945)

⁴⁰ Weiss, supra note 26, at 1559

⁴¹ See Weiss supra note 26, for a discussion of the disagreement between the Bush administration and Senators Claiborne Pell and Jesse Helms, the Chairman and ranking minority member of the Foreign Relations Committee, respectively, on the classification of the Agreement on Destruction and Non-Production of Chemical Weapons and Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons, signed on June 1 1990, by President Bush and Soviet President Mikhail Gorbachev See also, Felton, In the bag Chemical Weapons Pact, Cong Q May 26, 1990 at 1664, Felton Approval Seen on Chemical Weapons, Cong Q June 9 1990 at 1800 Superpower Chemical Weapons Agreement Hits Snag, The Reuters Library Report, Mar 7, 1991, and Zanft, Arms Control and Chemical Weapons -- Agreement on Destruction and Non-Production of Chemical Weapons, 32 Harv Int'l L J 497 (1991)

⁴² Id at 1582 This agreement established numerical limits on intercontinental ballistic missiles, submarine launched ballistic missiles and bomber-delivered nuclear weapons, placed constraints on the development of new types of missiles, and imposed limitations on the number of warheads which existing missiles could carry

⁴³ Fryer and Levengood, supra note 20, at 123

⁴⁴ Id.

⁴⁵ Weiss, supra note 26, at 1584