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## Contemporary Issues in an Ongoing Debate: the Roles of Congress and the President in Foreign Affairs<sup>†</sup>

The Constitution, cautious in allocating authority between Congress and the President in domestic matters, was an "invitation to struggle" in foreign affairs.<sup>1</sup> The struggle was not long in coming. Washington's proclamation of neutrality in 1793 triggered a sharp exchange between Hamilton, writing as Pacificus, and Madison, writing as Helvidius.<sup>2</sup> Their debate about the authority of the President in foreign affairs has since become a recurrent theme in American constitutional history. The intensity of the debate has been increased greatly by the strains of the post-World War II period.

In January 1953 a proposed constitutional amendment was introduced in the Senate by Senator Bricker on behalf of himself and 61 other senators. As reported out of the Judiciary Committee the amendment would have required legislation before international agreements could become internal law—that is, it would have prevented international agreements from being self-executing. It would also have reversed the rule of *Missouri v. Holland* that a treaty may be an independent source of federal legislative authority, and would have given Congress the authority to regulate Presidential agreements with foreign powers.<sup>3</sup>

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<sup>†</sup>Delivered as an address at the Symposium on Consular Affairs, September 13, 1972, in Washington, D.C. The views expressed in this paper are the personal views of the author and do not necessarily represent the views of the United States Government or any agency of the Government.

<sup>1</sup>The phrase comes from Edward S. Corwin. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, 171 (4th rev. ed. 1957).

<sup>2</sup>See Hamilton, *The Letters of Pacificus*, in *THE FEDERALIST ON THE NEW CONSTITUTION* 405 (1857), and Madison, *The Letters of Helvidius*, *id.* 432.

<sup>3</sup>For the flavor of the Bricker debate compare F. HOLMAN, *STORY OF THE "BRICKER" AMENDMENT* (Committee for Constitutional Government, 1954), with *THE BRICKER AMENDMENT: VIEWS OF DEANS AND PROFESSORS OF LAW* (Committee for Defense of the Constitution By Preserving the Treaty Power, 1957).

The impetus for the Bricker Amendment resulted from a combination of concerns—some constitutionally erroneous. The principal concerns were, first, that the constitutional authority for United States involvement in the Korean War stemmed from the United Nations Charter rather than internal constitutional sources. And second, some worried that vigorous United States participation in the United Nations would compromise national sovereignty—particularly by domestic implementation of the Covenant on Human Rights.

The Bricker Amendment had strong initial support, including the backing of the American Bar Association, the American Legion, and the United States Chamber of Commerce. Despite this overwhelming support, the Amendment was defeated by an aroused administration. It was never clear how all of the concerns of the sponsors would have been served by the Bricker Amendment, or that there had been an abuse of the treaty power. Nineteen years later it is generally agreed that the Amendment would have been a tragic mistake.

Just as an unpopular Korean War led to the Bricker Amendment, so too, the Indo-China War has reopened old and new constitutional wounds. But the current debate is far more pervasive than the Bricker debate. In fact, it is the most sweeping and searching debate about the foreign affairs power in the nation's history. There are at least three major issues in the debate, all of which are the subject of pending legislation.

They are: first, the debate concerning the war powers, or the authority to commit the nation to hostilities abroad; second, the debate concerning executive privilege, or the authority of the President to withhold information from Congress; and third, the debate concerning the independent authority of the President to enter into international agreements. It may be well, at this point to discuss briefly the highlights of pending legislation in each area and then make a few general observations on the debate as a whole. First, the war powers debate:

### **The War Powers Debate**

The focus of the debate is the Senate War Powers (Javits-Stennis) Bill.<sup>4</sup> The sponsors of this Bill are rightly concerned with strengthening the role of Congress in war-peace decisions and in developing viable alternatives

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<sup>4</sup>See, "War Powers Legislation," HEARINGS BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, 92D CONG., 1ST SESS. (1971); "Congress, the President, and the War Powers," HEARINGS BEFORE THE SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, 91ST CONG. 2D SESS. (1970). The War Powers Bill passed the Senate on April 13, 1972, by a vote of 68 to 16.

for that role in an era in which declarations of war seem outmoded.<sup>5</sup> But like the abortive Bricker Amendment, the Bill paints with too broad a brush and, if enacted, could impair the constitutional balance.

The issue is not, as some supporters of the Bill have urged, one of “restoring to the Congress and to the people a meaningful role on the question of war or peace.” There is no question that Congress must pass on the commitment of United States armed forces to major foreign wars. The issue is what legislation, if any, can best strengthen the roles of Congress and the President.

The Javits-Stennis Bill would permit the use of armed forces in hostilities in only four categories of situations without a declaration of war, and even in those situations would require Congressional authorization to sustain the use beyond thirty days. The vice of this approach is that it attempts to freeze the circumstances in which the armed forces can be used on Presidential authority—a “Maginot line” against the Presidency—and that it assumes complete Congressional primacy, judgments which the framers wisely avoided. There is a real need to preserve Presidential flexibility in using force short of war, in defense against attacks on United States’ forces, and in emergency circumstances until Congress is able to act. In each of these respects the War Powers Bill is dangerously rigid and probably unconstitutional.

The Javits-Stennis Bill would prevent United States participation in an emergency humanitarian mission for the protection of non-nationals, such as the 1964 joint United States-Belgian rescue operation in the Congo. More importantly, under present statutory authorization the Bill would prevent the President from acting in an emergency to assist many friendly nations, including Israel. Though the point has frequently been missed, the Middle East Resolution could not serve under the War Powers Bill, as statutory authorization for emergency assistance to Israel against an attack by its neighbors. The Resolution authorizes use of the armed forces only against aggression from countries “controlled by international communism.”

Thus, under the Javits-Stennis Bill, even if Congress were in session at the time of such an attack—an assumption which seems a frail reed for so important an issue—it might still take up to five days before United States forces could be committed even temporarily. By then the issue might be moot. The Javits-Stennis Bill could also destroy Presidential flexibility in providing United States’ contingents to participate in U.N. peacekeeping

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<sup>5</sup>See the article by Senator Thomas F. Eagleton, *Whose Power Is War Power?*, 8 *FOR. POL.* 23 (1972).

operations. Finally, the Bill attempts to curtail Presidential authority to defend against an attack on the United States beyond thirty days, unless Congress specifically authorizes continued defense—a limitation which is particularly suspect on constitutional grounds.

There are several alternatives which offer promise for improving our constitutional processes without the rigidity of the Senate War Powers Bill. The House has passed a joint resolution which would require the President to submit a report to Congress when United States military forces are deployed abroad or committed to armed conflict.<sup>6</sup> The report would include a statement of “the constitutional, legislative, and treaty provisions” under which the President acted.<sup>7</sup> Such a reporting requirement would increase the information flow to Congress, serve as an early warning of creeping involvement, and require the President to justify his action. Another useful proposal is for the creation of a Joint Congressional Committee on National Security to facilitate a continuing working relationship between Congress and the President.

### **The Executive Privilege**

Presidents throughout our history have asserted a constitutional privilege to withhold documents or information from Congress. In recent years, they have also asserted a privilege to protect Presidential advisers from compulsory process relating to the performance of their official duties.<sup>8</sup> George Washington first enunciated the privilege to withhold information and described it as extending to disclosure not “in the public interest.” Examples of the privilege with respect to Presidential advisers include President Truman’s assertion of the privilege for Presidential Assistant John Steelman and President Eisenhower’s similar assertion for Sherman Adams.

Beginning with the Kennedy Administration, every President has agreed that the privilege is one which must be asserted only on Presidential authority. Thus, the Nixon Administration operates under detailed procedures requiring Presidential review before invocation of executive privilege by a department head. Assertions of privilege are rare; the usual practice is simply to provide the information requested by Congress. In fact, the General Counsel of the Department of Defense recently testified before the Judiciary Committee that in fiscal year 1969 “an estimated 1,100

<sup>6</sup>H.J. Res. 1 was passed on August 2, 1971, reprinted in “War Powers Legislation,” *Hearings Before the Senate Committee on Foreign Relations*, 92d Cong., 1st Sess. (1971).

<sup>7</sup>*Id.* Reference is to § 3 (B) of the resolution.

<sup>8</sup>See “Executive Privilege: The Withholding of Information by the Executive,” *Hearing Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary* 92d cong., 1st sess. (1971).

man-hours were expended by Department of Defense personnel in complying with Congressional requests for information."<sup>9</sup>

Recently, Senator Fulbright introduced a bill which would require any employee of the Executive branch claiming executive privilege to appear personally and to present a statement signed by the President authorizing invocation of the privilege.<sup>10</sup> An amended version of the bill would also spell out details for obtaining Presidential authorization, and would require the President to give in writing his reasons for invoking the privilege.<sup>11</sup> The Fulbright Bill was sharply debated in hearings held before the Judiciary Committee last summer.

Without going too deeply into the intricacies of the debate over this Bill, it should be said that there are genuine interests on both sides. Congress has an interest in obtaining a maximum of information to enable it to perform its investigative and legislative functions. The President has an interest in preserving the integrity of the advisory process. The need is for development of responsive criteria which will reconcile these interests. Criteria which might be explored as a basis for executive privilege include the following:

- (1) Whether release of the information might compromise the integrity of the advisory process by deterring candid advice or criticism within the Executive branch;
- (2) whether release of the information might invade an individual's right of privacy as, for example, by compromising the confidentiality of personnel files;
- (3) whether release of the information might undercut ongoing efforts at international negotiations;
- (4) whether release of the information might compromise information provided in confidence by a foreign nation or an international organization; and
- (5) whether release of the information might seriously damage the national security.

### **The Authority of the President to Make Executive Agreements**

The Bricker debate raised a *potpourri* of issues concerning the treaty

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<sup>9</sup>Statement of J. Fred Buzhardt, General Counsel, Department of Defense, reprinted in "Executive Privilege: The Withholding of Information by the Executive." *Hearing Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 92d Cong., 1st Sess., at 443 (1971).

<sup>10</sup>Senator Fulbright's bill, S. 1125, was introduced on March 5, 1971, and debated in the Judiciary Committee that summer. *See id.* at 8-9.

<sup>11</sup>For the amended version of the bill, see *id.* at 10-14.

power. These included the extent to which treaties could avoid specific constitutional limitations, whether treaties should be self-executing, the nature of the treaty power as a source of independent federal legislative authority, and the authority of Congress to regulate international agreements entered into by the President. In contrast, the present debate focuses largely on the independent authority of the President to make international agreements, particularly agreements perceived as involving military commitments.<sup>12</sup>

In 1967 the Senate passed the National Commitments Resolution indicating that "it is the sense of the Senate that a national commitment by the United States to a foreign power . . . [only] results from affirmative action taken by the Executive and Legislative branches of the United States. . . ."<sup>13</sup> The hearings made it clear that the Resolution was prompted by a Vietnam-linked concern about United States overcommitment. But it was never clear that the problem was one of overcommitment by executive agreement or that the Resolution was responsive to the Vietnam situation. I am aware of no NATO-like defense commitment with a foreign nation which was concluded by executive agreement: all of the nation's present commitments to some 42 countries were made by treaty. And both the SEATO Treaty and the Tonkin Gulf Resolution would have met the requirements of the National Commitments Resolution.<sup>14</sup>

Early in 1972, hearings were held by the Foreign Relations Committee on whether the military bases agreements concluded with Portugal and Bahrain during December of 1971, were within the President's authority or whether they should have been submitted to the senate under the treaty power.<sup>15</sup> The Foreign Relations Committee favorably reported a resolution that these agreements should have been submitted to the Senate as treaties, and it subsequently attached an amendment to this effect in the Foreign Assistance Act.<sup>16</sup> In April and May of 1972, the Subcommittee on Separation of Powers of the Senate Judiciary Committee conducted hearings on

<sup>12</sup>See "Transmittal of Executive Agreements to Congress," *Hearing Before the Senate Committee on Foreign Relations*, 92d cong. st sess. (1971); "Transmittal of Executive Agreements to Congress," REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, 92D CONG. 2D SESS. (Report No. 92-591, Jan. 19, 1972).

<sup>13</sup>For the text of the 1967 "National Commitments Resolution" passed by the Senate (S. Res. 85), see "Legislation on Foreign Relations" (Joint Committee Print, 1972) at 830.

<sup>14</sup>See generally, "Security Agreements and Commitments Abroad," REPORT TO THE SENATE COMMITTEE ON FOREIGN RELATIONS BY THE SUBCOMMITTEE ON SECURITY AGREEMENTS AND COMMITMENTS ABROAD, 91ST CONG. 2D SESS. (1970).

<sup>15</sup>See, "Agreements with Portugal and Bahrain," REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS TO ACCOMPANY S. RES. 214, 92D CONG. 2D SESS. (Feb. 17, 1972).

<sup>16</sup>For the text of S. Res. 214, see "Congressional Oversight of Executive Agreements," *Hearing Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 92d Cong., 2d Sess., at 348 (1972).

executive agreements.<sup>17</sup> The bill contemplated in their deliberations would have required all executive agreements to be tabled with Congress for sixty days, and they would then take effect only if not *disapproved* by Congress during that period.<sup>18</sup>

At the outset, we should be clear about what the issue is. It is not the *international* authority of treaties as opposed to executive agreements. In international law, treaties and executive agreements are interchangeable: an oral agreement may be just as enforceable as the most solemn treaty.<sup>19</sup> The issue is rather the *constitutional* authority of the President, the President and the Senate, or the President and the Congress to enter into international agreements.

Article II, Section 2 of the Constitution provides that the President "shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur." This Executive-Senate treaty procedure may be used to conclude any international agreement, provided that it does not infringe on the specific guarantees of the Constitution. Though the records of the Constitutional Convention demonstrate that the treaty power was deliberately entrusted to the President and the Senate jointly, there is nothing in the records which defines what is meant by a treaty, or that forecloses alternative constitutional procedures for concluding international agreements.<sup>20</sup>

In fact, by differentiating in Article I, Section 10 between treaties and agreements, and mentioning only treaties in Article II, Section 2, the Constitution seems to imply a residual federal power to enter into international agreements other than by the treaty process. More important, the specific grants of authority to Congress and the President, as well as any inherent foreign affairs power, strongly suggest for their effectuation an included authority to enter into international agreements.<sup>21</sup> For example, the grant of authority to Congress to establish postal services implies for its

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<sup>17</sup>*Id.*

<sup>18</sup>For the text of S. 596 ("the Case Bill"), see *id.* at 347.

<sup>19</sup>According to the Harvard Research in International Law "the distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." HARVARD RESEARCH, *Law of Treaties: Draft Convention, with Comment* (1935), reprinted in 29 AM. J. INT'L L. SUPP. No. 4, 652, 697. See also McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L. J. 181-351, 534-615; reprinted in M. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 422-23 (1960). The form chosen may make an international political difference, however, since treaties normally signal a long-lasting or major commitment.

<sup>20</sup>See generally I-III M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911). See also *THE FEDERALIST PAPERS*, *supra* note 2; L. RODGERS, *CONSTITUTIONAL ASPECTS OF FOREIGN AFFAIRS* (1944); C. ROSSITER, *1787: THE GRAND CONVENTION* (1966).

<sup>21</sup>See, e.g. MCDUGAL & LANS, *supra* note 19, at 448-60.

effectuation, authority to authorize and approve international agreements for postal cooperation. As early as 1792 the Congress endorsed this interpretation by delegating authority to the Postmaster General to conclude international postal agreements.<sup>22</sup>

Whatever the original intent, one hundred and eighty years of constitutional practice and repeated rulings of the Supreme Court have established beyond doubt the constitutional validity of executive agreements. Professor Myres McDougal has concluded after the most thorough analysis of the agreement power to date:

No illusion as to the exclusiveness of the treaty-making clause, that is at all affected by intimations of reality, can survive the fact that of the "nearly two thousand international instruments" entered into by the United States between 1789 and 1939 "only some eight hundred were made by the treaty process."<sup>23</sup>

This reality seems even more compelling today. As of January 1, 1969, the United States was party to 909 treaties and 3,973 executive agreements, or more than four executive agreements for every treaty.<sup>24</sup> And between 1955 and April 1972, the United States entered into 5,591 executive agreements sufficiently important to be published in the official series.<sup>25</sup> It is evident from these figures that executive agreements are an indispensable tool of foreign relations.

Corwin summarizes the state of the present law when he says the essential question "is not whether the President can constitutionally enter into executive agreements with other governments—a point universally conceded—but what scope these may today validly take."<sup>26</sup>

In the absence of more definitive guidance in the record of the Constitutional Convention, a variety of tests have been suggested for delimiting the scope of authority to conclude executive agreements. At one extreme, it has been asserted that executive agreements are limited to unimportant as opposed to important agreements.<sup>27</sup> But constitutional practice will not

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<sup>22</sup>1 Stat. 236 (1792). The constitutionality of this procedure was upheld by Solicitor-General Taft in 1890. See 19 OPS. ATTY. GEN. 520 (1890).

<sup>23</sup>McDougal & Lans, *supra* note 19, at 474-74.

<sup>24</sup>These figures are based on a Department of State estimate discussed by Professor Ruhl J. Bartlett in testimony before the Senate Foreign Relations Committee. See HEARINGS, *supra* note 12, at 14, 16.

<sup>25</sup>See *Addendum* to the compilation of January 10, 1969, entitled *International Agreements Other Than Treaties, 1946-1968 Classified According to the Legal Authority on the Basis of Which They Were Made or Became Effective* to cover the period to April 1972. (Office of the Legal Adviser, Department of State), at 39.

<sup>26</sup>E. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 40 (1944).

<sup>27</sup>This test seems implicit in Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945). Sometimes it is said that this distinction stems from an international distinction between "public treaties" and "agreements" set out in the writings of Emmerich de Vattel and known to the framers. For the critical appraisal of this theory, see McDougal & Lans, *supra* note 19, at 460-75.

support a distinction that only unimportant agreements may be concluded as executive agreements. As Professor Quincy Wright pointed out in 1944:

[T]he United States annexed Texas and Hawaii, ended the first world war, joined the International Labor Organization, the Universal Postal Union and the Pan American Union, settled over ten billion dollars worth of post-World War I debts, acquired Atlantic naval bases in British territory during World War II, acquired all financial claims of the Soviet Union in the United States, joined the United Nations pledging itself not to make separate peace in World War II and to accept the Atlantic Charter, submitted over a score of cases to international arbitration, and modified the tariff in numerous reciprocal trade agreements, by means other than the treaty-making process.<sup>28</sup>

To Professor Wright's list might be added the 1898 peace protocol with Spain by which Spain agreed to cede Puerto Rico to the United States, the four-power agreement of 1949 ending the Berlin Blockade, the armistice agreement ending the Korean War, and so on.<sup>29</sup>

At the other extreme, some of the most thoughtful constitutional observers, including Professor Quincy Wright, have urged that the constitutional authority to conclude executive agreements is plenary, stemming from the inherent foreign affairs power of the Executive.<sup>30</sup> This theory of inherent Presidential authority to conclude international agreements receives support from the opinion of the Supreme Court in the famous *Curtiss-Wright* case.<sup>31</sup> Mr. Justice Sutherland, writing for the Court, indicated that the foreign affairs power of the nation is inherent, and does not depend on a specific constitutional grant of authority.<sup>32</sup>

One difficulty with the inherent Presidential authority test is that it seems to assume, without adequate explanation, an equivalence between inherent federal power and inherent Presidential power. More important, the test ignores the strong interest in shared responsibility underlying the separation of powers—an interest which should control in the absence of crisis or other functional basis for preferring Presidential authority.

The preferable test, and one which seems to command the greatest contemporary support, is that the scope of authority to conclude executive

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<sup>28</sup>Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 343 (1944). (Professor Wright's 1944 reference to the United Nations is to the Allied wartime coalition, not to the subsequent organization itself which the United States joined by treaty.)

<sup>29</sup>See, Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365 (1940), and *International Agreements Other Than Treaties, 1946-1968: A List With Citations of Their Legal Bases* (Office of the Legal Adviser, Department of State, 1969). One controversial example from the economic side is the International Antidumping Code. See Senator Russell B. Long's article, *United States Law and the International Anti-Dumping Code*, 3 INT'L LAWYER 464 (1969). In this case, only the United States, among the eighteen signatories, did not submit the agreement for legislative approval.

<sup>30</sup>Wright, *supra* note 28, at 349. See also W. McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 363 (1944).

<sup>31</sup>United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

<sup>32</sup>*Id.* at 318.

agreements depends on the constitutional authority of the President and the Congress, to deal with the subject matter of the agreement in question.<sup>33</sup> That is, an agreement concluded solely on Presidential authority must be within the President's power as Chief Executive of the nation, Commander-in-Chief of the army and navy, diplomatic representative of the nation, or some other general Presidential power. And an agreement concluded with the authorization or approval of Congress must be within the general legislative competence of Congress.

This subject matter test seems implicit in the Department of State "Circular 175 Procedure," which is the internal procedure used by the Department for determining the form an international agreement should take.<sup>34</sup> It is also the test most in accord with constitutional practice, the constitutional basis for executive agreements, and the nation's general tradition of separation of powers. Most important, since a subject matter test reflects the existing functional division between Congress and the Executive, it is more responsive to the reasons for preferring congressional or Presidential authority. Adopting the subject matter test, the scope of authority to conclude international agreements is as follows:

1. The President with the concurrence of two-thirds of the senators present may conclude an international agreement on any subject genuinely a concern of foreign relations. Such an agreement is a treaty;
2. The President may conclude an international agreement expressly or impliedly authorized by a valid treaty. Such an agreement is an executive agreement pursuant to treaty (one commentator refers to such agreements as treaties);<sup>35</sup>
3. The President may conclude an international agreement expressly or impliedly authorized by prior legislation or subsequently approved by Congress on any subject within congressional legislative competence and genuinely a concern of foreign relations. Such an agreement is an executive agreement pursuant to legislation.

<sup>33</sup>This test seems to be the one adopted by, among others, Corwin and McDougal & Lans. See E. CORWIN, *supra* note 26, at 44; McDougal & Lans, *supra* note 19, at 475-504.

<sup>34</sup>Department of State Circular 175, currently undergoing revision, provides with respect to the "Exercise of the Executive Agreement-making Power:"

Executive agreements are not to be used when the subject matter is of such a nature that it should be covered by a treaty. The executive agreement form is used only for agreements which fall into one or more of the following categories:

- a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty;
- b. Agreements which are made subject to congressional approval or implementation, or
- c. Agreements which are made under and in accordance with the President's constitutional power.

<sup>35</sup>See McDougal & Lans, *supra* note 19, at 433-35.

4. The President may conclude an international agreement solely on Presidential authority on any subject within his independent authority and genuinely a concern of foreign relations. Such an agreement is an executive agreement pursuant to the constitutional authority of the President.<sup>36</sup>

As is evident from the variety of constitutional procedures for concluding international agreements, executive agreements as such, should not be confused with those few executive agreements concluded solely on Presidential authority. The overwhelming bulk of executive agreements are concluded pursuant to prior or subsequent legislative or treaty authorization. For example of the 5,591 executive agreements concluded between 1955 and April 1972, only 64—or a fraction over one percent—were concluded solely under the independent authority of the President.<sup>37</sup>

### Conclusion

To close this survey of the current issues, a few general observations: First, in considering executive agreements, as well as other issues in the current debate about the foreign affairs power, we might profitably heed Dean Acheson's timeless reminder that "(t)he central question is not whether Congress should be stronger than the President, or *vice versa*, but how the Congress and the President can both be strengthened to do the pressing work that falls to each to do and to both to do together."<sup>38</sup>

The President should remember that congressional support is a prerequisite for a successful foreign policy. The President is dependent on Congress for legislative implementation and appropriations, he can in some areas be legislatively curbed by Congress, and above all, he must maintain a national consensus which only strong congressional support can assure. Moreover, Congress can be a helpful forum for obtaining new ideas refining old policies.

These realities suggest the importance of vigorous consultation with Congress and of keeping Congress informed of Executive policies fully and candidly—even if some lumps must be taken in return. The President needs Congress: an overbearing Executive, disdainful of exposure of his policies to the crucible of congressional debate, may pay heavily. The unnecessary use of the distracting and ambiguous attacks on American ships in the Gulf of Tonkin as the occasion for the principal authorizing legislation for the Indo-China War provides an example.

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<sup>36</sup>For a similar differentiation, *see id.*

<sup>37</sup>*See Addendum, supra* note 25, at 39. Presumably, this figure does not include informal agreements concluded in the day-to-day operation of the Executive branch and not officially reported in TREATIES AND OTHER INTERNATIONAL AGREEMENTS.

<sup>38</sup>D. ACHESON, A CITIZEN LOOKS AT CONGRESS 56 (1957).

Second, the Congress should remember that there are good reasons for Presidential leadership in foreign affairs. These include the facility of the Executive to act with speed and decisiveness, his capacity to respond with a high or low profile, to act with negotiating responsiveness—and secrecy when genuinely required—and to have access to more complete information. The recent China initiative by President Nixon illustrates all of these Presidential attributes.

Finally, as the only elected official responsible to the nation as a whole, the President has a unique responsibility and capacity for a unified foreign policy. He may, for example, be more aware of the linkages between different foreign policy programs. This is not to suggest that Congress should forego vigorous debate of important foreign policy issues or suspend its close scrutiny of possible Executive usurpation of the congressional role in foreign affairs. It is to suggest that Congress should curtail Presidential flexibility only where there are compelling reasons for doing so.

Third, we must remember that these issues transcend the immediate Indo-China debate. The present suggestions for curtailing Executive power are largely supported by liberals against a more conservative President. In contrast, the Bricker debate was triggered by conservatives against a more liberal President. The enduring issue is not the comparative wisdom of Congress and the President at any particular moment in time, but how authority in foreign affairs can be divided between Congress and the President *as institutions*, in a manner which will optimize the functional strength of both. On this issue the key is not the triumph of either Pacificus or Helvidius, but is instead a quest for reasonable lines.

Fourth, we should remember that the framers did not, except in the most general terms, engrave the lines of authority on the Constitution. This lack of detail suggests a variety of corollaries. One is that in a real sense we are constitutional framers and should approach the task with the thoroughness befitting it. A second is that generalizations such as separation of powers offer little guidance: there is no escape from the painful task of hammering out a workable balance, issue by issue. And a third corollary is that we should be cautious in attempting overly specific determination of the issues, lest we be caught in a web of hindsight.

As a final point, it is especially troubling to sense the strength of the feeling in Congress—quite honestly held—that the power of the legislative branch in foreign affairs has gradually eroded through the activities of the Presidency, and that the task is somehow to recapture it.

There is truth in this claim, particularly with respect to the extreme assertions of five or six years ago that the Executive has independent

authority to wage major wars abroad. But like all generalizations, this one is only partly true. And unlike many other generalizations, it has the power to buttress a Congressional crusade. Such a crusade—if undertaken against a Vietnam-weakened Presidency—could dangerously redraw the lines in foreign affairs.

In 1961, Senator Fulbright wrote:

The source of an effective foreign policy under our system is Presidential power. This proposition, valid in our own time, is certain to become more, rather than less compelling in the decades ahead. . . .<sup>39</sup>

Senator Fulbright's statement is too general to answer the range of specific issues which we must now address. But there is a truth in it which we must not forget.

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<sup>39</sup>Fulbright, *American Foreign Policy in the Twentieth Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 2 (1961).