The original documents are located in Box 13, folder "Executive Agreements (4)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Rec'd 3/22
(Mr. Buchen
has seen)

DEPARTMENT OF STATE
THE LEGAL ADVISER
WASHINGTON

March 16, 1976

TO : Mr. Philip W. Buchen,
Counsel to the President

FROM : L - Monroe Leigh ML

SUBJECT: Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement

Attached is a copy of a memorandum prepared in my office setting forth the criteria applied by the Legal Adviser when making determinations whether any arrangement or document, or series of arrangements or documents, constitutes one or more international agreements under the Case Act (P.L. 92-403; approved August 22, 1972). As you know, that Act requires the Secretary of State to transmit to the Congress all international agreements other than treaties no later than sixty days after their entry into force.

The memorandum also emphasizes the paramount necessity of transmitting concluded agreements to the Assistant Legal Adviser for Treaty Affairs in the Department of State no later than twenty days after their entry into force in order to enable the Department to meet the sixty-day requirement of the Case Act.

This material has been sent to all U.S. diplomatic posts abroad, to all key Department of State personnel in Washington, and to the general counsel of the several departments and agencies of the Government.

I should be most appreciative if you would be good enough to have copies of the attached memorandum distributed to all personnel in your agency whose responsibilities may result in the negotiation and conclusion of international agreements, whether agency-level arrangements, implementing or operating agreements, or government level agreements.

Attachments:
1. Memorandum
2. Rush letter

THE WHITE HOUSE

WASHINGTON

July 15, 1976

MEMO FOR: PHIL BUCHEN

FROM: KEN LAZARUS

Attached letter and memorandum are for your signature.

Although it would seem clear that Scalia will also find the proposal to be constitutionally infirm, this strikes me as an appropriate way in which to deal with Senator Clark's request.

Attachments

MEMORANDUM

NATIONAL SECURITY COUNCIL

Barnum
copy to Hen
for
comment
back to me.
J.

July 23, 1976

MEMORANDUM FOR: MAX FRIEDERSDORF

FROM: LES JANKA

SUBJECT: Impending Congressional Action on Executive Agreements

As you will recall the President met with Senator Case and Representative Zablocki a year ago in June and elicited their agreement to delay legislation concerning executive agreements (EAs). This issue is once again alive. Chairman Morgan is sponsoring H. R. 4438, which would require the President to transmit to Congress copies of EAs that concern national commitments; should Congress pass a concurrent resolution expressing disapproval of an agreement, it would be nullified. Senator Clark is sponsoring S. Res. 486, which reaffirms the constitutional treaty power of the Senate by restricting the scope of EAs. Of the two resolutions, S. Res. 486 is the most extreme, permitting the Senate to require significant political, military, or economic commitments to be submitted as treaties.

Over the past three weeks, both Zablocki and Clark have held hearings on their legislation; Zablocki's concluded this week. Eight persons testified in favor of such legislation:

-- Historian Arthur Bastor, University of Washington, stated that the intent of the Framers was that Congress has a right and responsibility to demand that EAs be subjected to scrutiny by either the Senate or both Houses, and to disallow it if it constitutes a commitment that Congress has not made, and is not willing to make.

-- University of Chicago Law Professor Gerhard Casper found the "framework" legislation of H. R. 4438 an attempt to implement Constitutional powers, and create a reasonable balance between the Executive and Legislative branches.

-- ABA Chairman John Laylin questioned the right of Congress to subject to its veto EAs made pursuant to a treaty or the Constitution, but not those made pursuant to legislation.

-- Raoul Berger, who wrote a book on executive privilege, stated that the President is not constitutionally empowered to enter into EAs unilaterally, unless they are based on his treaty power.

-- Lawyer Ann Holland stated that the Constitution does not prohibit the use of the legislative veto over EAs; she advocates the provisions of H.R. 4438.

-- Former Ambassador to Romania Leonard C. Meeker argued that H.R. 4438 should be enacted only if a determined effort to create joint branch cooperation fails.

-- Fletcher Law Professor Ruhl J. Bartlett supported H.R. 4438, believing that Congress' role in foreign policy should be increased, and Presidential EAs should be congressionally examined.

-- With regard to Clark's S. Res. 486, Arthur Bastor, taking a strict constructionist view, cited references of the Framers' intentions with regards to the branches' powers; in short, the Executive has usurped prerogatives, and the Senate must reaffirm them.

-- Princeton Professor Richard Falk stated that S. Res. 486 could provide a valuable additional legislative step towards the roles of both branches in the setting of significant commitments to foreign governments.

In support of the Administration's position, State Legal Advisor Monroe Leigh, Assistant Attorney-General Antonin Scalia, and University of Virginia Professor John Norton Moore cited constitutional and legal references to show that the Congress would seriously encroach on Executive power by these resolutions.

One more day of hearings will be held this next week on S. Res. 486. While Clark appears willing to move cautiously, members of the HIRC strongly feel that H.R. 4438 will be reported. Some revisions have been suggested for both resolutions, which could make them a few degrees more acceptable to the Executive. It was felt by those in favor of the legislation that the Executive's promise of consultation and cooperation had not been fulfilled.

I will keep you posted on further developments, but I feel that we are headed for another tug-of-war, because Zablocki, Morgan, and Clark all strongly feel that the Executive won't cooperate and consult, unless it is bound to do so. You may wish to alert the President to this cloud on the horizon.

cc: Phil Buchen
Bill Kendall
Charlie Leppert

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

JUL 23 1976

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: S. Res. 434

This is in response to your memorandum which asks for our views on S. Res. 434, the Treaty Powers Resolution.

The resolution declares that "any international agreement which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent" (Sec. 2(c)). It provides that the Senate may pass subsequent resolutions which find that such agreements should have been submitted as treaties (Sec. 4(a)(1)). If such a resolution is passed then the Senate will not consider funding the agreement unless it is submitted and approved as a treaty.

It is obvious at the outset that the resolution is based on a false premise. Contrary to what §2(c) asserts, not all international agreements constituting significant political, military or economic commitments to a foreign country are treaties under Art. II, Sec. 2, Cl. 2 of the Constitution. In fact, the great bulk of our commitments to foreign countries are made by executive agreements specifically authorized by statute. See, e.g., the Foreign Assistance Act of 1961, 22 U.S.C. §2151; the International Security Assistance and Arms Control Act of 1976, P.L. 94-329. The Senate, of course, participates in passing such laws. Although such commitments could be submitted as treaties, the Executive is entitled to rely on existing statutory authorization and appropriations where applicable to make executive agreements.

S. Res. 434 is a simple resolution of the Senate and cannot alter existing statute law. This point has been conceded by Sen. Clark, its sponsor, on the Senate floor; and he has introduced a substitute resolution, S. Res. 486, which makes it clear that, except insofar as the Senate's internal procedures are concerned, resolutions adopted under the new procedure would have no effect other than the expression of the "sense of the Senate." 122 Cong. Rec. S 11415-17, July 1, 1976. Thus, where there are already

appropriations and authorizations available for an agreement, neither S. Res. 434, nor S. Res. 486, nor any future resolution adopted under either, purports to negate them.

If there are no appropriations available and a special appropriation is needed for an agreement, then the Senate can always decline to approve it. If it chooses, in addition, to pass a resolution explaining its failure to pass the appropriation by asserting that it feels a treaty should have been written, that is assuredly the Senate's prerogative.

Since the resolution embodies an erroneous premise, concerning the necessity of proceeding by treaty, we believe it should be opposed. It does not, however, appear to be unconstitutional.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Hold file

THE WHITE HOUSE

WASHINGTON

July 15, 1976

MEMORANDUM FOR

The Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attached are the following materials: (1) a copy of S. Res. 434; (2) a memorandum on the bill prepared by the Office of Legislative Counsel in the Senate; and (3) an analysis setting forth the opposition of the Department of State to the proposal.

May I have your views regarding this legislation as soon as practicable. Thank you.

P.W.B.

Philip W. Buchen
Counsel to the President

Attachments

THE WHITE HOUSE

WASHINGTON

July 15, 1976

Dear Senator Clark:

In response to your letter to the President dated June 30 relative to S. Res. 434, I have requested an opinion from the Office of Legal Counsel at the Department of Justice regarding the constitutional issues posed by the legislation.

The issues involved are of great significance, as you indicate, and I want the President to be fully informed before he reaches any conclusion.

As soon as possible, I will write you again on this matter.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

The Honorable Dick Clark
United States Senate
Washington, D. C. 20510

94TH CONGRESS
2D SESSION

S. RES. 434

IN THE SENATE OF THE UNITED STATES

APRIL 14, 1976

Mr. CLARK submitted the following resolution; which was referred to the Committees on Foreign Relations, Rules and Administration, the Judiciary, Appropriations, and the Budget jointly by unanimous consent

MAY 6, 1976

Previous order vitiated; committees discharged; and ordered held at the desk, by unanimous consent

MAY 6, 1976

By unanimous consent, referred to the Committees on Foreign Relations, Armed Services, the Judiciary, Appropriations, and the Budget with authority for each to report individually

RESOLUTION

Relating to the treaty powers of the Senate.

Resolved, That this resolution may be cited as the "Treaty Powers Resolution".

PURPOSE, FINDINGS, AND DECLARATION

SEC. 2. (a) It is the purpose of this resolution to fulfill the intent of the framers of the Constitution and to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement.

(b) The Senate finds that—

(1) article II, section 2, clause 2, of 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";

(2) the requirement for Senate advice and consent to treaties has in recent years been circumvented by the use of "executive agreements"; and

(3) the Senate may, for its part, refuse to authorize and appropriate funds to implement those international agreements which, in its opinion, constitute treaties and to which the Senate has not given its advice and consent to ratification.

(c) The Senate declares that, under article 2, section 2, clause 2, of the Constitution, any international agreement, which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent.

ADVICE

SEC. 3. It is the sense of the Senate that, in determining whether an international agreement constitutes a treaty under section 2 (c) of this resolution, the President should, prior to and during the negotiation of such agreement, seek the advice of the Committee on Foreign Relations.

CONSENT

SEC. 4. (a) (1) The Senate may, by resolution, find that any international agreement hereafter entered into which has not been submitted to the Senate for its advice and consent constitutes a treaty under section 2 (c) of this resolution.

(2) Any such resolution shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5 (c) of the War Powers Resolution is privileged under section 7 (a) and (b) of that law.

(b) It shall not be in order to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority to implement any international agreement which the Senate has found, pursuant to subsection (a) of this section, to constitute a treaty under section 2 (c) of this resolution unless the Senate has given its advice and consent to ratification of such agreement.

(c) Any (1) committee of the Senate which reports any bill or joint resolution, and (2) committee of conference which submits any conference report to the Senate, authorizing or providing budget authority to implement any such

agreement, shall so indicate in the committee report or joint statement filed therewith, as the case may be.

94TH CONGRESS
2D SESSION

S. RES. 434

RESOLUTION

Relating to the treaty powers of the Senate.

By Mr. CLARK

APRIL 14, 1976

Referred to the Committees on Foreign Relations, Rules and Administration, the Judiciary, Appropriations, and the Budget jointly by unanimous consent

MAY 6, 1976

Previous order vitiated; committees discharged; and ordered held at the desk, by unanimous consent

MAY 6, 1976

By unanimous consent referred to the Committees on Foreign Relations, Armed Services, the Judiciary, Appropriations, and the Budget with authority for each to report individually

THE WHITE HOUSE

WASHINGTON

July 13, 1976

MEMORANDUM FOR: KEN LAZARUS

FROM: PHILIP BUCHEN P.

Please examine the attached memorandum and get back to me promptly with your preliminary review and your suggestion for either submitting the issue to Nino or our sending a reply.

Attachment

MEMORANDUM

3941

NATIONAL SECURITY COUNCIL

July 9, 1976

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: Jeanne W. Davis

SUBJECT: Letter from Senator Clark on Treaty Powers

It appears that this issue is more a legal, constitutional matter than a substantive foreign policy matter and that the requested further direct reply might more appropriately come from you than from Brent Scowcroft.

If you agree, we would appreciate an opportunity to concur in your proposed response.

3941

July 2, 1976

Dear Senator:

This will acknowledge receipt of your June 30 letter to the President commenting on the recent legal opinion by the Department of State relative to your resolution relating to treaty powers.

Please be assured I shall call your letter to the attention of the President and the appropriate Presidential advisers at the earliest opportunity. I am certain you will hear further as soon as possible.

With kind regards,

Sincerely,

William T. Kendall
Deputy Assistant
to the President

The Honorable Dick Clark
United States Senate
Washington, D. C. 20510

bcc: w/incoming to Gen. Scowcroft for DIRECT REPLY

WTK:JEB:VO:jlc

7-1

DICK CLARK
IOWA

COMMITTEES:
AGRICULTURE AND FORESTRY
FOREIGN RELATIONS
RULES AND ADMINISTRATION
SPECIAL COMMITTEE ON AGING

United States Senate

WASHINGTON, D.C. 20510

June 30, 1976

President Gerald Ford
The White House
Washington, D.C.

Dear Mr. President:

I am writing to convey my concern over two constitutional propositions advanced in a recent legal opinion by the Department of State relative to a Senate Resolution I had introduced regarding treaty powers. (S. Res. 434)

In this opinion, the Department's legal counsel, Monroe Leigh, advances two constitutional objections to my resolution. They are:

(1) That refusal to fund a valid executive agreement would, as it was spelled out in a cover letter by Ambassador Robert J. McCloskey to Chairman John Sparkman, violate "the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement."

(2) That the Senate has no constitutional power to establish this rule of internal procedure.

Mr. President, I believe it is fair to say that these two contentions, taken together, represent one of the broadest assertions of executive power that has yet been made by any administration on the treaty powers issue.

I would submit, Mr. President, that the first claim is patently unsound--that the Congress, even if it disagrees with an executive agreement or considers that agreement beyond the President's authority, must nonetheless provide the funds to implement it.

The second assertion is a flagrant violation of Article I, section 5, clause 2 of the Constitution, which provides that "Each House may determine the Rules of its proceedings..." In an opinion I requested from the Senate's Legislative Counsel, it was found that the pertinent section 4(b)) of the Resolution was "clearly constitutional as an exercise of the rule-making power..."

Mr. President, in light of the far-reaching significance of the Department's opinion on these critical issues, I ask your view on whether these two propositions represent the true position of this administration.

Sincerely,

Dick Clark

Dick Clark

DC/bvv

Enclosures

UNITED STATES SENATE
OFFICE OF THE LEGISLATIVE COUNSEL

MEMORANDUM FOR SENATOR CLARK

This memorandum is in response to your letter to Mr. Littell requesting the opinion of this Office as to the constitutionality of section 4 (b) of S. Res. 434 (94th Congress, 2d session) and the comments thereon by Monroe Leigh, Legal Adviser, Department of State.

The Constitution provides that "Each House may determine the Rules of its Proceedings. . . ." Article I, section 5, clause 2. This broad grant of authority is limited only by the specific exceptions set forth in section 5: the requirements respecting a quorum (clause 1), keeping and publishing a journal (clause 3), recording certain votes (clause 3), and adjournment (clause 4). No other exception is provided by the Constitution.

The Supreme Court has, accordingly, construed the rule-making power liberally. In United States v. Ballin, 144 U.S. 1 (1892), the Court upheld the validity of a rule relating to quorums, stating that "the advantages or disadvantages" and "the wisdom or folly" of the rule did not "present any matters for judicial consideration." It continued:

> . . .With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a

> reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal. Id. at 5.

Applying these standards to section 4 (b) of S. Res. 434, it is clear that the rule established, which causes a point of order to lie against the consideration of a measure providing funds to carry out certain executive agreements, does not "ignore constitutional restraints or violate fundamental rights". The Constitution provides that no moneys can be drawn from the Treasury except pursuant to appropriations made by law (article I, section 9, clause 7), but it does not place any restraint on the power of Congress to refuse to appropriate funds, nor does it contain any restraint against the adoption of rules which might facilitate such a refusal. It is also clear that a "reasonable relation" exists between the method established by section 4 (a) (1) and the result which is sought to be achieved. The result sought is apparently

that set forth in section 2 (a) of the Resolution, namely, "to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement." The method established for achieving that result is to allow a point of order to be made against the consideration of any measure which provides funds to carry out an executive agreement which the Senate (as indicated by simple resolution) should be submitted as a treaty. This method, it appears, could accomplish the result sought.

Under the language of Article I, section 5, clause 2 of the Constitution, therefore, and under the construction given that provision by the Supreme Court, the rule proposed to be established seems clearly constitutional.

Turning to the comments of Mr. Leigh, we note that he objects to the adoption of this rule on the grounds that it would "permit one Senator to block a particular and important type of legislation" and would thus "be a serious distortion of the legislative process and of the Constitutional requirements for the passage of legislation." Such a rule, he believes, would "impair the Constitutional process under Article I, section 7. . . ."

Simply summarized, article I, section 7 requires that revenue bills originate in the House; establishes the veto power and a procedure for overriding a veto; and requires that measures having the force and effect of law be presented for Presidential signature. Article I, section 7 thus contains no provision relevant to the adoption of the proposed rule, nor has any court ever construed the provisions of article I, section 7 as prohibiting the adoption of or invalidating a procedural rule of the Senate or the House of Representatives.

The proposed rule would not "permit one Senator to block" legislation. At least two, and possibly three, majority votes of the Senate would be required in order to block such legislation. First, a majority vote would be required to adopt S. Res. 434, which establishes the rule giving rise to points of order. Second, a majority vote would be required to adopt the single resolution of the Senate giving rise to a point of order with respect to a particular executive agreement. Third, if a point of order is made, under the procedural rules of the Senate, the Presiding Officer must first rule on the point of order. Any Senator may appeal the ruling of the Presiding Officer and the Senate by majority vote either sustains or overrules

that ruling. In effect the Senate by majority vote has the power to determine whether a point of order lies.

Both the Senate and the House of Representatives have numerous procedural rules relating to the consideration of bills, resolutions, and amendments under which points of order can be made. See, e.g., Rule XVI of the Standing Rules of the Senate; sections 303, 311, 401, and 402 of the Congressional Budget Act of 1974.

It is therefore the conclusion of this Office that section 4 (b) of S. Res. 434 is clearly constitutional as an exercise of the rule-making power granted the Senate under Article I, section 5, clause 2 of the Constitution.

Respectfully submitted,

June 25, 1976

Michael J. Glennon
Assistant Counsel

DEPARTMENT OF STATE

Washington, D.C. 20520

Dear Mr. Chairman:

The Secretary has asked me to thank you for your letter of April 19 requesting our comments on proposed Senate Resolution 434, relating to the treaty powers of the Senate, and to reply on his behalf.

Please find enclosed a memorandum from the Legal Adviser of the Department of State setting forth the Executive Branch position with respect to S. Res. 434. As discussed in detail in the memorandum, we believe that the proposed resolution contains a number of legal and practical drawbacks which render it deficient within the constitutional and statutory framework of U.S. law, as well as administratively unworkable. The following are the principal objections in summary form.

1. The Constitution vests the power to make treaties in the President, by and with the advice and consent of the Senate. S. Res. 434 would grant to the Senate an aspect of treaty-making which the Constitution does not contemplate.

2. A procedure permitting Senate designation of particular instruments as treaties would appear to conflict with the President's constitutional position as sole negotiator for the nation in international relations.

The Honorable
John J. Sparkman,
Chairman,
Committee on Foreign Relations,
United States Senate.

3. The Congress may not appropriately interfere with executive agreements concluded under the authority of the President's independent constitutional powers.

4. The intent of Section 4(a)(1) of S. Res. 434, permitting the Senate to designate an executive agreement as a treaty, is not clear. It is open to four alternative interpretations, all of which raise constitutional questions:

a. If the intended interpretation is to convert an executive agreement legally in force into a treaty not in force until approved by the Senate and ratified by the President, such conversion by means of a Senate resolution would not be consistent with Article I, §7 of the Constitution.

b. If the intended interpretation is that the executive agreement and its legal authorization would remain in full force and effect, the Senate's designation of the agreement as a "treaty" would not be sufficient to permit a change in the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement.

c. If the intended interpretation is that the designation would mean that the agreement "should have been" or "should be" submitted as a treaty, this hortatory statement cannot affect the validity of the agreement or its legal authorization, and thus the funding procedure would be subject to the same deficiencies as in (b).

d. If the intended interpretation is that the designation would be made for agreements before their entry into force, it would pose the problem that the Senate cannot by resolution preclude the entry into force of agreements previously authorized by statute, by treaty, or by the Constitution.

The proposed resolution also entails practical problems which, in our view render it unworkable. Among those problems are the following. Rghts and obligations, both private and governmental, which

had accrued under an agreement would be rendered uncertain by its conversion into a treaty. Foreign nations might feel compelled to insist upon a treaty in all cases to avoid uncertainty. Moreover, S. Res. 434 would create uncertainty with respect to multilateral executive agreements, which may go into and then out of force for all the parties depending upon the Senate's designation.

We continue to believe that full and continuous consultation between the two branches, as in the case of the recent treaty with Spain on defense cooperation, represents an approach more likely to achieve the goals shared by both branches than the proposed resolution.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this report and of its accompanying memorandum by the Legal Adviser.

Sincerely yours,

Robert J. McCloskey
Assistant Secretary for
Congressional Relations

Enclosure:

Legal Memorandum.

DEPARTMENT OF STATE

Washington, D.C. 20520

MEMORANDUM

Subject: Proposed Senate Resolution 434 Relating to the Treaty Powers of the Senate

This memorandum considers legal questions posed by proposed Senate Resolution 434 relating to the treaty powers of the Senate. Section 2(c) of that resolution is a "declaration" by the Senate that "any international agreement, which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent."

Section 4(a) of the resolution purports to empower the Senate by simple resolution to find that a particular executive agreement "constitutes a treaty."

Once such a finding has been made, it shall not be in order for the Senate to consider any authorizing bill or other budget authority to implement any international agreement which the Senate has designated to be a treaty within the meaning of section 2(c) unless the Senate has previously given its advice and consent to ratification of the agreement.

In our view, the proposed resolution contains a number of practical and legal difficulties which render it administratively unworkable and legally deficient within both the constitutional and statutory framework of U.S. law.

LEGAL DEFICIENCIES

General Constitutional Considerations

1. The proposed resolution assumes that the Constitution authorizes the Senate to "declare" what constitutes a treaty (section 2(c)), and to designate an executive agreement as a treaty (section 4(a)(1)). Yet the Constitution provides, in Article II, section 2, 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." The power, by and with the advice and consent of the Senate, to "make" treaties is specifically granted to the President, and is not given to the Senate. The proposed resolution, however, would appear to give the Senate precisely that power. In our view, this can be accomplished only by means of a constitutional amendment, and not by legislation or a sense-of-the-Senate resolution.

It may be recalled that the Constitutional Convention in Philadelphia did consider whether the power to "make" treaties should be vested in the Senate, rather than the President. This idea was rejected. Farrand points out that, "The Committee had recommended that the power of appointment and the making of treaties be taken from the Senate and vested in the President 'by and with the advice and consent of the Senate.' With surprising unanimity and surprisingly little debate, these important changes were agreed to." (M. Farrand, The Framing of the Constitution of the United States, p. 171 (1913)). Professor Henkin states that the Founding Fathers were "eager to abandon treaty-making by Congress which, under the Articles of Confederation, appointed negotiators, wrote their instructions, followed their progress, approved or rejected their product.... And so, the Constitution gave the power to make treaties to the President but only with the advice and consent of two-thirds of the Senators present." (L. Henkin, Foreign Affairs and the Constitution, p. 129 (1972)). The proposed resolution would, if passed and implemented, constitute a step back towards the abandoned system of treaty-making of the Articles of Confederation. It is true that Senate designation of an agreement as a treaty, followed by advice and consent to ratification, would leave the President free to ratify the treaty or not as he wished; at the same time it would arrogate to the Senate an aspect of treaty-making which our constitutional structure does not contemplate.

2. In the opinion of the Department of State, designation by the Senate of an executive agreement as a treaty also would be a constitutionally questionable interference with the negotiating powers of the President. The question of whether a legally authorized international agreement should be a treaty or an executive agreement is one of great difficulty, and there are no hard and fast legal rules distinguishing the two forms. In 1952, Senator Bricker of Ohio, upon introducing a version of his proposed constitutional amendment, said:

> I found it very difficult in my own mind to define an executive agreement, or what ought to be an executive agreement, and what ought to be encompassed by a treaty.... No attempt is made in the amendment to define the subject matter appropriate for an executive agreement. It is probably impossible to draw a satisfactory line of demarcation even in a statute. It would be unwise to make the attempt in a constitutional amendment.

In dealing with the same problem, Arthur Sutherland, Professor of Law at the Harvard Law School, wrote as follows:

> Two things are certain: They [executive agreements] have been used from the earliest days of the independence of the United States; and thoughtful men have during all that time been unable to supply what the Constitution lacks - a clear distinction between what is appropriate matter for executive agreement, and what should be handled by treaty with Senatorial concurrence.... We are as puzzled as President Monroe was in 1818. If we knew what was essentially treaty-like, we could define executive agreements by exclusion; but it is no more possible in our day than in his to define one unknown in terms of another.

Whenever the President is legally authorized to enter into an international agreement, whether his authorization is derived from a statute, a treaty, or the Constitution, he has to make a choice between treaty or executive agreement. There are necessarily many legal and political variables he must take into account in making that choice. Among the legal considerations are the following: the constitutional sources of authority; whether the agreement is intended to affect state laws; whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; and prior United States and international practice with respect to similar agreements.

There are also a number of political variables that must be considered by the President. Among them are the degree of formality desired for an agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a short-term agreement. The President also examines the extent to which the agreement involves commitments or risks affecting the nation as a whole.

None of the legal or political variables standing alone is sufficient, and in many cases, they point in different directions. However, the President, as negotiator for the nation, must consider all the variables, including political considerations which necessarily involve larger issues of our relationship with the foreign nation involved. What degree of formality to give an agreement, for example, touches directly on foreign policy questions that form part of the negotiating process. To permit the Senate to designate what shall be a treaty is to remove these political issues from the province of the Executive Branch and to give them to a house of the Congress not immediately involved in the negotiating process. A Senate decision on how much formality to give an agreement with a foreign nation, or a decision on the necessity of prompt conclusion of the agreement, would, in our view, be a constitutionally questionable interference with the President's role as negotiator. As the Supreme Court stated in the case of United States v. Curtiss Wright, "[The President] alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." (299 U.S. at 319.)

3. The resolution also raises serious constitutional questions in respect of executive agreements concluded solely upon the authority of the Constitution. While the vast majority of executive agreements are authorized by statute or treaty, there are some agreements (Department of State figures indicate about 2 - 3% of the total) that are concluded solely under the President's independent constitutional authority. The Congress may not constitutionally interfere with such agreements, either by statute or resolution.

The legal right of the President to enter into executive agreements pursuant solely to his independent constitutional powers is not open to question. That right has been recognized by the United States Supreme Court, the Congress, innumerable scholars, and by a constant practice dating from the early days of the Republic. Two leading cases on this question, decided by the Supreme Court, are U.S. v. Belmont, 301 U.S. 324 (1937), and U.S. v. Pink, 315 U.S. 203 (1942).

A number of executive agreements entered into by the United States over the years, such as agreements with respect to recognition of governments, claims settlements, armistices, and control of occupied areas, among others, have been authorized not by statute or treaty, but by the independent constitutional powers of the President. Such agreements may not be "converted" into treaties by action in pursuance of a Senate resolution.

Constitutional Deficiencies in the Proposed Legislative Process

The intent of section 4(a)(1) of the proposed S. Res. 434, which would permit the Senate to designate an executive agreement as a treaty, is not entirely clear. The wording of

section 4(a)(1) is open to at least four interpretations:

(1) The Senate designation would convert an executive agreement legally in force into a treaty not legally in force because the agreement lacks Senate approval and the President's ratification. The "point of order" procedure of section 4(b) would be applicable after the designation.

(2) The executive agreement would remain in full force and effect, but the Senate would attach the designation of "treaty" to the agreement. This designation would have no purpose or effect other than to trigger the "point of order" procedure of section 4(b).

(3) The Senate designation would mean that the executive agreement "should have been" or "should be" submitted as a treaty. As in (2) above, this statement would have no purpose or effect other than to trigger the section 4(b) procedure.

(4) The Senate designation under section 4(a)(1) would apply to an executive agreement before it entered into force. The 4(b) procedure would apply after the Senate designation had been made.

The following is an analysis of the constitutional deficiencies in the legislative process entailed by each of the four interpretations.

(1) Under interpretation (1), which best comports with the wording of the resolution, section 4(a)(1) of S. Res 434 necessarily has the effect of converting an executive agreement in force into a treaty that is not in force. A treaty, in order to enter into force, must have the approval of two-thirds of the Senate and the ratification of the President. An executive agreement which has already entered into force but which is then designated a treaty can no longer be in force since at the time of the designation it did not have Senate approval or ratification by the President. Even should the Senate give its approval, the President might decide not to ratify. Thus for purposes of both international law and domestic law, an executive agreement that had been in force would be converted into a treaty not in force.

The question presented is whether the Senate may accomplish this conversion by means of a simple resolution. In our view, this would not be consistent with Article I, Section 7 of the Constitution, which requires that legislation receive the approval of both Houses of Congress and of the President, or failing the President's approval, a two-thirds vote of approval of both Houses of Congress. In order to turn an

agreement in force into a treaty not in force, appropriate legislation would be needed. An executive agreement, properly authorized by statute, treaty, or the Constitution, is the law of the land, and this law cannot be undone by a Senate resolution. Nor has any court ever held an executive agreement invalid on the ground that the agreement should have been made as a treaty.

In U.S. v. Pink, Justice Douglas for the Supreme Court said that "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." Justice Douglas, in holding that the Litvinov Assignment (an executive agreement) superseded the inconsistent law of New York, quoted from the Federalist, No. 64, stating that

> "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature...."

The American Law Institute, in its 1965 Restatement (Second) of the Foreign Relations Law of the United States, also describes executive agreements, whether authorized by statute, treaty, or the Constitution, as the supreme law of the land. (See Sections 141-144, pp. 432-448.)

It follows that the proposed Senate Resolution 434, which would, under interpretation (1), permit the Senate by resolution to designate a legally binding executive agreement in force as a treaty necessarily not in force, is constitutionally defective in that it is not consistent with Article 1, section 7 with respect to the appropriate legislative process.

It is believed that this constitutional flaw infects the funding provision in section 4(b) of the proposed resolution. Section 4(b) would permit one Senator to block consideration of any legislative measure that would provide budget authority or authorization to fund an international agreement which the Senate had designated as a treaty, unless the Senate had given its advice and consent to ratification. However, since the Senate alone may not legally convert an executive agreement in force into a treaty not in force, the procedure in 4(b) is necessarily defective. A point of order in the Senate cannot properly lie if it is based solely upon a Senate designation which the Senate lacks constitutional capacity to make.

(2) A second method of interpreting section 4(a)(1) of the proposed S. Res. 434 is that the executive agreement designated a treaty would remain in full force and effect as a legally binding executive agreement, but that the Senate would

nevertheless attach the "treaty" designation to it for purposes only of its own internal rules regarding funding. This interpretation would, of course, remove the objection that the Senate by resolution was attempting to convert a legally binding agreement into a treaty that had not yet entered into force. The term "treaty" would be a label, and nothing more, except that the stage would be set for the funding procedure of section 4(b).

This interpretation would appear to be somewhat less likely than interpretation (1) above, since it could lead to the anomalous result of leaving in full force and effect an international agreement labelled "treaty," even though the Senate had failed to approve it or the President had failed to ratify it. This would be incompatible with Article 2, section 2 of the Constitution.

A second reason why interpretation (2) is somewhat less likely than interpretation (1) is the reference in S. Res. 434 to "the legislative power of the Senate," and repeated references to "advice and consent to ratification," and the requirement for Senate "advice and consent." These phrases indicate that the proposed S. Res. 434 contemplates that a legislative effect should follow from the Senate's designation, and not merely that a label is attached thereby setting the stage for the use of an internal rule of procedure. Indeed, if the intent of S. Res. 434 is merely to make a designation with no legal effect on an executive agreement in force, there is no reason why the House of Representatives could not also so act. Yet the proposed resolution has been cast in terms of Senate prerogatives. It would thus appear that interpretation (1), under which an agreement in force is converted into a treaty not in force, represents the meaning of S. Res. 434.

However, since that interpretation necessarily leads to the conclusion that S. Res. 434 is constitutionally defective, the following analysis is based on the assumption that, despite the indications to the contrary cited in the preceding paragraph, the proper interpretation is that the Senate designation would have no legal effect on the executive agreement designated as a treaty, and that the agreement would remain in full force and effect under both international law and U.S. domestic law. This would be so despite the failure of the Senate to give its advice and consent to ratification, or the failure of the President to ratify.

If this second interpetation of S. Res. 434 is correct, the label "treaty" would simply trigger the procedure whereby a single Senator could block legislation to fund an executive agreement already in force. Indeed, there would be no need even to use the term "treaty" as the designation. Any term would do.

The question then arises whether such designations are constitutionally sufficient to permit a single Senator to block funding legislation. An authorization or appropriations bill is legislation, and the requirements of Article I, section 7 of the Constitution for its passage must accordingly be met. For the Senate so to permit one Senator to block a particular and important type of legislation would, in our submission, be a serious distortion of the legislative process and of the constitutional requirements for passage of legislation. Ordinarily the Department of State would not venture to present a position on the internal rules of procedure of the Senate. We nevertheless feel obligated to oppose a proposal which would so impair the constitutional process under Article 1, section 7, with such potentially damaging effect on the capacity of the United States to conclude international agreements.

Senator Clark, in presenting S. Res. 434 to the Senate on April 14, said that the resolution was "patterned, in fact, after the House germaneness rule." (Cong. Rec., Apr. 14, 1976, p. S5746.) However, it does not appear that there is a relationship between the germaneness rule and the point of order procedure suggested in S. Res. 434. It is one thing to permit a point of order to block an amendment because it is not germane to the subject under consideration (see House Rule XVI, para. 7). It is quite another matter to permit a point of order to block legislation to fund an international agreement authorized by law and legally binding under international law, simply because one House has passed a resolution giving that agreement another designation.

The germaneness rule follows naturally from the legislative process prescribed in Article I, section 7 of the Constitution. But a Senate or even a concurrent resolution cannot constitutionally overcome the President's legal authorization by a statute, a treaty, or the Constitution, to conclude an executive agreement. Where the President is legally empowered to conclude an international agreement, it would be a most serious distortion of the constitutional framework to permit one Senator to block funding legislation on the basis of a Senate resolution which cannot legally supersede the law authorizing the agreement.

A point of order would lie, of course, where an attempt is made to appropriate funds for an item for which there is no legal authorization. But where an executive agreement is authorized by law, that authorization will subsist and cannot be nullified by a Senate resolution or a concurrent resolution. No matter what designation the Senate attaches to the agreement, the legal authorization for that agreement remains valid and in force.

Nor, it is submitted, can the Senate alone constitutionally impose a rule requiring that legally authorized executive agreements receive a further two-thirds approval by the Senate before such agreements are implemented. Special majorities are imposed by the Constitution, and not by Senate resolution. In fact, in its most fundamental sense S. Res. 434 is an attempt by resolution to create a unanimous Senate approval rule for money bills that would fund "significant" international agreements. But like all other bills, funding measures are adopted by a majority, and it requires an amendment to the Constitution to make it otherwise.

We do not believe that either the Senate or the House would wish to establish a precedent under which statutory authorizations or mandates may be so overridden or amended. The alteration of the legislative process involved in proposed S. Res. 434 is extremely serious, and is one which, in our view, would substantially upset that process as set forth in the Constitution.

(3) A third possible interpretation of S. Res. 434 is that the Senate's designation under section 4(a)(1) would simply be a statement to the effect that the executive agreement "should have been" or "should be" submitted as a treaty. This would avoid overturning an existing executive agreement, as in the first interpretation, above, and might be argued to constitute more than a simple designation with no legal effect beyond service as a trigger for the point of order procedure for section 4(b).

In our view, however, a hortatory statement by the Senate, while less clearly an affront to constitutional principles, can have no legal effect on an executive agreement. The executive agreement it refers to would subsist as an agreement in force, and the hortatory statement would have no more legal effect upon that agreement or its authorization than in the case of a simple designation, as in interpretation (2), above. The resolution would have no purpose or effect beyond service as a triggering device for the point of order procedure to block funding legislation, and thus that procedure would be subject to the same deficiencies cited in the previous paragraph.

(4) A possible fourth interpetation of S. Res. 434 is that the Senate designation made under section 4(a)(1) would refer only to executive agreements before their entry into force. Under this interpretation, however, executive agreements would, prior to their entry into force, have to be submitted to the Senate for its view as to whether any of them were to be designated as treaties.

It is submitted that this would also be an unconstitutional procedure. The Senate, by means of a resolution, cannot preclude the entry into force of agreements previously authorized by statute, by treaty, or by the Constitution. If the agreement is properly authorized, and if it provides that it enters into force upon signature, this legal result cannot be blocked by a Senate resolution. Moreover, as with interpretation (1), above, the point of order procedure in this case would be deficient because based on a Senate action that the Senate lacked legal authority to undertake.

PRACTICAL PROBLEMS

The practical problems which flow from S. Res. 434 differ to some extent depending upon which of the four possible interpretations of section 4(a)(1) is accepted.

First, suppose that an agreement in force is changed into a treaty not in force, and that either the Senate refuses to give its approval or the President refuses to ratify. Or suppose even that approval by both Senate and President is forthcoming. At best there is a hiatus between the date of the Senate designation and the final ratification when the agreement once more enters into force. What happens to rights and obligations that were legally binding, but then were no longer binding, and that (perhaps) became binding once again? Private rights and obligations may be rendered uncertain, as well as rights and obligations of the U.S. Government and of foreign governments. The status of the parties and of their rights and duties is left in confusion during the hiatus, and even after it is clear that the agreement has been undone. Neither international nor U.S. domestic law provides for such contingencies. Our international legal obligations would be violated, as might various obligations of national law. This is hardly a reasonable method for administering the international obligations and foreign policy of the United States.

In addition, the foreign nation could not be certain that an executive agreement it had entered into with the United States would not be changed. A treaty may be amended, or certain reservations may be attached before ratification; the Senate or President may not approve the treaty at all. Foreign nations might thus be obliged to insist upon a treaty in every instance, no matter whether it is wartime, or an emergency brought on by a natural disaster, or any one of innumerable situations in which an executive agreement would be appropriate, desirable, or necessary.

Indeed, the proposed resolution would constitute a major step toward making the United States the only nation in the world unable to enter into an international agreement on signature or short notice. Surely there is no advantage in this.

S. Res. 434 is also objectionable in that it appears to be applicable in war as well as peacetime. As we noted in our report dated December 23, 1975, concerning the bills H.R. 4438 and 4439, the President, as Commander-in-Chief, has made hundreds of agreements, many on very short notice, necessary to the conduct of war or hostilities. It is not practical at such times for the President to have these profoundly significant agreements "converted" into treaties, either in force or not, nor is it a constitutionally required procedure. In addition, as in the case of H.R. 4438 and 4439, armistice or ceasefire agreements appear to be covered by S. Res. 434. These agreements must be timed precisely to the hour and minute, and cannot wait for a period during which the Senate may convert them into treaties which may or may not enter into force. This would represent an infringement of the President's powers as Commander-in-Chief which is consonant neither with national security nor the Constitution.

Still another problem is the position of the foreign nation or nations involved. If the agreement is converted into a treaty not in force, the foreign nation would be entitled to terminate the arrangement altogether. In any particular case, this may not be in the best interests of the United States. Even if the agreement remains in force and only the label "treaty" is attached, the foreign nation might well be in a position to argue that the Senate itself had decided and made manifest that a fundamental rule of U.S. domestic law had been violated in using an executive agreement. The foreign nation might thus terminate the treaty, citing Article 46 of the Vienna Convention on the Law of Treaties.* That article is declaratory of customary international law on the subject.

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* Article 46 is as follows:

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

S. Res. 434 also raises the question of classified agreements. The United States enters into a very small number of such agreements each year, and they are reported to the Senate Committee on Foreign Relations and the House Committee on International Relations, in accordance with the terms of the Case Act (P.L. 92-403). That Act also provides for their continued classification "to be removed only upon due notice from the President." Yet under S. Res. 434, a classified agreement could in effect be declassified through the simple expedient of a Senate resolution designating an executive agreement as a treaty, since the United States does not have classified treaties. The procedure of section 4(a)(1) apparently would thus give to the Congress, and remove from the President, the right to declassify international agreements to which the United States is a party. At the least, until the United States is prepared to adopt classified treaties as an acceptable form of international agreement, such a system would not accord with the Case Act.

S. Res. 434 raises the further question of time limits on the Senate power of designation. How much time does the Senate have to "find" that an executive agreement is a treaty? Suppose that the executive agreement is funded through the normal process once or twice, or perhaps more often. Does the Senate nevertheless still have the right to designate it a treaty for purposes of the next round of funding?

There are other administrative questions of a serious nature. Is S. Res. 434 aimed only at legally binding commitments? Could it be applied to any international exchange that engaged the United States in some kind of political or moral undertaking? The Senate might decide first that a particular arrangement was in fact and in law an executive agreement, and then under section 4(a)(1) designate it a treaty. Depending upon how the Senate decided to apply the resolution, various international undertakings, not meant by the parties to be binding, could be converted into a "treaty," providing it were perceived by the Senate to be "significant" within the meaning of section 2(c).

The administrative problems are particularly difficult in the area of multilateral executive agreements, of which there are many (such as those that provide for U.S. membership in the ILO and GATT). Suppose that a multilateral agreement entered into force, as stipulated in the agreement, upon the signature of twenty parties, of which the United States was one.

Subsequently, however, the Senate designated this agreement a treaty, subject to Senate approval and ratification by the President. Now there are only nineteen parties to the multilateral agreement, and of course it would no longer be in force among any of the parties. Obviously this would greatly complicate the routine administration of multilateral agreements, and raise the most difficult legal and practical questions with respect to vested rights and the maintenance of international rights and obligations.

* * * * * * *

In the view of the Department of State, the legal and practical difficulties posed by the proposed resolution indicate that it would not represent a sound approach to the problem of cooperation between the Congress and the Executive Branch in the negotiation and conclusion of international agreements. As we have stated more than once, we continue to believe that effective and continuing consultation is more likely to achieve the goals shared by both branches than the drastic approach represented by S. Res. 434.

As the Committee is aware, the Department of State's Circular 175 Procedure, in section 721.4, requires consultations with Congress whenever there is a question whether a particular agreement should be concluded as a treaty or as an agreement other than a treaty. The consultations held between the Department of State and the Congress with respect to the recently concluded treaty on defense cooperation with Spain indicates that this process may be carried out to the mutual satisfaction of both branches of the Government.

In addition, section 723.1(e) of the Circular 175 Procedure requires the office or officer responsible for any negotiations to advise the appropriate congressional leaders and committees of the President's intention to negotiate significant new international agreements, to consult concerning such agreements, and to keep Congress informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement.

In the Department's view, there is no better method for meeting the shared responsibilities of the two branches than a process of full and continuous consultation between them. We have made efforts to increase the number and scope of

such consultations, and these efforts will certainly be continued in the months and years ahead. It is our impression that the consultations on the Spanish treaty were satisfactory to the Congress. We are confident that this approach will be acceptable, and we are convinced that it is preferable to the proposed resolution, which is of doubtful constitutionality, and which would impair the capacity of the nation to deal effectively with other states.

Monroe Leigh
Legal Adviser

May 11, 1976

ASSISTANT ATTORNEY GENERAL

Treaty Powers Res B to Resolution original Ken Ass cy.

Department of Justice
Washington, D.C. 20530

JUL 23 1976

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: S. Res. 434

This is in response to your memorandum which asks for our views on S. Res. 434, the Treaty Powers Resolution.

The resolution declares that "any international agreement which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent" (Sec. 2(c)). It provides that the Senate may pass subsequent resolutions which find that such agreements should have been submitted as treaties (Sec. 4(a)(1)). If such a resolution is passed then the Senate will not consider funding the agreement unless it is submitted and approved as a treaty.

It is obvious at the outset that the resolution is based on a false premise. Contrary to what §2(c) asserts, not all international agreements constituting significant political, military or economic commitments to a foreign country are treaties under Art. II, Sec. 2, Cl. 2 of the Constitution. In fact, the great bulk of our commitments to foreign countries are made by executive agreements specifically authorized by statute. See, e.g., the Foreign Assistance Act of 1961, 22 U.S.C. §2151; the International Security Assistance and Arms Control Act of 1976, P.L. 94-329. The Senate, of course, participates in passing such laws. Although such commitments could be submitted as treaties, the Executive is entitled to rely on existing statutory authorization and appropriations where applicable to make executive agreements.

S. Res. 434 is a simple resolution of the Senate and cannot alter existing statute law. This point has been conceded by Sen. Clark, its sponsor, on the Senate floor; and he has introduced a substitute resolution, S. Res. 486, which makes it clear that, except insofar as the Senate's internal procedures are concerned, resolutions adopted under the new procedure would have no effect other than the expression of the "sense of the Senate." 122 Cong. Rec. S 11415-17, July 1, 1976. Thus, where there are already

appropriations and authorizations available for an agreement, neither S. Res. 434, nor S. Res. 486, nor any future resolution adopted under either, purports to negate them.

If there are no appropriations available and a special appropriation is needed for an agreement, then the Senate can always decline to approve it. If it chooses, in addition, to pass a resolution explaining its failure to pass the appropriation by asserting that it feels a treaty should have been written, that is assuredly the Senate's prerogative.

Since the resolution embodies an erroneous premise, concerning the necessity of proceeding by treaty, we believe it should be opposed. It does not, however, appear to be unconstitutional.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

July 15, 1976

MEMORANDUM FOR

The Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attached are the following materials: (1) a copy of S. Res. 434; (2) a memorandum on the bill prepared by the Office of Legislative Counsel in the Senate; and (3) an analysis setting forth the opposition of the Department of State to the proposal.

May I have your views regarding this legislation as soon as practicable. Thank you.

P.W.B.

Philip W. Buchen
Counsel to the President

Attachments

THE WHITE HOUSE

WASHINGTON

July 15, 1976

Dear Senator Clark:

In response to your letter to the President dated June 30 relative to S. Res. 434, I have requested an opinion from the Office of Legal Counsel at the Department of Justice regarding the constitutional issues posed by the legislation.

The issues involved are of great significance, as you indicate, and I want the President to be fully informed before he reaches any conclusion.

As soon as possible, I will write you again on this matter.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

The Honorable Dick Clark
United States Senate
Washington, D. C. 20510

THE WHITE HOUSE

WASHINGTON

July 15, 1976

MEMO FOR: PHIL BUCHEN

FROM: KEN LAZARUS

Attached letter and memorandum are for your signature.

Although it would seem clear that Scalia will also find the proposal to be constitutionally infirm, this strikes me as an appropriate way in which to deal with Senator Clark's request.

Attachments

94TH CONGRESS
2D SESSION

S. RES. 434

IN THE SENATE OF THE UNITED STATES

APRIL 14, 1976

Mr. CLARK submitted the following resolution; which was referred to the Committees on Foreign Relations, Rules and Administration, the Judiciary, Appropriations, and the Budget jointly by unanimous consent

MAY 6, 1976

Previous order vitiated; committees discharged; and ordered held at the desk, by unanimous consent

MAY 6, 1976

By unanimous consent, referred to the Committees on Foreign Relations, Armed Services, the Judiciary, Appropriations, and the Budget with authority for each to report individually

RESOLUTION

Relating to the treaty powers of the Senate.

Resolved, That this resolution may be cited as the "Treaty Powers Resolution".

PURPOSE, FINDINGS, AND DECLARATION

SEC. 2. (a) It is the purpose of this resolution to fulfill the intent of the framers of the Constitution and to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement.

(b) The Senate finds that—

(1) article II, section 2, clause 2, of 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";

(2) the requirement for Senate advice and consent to treaties has in recent years been circumvented by the use of "executive agreements"; and

(3) the Senate may, for its part, refuse to authorize and appropriate funds to implement those international agreements which, in its opinion, constitute treaties and to which the Senate has not given its advice and consent to ratification.

(c) The Senate declares that, under article 2, section 2, clause 2, of the Constitution, any international agreement, which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent.

ADVICE

SEC. 3. It is the sense of the Senate that, in determining whether an international agreement constitutes a treaty under section 2 (c) of this resolution, the President should, prior to and during the negotiation of such agreement, seek the advice of the Committee on Foreign Relations.

CONSENT

SEC. 4. (a) (1) The Senate may, by resolution, find that any international agreement hereafter entered into which has not been submitted to the Senate for its advice and consent constitutes a treaty under section 2(c) of this resolution.

(2) Any such resolution shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5(c) of the War Powers Resolution is privileged under section 7 (a) and (b) of that law.

(b) It shall not be in order to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority to implement any international agreement which the Senate has found, pursuant to subsection (a) of this section, to constitute a treaty under section 2(c) of this resolution unless the Senate has given its advice and consent to ratification of such agreement.

(c) Any (1) committee of the Senate which reports any bill or joint resolution, and (2) committee of conference which submits any conference report to the Senate, authorizing or providing budget authority to implement any such

94TH CONGRESS
2D SESSION

S. RES. 434

RESOLUTION

Relating to the treaty powers of the Senate.

By Mr. CLARK

APRIL 14, 1976

Referred to the Committees on Foreign Relations, Rules and Administration, the Judiciary, Appropriations, and the Budget jointly by unanimous consent

MAY 6, 1976

Previous order vitiated; committees discharged; and ordered held at the desk, by unanimous consent

MAY 6, 1976

By unanimous consent referred to the Committees on Foreign Relations, Armed Services, the Judiciary, Appropriations, and the Budget with authority for each to report individually

4

agreement, shall so indicate in the committee report or joint statement filed therewith, as the case may be.

THE WHITE HOUSE

WASHINGTON

July 13, 1976

MEMORANDUM FOR: KEN LAZARUS

FROM: PHILIP BUCHEN P.

Please examine the attached memorandum and get back to me promptly with your preliminary review and your suggestion for either submitting the issue to Nino or our sending a reply.

Attachment

MEMORANDUM

3941

NATIONAL SECURITY COUNCIL

July 9, 1976

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: Jeanne W. Davis

SUBJECT: Letter from Senator Clark on Treaty Powers

It appears that this issue is more a legal, constitutional matter than a substantive foreign policy matter and that the requested further direct reply might more appropriately come from you than from Brent Scowcroft.

If you agree, we would appreciate an opportunity to concur in your proposed response.

July 2, 1976

Dear Senator:

This will acknowledge receipt of your June 30 letter to the President commenting on the recent legal opinion by the Department of State relative to your resolution relating to treaty powers.

Please be assured I shall call your letter to the attention of the President and the appropriate Presidential advisers at the earliest opportunity. I am certain you will hear further as soon as possible.

With kind regards,

Sincerely,

William T. Kendall
Deputy Assistant
to the President

The Honorable Dick Clark
United States Senate
Washington, D. C. 20510

bcc: w/incoming to Gen. Scowcroft for DIRECT REPLY

WTK:JEB:VO:jlc

DICK CLARK
IOWA

COMMITTEES:
AGRICULTURE AND FORESTRY
FOREIGN RELATIONS
RULES AND ADMINISTRATION
SPECIAL COMMITTEE ON AGING

United States Senate

WASHINGTON, D.C. 20510

June 30, 1976

President Gerald Ford
The White House
Washington, D.C.

Dear Mr. President:

I am writing to convey my concern over two constitutional propositions advanced in a recent legal opinion by the Department of State relative to a Senate Resolution I had introduced regarding treaty powers. (S. Res. 434)

In this opinion, the Department's legal counsel, Monroe Leigh, advances two constitutional objections to my resolution. They are:

(1) That refusal to fund a valid executive agreement would, as it was spelled out in a cover letter by Ambassador Robert J. McCloskey to Chairman John Sparkman, violate "the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement."

(2) That the Senate has no constitutional power to establish this rule of internal procedure.

Mr. President, I believe it is fair to say that these two contentions, taken together, represent one of the broadest assertions of executive power that has yet been made by any administration on the treaty powers issue.

I would submit, Mr. President, that the first claim is patently unsound--that the Congress, even if it disagrees with an executive agreement or considers that agreement beyond the President's authority, must nonetheless provide the funds to implement it.

The second assertion is a flagrant violation of Article I, section 5, clause 2 of the Constitution, which provides that "Each House may determine the Rules of its proceedings..." In an opinion I requested from the Senate's Legislative Counsel, it was found that the pertinent section 4(b)) of the Resolution was "clearly constitutional as an exercise of the rule-making power...

Mr. President, in light of the far-reaching significance of the Department's opinion on these critical issues, I ask your view on whether these two propositions represent the true position of this administration.

Sincerely,

Dick Clark

Dick Clark

DC/bvv

Enclosures

UNITED STATES SENATE
OFFICE OF THE LEGISLATIVE COUNSEL

MEMORANDUM FOR SENATOR CLARK

This memorandum is in response to your letter to Mr. Littell requesting the opinion of this Office as to the constitutionality of section 4 (b) of S. Res. 434 (94th Congress, 2d session) and the comments thereon by Monroe Leigh, Legal Adviser, Department of State.

The Constitution provides that "Each House may determine the Rules of its Proceedings. . . ." Article I, section 5, clause 2. This broad grant of authority is limited only by the specific exceptions set forth in section 5: the requirements respecting a quorum (clause 1), keeping and publishing a journal (clause 3), recording certain votes (clause 3), and adjournment (clause 4). No other exception is provided by the Constitution.

The Supreme Court has, accordingly, construed the rule-making power liberally. In United States v. Ballin, 144 U.S. 1 (1892), the Court upheld the validity of a rule relating to quorums, stating that "the advantages or disadvantages" and "the wisdom or folly" of the rule did not "present any matters for judicial consideration." It continued:

> . . .With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a

DEPARTMENT OF STATE

Washington, D.C. 20520

Dear Mr. Chairman:

The Secretary has asked me to thank you for your letter of April 19 requesting our comments on proposed Senate Resolution 434, relating to the treaty powers of the Senate, and to reply on his behalf.

Please find enclosed a memorandum from the Legal Adviser of the Department of State setting forth the Executive Branch position with respect to S. Res. 434. As discussed in detail in the memorandum, we believe that the proposed resolution contains a number of legal and practical drawbacks which render it deficient within the constitutional and statutory framework of U.S. law, as well as administratively unworkable. The following are the principal objections in summary form.

1. The Constitution vests the power to make treaties in the President, by and with the advice and consent of the Senate. S. Res. 434 would grant to the Senate an aspect of treaty-making which the Constitution does not contemplate.

2. A procedure permitting Senate designation of particular instruments as treaties would appear to conflict with the President's constitutional position as sole negotiator for the nation in international relations.

The Honorable
John J. Sparkman,
Chairman,
Committee on Foreign Relations,
United States Senate.

DEPARTMENT OF STATE

Washington, D.C. 20520

July 29, 1976

Mr. Philip W. Buchen
Counsel to the President
The White House Office
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Buchen:

Pursuant to your telephone conversation with Monroe Leigh this morning, I am enclosing a copy of S. Res. 486 and of Mr. Leigh's statement on the resolution as presented to the Senate Foreign Relations Committee on July 28.

Sincerely yours,

Arthur W. Rovine

Arthur W. Rovine
Assistant Legal Adviser
for Treaty Affairs

Enclosures:
As stated

94TH CONGRESS
2D SESSION

S. RES. 486

IN THE SENATE OF THE UNITED STATES

JULY 1 (legislative day, JUNE 18), 1976

MR. CLARK (for himself, MR. CHURCH, MR. GRAVEL, MR. KENNEDY, and MR. MONDALE) submitted the following resolution; which was referred to the Committee on Foreign Relations and if and when reported the Committees on the Judiciary and Rules and Administration for not to exceed thirty days to consider matters which may be within their jurisdiction, jointly by unanimous consent

RESOLUTION

Relating to the treaty powers of the Senate.

Resolved, That this resolution may be cited as the "Treaty Powers Resolution".

PURPOSE, FINDINGS, AND DECLARATION

SEC. 2. (a) It is the purpose of this resolution to fulfill the intent of the framers of the Constitution and to ensure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement.

(b) The Senate finds that—

(1) article II, section 2, clause 2 of 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";

(2) the requirement for Senate advice and consent to treaties has in recent years been circumvented by the use of "executive agreements"; and

(3) the Senate may, for its part, refuse to authorize and appropriate funds to implement those international agreements which, in its opinion, constitute treaties and to which the Senate has not given its advice and consent to ratification.

(c) It is the sense of the Senate that, under article 2, section 2, clause 2, of the Constitution, any international agreement which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent.

ADVICE

SEC. 3. It is the sense of the Senate that, in determining whether an international agreement constitutes a treaty under section 2 (c) of this resolution, the President should, prior to and during the negotiation of such agreement, seek the advice of the Committee on Foreign Relations.

CONSENT

SEC. 4. (a) (1) Where the Senate, by resolution, expresses its sense that any international agreement hereafter entered into which has not been submitted to the Senate for its advice and consent constitutes a treaty under section 2(c) of this resolution and should be so submitted.

(2) Any such resolution shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5(c) of the War Powers Resolution is privileged under section 7 (a) and (b) of that law.

(b) (1) It shall not be in order to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority to implement any international agreement if the Senate has expressed its sense, pursuant to subsection (a) of this section, that such agreement constitutes a treaty under section 2(c) of this resolution.

(2) This subsection shall not apply if the Senate has given its advice and consent to ratification of such agreement.

(c) Any (1) committee of the Senate which reports any bill or joint resolution, and (2) committee of conference which submits any conference report to the Senate, authorizing or providing budget authority to implement any such

agreement, shall indicate in the committee report or joint statement filed therewith, as the case may be, that budget authority is authorized or provided in such bill, resolution, or conference report.

94TH CONGRESS
2D SESSION

S. RES. 486

RESOLUTION

Relating to the treaty powers of the Senate.

By Mr. CLARK, Mr. CHURCH, Mr. GRAVEL, Mr. KENNEDY, and Mr. MONDALE

JULY 1 (legislative day, JUNE 18), 1976

Referred to the Committee on Foreign Relations and if and when reported the Committees on the Judiciary and Rules and Administration for not to exceed thirty days to consider matters which may be within their jurisdiction, jointly by unanimous consent

STATEMENT BY MONROE LEIGH,
LEGAL ADVISER OF THE DEPARTMENT OF STATE,
BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS
ON S. RES. 486

July 28, 1976

Mr. Chairman, I am grateful for this opportunity to appear before the Committee to consider with you S. Res. 486, the "Treaty Powers Resolution." S. Res. 486 would permit the Senate to express its opinion that particular executive agreements should be or are treaties, and once that opinion is expressed, unless the Senate approves the agreement by a two-thirds majority, a point of order procedure would become applicable permitting any Senator to block the funding for that agreement.

As you know, Mr. Chairman, the Department of State believes that this resolution, even though it would purport to do no more than establish an internal rule of procedure for the Senate, would raise difficult legal and policy questions if adopted.

Our objections to the proposed resolution focus on three problem areas.

First, the resolution, if adopted, would seriously diminish the role of the House of Representatives in authorizing or approving many international agreements. The resolution would claim for the Senate the power to treat an executive agreement as a treaty, irrespective of the prior participation of both Houses in authorizing or approving the agreement.

Second, the resolution, if adopted, would interfere with the President's role as the Nation's negotiator of international agreements with other countries. Implicit in this role is his making an assessment of what type of instrument would best serve in a particular case.

Third, the resolution if adopted, would raise questions with respect to the requirements concerning adoption of legislation.

Let me now discuss each of these problem areas in further detail.

ROLE OF THE HOUSE OF REPRESENTATIVES

Mr. Chairman, in our judgment the proposed S. Res. 486 would, if adopted, constitute a very significant interference with the proper role of the House of Representatives. The House, of course, has a role in the authorization and funding of the vast majority of executive agreements. Under S. Res. 486, however, the Senate could deprive the House of that role whenever it so wished simply by expressing its opinion on the matter.

If for example, a statute authorizes the President to conclude an executive agreement, and the President in good faith concludes an agreement pursuant to the statute, in our view it would frustrate the statutory purpose to permit the Senate to redesignate the agreement as a treaty. Most particularly, the role of the House in the statutory process would be greatly diminished, if not eliminated altogether.

Surely it could not have been the intention of the House when assisting in the passage of a statute authorizing executive agreements to have such an agreement transformed into a treaty. This is important, Mr. Chairman, since approximately 86% of all executive agreements are authorized by statute.

Further, if the House had a particular point of view as to how existing statutory authority for particular agreements should henceforth be shaped, but the Senate wished to assume total control of the matter itself, it could do so simply by designating such agreements as treaties. This could be done for individual agreements or entire classes of agreements concluded pursuant to statutory authority. The role of the House in the process would vanish. It is doubtful, at the least, that the constitutional framework can be stretched this far.

In addition, many existing statutes, such as the Trade Act, the Atomic Energy Act, the Arms Control and Disarmament Act, and others, require that executive agreements concluded thereunder be submitted to both Houses for approval, or the possibility of disapproval. S. Res. 486 would contravene those statutes by once again removing the House from any role. For example, the Senate could simply call a trade agreement a treaty and the House role would immediately vanish. Does the Constitution intend the system to work this way? Did the Senate and the House intend such a system when it subjected such agreements to the approval of both

Houses? I believe the proper answer to both questions is no. I do not believe that either the Senate or the House would wish to establish a precedent under which statutory authorizations or mandates might be so easily overridden or amended. S. Res. 486 would, if adopted, constitute a very serious alteration of the normal legislative process, and in our view, would substantially upset that process as set forth in the Constitution.

Proponents of this resolution have argued that once the Senate has already agreed in a statute that an agreement must be submitted to both Houses for approval, it would be exceedingly unlikely that the Senate would then turn around and call the agreement a treaty. Nevertheless, Senator Clark argued when presenting the first draft of this resolution, "the possibility of such a reversal should not be precluded altogether, for a situation may always arise in which the President exceeds his statutory authority. This resolution," said Senator Clark, "provides the means of proceeding in that event." (Cong. Record, Apr. 14, 1976, p. S5746.)

Indeed, the stated purpose of the resolution, as set forth in Section 2(a), is "to ensure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented" by the Senate without its prior approval.

But who is to determine whether the President has exceeded his statutory authority? Apparently the Senate alone would make that determination. We thus are in a situation in which the Senate and House together have authorized the President to conclude an agreement, the President concludes an agreement, a question is raised whether the President has exceeded his statutory authority, and the Senate alone, without the House, makes the determination. Once again the House is deprived of any role.

I should also add here, Mr. Chairman, that the question whether the President has exceeded his statutory authority is for the courts to determine, not the legislature. In that sense, the proposed S. Res. 486 is also an invasion of the rights of the Judicial Branch.

It is true that the House is not entirely without recourse, but the possibilities in this context are hardly encouraging. Indeed, the most likely House reaction to S. Res. 486 is one of imitation. If the Senate can designate executive agreements as treaties and thereby trigger a point of order procedure for funding, what is to prevent the House from designating treaties by some characterization which would trigger a rule permitting one House member to block the funding for that treaty?

It may of course be argued that the House has no role in the treaty process. But the House could rely upon the same arguments we have heard in support of S. Res. 486.

The House could argue that its designation was not legally binding on anyone, that it was just a simple expression of opinion by the House, and that surely the House is entitled to express its opinion. Once the opinion is expressed, unless the House approved of the treaty (now given some other characterization) by two-thirds, then any single House member could block the funding for the treaty. Thus the House would have a role over treaties never intended by the Constitution, and all on the basis of a simple expression of opinion and a procedure suggested to them by the Senate. The House procedure might simply require that the House first express its opinion that the treaty was very important and should have the assent of both Houses. Then unless the House approved the treaty by two-thirds, the point of order procedure would apply.

Mr. Chairman, in my view, this is playing games with the Constitution - such a House procedure would be equally objectionable as S. Res. 486, since it would interfere with the proper role of the Senate.

House action of this kind also raises a great likelihood of conflict between the two Houses and substantial confusion in the process of international agreement making. Suppose, for example, that the Administration concludes an important new agreement on military bases. The Senate argues that unless the agreement is submitted as a treaty, the Senate will designate it a treaty and apply its new point of order procedure. The House argues that unless the

agreement is submitted as an executive agreement subject to joint approval, the House point of order procedure will apply. Mr. Chairman, this is not a rational procedure conducive to the effective conduct of U.S. foreign policy or the effective functioning of the Government. It is impasse.

ROLE OF THE PRESIDENT

Mr. Chairman, we believe the proposed resolution would also interfere with the accepted role of the President in the process of international agreement making.

First, and most generally, as we noted in our memorandum on S. Res. 434, the proposed resolution assumes that the Constitution authorizes the Senate to make designations of particular agreements as treaties. Yet the Constitution provides, in Article II, section 2, that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senator present concur." The power, by and with the concurrence of the Senate, to "make" treaties is specifically granted to the President, and is not given to the Senate. The proposed resolution, however, would appear to give the Senate at least some part of that power. In our view, this can be accomplished only by means of a constitutional amendment, and not by legislation or a sense-of-the-Senate resolution.

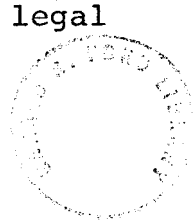
It may be recalled that the Constitutional Convention in Philadelphia did consider whether the power to "make" treaties should be vested in the Senate, rather than the President. This idea was rejected. Farrand points out that "The Committee had recommended that the power of appointment and the making of treaties be taken from the Senate and vested in the President 'by and with the advice and consent of the Senate.' With surprising unanimity and surprisingly little debate, these important changes were agreed to." (M. Farrand, The Framing of the Constitution of the United States, p. 171 (1913)). Professor Henkin states that the Founding Fathers were "eager to abandon treaty-making by Congress which, under the Articles of Confederation, appointed negotiators, wrote their instructions, followed their progress, approved or rejected their product.... And so, the Constitution gave the power to make treaties to the President but only with the advice and consent of two-thirds of the Senators present." (L. Henkin, Foreign Affairs and the Constitution, p. 129 (1972)).

The proposed resolution would, if adopted and implemented, constitute a step back towards the abandoned system of treaty-making of the Articles of Confederation. It is true that Senate designation of an agreement as a treaty, followed by Senate approval, would leave the President free to ratify the treaty or not as he wished; at the same time it would claim for the Senate an aspect of treaty-making which our constitutional structure does not contemplate.

In our view, Mr. Chairman, the proposed resolution also raises constitutional questions in respect of executive agreements concluded solely upon the authority of the Constitution. While the vast majority of executive agreements are authorized by statute or treaty, there are some agreements that are concluded solely under the President's independent constitutional authority. The Congress may not constitutionally redesignate such agreements as treaties. I would like at this point to submit for the record a detailed memorandum on this subject that I sent to Senator Abourezk last year at his request. It sets forth the nature, scope, and illustrative examples of agreements authorized solely by the Constitution.

One of the clearest examples, to take but one illustration, is a cease-fire or armistice agreement which, of course, must be timed precisely to the hour and minute. Such agreements may be of profound significance to the nation, but there is no constitutionally appropriate method pursuant to which the Senate may designate them as treaties.

Further, Mr. Chairman, we believe the proposed resolution would also interfere with the accepted negotiating powers of the President. As we noted in our memorandum on S. Res. 434, the question whether a legally authorized international agreement should be a treaty or an executive agreement is one of great difficulty, and there are no hard and fast legal rules distinguishing the two forms.



We noted that whenever the President is legally authorized to conclude an international agreement, whether his authorization is derived from a statute, a treaty, or the Constitution, he has to make a choice between treaty or executive agreement. There are necessarily many legal and political variables he must take into account in making that choice. The President, as negotiator for the nation, must consider all the variables, including political considerations which necessarily involve larger issues of our relationship with the foreign nation involved. What degree of formality to give an agreement, for example, touches directly on foreign policy questions that form part of the negotating process. To permit the Senate to designate what shall be a treaty is to remove these political issues from the province of the Executive Branch and to give them to a House of the Congress not immediately involved in the negotiating process.

Congressional experts have agreed with this view. Senator Sam Ervin's Subcommittee on the Separation of Powers of the Senate Judiciary Committee, after lengthy hearings in 1972 on this subject, wrote the following:

> American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreement. First in order of importance is the treaty, an international bilateral or multilateral compact that requires consent by a two-thirds vote of the Senate prior to ratification.... Next is the congressional-executive agreement, entered into pursuant to statute or to a preexisting treaty. Finally, there

> is the 'pure' or 'true' executive agreement, negotiated by the Executive entirely on his authority as a constituent department of government.
>
> It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialog. (Italics added.)
>
> (Congressional Oversight of Executive Agreements, Committee Print, 93d Cong., 1st Sess., p. 6.)

It has been stated in these hearings that the Executive Branch has claimed a totally unfettered right to choose between treaty and executive agreement. Mr. Chairman, we have never claimed that right. Our position, as set forth in memorandum previously submitted to this Committee, is that where an agreement is properly authorized by law, whether by statute, treaty, or the Constitution, then the President must make a choice between treaty or executive agreement. We said that even where an agreement is authorized by law, the President's choice is not completely unfettered since he is expected to adhere to the customs and practices which have developed since the conclusion of the first executive agreements in the early years of the Republic.

We noted that there is in our constitutional practice a presumption that agreements of exceptional national importance will be treaties, although long years of practice have shown that many vitally important agreements were not treaties. Nevertheless, if there is no prior authority for an agreement, or if the agreement is of particular significance, then normally treaties are required. Subject

matters within the competence of the states of the Union, and where an agreement will affect state law, normally require treaties, even though the Supreme Court has twice held that executive agreements may override inconsistent state law. U.S. v. Belmont, 301 U.S. 324 (1937), and U.S. v. Pink, 315 U.S. 203 (1942).

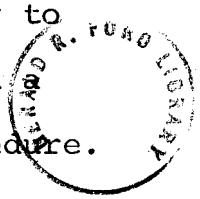
May I add here, Mr. Chairman, that the wording of Section 2(c) of S. Res. 486, in which the Senate would present its opinion that any agreement involving a "significant political military, or economic commitment to a foreign country constitutes a treaty" is not consistent with many statutes authorizing important agreements, such as the Trade Act, the Atomic Energy Act, and the Arms Control and Disarmament Act, among others. In addition, section 2(c) of S. Res. 486 would appear to be inconsistent with the 1969 National Commitments Resolution, which permits "national commitments" of the United States "by means of a treaty, statute, or concurrent resolution of both Houses of Congress." The 1969 Resolution is perfectly clear that a treaty is not required for "national commitments."

In any event, we believe that Senator Ervin's Separation of Powers Subcommittee summed it up best in its statement that the Executive has the "power to choose the instrument of international dialog." Within the limits I have specified, I believe that statement is correct.

FUNDING LEGISLATION AND THE POINT OF ORDER PROCEDURE

Before presenting our view on this matter, Mr. Chairman, I wish to emphasize that we are certainly not challenging the Senate right to refuse funding for international agreements. The Senate and the House each have the power to withhold funding from any international agreement, and obviously our remarks should not be taken as casting any doubt whatever on the congressional power of the purse. Our objections to S. Res. 486, and to 434 before it, are based only on the particular method chosen to exercise the power of the purse, and not the power itself. The normal method for refusing funds is to refuse to pass the required authorization or appropriation measure. If a majority of either House does not approve of the requisite authorization or appropriation bill, that is the end of the matter - there is no funding.

But the normal majority rule does not apply under S. Res. 486, and that is one of the basic problems. Under S. Res. 486 if the Senate gives its non-binding opinion that an agreement should be a treaty, and if the Senate does not approve the agreement by two-thirds, then the point of order procedure applies, and any Senator can block the funding measure. It was argued that this point or order procedure is subject to three majorities - a majority to pass the original resolution, a majority to give its opinion that the agreement is a treaty, and a possible majority to uphold the point of order procedure.



But if the proposed procedure for funding is really subject to majority rule, why have this unusual resolution at all? Why not continue with the normal and constitutionally mandated procedure under which all legislation, including funding measures, are subject to the normal majority procedure? The entire purpose of a point of order procedure is to permit fewer than a majority, even one Senator, to block a proceeding. It is quite misleading, in our view, to give the impression that S. Res. 486 is simply one more application of the normal majority rule.

The resolution has been described as resting on the rulemaking power of the Senate. Unquestionably the two Houses of Congress have the right and power to establish their own internal rules of procedure. But I believe we are all agreed that internal rules of the Senate and House must be consistent with the Constitution. The Supreme Court has said that each House "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." United States v. Ballin, 144 U.S. 1 (1892). There are other cases as well that hold that internal rules of the Senate and House must be consistent with the Constitution. See for example, Powell v. McCormack, 395 U.S. 486 (1969).

I believe we are also agreed that the Constitution requires that legislation - all legislation, includin

funding measures - receive a simple majority for approval. While the Constitution does not explicitly state that voting is by a simple majority, it implies as much in Article I, §3, which provides that "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." Jefferson's manual states that "The voice of the majority decides; for the lex majoris partis is the law of all councils, elections, etc., where not otherwise expressly provided." (At p. 246.) The Constitution does, of course, provide for special majorities, as the two-thirds rule for approval of treaties in the Senate, and the necessity for a two-thirds override of a President's veto. But the normal constitutional requirement is for decision by a simple majority - not two-thirds, and certainly not 100 percent. Thus it would be clear to all that a simple Senate rule requiring that funding legislation be approved by all Senators (a 100% requirement) would be unconstitutional.

What is the difference between such a rule and the rule proposed in S. Res. 486? The only difference is that in S. Res. 486 the Senate must first give its opinion that an executive agreement is or should be a treaty, and then, unless the Senate approves the agreement now called a treaty by two-thirds, the point of order procedure applies and any Senator can block the funding for this agreement. In brief, a 100% rule is established on the basis of the Senate's opinion, which is not binding on anyone, that a particular executive agreement should have been a treaty.

In my view, Mr. Chairman, the Senate cannot change the constitutional rule of a simple majority into a rule requiring 100% simply on the basis of a non-binding Senate opinion.

In summary, Mr. Chairman, we believe that the proposed resolution raises legal and policy questions because (1) the resolution would permit an unacceptable interference with the role of the House of Representatives; (2) the resolution would interfere with the President's position as negotiator for the nation; and (3) the rule of procedure it would establish appears to be inconsistent with the requirements for adoption of legislation.

TECHNICAL DIFFICULTIES

Mr. Chairman, there are other problems as well with the proposed resolution. Since it leaves any executive agreement upon which it may operate in full force and effect, it leaves standing obligations of the United States under international law. Yet if the funding is cut off, the obligation cannot be performed, and the United States is in the position of having to violate its international legal obligations on the basis of a sense-of-the-Senate resolution. In 1900 the Supreme Court of the United States, in The Paquete Habana, 1975 U.S. 677, said that "International law is part of our law." Mr. Chairman, it is difficult enough for the Government when a duly passed statute places the United States in violation of its international legal obligations. To be put in that position

on the basis of a sense-of-the-Senate resolution would appear to be unjustified even in domestic law and detrimental to the conduct of U.S. foreign policy.

There are other serious domestic law difficulties and ambiguities with the proposed S. Res. 486. For example, there is the obvious question of time limits. How much time does the Senate have to give its opinion that an executive agreement is a treaty? Suppose that the executive agreement in question is funded through the normal process once or twice, or perhaps more often. Does the Senate nevertheless still have the right to designate it a treaty for purposes of the next round of funding?

There is also the question whether the resolution is aimed only at legally binding commitments. Could S. Res. 486 be applied to any international exchange that engaged the United States in some kind of political or moral undertaking? The Senate might decide first that a particular arrangement was in fact and in law an agreement, and then designate it a treaty. Such action by the Senate would create confusion in the minds of the foreign recipients of such political and moral undertakings and could indicate a degree of commitment beyond that intended by the President or his representatives. In truth such an action by the Senate in the circumstances just described comes perilously close to usurping the President's constitutional prerogative in negotiation.

We also noted in our memorandum on S. Res. 434 the problem of classified agreements. The small number of such agreements concluded by the United States each year are reported to the Committee and to the House International Relations Committee pursuant to the Case Act, which provides for their continued classification "to be removed only upon due notice from the President." (P.L. 92-403). Yet under S. Res. 486 a classified agreement could in effect be declassified through the simple expedient of a Senate opinion that the agreement is a treaty. The United States does not have classified treaties, and the resolution would apparently give to the Congress and remove from the President the right to declassify international agreements to which the United States is a party. At the least, until the United States is prepared to adopt classified treaties as an acceptable form of international agreement, S. Res. 486 would not accord with the Case Act.

CONCLUSION

Mr. Chairman, as noted in our memorandum on S. Res. 434, we continue to believe that effective and continuing consultation between the two branches is more likely to achieve the goals we share than the drastic approach represented by this proposed resolution. There are admitted difficulties with consultation. With whom, how often, on what issues - are complicated questions. But consultation on agreements of significance is already required by the Department of State's Circular 175 Procedure. Perhaps

we should be engaged in the development of further mutually agreed details on how that consultation should work. It can be done. Certainly the consultations with respect to the recently concluded treaty on defense cooperation with Spain indicates that this process may be carried out to the mutual satisfaction of both branches.

There are other approaches on this matter that should be explored. For example, we might examine the possibility of having the several Assistant Secretaries of State provide the relevant committees with regular and detailed briefings on developments in their areas of responsibility. These briefings could certainly include reporting in advance on any contemplated international agreements of significance, and could lead to consultations whether particular agreements should be in treaty form. This idea was originally recommended by Secretary of State Rogers in 1971 and repeated by the Legal Adviser in 1972 and 1975.

Thank you very much for the opportunity to present this statement to you today. I appreciate the chance to take part in these hearings, and I should be most happy to attempt to answer any questions you might have.

DEPARTMENT OF STATE
THE LEGAL ADVISER

March 12, 1976

TO : KEY DEPARTMENT PERSONNEL

FROM : L - Monroe Leigh

SUBJECT: Case Act Procedures and Department of State Criteria for Deciding What Constitutes an International Agreement

On February 20, 1976, the Comptroller General issued a Report on U.S. Agreements with the Republic of Korea which stated that certain agencies of the Government have not been submitting to the State Department or the Congress all agency-level agreements which they have concluded. The Report states that some agencies have apparently interpreted agreements concluded by agency personnel or agreements of a subordinate or implementing character to be outside the reporting requirements of the Case Act (P.L. 92-403, 1 U.S.C. 112b). The Case Act requires that all international agreements other than treaties be submitted by the Department of State to the Congress no later than 60 days after their entry into force.

The GAO Report called for "clarification of the reporting requirements and improved controls over the reporting of agreements." The Report listed 34 Korean agreements concluded after passage of the Case Act but never submitted by the agencies involved to the Department of State for transmittal to the Congress.

This Report by the GAO, in addition to legislative proposals now before the Congress calling for Congressional authority to disapprove executive agreements, has raised the question of how the Department of State Legal Adviser decides what constitutes an international agreement within the meaning of the Case Act and of

the law requiring publication of international agreements (1 U.S.C. 112a).

The following discussion should be brought immediately to the attention of all personnel with responsibilities for the negotiation and conclusion of international agreements, whether agency-level arrangements, implementing or operating agreements, or government level agreements.

A. It is essential that all international agreements concluded by any officer or representative of the U.S. Government be transmitted to the Assistant Legal Adviser for Treaty Affairs no later than 20 days after entry into force. Most agreements enter into force upon signature. The 20-day limit must be met if the Department is to meet its obligations to process and transmit the agreements to Congress no later than 60 days after entry into force in accordance with the Case Act.

B. Whenever a question arises whether any document or set of documents, including an exchange of diplomatic notes or of correspondence, constitutes an international agreement within the meaning of the Case Act, the documents must be sent for decision to the Assistant Legal Adviser for Treaty Affairs. See also 11 FAM 723.6 and 723.7.

C. The following statement is designed to provide basic guidance with respect to the criteria applied by the Legal Adviser in deciding what constitutes an international agreement. While difficult judgments will have to be made in many cases, it is hoped that the principles set forth below will permit officers in the field to focus on the right questions, and to know when there is an issue for which further guidance from the Department should be sought.

For purposes of implementing legal requirements with respect to publication of international agreements and transmittal of international agreements to Congress, the Legal Adviser applies the following criteria in deciding what constitutes an international agreement:

1. Intention of the parties to be bound in international law;
2. Significance of the arrangement;
3. Requisite specificity, including objective criteria for determining enforceability;
4. The necessity for two or more parties to the arrangement;
5. Form.

1. Intention of the parties to be bound in international law.

The central requirement is that the parties intend their undertaking to be of legal, and not merely political or personal, effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements. An example is the Final Act of the Helsinki Conference on Cooperation and Security in Europe.

In addition, the agreement must be governed by international law. Most instruments are silent as to governing law, but the intent is normally to seek guidance from rules of international law when questions arise with respect to interpretation or application. However, if the agreement specifies another legal system as entirely governing interpretation or application, we do not consider the arrangement to be a true international agreement. An example of the latter is a foreign military sales contract governed in its entirety by the law of the District of Columbia.

2. Significance of the arrangement.

It is our interpretation of sections 112a and 112b that minor or trivial undertakings, even if couched in legal language and form, do not constitute international agreements. Significance of the obligations undertaken is cited in the House Report on the Case Act (House Rept. 92-1301) as a relevant variable in deciding whether a particular document is an international agreement under the Act. Senator Case himself excluded "trivia" from the coverage of the Act (Hearings on S. 596, October 21, 1971, p. 65).

We have not developed detailed guidelines to assist in deciding what level of significance must be reached before a particular arrangement becomes an international agreement. This must remain a matter of judgment, taking into account the entire context of the particular transaction. It is frequently a matter of degree. For example, a promise to sell one map to a foreign nation is not an international agreement; a promise to sell one million maps probably is an international agreement. At what point between one and one million the transaction turned into an agreement is difficult to say.

The attached letter from Acting Secretary of State Kenneth Rush in September, 1973, to all Government departments and agencies addresses itself to this problem. It requires agencies to transmit to the Department for possible transmittal to the Congress "any agreements of political significance, any that involve a substantial grant of funds, any involving loans by

the United States or credits payable to the United States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment."

3. Requisite specificity, including objective criteria for determining enforceability.

International agreements require a certain precision and specificity setting forth the legally binding undertakings of the parties. Many international diplomatic undertakings are couched in legal terms, but are unenforceable promises because there are no objective criteria for determining enforceability of such undertakings. For example, a promise "to help develop a more viable world economic system" lacks the specificity essential to constitute a legally binding international agreement. At the same time, undertakings as general as those of Articles 55 and 56 of the U.N. Charter have been held to create internationally binding obligations (though not self-executing ones).

4. The necessity for two or more parties to the arrangement.

While unilateral commitments on occasion may be legally binding and may be significant in international relations, they do not constitute international agreements. For example, a promise by the President to send money to Country Y to help earthquake victims, but without any obligation whatever on the part of Country Y, would be a gift and not an international agreement. It might be an important undertaking, but not all undertakings in international relations are in the form of treaties or executive agreements. There may be a difficult question whether a particular undertaking is truly unilateral in nature, or is part of a larger bilateral or multilateral set of undertakings. Parallel "unilateral" undertakings by two or more states may constitute an international agreement.

5. Form.

While form as such is not normally an important factor in the law of treaties and international agreements, it does deserve some weight. Documents which do not follow the customary form for international agreements, as to matters such as style, final clauses, signatures, entry into force dates, etc. may or may not be international agreements under the law. Failure to use the customary form may on occasion constitute evidence of

a lack of intent to be legally bound by the arrangement. On the other hand, if the general content and context reveals an intention to enter into a legally binding relationship, the lack of proper form will not be decisive.

Two types of international arrangements which frequently cause difficulty in this context are agency-to-agency agreements and implementing agreements.

a. Agency-to-Agency Agreements.

Despite variations in prior practice, it is currently our position that agency level agreements are international agreements for purposes of publication and transmittal to the Congress if they meet the above criteria. The fact that an agreement is signed by a particular department or agency of the United States Government is not determinative. Agencies can and do bind the U.S. Government in international law, and it is questionable whether any Government agency has a separate legal personality. What is important is the substance of the agreement. This is of particular current significance since many departments and agencies are now signing international agreements in their own name. The Rush letter was designed to ensure that the Department is made aware of these agreements in a timely fashion and is placed in a position to transmit them to the Congress, if in its view it is required to do so by the Case Act.

b. Implementing Agreements.

Implementing agreements present still more complicated problems. Assuming that an implementing agreement meets the criteria specified above, the question then becomes how precisely it is anticipated and identified in the underlying agreement it is designed to implement. For example, suppose the underlying agreement calls for the sale by the United States of 1000 tractors, and a subsequent implementing agreement requires a first installment on this obligation by the sale of 100 tractors of the Brand X variety. In that case, the implementing agreement, is sufficiently identified in the underlying agreement, and would not be subject to the requirements of sections 112a and 112b. However, if the underlying agreement is general in nature, and the implementing agreement meets the specified criteria, it might well be subject to sections 112a and 112b. For example, if the "umbrella" agreement calls for the conclusion of "agreements for agricultural assistance," but without further specificity, then a particular agricultural assistance agreement subsequently concluded in "implementation" of that obligation, provided it meets the specified criteria, would constitute an international agreement independent of the "umbrella" agreement. It would be an "implementing agreement," but nevertheless subject to publication and Case Act requirements.

D. All officers who have not done so should familiarize themselves with the provisions of the Circular 175 Procedure, which sets forth detailed guidelines and information on Department procedures in the negotiation, signature, publication, and registration of treaties and other international agreements of the United States. The Circular 175 Procedure is found at Volume 11 of the Foreign Affairs Manual, Section 700.

Enclosures:
1. The Case Act
2. Rush letter

Public Law 92-403
92nd Congress, S. 596
August 22, 1972

An Act

To require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 1, United States Code, is amended by inserting after section 112a the following new section:

U. S. international agreements other than treaties. Transmittal to Congress. 64 Stat. 980.

"§ 112b. United States international agreements; transmission to Congress

"The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

SEC. 2. The analysis of chapter 2 of title 1, United States Code, is amended by inserting immediately between items 112a and 113 the following:

"112b. United States international agreement; transmission to Congress."

Approved August 22, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-1301 (Comm. on Foreign Affairs).
SENATE REPORT No. 92-591 (Comm. on Foreign Relations).
CONGRESSIONAL RECORD, Vol. 118 (1972):
Feb. 16, considered and passed Senate.
Aug. 14, considered and passed House.

GPO 83-139

DEPARTMENT OF STATE
WASHINGTON

September 6, 1973

Dear

I want to invite your personal attention to the problem of ensuring that all international agreements to which the United States becomes a party are cleared, prior to conclusion, with the Department of State and are submitted, after conclusion, by the Department of State to the Congress, as required by the Case Act (Public Law 92-403; 1 USC 112b). Although cooperation by the various executive departments and agencies has, in general, been most gratifying, there remain difficulties, particularly in achieving mutual understanding of the types of agreements covered by the applicable law and in assuring sufficient awareness by officers and employees of the implications for the operations of their department or agency. It may well be that a combination of new regulations and broad educational efforts within each affected department and agency will suffice to eliminate these difficulties, and I hope you will ensure that the necessary action is taken within your jurisdiction.

A recent Report by the Comptroller General, "U. S. Agreements with and Assistance to Free World Forces in Southeast Asia Show Need for Improved Reporting," B-159451, April 24, 1973, has recommended that the Congress consider legislation requiring that the Secretary of State submit annually to the Congress a list of all such subordinate and implementing agreements made involving substantial amounts of U. S. funds

or other tangible assistance, together with estimates of the amounts of such funds or other assistance. I believe that such legislation should be unnecessary. Certainly it is preferable to bring about full co-operation through our own efforts.

On August 15, 1973 the Department of State published in the Federal Register a Public Notice inviting comment on a proposed revision of its Circular 175 Procedure, and related procedures, regarding the authorization, negotiation and conclusion of treaties and other international agreements (38 Fed. Reg. 22084). We would appreciate the opportunity to discuss with you any particular questions or problems that you may have regarding the application of that procedure, which we hope will provide a satisfactory basis for instructions within each of the departments and agencies concerned.

In this connection, I would also note that neither the form in which an agreement is expressed nor the fact that an agreement is of a subordinate or implementing character in itself removes the agreement from the requirements of the Case Act or of the law regarding the publication of international agreements (1 U.S.C. 112a). The determination whether an instrument or a series of instruments constitutes an international agreement that is required to be transmitted to the Congress and to be published is based upon the substance of that agreement, not upon its form or its character as a principal agreement or as a subordinate or implementing agreement.

As the subject matter of our international agreements is, in general, as broad as the scope of our foreign relations, it is not practicable to enumerate every type of agreement which the Department of State should receive from the other executive departments and agencies. However, it seems clear that texts should be transmitted to the Department of State of the agreements referred to in the recommendations of the Comptroller General and of any agreements of political significance, any that involve a substantial grant of funds, any involving loans by the United States or credits payable to the United

States, any that constitute a commitment of funds that extends beyond a fiscal year or would be a basis for requesting new appropriations, and any that involve continuing or substantial cooperation in the conduct of a particular program or activity, such as scientific, technical, or other cooperation, including the exchange or receipt of information and its treatment. In general, the instruments transmitted to the Congress pursuant to the Case Act, and those published (other than those classified under E. O. 11652), should reflect the full extent of obligations undertaken by the United States and of rights to which it is entitled pursuant to instruments executed on its behalf.

The fact that an agency reports fully on its activities to a given Committee or Committees of Congress, including a discussion of agreements it has entered into, does not exempt the agreements concluded by such agency from transmission to the Congress by the Department of State under the Case Act.

In the event of a question whether any particular document or series of documents constitutes an international agreement, inquiry may be made of the Assistant Legal Adviser for Treaty Affairs in the Department of State, telephone 632-1074. We look forward to your continued cooperation in ensuring compliance with these requirements.

Sincerely,

Kenneth Rush

Kenneth Rush
Acting Secretary

THE WHITE HOUSE
WASHINGTON

Eva:

Further information has been requested from M. Leigh re S. Res. 434. Ken said there was no urgency about it now. Will reply to Senator Clark when we receive State's reply back.

dm

August 13, 1976

MEMORANDUM FOR

The Honorable Monroe Leigh
Legal Adviser
Department of State

Attached is a copy of a memorandum prepared by the Office of Legal Counsel at Justice relative to S. Res. 434.

Counsel's Office has already reviewed your memorandum on the same subject, which concluded that the resolution contains a number of practical and legal difficulties which render it administratively unworkable and legally deficient within both the constitutional and statutory framework of U. S. law. Would you care to comment further in light of Mr. Scalia's conclusions?

Thank you.

/s/

Kenneth A. Lazarus
Associate Counsel
to the President

Attachment

Department of Justice
Washington, D.C. 20530

JUL 23 1976

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: S. Res. 434

This is in response to your memorandum which asks for our views on S. Res. 434, the Treaty Powers Resolution.

The resolution declares that "any international agreement which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent" (Sec. 2(c)). It provides that the Senate may pass subsequent resolutions which find that such agreements should have been submitted as treaties (Sec. 4(a)(1)). If such a resolution is passed then the Senate will not consider funding the agreement unless it is submitted and approved as a treaty.

It is obvious at the outset that the resolution is based on a false premise. Contrary to what §2(c) asserts, not all international agreements constituting significant political, military or economic commitments to a foreign country are treaties under Art. II, Sec. 2, Cl. 2 of the Constitution. In fact, the great bulk of our commitments to foreign countries are made by executive agreements specifically authorized by statute. See, e.g., the Foreign Assistance Act of 1961, 22 U.S.C. §2151; the International Security Assistance and Arms Control Act of 1976, P.L. 94-329. The Senate, of course, participates in passing such laws. Although such commitments could be submitted as treaties, the Executive is entitled to rely on existing statutory authorization and appropriations where applicable to make executive agreements.

S. Res. 434 is a simple resolution of the Senate and cannot alter existing statute law. This point has been conceded by Sen. Clark, its sponsor, on the Senate floor; and he has introduced a substitute resolution, S. Res. 486, which makes it clear that, except insofar as the Senate's internal procedures are concerned, resolutions adopted under the new procedure would have no effect other than the expression of the "sense of the Senate." 122 Cong. Rec. S 11415-17, July 1, 1976. Thus, where there are already

appropriations and authorizations available for an agreement, neither S. Res. 434, nor S. Res. 486, nor any future resolution adopted under either, purports to negate them.

If there are no appropriations available and a special appropriation is needed for an agreement, then the Senate can always decline to approve it. If it chooses, in addition, to pass a resolution explaining its failure to pass the appropriation by asserting that it feels a treaty should have been written, that is assuredly the Senate's prerogative.

Since the resolution embodies an erroneous premise, concerning the necessity of proceeding by treaty, we believe it should be opposed. It does not, however, appear to be unconstitutional.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel