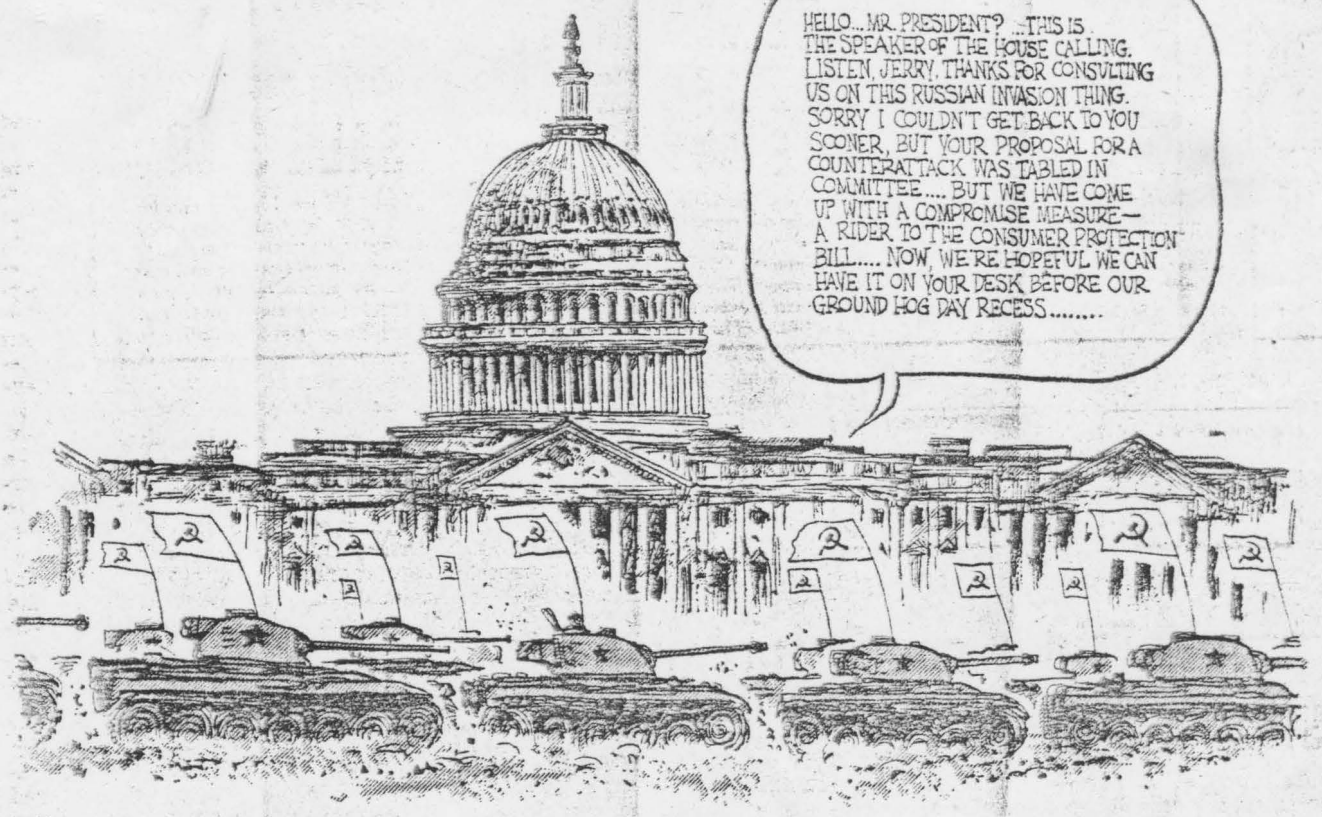
The original documents are located in Box 12, folder "Executive Agreements (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.



By MacNelly for the Richmond News Leader

THE WHITE HOUSE
WASHINGTON

Philip Barringer	DOD
Ben Forman	DOD
Antonin Scalia	Justice
Jack Goldklang	Justice
Monroe Leigh	State
Arthur Rovina	State
Les Janka	
Bob Wolthius	

U.K. agreement

John Foster Dulles position in 1951

Department of Justice

STATEMENT OF RALPH E. ERICKSON

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

before the

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on

EXECUTIVE AGREEMENTS

and

S. 3475

May 19, 1972

Mr. Chairman, Members of this Subcommittee:

I appreciate this opportunity to appear before you to discuss the legal aspects of "executive-legislative relations in foreign affairs" with particular reference to executive agreements.

When S. 3475, which proposes a new role for Congress in connection with executive agreements, was introduced Senator Ervin expressed the concern that the Founding Fathers' concept of shared powers in the area of international agreements had been substantially eroded by the use of executive agreements. (118 Cong. Rec. S 5787). In light of that expressed concern, I would like today to provide the Committee with some general observations regarding international agreements together with our views on the legal aspects of executive agreements. Thereafter I will address myself specifically to S.3475, which we oppose as not being constitutional.

I.

It will be useful I believe, to begin with a brief mention of the treaty-making power. In recent years statements have been made by members of the Senate as to the intentions of the Framers concerning treaties. These statements deserve analysis. For example, in the debate over agreements made with Portugal and Bahrein, Senator Case asserted: "The Constitution does not define the term 'treaty.' Yet, it seems clear that the Founding Fathers intended any agreement with a foreign country on a matter of substance to be embraced within the term." 118 Cong. Rec. S 3286, March 3, 1972.

We can find no evidence for Senator Case's contention if it is taken to mean that all international agreements on matters of substance must take the form of a treaty. The available records of the Constitutional Convention do not indicate that any question was raised concerning the scope of the term "treaty," or that a treaty was to be the only means for concluding agreements on matters of substance. Although Senator Ervin suggested when S. 3475

was introduced that the treaty is the only kind of international instrument mentioned in the Constitution (118 Cong. Rec. S 5787), an examination of its text does not support this. In the vocabulary of the Framers, the term "treaty" did not cover every type of arrangement with a foreign nation. Article I, § 10 carefully distinguishes between a "Treaty, Alliance and Confederation," which the states are absolutely prohibited from entering, and an "Agreement or Compact * * * with a foreign Power" which the states may make provided they obtain the consent of Congress. The draftsmen of the Constitution thus made a clear distinction between treaties and agreements. Chief Justice Taney stated that difference as follows, quoting from Vattel, a scholar on international law well known to American lawyers during the period of the Revolution:

> "'A treaty * * * is a compact made with the view to the public welfare, by the superior power, either for perpetuity, or for a considerable time.' * * * * "
>
> 'The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act, and not by repeated acts.

> These compacts are perfected in their execution, once for all; treaties receive a successive execution, whose duration equals that of the treaty.'" Holmes v. Jennison, 39 U.S. 540, 572 (1840).

In some ways the best evidence of the Framers' intention not to limit international agreements to treaties lies in the usage of executive agreements in the early days of the Republic. The Post Office Act of 1792 authorized the Postmaster General to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices." 1 Stat. 232, 239. These were plainly not treaties in the constitutional sense. If they had been, congressional authorization would have been of no avail to the President in the absence of the advice and consent of two-thirds of the Senators present. It is also worthy of note that the courts have rejected the contention that executive agreements authorized by statute violate the Constitution because they impinge on the treaty power. See Star-Kist Foods, Inc. v. United States, 169 F. Supp. 268 (Cust. Ct. 1958), and cases collected therein. In Field v. Clark, 143 U.S. 649 (1892),

the Supreme Court upheld an act permitting the President to change duties on certain imports. The first Mr. Justice Harlan noted the well-established practice of granting discretion of this kind to the executive in matters relating to trade with other nations, when he stated:

> "* * * the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land." 143 U.S. at 691.

It has been said by an eminent authority that between 1789 and 1939 over 1300 international agreements based on various types of authority were consummated without the participation of the Senate. E. Corwin, The President: Office and Powers 422 (1957). It therefore seems plain to me that there is no validity at all to the claim that the executive agreement as a method of international dealings is beyond the powers authorized by the Constitution.

Turning then to the permissible uses of the executive agreement, it is the firmly established policy of the Executive branch that executive agreements should not be

used when the subject matter should be covered by a treaty; there must be a constitutional source of authority for the agreement. As stated in the Foreign Affairs Manual of the Department of State, the executive agreement form is only used for agreements which are made (a) pursuant to or in accordance with existing legislation or a treaty; (b) subject to congressional approval or implementation; or (c) under and in accordance with the President's constitutional power. See 11 Foreign Affairs Manual 722; 14 M. Whiteman, Digest of International Law 195 (1970).

Basically, the making of executive agreements involves a procedure which is supervised primarily by the Department of State. In this connection I should inform the Committee that it is not a regular practice for the Department of Justice to be consulted in the making of such agreements, although there are occasions when we are called upon to discuss specific related legal questions.

Questions of separation of powers are not likely to be raised in Congress concerning agreements based on treaties

or statutes since Congress or the Senate alone has, by express delegation, empowered the Executive to make them. Apparently the issue of authority tends to arise most often where the Constitution or implied constitutional powers are the source of the President's authority. An executive agreement made by the United States, which does not rely for authority on a treaty or act of Congress, may deal with any matter that under the Constitution falls within the independent powers of the President. Restatement (Second), Foreign Relations Law of the United States, § 121 (1965); 14 M. Whiteman, Digest of International Law 195 (1970).

The independent authority of the President to make executive agreements is based on a number of express constitutional provisions including the following:

> "The executive Power shall be vested in a President of the United States of America." Art. II, § 1;
>
> "The President shall be Commander in Chief of the Army and Navy * * *." Art. II, § 2; and

"[H]e shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed * * *." Art. II, § 3.

The President also derives constitutional power in his role as Chief Executive to make executive agreements based on attributes of the sovereignty of the United States. In other words, the United States can act in the international field to the same extent as other sovereign nations do. The classic exposition of this concept appears in the opinion of the Supreme Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936):

> "* * * the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. * * * As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire

territory by discovery and occupation * * * the power to make such international agreements as do not constitute treaties in the constitutional sense * * * none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality." (Emphasis added.)

As the State Department has indicated, the number of agreements based solely on the constitutional authority of the President is relatively small. One type of agreement where that power is exercised is recognition of foreign governments, based on the constitutional power of the President to "receive Ambassadors and other public Ministers"; another is the settlement of foreign claims. The Curtiss-Wright opinion has been followed in subsequent decisions which have upheld the President's power to make executive agreements in these two areas. In United States v. Belmont, 301 U.S. 324 (1937), the Supreme Court upheld the validity of an executive

agreement, not based on any pre-existing treaty or statute, which established relations with the Soviet Union and settled certain claims by assignment of assets to the United States. The Court said:

> "Governmental power over external affairs is not distributed, but is vested exclusively in national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.
>
> * * * an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations." 301 U.S. at 330.

Similar language was used by the Supreme Court in United States v. Pink, 315 U.S. 203, 229 (1942).

Furthermore, some power to make executive agreements can be implied from the treaty power. Although treaties require the concurrence of the Senate, as Curtiss-Wright and Belmont indicate the President alone negotiates. In the course of negotiating a treaty, it is sometimes necessary to conclude an interim arrangement or modus vivendi until the treaty is finally ratified. See United States v. Belmont, supra at 330.

The President also may make agreements based on his power as Commander in Chief. Controversy in this area has been relatively recent. A point of departure often mentioned is 1940, when the United States was being increasingly thrust into the international arena. Britain, having sustained heavy losses, appealed for American destroyers. President Roosevelt asked Attorney General Jackson for his opinion regarding the authority for effectuating by executive agreement an exchange of American destroyers for British bases in the Western Hemisphere.

The Attorney General concluded that the agreement could be made without submitting it to the Senate as a treaty for its advice and consent. 39 Ops. A.G. 484 (1940). The President's authority was deemed to derive from his constitutional powers as Commander in Chief and from "that control of foreign relations which the Constitution vests in the President as part of the Executive function," citing Curtiss-Wright, supra, 39 Ops. A.G. at 486.

Since no future "commitment" was involved, Attorney General Jackson held that the agreement did not require the advice and consent of the Senate:

> "* * *. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The Executive agreement obtains an opportunity to establish naval and air bases for the protection of our coastline but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation." 39 Ops. A.G. at 487.

One scholar who commented on Attorney General Jackson's opinion stated:

> "While there is no clear line between the subjects on which the President can enter into agreements under his constitutional powers to conduct foreign relations and those on which he must ask the advice and consent of the Senate, it appears that the prime consideration is whether the agreement imposes legal obligations upon the

United States beyond the independent power of the President to fulfill. If the aid of Congress is necessary for fulfillment, the President should, before finally approving the instrument, either get the advice and consent of the Senate, thus making it a treaty in the constitutional sense, or he should get an authorizing act from Congress making appropriations or enacting legislation to fulfill such obligations. Since the present agreement imposed no such obligation requiring congressional action, neither of these procedures was necessary." Editorial Comment, Q. Wright, The Transfer of Destroyers to Great Britain, 34 Am. J. Int'l L., 680, 681 (1940).

In the last few years there have been a growing number of occasions when the Executive and the Senate have disagreed on the scope of the President's powers to conclude executive agreements relating to the war power. Given the fact that there is no simple answer to the question of the precise magnitude of the independent powers of the President, each dispute has itself become part of both the lore and the legal precedent on this subject.

For example, in June 1969, the Senate debated and adopted a "sense of the Senate" resolution that the use of armed forces on foreign territory or a promise to assist a foreign government by American military or financial

resources can only be achieved by a treaty, statute or concurrent resolution. S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. 17214-17245.

Also, in 1970 debate arose as to whether the proposed Friendship and Cooperation Agreement with Spain should be submitted to the Senate as a treaty. (T.I.A.S. No. 6924). That debate focused largely on the question of the effect of the agreement, that is, did it constitute a military commitment by the United States to Spain? The Administration's position was that it did not constitute a commitment, while Senator Fulbright, among others, challenged the Administration's position, and argued that if his interpretation was correct then the matter was of sufficient importance to require the concurrence of the Senate. As a subsequent resolution passed by the Senate demonstrated, the issues raised did not in any realistic sense relate to the law or constitutional practice concerning the right of the President to make agreements for bases as much as they did to the meaning of the agreements. See S. Rep. No. 91-1425 on S. Res. 469.

It is difficult for us as lawyers to state the "holding" of each of the debates. Indeed, they emphasize the importance of the Executive dealing with these matters on a case-by-case basis. It is against this background that we must view S. 3475.

II.

I will now turn to some specific comments on S. 3475. Senator Ervin has stated that the bill is designed to "help restore the balance of power between the executive and legislative branches of the government in the area of international agreements." S. 3475, he states, would also further the constitutional prerogatives of Congress by requiring transmission of all executive agreements to both houses of Congress. In general, executive agreements would come into force 60 days after transmittal unless, prior to the expiration of the 60-day period, both houses of Congress pass a concurrent resolution disapproving the executive agreement.

I believe that this proposal, although intended to resolve a constitutional problem, presents substantial constitutional problems of its own.

The President has independent power under the Constitution to conclude executive agreements. For example, as I have noted, he has specific constitutional power to "receive Ambassadors" (Art. II, § 3), and thus to recognize foreign governments. Under his power as Commander in Chief, he has the right to make operational arrangements, such as cease-fire agreements to insure the safety of troops which have been placed at his disposal. Cf. Ex parte Milligan, 71 U.S. 2, 139 (1866). In my opinion, Congress cannot by statute take away or substantially limit this power. Further, if the President sent an agreement to Congress which he did not have authority to make, it is doubtful that the failure of Congress to disapprove the agreement could give it a validity it would not otherwise have.

Similarly, if the President has authority, either by statute or treaty, to enter an executive agreement, that power continues until the statute is repealed or the treaty is no longer in force.

It is also our position that Congress cannot, in fact, take legally binding action against any of these exercises of authority by concurrent resolution. This is not a

S. has broad exemption | no section 4

94TH CONGRESS
1ST SESSION

S. 632

Speech at S 1651 2/7/75

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1975

Mr. BENTSEN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress declares that the Constitution of the United States established a system of shared powers between the legislative and executive branches of the United States Government in the making of international agreements; the powers of Congress have been substantially eroded by the use of so-called executive agreements, and the Senate is thereby prevented from performing its duties under section 2, article II, of the Constitution, which provides that the

President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur".

SECTION 1. (a) In furtherance of the provisions of the United States Constitution regarding the sharing of powers in the making of international agreements, any executive agreement made on or after the date of enactment of this Act shall be transmitted to the Secretary of State, who shall then transmit such agreement (bearing an identification number) to the Congress. However, any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Each committee shall personally notify the Members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such Members.

(b) Except as otherwise provided under subsection (d) of this section, any such executive agreement shall come into force with respect to the United States at the end of the first period of sixty calendar days of continuous session of

Congress after the date on which the executive agreement is transmitted to Congress or such committees, as the case may be, unless, between the date of transmittal and the end of the sixty-day period, both Houses agree to a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day period.

(d) Under provisions contained in an executive agreement, the agreement may come into force at a time later than the date on which the agreement comes into force under subsections (b) and (c) of this section.

SEC. 2. For purposes of this Act, the term "executive agreement" means any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

SEC. 3. (a) This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the

Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedures to be followed in that House in the case of concurrent resolutions described by subsection (b) of this section; and it supersedes other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(b) For the purposes of this section, "concurrent resolution" means only a concurrent resolution of either House of Congress, the matter after the resolving clause of which is as follows: "That the Congress does not approve the executive agreement numbered transmitted to (Congress) (the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House or Representatives) by the President on , 19 .", the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a concurrent resolution which specifies more than one executive agreement.

(c) A concurrent resolution with respect to an execu-

tive agreement shall be referred to a committee (and all concurrent resolutions with respect to the same executive agreement shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives as the case may be.

(d) (1) If the committee to which a concurrent resolution with respect to an executive agreement has been referred has not reported it at the end of twenty calendar days after its introduction, it is in order to move either to discharge the committee from further consideration or the concurrent resolution or to discharge the committee from further consideration of any other concurrent resolution with respect to the executive agreement which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the concurrent resolution, is highly privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same executive agreement), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same executive agreement.

(e) (1) When the committee has reported, or has been discharged from further consideration of, a concurrent resolution with respect to an executive agreement, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on the concurrent resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the concurrent resolution is not in order, and it is not in order to move to reconsider the vote by which the concurrent resolution is agreed to or disagreed to.

(f) (1) Motions to postpone, made with respect to the discharge from committee, or the consideration of a concurrent resolution with respect to an agreement, and motions

to proceed to the consideration of other business, shall be decided without debate.

(2) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution with respect to an executive agreement shall be decided without debate.

SEC. 4 (5) The provisions of section 1 of this Act shall not apply to any executive agreements entered into by the President pursuant to a provision of the Constitution or prior authority given the President by treaty or law.

1 Something like this passed w/o hearings in the Senate last year. S. 3830 - see Rentsen statement

§5 not in bill Ericson testified on =

94TH CONGRESS
1ST SESSION

S. 1251

IN THE SENATE OF THE UNITED STATES

MARCH 20 (legislative day, MARCH 12), 1975

Mr. GLENN introduced the following bill; which was read twice and, by unanimous consent, referred to the Committee on Government Operations and to the Committee on Foreign Relations, if and when reported by the Committee on Government Operations

MARCH 21 (legislative day, MARCH 12), 1975

The Committee on Government Operations discharged, and referred to the Committee on the Judiciary, and if and when reported to the Committee on Foreign Relations

A BILL

To provide for improved government organization with respect to executive agreements and to provide improved procedures for congressional review of such executive agreements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Executive Agreements Review Act".

SEC. 2. (a) In furtherance of the provisions of the United States Constitution regarding the sharing of powers in the making of international agreements and in order to promote greater certainty and understanding with regard to

international agreements, any executive agreement made on or after the date of enactment of this Act shall be transmitted (bearing an identification number) by the President to the Senate. Any ~~such~~ agreement the ~~immediate~~ disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Such committee shall notify the Member of the Senate that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such Members.

(b) Except as otherwise provided under subsections (d) or (e) of this section, any such executive agreement shall come into force with respect to the United States at the end of the first period of sixty calendar days of continuous session of the Senate after the date on which the executive agreement is transmitted to the Senate or such committee, as the case may be, unless, between the date of transmittal and the end of the sixty-day period, the Senate agrees to a resolution pursuant to section 4 of this Act stating that the Senate disapproves the executive agreement.

one House veto

Why not go into effect

(c) For the purpose of subsection (b) of this section—

(1) continuity of session is broken only by an adjournment of the Senate sine die; and

(2) the days on which the Senate is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day period.

(d) If the executive agreement specifically so provides, the agreement may come into force at a time later than the date on which the agreement would otherwise come into force under subsections (b) and (e) of this section.

(e) (1) The provisions of subsection (b) of this Act shall not apply with respect to a particular executive agreement if the Committee on Foreign Relations reports and the Senate agrees to a resolution approving such agreement.

(2) Such resolution shall be considered in accordance with subsections (a), (b), (e), and (f) of section 4 of this Act.

(f) (1) In the event a resolution of approval is, in accordance with subsection (e) of this section—

(A) adopted, it is not at any time thereafter in order to move to proceed to the consideration of a resolution of disapproval under subsection (b) of this section; or

(B) not adopted, it is in order at any time thereafter to move to proceed to the consideration of such resolution of disapproval;

with respect to the same executive agreement.

(2) In the event a resolution of disapproval is, in accordance with subsection (b) of this section—

(A) adopted, it is not at any time thereafter in order to move to proceed to the consideration of a resolution of approval under subsection (e) of this section; or

(B) not adopted, it is in order at any time thereafter to move to proceed to the consideration of such resolution of approval;

with respect to the same executive agreement.

SEC. 3. For purposes of this Act, the term "executive agreement" means any bilateral or multilateral international agreement or understanding, formal or informal, written or verbal, other than a treaty, which involves, or the intent is to leave the impression of, a commitment of manpower, funds, information, or other resources of the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

SEC. 4. (a) This section is enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of

the Senate but applicable only with respect to the procedure to be followed in the Senate in the case of a resolution described by subsection (b) or (e) of this section; and it supersedes other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner, and to the same extent as in the case of any other rule of the Senate.

(b) For the purposes of this section, "resolution" means only a simple resolution of the Senate, the matter after the resolving clause of which is as follows: "That the Senate (approves) (disapproves) the executive agreement numbered transmitted to (the Senate) (the Committee on Foreign Relations of the Senate) by the President on , 19 .", the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a resolution which specifies more than one executive agreement.

(c) A resolution with respect to an executive agreement shall be referred to a committee (and all resolutions with respect to the same executive agreement shall be referred to the same committee) by the President of the Senate.

(d) (1) If the committee to which a resolution with respect to an executive agreement has been referred has not reported it at the end of thirty calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the executive agreement which has been referred to the committee.

(2) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same executive agreement), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same executive agreement.

(e) (1) When the committee has reported, or has been discharged from further consideration of, a resolution with

respect to an executive agreement, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the concurrent resolution is agreed to or disagreed to.

(f) (1) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution with respect to an agreement, and motions to proceed to the consideration of other business, shall be decided without debate.

(2) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution with respect to an executive agreement shall be decided without debate.

SEC. 5. No executive agreement shall come into force with respect to the United States except in accordance with the provisions of this Act, upon the enactment of which the President shall see that all countries and international agencies with which the United States has relations shall be notified of the provisions of such Act.

94TH CONGRESS
1ST SESSION

S. 1251

A BILL

To provide for improved government organization with respect to executive agreements and to provide improved procedures for congressional review of such executive agreements.

By Mr. GLENN

MARCH 20 (legislative day, MARCH 12), 1975
Read twice and referred to the Committee on Government Operations and to the Committee on Foreign Relations, if and when reported by the Committee on Government Operations

MARCH 21 (legislative day, MARCH 12), 1975
The Committee on Government Operations discharged, and referred to the Committee on the Judiciary, and if and when reported to the Committee on Foreign Relations

ASSISTANT ATTORNEY GENERAL

~~SECRET~~

Department of Justice

Washington, D.C. 20530

MAR 28 1975

MEMORANDUM FOR DUDLEY H. CHAPMAN
Associate Counsel to the President

Re: Information on Executive Agreements

In connection with the introduction of S. 1251, the Executive Agreements Review Act, by Sen. Glenn on March 20, 1975, you have requested copies of studies prepared by this Office relating to the subject matter of the bill.

I am enclosing a number of documents prepared by Jack Goldklang of this Office including the following:

(1) Memorandum for the Honorable John W. Dean, III, Counsel to the President re: Whether U.S. bases agreement with Spain should have been submitted to the Senate for its advice and consent to ratification (Feb. 17, 1971) (SECRET).

(2) Memorandum for the Honorable John W. Dean, III, Counsel to the President re: Constitutionality of Proviso to Section 33 of the Arms Control and Disarmament Act (June 13, 1972).

(3) Statement of Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate on Executive Agreements and S. 3475, May 19, 1972.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

~~SECRET~~

ITEM WITHDRAWAL SHEET
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cc: Mr. Erickson
Mr. Ulman
Mr. Goldkland
Mrs. Gauf
Files

June 13, 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Constitutionality of Proviso to Section 33 of the Arms Control and Disarmament Act

This is in response to your memorandum of June 7, 1972, asking for our views concerning the constitutionality of the proviso in Section 33 of the Arms Control and Disarmament Act. 22 U.S.C. 2573, 75 Stat, 634 (1961). That proviso states:

> "That no action shall be taken under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States."

Although you do not expressly refer to the Interim Agreement with the USSR on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, dated May 26, 1972, we assume that your inquiry is directed to the constitutionality of the proviso as applied to that type of agreement.

As noted in our memorandum to you of June 7, the text of the proviso and its legislative history indicate that it was intended by Congress to apply to agreements such as the Interim Agreement. The Agreement would, during the interim period pending conclusion of an agreement on more complete measures, effect a limitation on the armaments of the United States by obligating the United States not to undertake construction of additional fixed land-based intercontinental ballistic missile launchers after July 1, 1972; not to convert land-based launchers for light ICBMs

into launchers for heavy types; and to limit the number of missile launching submarines. The Agreement is to remain in force for five years unless earlier replaced by an agreement on more complete measures limiting strategic offensive arms.

The question as to whether the proviso represents an unconstitutional encroachment on the President's authority to conclude executive agreements requires analysis in two stages: (1) whether the President could, in the absence of legislative restriction, conclude an executive agreement limiting arms based on his constitutional power; and (2) whether Congress has the authority to limit that power by legislation.

I.

An executive agreement which does not rely for authority on a treaty or act of Congress may deal with any matter that under the Constitution falls within the powers vested in the President. Restatement (Second), Foreign Relations Law of the United States § 121 (1965). When it comes to executive agreements relating to military matters, the President's power is based principally on his constitutional authority as Commander in Chief and on the foreign relations power, which the Constitution vests in the Chief Executive. See United States v. Curtiss-Wright Export Corp., 299 U.S. 305, 318 (1936); 39 Ops. A.G. 484, 486 (1940). In his role as Commander in Chief the President has discretion concerning the command and deployment of forces and the conduct of campaigns. Cf. Ex parte Milligan, 71 U.S. 2, 139 (1866). As noted in our memorandum to you of June 12, 1972, we are of the opinion that the President can by virtue of his constitutional authority issue certain orders which would require the termination of contracts for the construction of land-based missile launchers or missile launching submarines, or direct that no more missiles of certain types be added to the Nation's arsenal. It might be argued therefore that he could agree with another country to take such action, and he would not have to submit the agreement to Congress for approval.

There is not much precedent, however, for arms limitation agreements based solely on Executive authority. As noted in our memorandum of June 7, the Rush-Bagot Agreement of 1817 provided for the limitation of the naval forces to be maintained by the United States and Great Britain on the Great Lakes. Nearly a year after concluding this matter as an executive agreement, President Monroe nevertheless sent it to the Senate, inquiring whether "this is such an agreement as the Executive is competent to enter by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate." The Senate, by resolution, two-thirds concurring, approved the arrangement as a treaty. D. Levitan, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States, 25 Nw. U.S. Rev. 364, 376 (1940). Since then, however, a series of executive agreements has been concluded with Canada bringing our arrangements regarding armed vessels on the Great Lakes up to date even though the original treaty did not specifically authorize such executive agreements. See G. Bunn, Missile Limitation: By Treaty or Otherwise?, 70 Colum. L. Rev. 1, 27-30 (1970).

In 1931 the United States, in response to a request from the League of Nations, stated that it was prepared for a period of one year to accept an armaments truce provided that like action was taken by the other principal military and naval powers. This has been described as an executive agreement on arms limitation and is perhaps the best example that can be found where such an agreement was reached that was not related to a treaty. W. McClure, International Executive Agreements 122-123 (1941).

Thus, it appears that if the proviso to section 33 had not been enacted, it might well be concluded that the President can enter into certain types of arms limitation agreements with foreign powers based solely on his constitutional powers.

II.

Although the President may, in general, enter certain types of executive agreements dealing with arms limitation, we believe, however, that the better view is that Congress may circumscribe such action, as it has done in the proviso to section 33.

At the outset, it should be noted that the enactment of the proviso was not accomplished by Congress alone; President Kennedy signed it into law and did not at that time indicate that he entertained any doubts as to its constitutionality, John F. Kennedy, Public Papers of the Presidents 626 (1961), */ nor does the public record indicate that any such objection was made by Executive spokesmen at any time during the legislative consideration of the proviso.

In the more than ten years since the proviso has been law, the Executive branch has not, to our knowledge, challenged its constitutionality. United States practice, so far as we are aware, has been consistent with the proviso. We know of no executive agreements limiting armaments that have been made during this period. As against this, the treaty-making power has been resorted to on a number of occasions in the arms control area. Such treaties include the recent Seabed Arms Control Treaty, the Limited Test Ban, and the Nuclear Nonproliferation Treaty. A Biological Warfare Convention has been negotiated but not submitted to the Senate. Under the circumstances, the proviso is entitled to be viewed as presumptively squaring with the Constitution.

The legislative history of the proviso shows that Congress enacted it in order to preserve what it considered to be its role in such matters under the Constitution. Thus, when the matter was first raised in the House, a member of Congress read various provisions of the Constitution relating to the war powers of Congress into the record and, in a

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*/ It may be noted on the other hand that on occasion Presidents have signed bills while indicating that certain parts are unconstitutional. See, e.g., United States v. Lovett, 328 U.S. 303, 313 (1946).

colloquy on the House floor made clear that the Arms Control and Disarmament Act would not in any way act as "a delegation or derogation" of the power of Congress. 107 Cong. Rec. 20293. Subsequently, when the proviso was introduced, Representative Fountain, its sponsor, stated: "This amendment is designed to insure that on the subject of arms control no President of the United States, whoever he may be, will ever take any action that is not in conformity with the Constitution of the United States." 107 Cong. Rec. 20309.

The power of Congress in this area has a considerable breadth. It includes the power to raise and support armies and to provide and maintain a navy (Art. I, § 8). One distinguished constitutional scholar has explained these powers as follows:

> "The clauses of the Constitution which give Congress authority 'to raise and support armies, to provide and maintain a navy' and so forth, were not inserted for the purpose of endowing the National Government with power to do these things, but rather to designate the department of Government which should exercise such powers. Moreover, they permit Congress to take measures essential to the national defense in time of peace as well as during a period of actual conflict. That these provisions grew out of the conviction that the Executive should be deprived of the 'sole power of raising and regulating fleets and armies' which Blackstone attributed to the King under the British Constitution, was emphasized by Story in his Commentaries. He wrote: 'Our notions, indeed, one of the dangers of standing armies, in time of peace, are derived in a great measure from the principles and examples of our English ancestors. In England, the King possessed the power of raising armies in the time of peace according to his own good pleasure. And this prerogative was justly esteemed dangerous to the public liberties.

> Upon the revolution of 1688, Parliament wisely insisted upon a bill of rights, which should furnish an adequate security for the future. But how was this done? Not by prohibiting standing armies altogether in time of peace; but (as has been already seen) by prohibiting them without the consent of Parliament. This is the very proposition contained in the Constitution; for Congress can alone raise armies; and may put them down, whenever they choose." E. Corwin, The Constitution of the United States of America 330 (1964 ed.).

Although the present proviso may have been motivated by apprehensions quite different from those which motivated the Framers, i.e., that a contemporary President might disperse an army which Congress had raised, the analysis of Professor Corwin, that the power of decision is placed in large part in the hands of Congress, would seem, in our view, to be still applicable.

The limited judicial precedent available on the subject confirms this. In Ex Parte Milligan, 71 U.S. 2, 139 (1866), the opinion of four concurring Supreme Court Justices stated that

> "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."

Similarly, in 1850 Chief Justice Taney, for the Court, said:

> "His [the President's] duty and his power are purely military. As Commander in chief, he is

authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." (Emphasis added.) Fleming v. Page, 50 U.S. 603, 615, 618 (1850).

In recent times the powers of the President as military commander have been enlarged by constitutional practice and tradition. However, we believe that, as applied to the question at hand, the force of these dicta remain sound. For, as here, where the President claims authority based on general provisions of the Constitution to authorize what Congress has forbidden his power has been said to be at its "lowest ebb." See the concurring opinion of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 at 637-638 (1952). A court could uphold such action only by disabling Congress from acting on the subject; in this case such a result is highly unlikely given the broad grants of power delegated to Congress by Article I, section 8.

It may be argued that the President has, by impounding funds for military appropriations, asserted his power as Commander in Chief against that of Congress to support armed forces. However, as noted in our memorandum of June 12, appropriation acts generally "are of a fiscal and permissive nature and do not in themselves impose upon the executive branch an affirmative duty to expend the funds." 42 Op. A.G., No. 32 at 4 (1967). Here the language of the proviso is, of course, mandatory. In addition, the legislative history of the proviso makes clear that it was not intended to interfere with the President's right to control the size of United States armed forces under existing law. H. Rep. No. 1263, 87th Cong. What the proviso does is make clear that the President could not obligate the United States to reduce or limit forces by agreement with a foreign country.

We conclude therefore that, under the stated circumstances, the proviso to section 33 of the Arms Control and Disarmament Act is constitutional.

Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE
WASHINGTON

May 2, 1975

TO: PHIL BUCHEN

FROM: JIM WILDEROTTER

Attached per your request is the legislative history of the "International Agreements" Act, 1 U.S.C. § 112b. The House Report (Tab A) is controlling; also attached FYI is the Senate Report (Tab B).

(41)

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

An Act

86 STAT. 619

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

A

92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 92-1301

TRANSMITTAL OF EXECUTIVE AGREEMENTS TO CONGRESS

AUGUST 3, 1972—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ZABLOCKI, from the Committee on Foreign Affairs, submitted the following

REPORT

[To accompany S. 596]

The Committee on Foreign Affairs, to whom was referred the bill (S. 596) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

COMMITTEE ACTION

S. 596 was passed by vote of 81 to 0 in the Senate on February 16, 1972. It was referred to the Foreign Affairs Committee on February 17, where identical bills (H.R. 14365 by Mr. Zablocki and H.R. 14647 by Mr. Whalen) were already pending. A hearing on the measures was held by the Subcommittee on National Security Policy and Scientific Developments on June 19. Witnesses were Senator Clifford P. Case of New Jersey, the author of S. 596, and Mr. Carl Salans, deputy legal adviser to the Department of State.

The subcommittee subsequently approved sending S. 596 to the full committee for consideration. On August ———, the committee by voice vote approved the measure without amendment and ordered it reported to the House.

MEANING AND BACKGROUND OF THE BILL

The legislation is not complex.

First, it provides that the Secretary of State will transmit to Congress the text of any international agreement—other than a treaty—to which the United States is a party as soon as practicable after the

agreement has entered into force, but in no case more than 60 days thereafter.

Second, for those agreements which are sensitive and must be kept secret in the national interest, S. 596 provides that the President should transmit them not to the Congress as a whole, but to the House Foreign Affairs Committee and the Senate Foreign Relations Committee. Those agreements would be held under an appropriate injunction of secrecy which could be removed only upon due notice from the President.

The bill is not retroactive and would not require that the more than 4,360 existing international agreements to which the United States is presently a party be transmitted to the Congress. All international executive agreements executed after the legislation goes into effect, however, would be covered. The United States enters into approximately 200 such agreements each year.

As State Department witnesses have readily admitted the Congress has not always been kept adequately informed about the international executive agreements entered into by the President and officials of the executive branch on behalf of the United States.

For example, the provisions of the Yalta agreement at the end of World War II were not publicly disclosed for 3 years, and the entire text of the Yalta agreement was not published until 1947—a situation which resulted in considerable controversy in the Congress and among the American public.

More recently, the Symington Subcommittee on National Commitments uncovered contemporary examples of secret agreements entered into without adequate reference to the Congress.

Each incident in which such secret agreements become known create tensions and irritations between the Congress and the executive branch which severely inhibit carrying out an effective foreign policy. In recent testimony before House Foreign Affairs Subcommittee on National Security Policy and Scientific Developments, Mr. McGeorge Bundy stated that:

> The most serious present difficulty in the framing and execution of the foreign policy of the United States is the almost complete breakdown of effective relations between the executive and legislative branches of the government.

S. 596 is a step toward restoring a proper working relationship between the Congress and the executive branch in the area of foreign affairs. By establishing in law a formal procedure for the transmittal to Congress of all executive agreements, the bill would eliminate one potential source of friction.

State Department spokesmen have expressed their preference for informal "practical arrangements" for providing Congress with information about executive agreements, rather than passage of legislation in this area.

Informal procedures would not, however, address the basic problem involved. Such arrangements would still leave with the executive branch the discretion to disclose or not to disclose as it saw fit. Moreover, informal procedures worked out by the present administration with the Congress would not be binding on future administrations and likely would require renegotiation every few years.

Working on a "case by case" basis, therefore, is not likely to be a satisfactory answer to the present difficulties and might well result in an exacerbation of tensions.

It should be pointed out that this legislation is not new. Its history goes back to 1954 when a similar proposal was introduced in the Senate by Senators Homer Ferguson of Michigan and William Knowland of California. In 1956 it was adopted unanimously in the Senate but the House failed to act.

The Eisenhower administration had a hand in shaping the bill, which was seen as an acceptable alternative to measures affecting executive agreements which had been offered by Senator John Bricker of Ohio. S. 596 is virtually identical to the earlier legislation.

In hearings before the Senate Foreign Relations Committee last October, the State Department recommended against the adoption of S. 596 in favor of mutually acceptable practical arrangements. In May, following unanimous Senate passage, the Department changed its position and stated that the executive branch would not oppose the bill's adoption if Congress believed that to be desirable.

Spokesmen for the Department of State have, however, raised several issues about the legislation which require additional committee comment.

ADDITIONAL COMMITTEE COMMENTS

1. *What constitutes an international agreement.*—During committee hearings a State Department spokesman raised the question of what kind of arrangements constitute international executive agreements within the meaning of the legislation. He pointed out that many exchanges involve administrative working details for carrying out a treaty or agreement or are in the nature of commercial contracts relating to sales of equipment and commodities.

Clearly the Congress does not want to be inundated with trivia. At the same time, it would wish to have transmitted all agreements of any significance.

2. *Physical security of classified agreements.*—A question was raised by the State Department spokesman on possible difficulties involved in establishing a viable working procedure for transmitting sensitive agreements, including measures for their storage, rules on their removal from storage areas, and questions of access by various personnel.

The committee does not believe that the situation poses any real problem. A number of classified materials already repose within the committee offices. They are safeguarded by security procedures which have proved effective in the past. Should the executive branch believe that the present system requires enhancement as a result of the passage of S. 596, the committee stands ready to cooperate.

In that context, it should be noted that the bill leaves to the discretion of the President which agreements shall be made public and which shall be kept secret. Further, under the bill, once an agreement has been classified, only he has the right to declassify it. The right of declassification is not open to the committee or to any Member of Congress. Thus, the legislation helps protect against unauthorized disclosures.

3. *Transmittal of all executive agreements.*—Question was also raised by the State Department spokesman about the authority of

Congress to oblige the President to transmit the texts of *all* international executive agreements. The contention was that in some cases the Congress would not have a legitimate interest in the texts of agreements concluded by the President with foreign states and that he could keep that information from Congress under a right of executive privilege.

Study of this issue by the committee, aided by specialists from the American Law Division of the Congressional Research Service, Library of Congress, does not indicate any constitutional or other legal basis for such a view.

The right of the President to *conclude* executive agreements is not in question here, or in any way affected by S. 596. Thus, the bill in no way transgresses on the independent authority of the Executive in the area of foreign affairs.

As the State Department itself has recognized, however, executive agreements have the same effect as treaties in international law. To the nations with which they have been concluded, there is no difference between the two. That is, executive agreements no less than treaties bind the United States of America as a whole nation—not just the President or administration which makes them—under international law.

Nor, under international law, is the duration of an executive agreement limited by the tenure of the President who concluded it. It continues to be binding on the Nation after he has left the scene, just as a treaty would.

If the contention of the Department of State is accepted, the Congress, in effect, would agree that the President has the right to bind it, and the rest of the Nation, to agreements in perpetuity with foreign nations about which the Congress has no right to know.

Such a situation is clearly a distortion of the constitutional grant of power to both the executive and legislative branches in the area of foreign affairs, and smacks of the practice of the English sovereigns against which our Founding Fathers were reacting.

Under Article 1, Section 8, of the Constitution the Congress is empowered to make laws "necessary and proper" for carrying into execution all powers vested by the Constitution in the Government of the United States or in any officer of that government. Under that authority, which includes the domain of foreign affairs, the Congress clearly has the power to require the disclosure to itself of the texts of *all* international executive agreements.

B

Calendar No. 564

92D CONGRESS
2d Session

SENATE

REPORT
No. 92-591

TRANSMITTAL OF EXECUTIVE AGREEMENTS TO CONGRESS

JANUARY 19, 1972.—Ordered to be printed

Mr. FULBRIGHT, from the Committe on Foreign Relations, submitted the following

REPORT

[To accompany S. 596]

The Committee on Foreign Relations, to which was referred the bill (S. 596) to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within 60 days after the execution thereof, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

The bill was approved by the committee on December 7, 1971, without amendment. The essential provision of the bill reads as follows:

> "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 60 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."

COMMITTEE ACTION

Public hearings on S. 596, which had been introduced in the Senate by Senator Case on February 4, 1971, provided the committee with testimony expressing the favorable views of a distinguished historian and a leading academician and the unfavorable views of the admin-

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istration. On October 20, 1971, Prof. Ruhl J. Bartlett of the Fletcher School of Law and Diplomacy provided the committee with an analysis of the problem of secrecy to which this bill addresses itself in the broader context of the historical problem of executive agreements as means of contracting significant foreign commitments. On the basis of this historical perspective, Professor Bartlett expressed his view that—"this proposed measure is so limited in its scope, so inherently reasonable, so obviously needed, so mild and gentle in its demands, and so entirely unexceptionable that it should receive the unanimous approval of the Congress."

On the same day the committee heard testimony by Prof. Alexander M. Bickel of the Yale University Law School, who also expressed strong support for the measure. "In requiring, as S. 596 would do," said Professor Bickel, "that international agreements other than treaties to which the United States is a party be transmitted to it, Congress would be exercising a power that, in my opinion, clearly belongs to Congress under the Constitution."

Professor Bickel also expressed his belief that "Congress has too long tolerated, indeed cooperated in, a diminution of its role in the conduct of foreign affairs and in the decision of questions of war and peace—a diminution that approaches the vanishing point."

In this respect, Professor Bickel concluded, the balance of power between Congress and the President ought to be redressed, to which end S. 596 would constitute "an important step."

The views of the administration were presented to the Committee on October 21, 1971, by Mr. John R. Stevenson, Legal Advisor to the Department of State. Mr. Stevenson expressed the administration's view that the provision of a reliable flow of information to Congress could best be provided for by "practical arrangements" of a nonlegislative nature. Conceding that in the past they (the Congress) have not been informed on a current basis but only ad hoc some years later, Mr. Stevenson concluded nonetheless that "we are dealing with a question of practical arrangements, not with a question of right or authority which would in any way be altered by statute."

On December 7, 1971, the bill was considered by the committee in executive session and ordered reported without amendment and without dissent.

BACKGROUND OF THE BILL

The legislative history of S. 596 goes back to 1954 when a similar proposal was introduced in the Senate by Senators Homer Ferguson of Michigan and William Knowland of California. It was reported favorably to the Senate in August 1954 but no action was taken on the bill. The proposal was revived by Senator Knowland in 1955 and subsequently, in July 1956, favorably reported and then adopted unanimously by the Senate. No action was taken by the House of Representatives.

As adopted in 1956, and as introduced by Senator Case in February 1971, the bill was in a form which had made it acceptable to the Eisenhower administration. As originally conceived in 1954, the proposal called for the submission of all executive agreements to the Senate within 30 days. The Eisenhower administration, through its Assistant Secretary of State for Congressional Relations, Thruston B. Morton,

objected that the 30-day time period was too short and objected further to the absence of a provision for the protection of highly classified agreements. In order to meet that objection, the bill was amended to provide for a 60-day transmittal period and also to permit the President, at his option, to submit sensitive agreements not to the Senate as a whole but to the Committee on Foreign Relations "under an appropriate injunction of secrecy." With these amendments the Eisenhower administration offered no objection to the bill.

As reintroduced by Senator Case in 1971, S. 596 was broadened to require the reporting of agreements to the House of Representatives and its Committee on Foreign Affairs as well as to the Senate and its Committee on Foreign Relations. In all other respects the bill as introduced by Senator Case and favorably reported by the Foreign Relations Committee in 1971 is the same as the proposal to which the Eisenhower administration offered no objection in 1954 and 1955.

COMMITTEE COMMENTS

In the view of the Foreign Relations Committee, S. 596 embodies a proposal which is highly significant in its constitutional implications. The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy. The committee shares Professor Bickel's view that the adoption of this bill would be "an important step" in the direction of redressing the balance of power between Congress and the President in the conduct of foreign relations.

The committee does not accept the administration's view, as expressed by Mr. Stevenson, that the sole requirement for the flow of reliable information to Congress is the working out of "practical arrangements." As outlined by Mr. Stevenson, these "practical arrangements" would still fail to establish the *obligation* of the executive to report all agreements with foreign powers to the Congress. In the absence of legislation, even the soundest of "practical arrangements" would leave the ultimate decision as to whether a matter was to be reported or withheld to the unregulated judgment of the executive.

It is well and good to speak, as Mr. Stevenson does, of the executive's recognition of the needs of Congress and of the desirability of "mutual cooperation and accommodation" between the two branches of government. These are highly desirable, but the principle of mandatory reporting of agreements with foreign countries to the Congress is more than desirable; it is, from a constitutional standpoint, crucial and indispensable. For the Congress to accept anything less would represent a resignation from responsibility and an alienation of an authority which is vested in the Congress by the Constitution. If Congress is to meet its responsibilities in the formulation of foreign policy, no information is more crucial than the fact and content of agreements with foreign nations.

As the committee has discovered, there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown

to Congress and to the people. A number of these agreements have been uncovered by the Symington Subcommittee on Security Agreements and Commitments Abroad, including, for example, an agreement with Ethiopia in 1960, agreements with Laos in 1963, with Thailand in 1964 and again in 1967, with Korea in 1966, and certain secret annexes to the Spanish bases agreement.

Section 112(a) of title I of the United States Code now requires the Secretary of State to compile and publish all international agreements other than treaties concluded by the United States during each calendar year. The executive, however, has long made it a practice to withhold those agreements which, in its judgment, are of a "sensitive" nature. Such agreements, often involving military arrangements with foreign countries, are frequently not only "sensitive" but exceedingly significant as broadened commitments for the United States. Although they are sometimes characterized as "contingency plans," they may in practice involve the United States in war. For this reason the committee attaches the greatest importance to the establishment of a legislative requirement that all such agreements be submitted to Congress.

The committee fully recognizes the sensitive nature of many of the agreements the executive enters with foreign governments. At some point the committee may wish to explore the question whether the executive is exceeding his constitutional authority in making some of these agreements. That, however, is not the issue to which S. 596 addresses itself. Its concern is with the prior, more elemental obligation of the executive to keep the Congress informed of all of its foreign transactions, including those of a "sensitive" nature. Whatever objection on security grounds the executive might have to the submission of such information to Congress is met by the provision of the bill which authorizes the President, at his option, to transmit certain agreements not to the Congress as a whole, but to the two foreign affairs committees "under an appropriate injunction of secrecy to be removed only upon due notice from the President."

As reported by the Foreign Relations Committee, S. 596 would not require the submission to Congress of international agreements entered into prior to the enactment of the bill. It is the strongly held view of the committee, however, that the absence of a retroactive provision in this bill is not to be interpreted as license or authority to withhold previously contracted agreements from the Congress. In keeping with the spirit and intent of the bill, the committee would expect the executive to make all such previously enacted agreements available to the Congress or its foreign affairs committees at their request and in accordance with the procedures defined in the bill.

In conclusion, the committee reiterates its view that the proposal contained in S. 596 is a significant step toward redressing the imbalance between Congress and the executive in making of foreign policy. Twenty years ago Congres undertook an examination of the broader issue of the treaty power through its consideration of the so-called Bricker amendment. One of the essential purposes of the Bricker amendment, in the various forms in which it was considered by Congress, was to place restrictions on the use of executive agreements as a means of contracting significant agreements with foreign powers in circumvention or violation of the treaty power of the Senate.

The present proposal, which was originally initiated as a modest alternative to the Bricker amendment, does not purport to resolve the underlying constitutional question of the Senate's treaty power. It may well be interpreted, however, as an invitation to further consideration of this critical constitutional issue. For the present, however, the committee strongly recommends the adoption of S. 596 as an effective means of dealing with the prior question of secrecy and of asserting the obligation of the executive to report its foreign commitments to Congress.

○

S. Rept. 92-591 O

Thursday 5/8/75 Meeting
5/9/75
10 a.m

4:30 In checking around, I reconstruct the following (PLEASE TELL ME IF THE FACTS AREN'T CORRECT OR IF ANYONE ELSE SHOULD BE INVOLVED):

Apparently, Arthur Rovina in Monroe Leigh's office 632-1074 called the various people for the meeting. My understanding is that the following will attend:

Philip Barringer (Robert Ellsworth cannot come) (Director of Foreign Military Rights, Int. Security Affairs)	Ox. 5-6386
Antonin Scalia	739-5111
Jack Goldklang (Staff Attorney)	739-5
Monroe Leigh	632-9598
Arthur Rovina	632-1074

Subject: hearings next week on Executive Agreements

Seems as if someone from Congressional Office should attend.

Roosevelt Room is tied up
Situation Room is tied up

So I guess we'll have to have it in your office.

THE WHITE HOUSE

WASHINGTON

May 16, 1975

MEMORANDUM FOR: JEANNE DAVIS

FROM: PHILIP W. BUCHEN

SUBJECT: Senate Foreign Relations Committee Request for Presidential Correspondence on Saudi Arabia

In response to your memorandum of May 12 on the above subject, I comment as follows:

1. Preferred option: I prefer option 2 of this draft memo under which appropriate representatives of the Senate Foreign Relations Committee would be permitted to review the classified letters, but would not be provided with copies of those letters. Option 1 -- providing copies to the Committee on a classified basis -- tracks too closely the procedure required under the Case Act for "international agreements." Adopting that option might be interpreted as an acknowledgement that these letters in fact represent an "international agreement," a position we have rejected in the case of the Nixon-Thieu letters. Option 3 -- total denial -- strikes me as unnecessarily belligerent and inappropriate in view of the low sensitivity of these particular letters and the Senate's unquestionable legitimate inquiry into the scope and nature of U. S. commitments in the Middle East.

2. Legal basis for denial: For language to support option 3, I would suggest the following:

The letters in question do not constitute international agreements because they do not bind the U. S. as a Nation. They are not in any way analagous to treaties and do not abrogate in any way treaty power of the Senate.

In truth and in fact the letters in question represent nothing more than confidential communications between heads of state. As such, to provide them to the Congress would irreparably harm the ability of a President to conduct the foreign relations of the United States. If the President's correspondence with other heads of state is subject to being provided to the Congress, the result would be a significant chill in the candor and utility of such confidential exchanges. As President Ford recently indicated, "it would not be wise to establish the precedent of providing correspondence between the heads of state."

THE WHITE HOUSE

WASHINGTON

Classified
by Senate
Foreign
Relations
(see
Exec
Agreements)

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