The original documents are located in Box 13, folder "Executive Agreements (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

ASSISTANT ATTORNEY GENERAL

May 18, 1975

MEMORANDUM FOR HONORABLE PHILIP BUCHEN
COUNSEL TO THE PRESIDENT

Enclosed is a copy of my testimony on executive agreements. The portion from p. 10 to the end should give you some idea of the strength of our position on the invalidity of concurrent resolutions.

The portions of the testimony bracketed on pp. 22-24 were deleted from the final text which I delivered. I finally agreed with OMB that they were true but impolitic, at least at this point.

Nino Scalia

Department of Justice

STATEMENT

OF

ANTONIN SCALIA
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

ON

EXECUTIVE AGREEMENTS (S. 1251 AND S. 632)

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS
COMMITTEE ON JUDICIARY
UNITED STATES SENATE

MAY 15, 1975

Mr. Chairman and Members of the Subcommittee:

The Office of Legal Counsel has often participated in hearings conducted by this Subcommittee concerning separation of powers problems. The records of those hearings remain as useful studies on issues that few had focused on previously. This is particularly so in the case of executive agreements. The hearings on that subject which you conducted in 1972 collected the views of scholars, both in and out of government, and brought together important source materials; the 668-page printed record is a basic reference tool for students of this area. Congressional Oversight of Executive Agreements, Hearing before the Subcommittee on Separation of Powers of the Senate Judiciary Committee on S. 3475, 92d Cong., 2d Sess. (1972).

As a result of that earlier work, your deliberations today have been greatly simplified. The 1972 hearings clearly established not only that the executive agreement was a useful tool for the conduct of this Nation's business, but also that its constitutional legitimacy was solidly based. Our own 1972 statement described that basis in some detail. We noted that executive agreements had a history going back to the First Congress (1 Stat. 232, 239), and that they had been upheld in major opinions of the Supreme Court. E.g., United States v. Belmont, 301 U.S. 324 (1937). See Statement of Ralph E. Erickson, Assistant Attorney General, in Hearing, supra at 307-328.

By the time the hearings were completed, we believe a consensus was reached on legal fundamentals. Thus, when this Subcommittee issued its report on Congressional Oversight of Executive Agreements (Committee Print, 93d Cong., 1st Sess.), it recognized that other types of international agreements besides treaties exist and have been approved by the Supreme Court (p. 4). The Subcommittee report explains (p. 6):

> "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."

Although the Subcommittee believed that Congress should have a greater role in the review of international agreements, it refrained at that time from recommending specific legislation. It did not endorse the Ervin bill (S. 3475, 93d Cong.) which made all executive agreements subject to veto by concurrent

resolution of Congress. The Report recognized that the bill was not "a finished product of legislative drafting" but "a basis for beginning a study and dialog which may lead to more detailed and refined legislation" (p. 12).

The bills before us today, S. 632 introduced by Senator Bentsen and S. 1251 introduced by Senator Glenn, differ in significant respects from the original Ervin bill. Both provide for review of executive agreements, the former by concurrent resolution of Congress and the latter by resolution of the Senate alone. We do not believe that either is an appropriate measure that we can support.

S. 632 more closely resembles the bill on which the 1972 hearings were held, but contains a major difference: The original bill purported to regulate all executive agreements and to make them subject to veto by concurrent resolution; section 5 of S. 632, however, excepts "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/] Presumably, this change reflects the conclusion drawn by the Subcommittee from its earlier hearings--that there are legitimate, well accepted areas for the conclusion

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1/ We note that S. 632 has no section 4.

of executive agreements under existing law. The problem with S. 632 is that, by including all these areas within the exception, it leaves nothing upon which the bill would operate--nothing, that is, except unlawful executive agreements, which it is not the President's intent ever to conclude. In other words, in my view S. 632 has no effect, unless one adopts an interpretation which would cause it to expand rather than to constrict Presidential power.

Let me explain: All executive agreements rely for their authority upon the Constitution, which empowers the President, and the President alone, to make agreements with foreign nations. In addition to the agreement-making authority, however, the President also requires authority to deal with the particular substantive area which the agreement affects. In some cases this authority is likewise conferred by the Constitution--as is the case, for example, with an agreement to recognize a foreign nation or to coordinate military tactics in the event of an attack upon the United States. When, however, the substance of the agreement is a matter over which the Congress exercises control, then if the President is relying upon the Constitution alone he must expressly or impliedly either (a) condition the performance of the agreement upon the enactment of appropriate legislation or (b) condition the

very effectiveness of the agreement upon the enactment of appropriate legislation. Thus, for example, the President could, under the Constitution alone, enter into a bilateral agreement for the reduction of tariffs which states that the reductions will only occur when the Congress passes implementing legislation--or which recites that the agreement itself will be effective only upon the passage of implementing legislation. (A prominent historical example of an agreement of the latter sort was the executive agreement providing for establishment of the United Nations Headquarters District in New York City, which was to be "brought into effect" only after appropriate action by the Congress. 22 U.S.C. 287, note; see 40 Op. A.G. 469 (1946).) If the President desires to do any more than this with respect to a substantive area that is within congressional control, he must rely not upon the Constitution alone but also upon the laws and treaties of the United States. When, to take a common example from actual practice, he makes an executive agreement for the distribution of United States funds to foreign countries, he relies not merely upon the Constitution but also upon the provisions of the Foreign Assistance Act of 1961, 22 U.S.C. 2151, et seq.

It should appear from the foregoing that executive agreements made under the Constitution alone and those made under the Constitution and the laws and treaties of the United States

comprise the totality of executive agreements which the President can now lawfully make; and since both categories are covered by the exception in S. 632, I am at a loss to explain what remains to be covered by the other provisions of the bill.

The one possible explanation does not seem to me a plausible estimate of the congressional intent. It might be argued that S. 632 is meant to be an implied grant of authority to the President to enter into unconditional executive agreements with any substantive content whatever--so long as those which deal with matters not within his constitutional power, or not previously placed within his power by statute or treaty, are submitted to the Congress pursuant to the concurrent resolution feature of the legislation. This would amount to an increase rather than a decrease of the President's executive agreement authority. I think it unlikely that was intended; and even if it were intended, we would oppose it. There is no reason why the need for congressional approval, when it exists, cannot be met--as it is under current law--through the normal legislative process rather than by the artificial concurrent resolution procedure which S. 632, if interpreted as I have just described, would establish.

The fact that Section 5 of S. 632 swallows the rest of the bill can only be understood (if not entirely explained) by

referring to the history of its development. Last year, a bill similar to S. 632 was introduced, exempting only executive agreements made pursuant to "specific" provisions of the Constitution or laws. S. 3830, 93d Cong., 2d Sess. That language would, of course, have left substantial areas of lawful executive agreement upon which the remainder of the bill could operate. The Senate Judiciary Committee reported the bill out, but deleted the requirement that authority be "specific." It explained that the change was made, "to make clear that the bill would not deprive the President of any implied powers which he may have to make executive agreements." S. Rep. 93-1286 on S. 3830. The bill thus amended was reported out without hearings and passed the Senate without debate. 120 Cong. Rec. S 19867-69 (Nov. 21, 1974, daily ed.). It is consistent with this history to surmise that, in its concern to preserve implied Presidential authority, the Judiciary Committee overlooked the fact that it was reducing the effective scope of the bill to coverage of only unauthorized agreements.

The other bill before you, S. 1251, has a broader scope than S. 632. Indeed, it can be read as being wider than existing understandings of what normally constitute executive agreements. Section 3 of S. 1251 defines executive agreement to

include "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." No exceptions are made. Under Section 2(a) all such agreements must be transmitted to the Senate and are subject to a 60-day waiting period unless the Senate sooner passes a resolution of approval or disapproval. (The House has no role to play under S. 1251.)

I had intended to say that the Department of Justice is rarely involved in the making of executive agreements, and thus would leave discussion of the practical problems involved in the 60-day waiting period to other agencies. With the broad definition that S. 1251 contains, however, I am not sure such a statement would be accurate. On any one day there may be innumerable informal arrangements made by individuals or units in the Immigration and Naturalization Service, the Drug Enforcement Administration and the Federal Bureau of Investigation which might be considered to fall within the definition. For example, an oral agreement between I&NS officials and Mexican authorities that the Service will deliver over certain illegal immigrants on a certain day at a certain time could be thought to qualify.

I will indeed leave it to other agencies to expand further upon such examples, since I am sure their problems would be even greater than ours. I do want to note, however, my strong view that the definition of S. 1251 is inadvisably broad--so broad that, if interpreted literally, it is plainly unworkable. You should also be aware, moreover, that even at this cost it does not achieve the apparent intent of eliminating all doubt that every possible agreement must be submitted to the Congress. That is to say, one can reasonably take the position that "informal understandings" do not ordinarily constitute, or even give the impression of, a binding commitment of the United States to provide manpower, funds, information, or other resources. In other words, your dependence upon good-faith submission of important agreements by the executive branch would not be eliminated by this strange definition; nothing will have been accomplished but a muddying of the waters.

Thus, each of the two bills presents at the outset difficult questions of construction. In this respect, they represent extremes. S. 632 is on its face so narrow that one is at a loss to construe it sensibly without making it meaningless; S. 1251 is so broad that, if taken literally, it could create serious administrative problems for the executive branch.

Beyond this, both bills raise fundamental issues concerning the proper roles of Congress and the Executive. They have the potential of precipitating constitutional conflict affecting virtually the entire field of our foreign affairs. No one can deny that in many areas Congress can and does legislate standards for the making of executive agreements. A good example is the P.L. 480 program, under which the President is authorized to negotiate and carry out agreements with friendly countries for the purchase and sale of agricultural commodities. 7 U.S.C. 1701. Congress has frequently reviewed and amended that program, through normal legislative methods, to adapt it to changing conditions. Congress has set the standards, in as much detail as it wished, for making the agreements, and the executive branch has carried out the law. By thus focusing on a particular subject area over which it has clear legislative competence under the Constitution, Congress has carefully and intelligently controlled the executive agreement process.

Unfortunately, the bills before us do not legislate on specific substantive areas of concern to the Congress; but attempt to subject all executive agreements to a requirement of subsequent Congressional approval. In doing this, they carry Congress beyond its proper function of making laws under

Article I of the Constitution, and thrust it into the role of executing the laws, reserved to the President under Article II. The balance of my testimony will be devoted to a discussion of the precise manner in which these bills would violate specific provisions of the Constitution; but my basic appeal is to the inherent repugnance of the overall scheme to our accepted constitutional framework. As our system operates, the Congress makes the laws, within its fields of competent authority, in as much detail as it desires; the President executes those laws, with due regard for the congressional intent; and the Judiciary determines the laws to be of no effect when they exceed congressional authority and determines the President's application of the laws to be of no effect when it is inconsistent with valid congressional prescription. This rough division of government power is what the doctrine of separation of powers is all about.

Under this proposed legislation, however, the Congress would seek to control executive action not by passing laws before the fact, but by requiring authorized actions under existing law to be submitted for its approval. These bills are the approximate equivalent, in the foreign affairs field, of a law that would purport to render all executive orders and regulations under domestic law ineffective until presented

for congressional endorsement. I would hope it is apparent upon the face of the matter--and even to one who is not familiar with the specific clauses of the Constitution violated by such an arrangement--that this is simply not the manner in which the United States Government is supposed to function. When, under such an arrangement, the Congress attempts to deny effect to an executive action validly taken under existing law, it is usurping the function of the Executive; and when it purports to invalidate such action on the basis that the action was not authorized, it is usurping the function of the Judiciary. I would hope, in short, that it would be entirely clear, even without the more technical discussion which I am about to embark upon, that when the Constitution established a system in which the Congress makes the laws and the President executes them, it did not envision or permit a system in which the Congress could pass a law which says: "The President may do anything within his authority we have not otherwise prohibited, so long as he submits all of that action for our prior approval."

Turning now to a more legalistic discussion of the problem: As the bills are drafted, there are two basic constitutional defects. First, Congress cannot in any manner restrict or modify powers which the Constitution reserves to the President

alone. Second, as to those Presidential powers--conferred by the Constitution, treaty or statute--which are subject to congressional restriction or modification, Congress cannot impose such restriction or modification by the device of concurrent resolution or Senate resolution. As far as the first point is concerned, it is clear that some subjects, such as the recognition of foreign governments or the conclusion of operational arrangements on the battlefield are exclusively Presidential in nature and not subject to limitation by Congress, even by statute. See Art. II, sections 2 and 3; United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203, 229 (1942). Cf. Ex parte Milligan, 71 U.S. 2, 139 (1866). It would be difficult to anticipate or describe all of the circumstances in which the President's exclusive powers might form the subject matter of executive agreements. In practice they have done so rarely, and executive agreements of this sort constitute by far the smallest category. The 1973 Report of your Subcommittee (p. 34) includes an ingenious and not unlikely example: an executive agreement to grant a Presidential pardon to an alien in this country in exchange for like treatment of an American abroad. Since the pardon power is vested in the President alone (see Art. II, section 2), it would be difficult to see how Congress could negate such an agreement, even by

statute passed over the President's veto. A fortiori the concurrent resolution and Senate veto established by the present bills would be ineffective. With respect to executive agreements asserting only exclusive Presidential powers, then, the present bills would contravene the Constitution.

I turn next to agreements whose subject matter involves Presidential powers (conferred by the Constitution, statute or treaty) which are constitutionally subject to congressional control. In my view it is clear that such agreements are valid and binding unless Congress limits the Presidential powers in question by the one means available to it under the Constitution: legislation passed by both Houses and submitted to the President for his approval. Congress cannot repeal or amend or restrict Presidential powers by concurrent resolution as provided in S. 632 or by resolution of the Senate alone as provided in S. 1251, since this would distort the constitutional legislative process by avoiding the President's veto.

The difficulty is not solved by the fact that this legislation itself must pass over the President's veto. For this legislation does not purport to remove Presidential power to enter executive agreements (it is doubtful that it could constitutionally do so) or Presidential power to act in all of

those substantive areas which the category of executive agreements we are now discussing might deal with. The legislation would leave the power, but subject it to a congressional restriction which is simply not envisioned by the Constitution. One might reasonably ask, if the Congress can do the greater (take away the power entirely), why can it not do the lesser (subject the use of the power to congressional approval)? I can best explain by an analogy to the law of property: A person is entirely free under the common law to refuse to sell his real property, but if he chooses to sell it he cannot subject it to continuing restrictions, so-called "restraints on alienation," which are inconsistent with full title in the new owner. So also, the Congress has authority to deprive the President completely of substantive powers in a number of fields; but unless it is willing to take that drastic step, it cannot leave the powers intact and yet subject them to formal restrictions other than those that can subsequently be imposed by the normal legislative process. The need for this doctrine should be obvious: Without it, the carefully drawn legislative procedure of the Constitution could be entirely evaded by a congressional grant of enormously broad powers and authorities to the President, subject only to the condition

that Congress approve their exercise by concurrent resolution. In effect, our laws would thereafter be made by the Congress alone, without any effective Presidential participation.

The language and history of the Constitution indicate that the veto power of the President was intended to apply to all actions of Congress which have the force of law. It would be difficult to conceive of language and history which make the point more explicitly. Two provisions of Article I, section 7 are involved. The Constitution provides, first, that every bill which passes the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President for his approval or disapproval. If disapproved it does not become law unless repassed by a two-thirds vote of each House. (Art. I, sec. 7, clause 2).

The problem that we face today was foreseen by the Framers. At the Constitutional Convention it was recognized that Congress might evade the above-described provision by passing "resolutions" (the precise language of these proposals) rather than bills. During the debate on this clause, James Madison observed that

> "if the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolutions, votes &c . . . ."

Madison believed that additional language was necessary to pin this point down and therefore

> "proposed that 'or resolve' should be added after 'bill' . . . with an exception as to votes of adjournment &c."

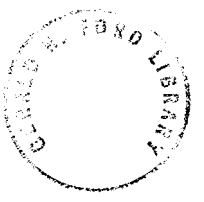
Madison's notes show that "after a short and rather confused conversation on the subject," his proposal was, at first, rejected. 2 M. Farrand, The Records of the Federal Convention of 1737, 301-02 (1937 Rev. ed.) ("Farrand"). However, at the commencement of the following day's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it. It passed by a vote of 9-1. 2 Farrand 303-05. Thus, the Constitution today provides--not in clause 2 of section 7, dealing with the passage of legislation (which has its own Presidential veto provision), but as an entirely separate clause 3--the following:

> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

It should be apparent from the wording of this provision, and from its formulation as a separate clause apart from the clause dealing with legislation, that it was intended to

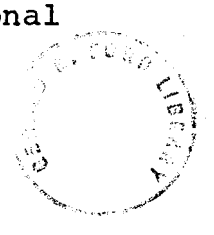
protect the President against all congressional evasions of his veto power, and not merely those that were formally connected with the legislative process. Of course, the fact that it refers only to concurrent resolutions, and not to one-House resolutions such as S. 1251 would provide, was not meant to sanction avoidance of the Presidential veto by the latter process; rather, the omission was meant to exclude from the veto requirement those instances in which, under the Constitution, the Senate has authority to take binding action on its own--to wit, in ratifying treaties and in confirming the appointment of Federal officers (Article II, section 2). The Framers probably never even envisioned that, apart from those constitutionally prescribed instances, a single House would purport to take any legally effective action on behalf of the entire Congress. In other words, the provision of S. 1251 for a one-House resolution is not in literal violation of section 7, clause 3 of the Constitution only because it has, in addition to the defect which that provision addresses, the defect of being an unlawful delegation of congressional power to one of its Houses.

The purpose of the veto was not merely to prevent bad laws but to protect the powers of the President from inroads of the kind represented by S. 632 and S. 1251. Leading



participants in the Convention of 1787, such as James Madison, Gouverneur Morris and James Wilson, pointed out that the veto would protect the office of President against "encroachments of the popular branch" and guard against the legislature "swallowing up all the other powers." 2 Farrand 299-300, 586-87. In The Federalist (No. 73), Hamilton states that the primary purpose of conferring the veto power on the President is "to enable him to defend himself." Otherwise he "might be gradually stripped of his authorities by successive resolutions, or annihilated by a single vote." We are faced in this proposed legislation with precisely the situation these quotations describe. The actions of the President in carrying out one of his principal functions--as the sole instrument for the actual conduct of our foreign relations--will be subjected to impairment and reversal by congressional vote without protection of the Presidential veto.

Despite the explicit language of the Constitution and the clear evidence of the original understanding contained in the remarks of the Framers, statutes have existed for some years which provide for congressional action by concurrent resolution. Moreover, although Presidents have vetoed proposed laws because of the unconstitutionality of such provisions, and have even more frequently registered their constitutional



objections in signing statements, they have sometimes accepted such provisions in silence, and have on several occasions even proposed legislation containing them. This is to be explained, one presumes, by the Presidential determination of acute need for legislation which could not be obtained without the objectionable provision. Former Justice (and before that Attorney General) Jackson recounted that when President Roosevelt signed without objection the Lend Lease Act of 1941, 55 Stat. 32, he addressed an internal memorandum to the Attorney General stating, for the record, that in view of the importance of the legislation he felt constrained to sign the bill in spite of the fact that in his view section 3(c) purported to give legislative effect to congressional action not presented to the President and this violated Article I, section 7 of the Constitution. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1357-58 (1953).

The argument suggests itself that repeated congressional use of such provisions, and occasional Presidential acceptance, comprise a constitutional practice which establishes their validity. This can not be so. Custom or practice may indeed give conclusive content to vague or ambiguous constitutional provisions, but it cannot overcome the explicit language of the text--especially when that text is supported by historical

evidence that shows it means precisely what it says. Moreover, if one is to rely upon practice, it must be both accepted and long standing. Repeated Presidential objections destroy the first of these characteristics, and the clear record of history eliminates the second. Use of the concurrent resolution is in fact a very recent phenomenon, and flatly contradicts what was the accepted understanding and usage until the second third of this century. A careful analysis of the historical practice was compiled by the Senate Judiciary Committee in 1897. It shows that from the First Congress through the nineteenth century concurrent resolutions were limited to matters "in which both Houses have a common interest, but with which the President has no concern." They never "embraced legislative provisions proper." S. Rep. No. 1335, 54th Cong., 1st Sess. 6 (1897). The report concluded that the Constitution requires that resolutions must be presented to the President when "they contain matter which is properly to be regarded as legislative in its character and effect." Id. at 8, quoted in part in 4 Hinds' Precedents of the House of Representatives § 3483. A concise formulation of the understanding may be found in Congressman Mann's statement that a concurrent resolution has "no force beyond the confines of the Capitol". 42 Cong. Rec. 2661 (1908).

It was not until the 1930's that enactments of the present sort first appeared, see R. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569, 575 (1953), and not until very recent years that they became fairly frequent. It has been recognized, even by their supporters, that they raise difficult constitutional issues. See, e.g., Memorandum of Senator Javits on the Foreign Assistance Act of 1961, 107 Cong. Rec. 15039 (1961); L. Henkin, Foreign Affairs and the Constitution 120-123 (1972). If, then, we are to give any credit to constitutional custom, we believe that it argues persuasively against the validity of congressional action by concurrent resolution. The tradition begun with the adoption of the Constitution and continued uniformly until relatively recent years is entitled to far greater weight than a disputed current practice.

I may add, that while the present bills present the occasion for our expression of concern about the concurrent resolution, they alone are by no means what prompts it. The Office of Legal Counsel has been concerned for some time with the dramatic increase in the number of legislative proposals which provide for concurrent resolutions, one-House vetos, and committee vetos. The situation may indeed be approaching Hamilton's description of a veto-less President being "gradually stripped

of his authorities by successive resolutions." Legislators' attraction to such provisions is of course understandable--though, as I will shortly discuss, short-sighted; and unless the Congress comes to see the necessity of adhering to the clear language of the Constitution I fear that erosion of the separation of powers in this fashion will rapidly accelerate. I have discussed the point at such length before this Subcommittee, in the hope that I can induce you, out of your special responsibility for matters involving the separation of powers, to address the problem not just in this legislation but more generally.

As I have plainly acknowledged, my primary concern in this matter is preservation of the President's separate constitutional power to execute the laws. I believe, however, that widespread use of the concurrent resolution device will ultimately impair the congressional function as well. As I have noted, Presidents have in the recent past acceded to, or even proposed, concurrent resolution provisions because they believed that only in this fashion could they induce the Congress to accord the broad powers they required. In other words, the device, because of the continuing congressional "string" it provides, is an incentive to broad, unspecific delegation. Instead of thrashing out the difficult details of a new legislative proposal, expressing the popular will in the context of

the concrete and specific results which the legislation would achieve, the Congress may, in reliance upon the concurrent resolution device, content itself with the expression of universally unobjectionable generalities--avoiding political controversy by leaving it to the Executive to determine what the legislation actually means to the man in the street. The result is the avoidance of that clear expression of the popular will which the legislative process is supposed to provide. The concurrent resolution device does not make up the defect. If the requirement of congressional oversight which it is designed to establish is not completely disregarded, it is often provided in effect by a single committee.

* * * * *

I apologize, Mr. Chairman, for the length of this statement which, as long as it is, does not exhaust the difficult and important problems with which it deals. For both the reasons I have discussed--the inappropriate scope of coverage and the concurrent resolution and one-House veto provisions--we oppose the enactment of both S. 632 and S. 1251.

Ford-Congress Rift Grows On Executive Agreements

NYT 8/15/75 p 2

By LESLIE H. GELB
Special to The New York Times

WASHINGTON, Aug. 14—A[P]ident's authority under previ-

Congress Is Widening Its Struggle for a Foreign Policy Role

A Domestic Challenge to Executive Agreements

NYT Sec. 4 p. 2 8/17/75

By LESLIE H. GELB

WASHINGTON—On a number of issues recently, including military aid to Turkey and trade credits for

the United States negotiated only 13 treaties but 230 executive agreements. Most of these were routine, public understandings.

But what troubles many Congressmen is that a number of formal accords with foreign countries

Thus, Representative Les Aspin, D
Wisconsin, asserts that between 400 and
have been concluded since the passage
Act but have never been transmitted t
because the Administration does not co
executive agreements. In effect executive
have "abridged Congress foreign affairs p
the Constitution."

The Administration has some strong a
its own. Officials contend that requirin
sional approval would interfere with the
negotiating ability, create uncertainty
capitals, risk the unravelling of delicate c
during the 60-day waiting period, and, m
tant of all, infringe upon the President

DEPARTMENT OF STATE
THE LEGAL ADVISER
WASHINGTON

File
u Foreign Affairs—
Legal Questions

August 20, 1975

The Honorable Philip Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Buchen:

Some time ago you expressed an interest in seeing the ultimate result of Gordon Baldwin's research on whether there is a legal basis for declining to submit certain types of executive agreements to Congress under the Case Act.

Enclosed for your information is Gordon Baldwin's best effort to make such a case. I will be interested in having your reaction as a lawyer.

Very sincerely,

Monroe Leigh

Monroe Leigh

Enclosure

THE CASE ACT

Executive Agreements and Disclosing Defense Intelligence Agreements

ISSUE: May the Executive Branch constitutionally refuse to inform Congress of certain classified "defense intelligence agreements" despite the provisions of the Case Act.

I. Summary and Conclusion

This memorandum concludes that the statutory obligation to inform Congress of classified "defense intelligence agreements" is unconstitutional in the following circumstances, and that a refusal to disclose them would be upheld by the Supreme Court:

a) the "defense intelligence agreement" is withheld from Congress at the specific request of the foreign party; and,

b) the foreign party would be entitled under international law to terminate the agreement if it is disclosed to Congress; and,

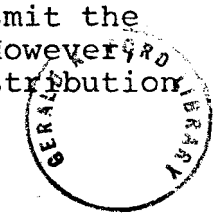
c) the President, or his appropriate agent, certifies that the agreement only involves the exchange of intelligence information and does not involve breaches of constitutional rights; or in the alternative to "a" and "b";

d) the Executive Department shows specific facts which imperatively support non-disclosure (see p. 18 of this memorandum for examples).

II. The Statute

The Case Act requires the Secretary of State to transmit the texts of all international agreements to Congress. However, the Act allows some agreements to receive limited distribution in stating that:

> "any agreement, the immediate public disclosure of which would in the opinion of the President, be prejudicial to the security of the United States, shall not be 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 (86 Stat. 619, 1 U.S.C.A. Sec. 112 b, effective 23 August 1972)."

The statute is not retroactive, and its legislative history reveals that Congress heard doubts as to its constitutionality if applied rigidly. The late Professor Alexander Bickel of Yale advised the Committee on Foreign Relations of his doubts of the difficulty of drafting to meet the constitutional problem: "I don't know that there is a draftsman who would be equal to the task of putting that shadowy doctrine [i.e. Executive privilege] into acceptable and comprehensible words."* A deputy legal adviser (Carl Salans) also suggested some constitutional doubts, but his views were rejected also.

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* Hearings before the Committee on Foreign Relations, U.S. Senate 92nd Congress, 1st Session on S. 596, Oct. 20-21, 1971 (Transmittal of Executive Agreements to Congress.) at pp. 27-28.

"The only possible difficulty I can see with S. 596, therefore, is that the President might decline to transmit an agreement which he views as executed in exercise of his own independent power and of no proper concern to Congress. I would seriously doubt the wisdom of a President taking such a position in any circumstances I can now imagine short of full-scale hostilities, but I should suppose that if his function as commander responsible for the safety of troops was involved, he might well be on sound constitutional ground in involving executive privilege and withholding a document from Congress. Yet I would see no need to attempt to write the doctrine of executive privilege into S. 596, and I don't know that there is a draftsman who would be equal to the task of putting that shadowy doctrine into acceptable and comprehensible words. It would seem to me that without now attempting prospectively to settle some future case that might arise in circumstances not now easily foreseeable, the legislative history might make clear the understanding of the Congress that nothing in S. 596 was intended to deny the President the benefit of the doctrine of executive privilege in the conditions in which he would be constitutionally entitled to invoke it."

Although the statute is drafted so as to include all international agreements, its primary purpose was to require the disclosure of those agreements which involved significant national commitments of a kind that might create "tensions and irritations between the Congress and the Executive branch."* Congress, says the House Report, "does not want to be inundated with trivia."** Therefore, insofar as a "defense intelligence agreement" is "trivial" the statute does not apply. Unfortunately, Congress gives us no test of what constitutes the important or the insignificant.

III. Assumptions

This memorandum assumes that:

a) the "defense intelligence agreements" do create binding agreements between nations and are not informal interagency understandings not reaching the dignity of an international agreement;

b) that the agreements do not specifically authorize unconstitutional behavior. Two examples of unconstitutional agreements which must be disclosed follow:

1. An agreement by which "Ruritania" will tap the telephone of U.S. Senator Erehwon and exchange information with the United States which taps the telephone of the Ruritanian Congress Minority Leader Savonarola would clearly be unconstitutional. Both Congress and the judiciary might have a legitimate constitutional claim to information showing such a violation of the 4th Amendment.

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* See House Report 92-1301, in 1972 U.S. Code Cong. & Admin. News, pp. 3067, 3068.

** Id. p. 3069.

2. An agreement with Ruritania by which the President undertook to return fugitives from Ruritanian justice who are captured in the United States. Such an undertaking by an Executive Agreement is unconstitutional -- according to Factor v. Laubenheimer 290 U.S. 276 (1933) and Valentine v. U.S. 5 (1936).* Hence, Congress -- not to mention the victim and the Courts -- might have a legitimate interest in the agreement, however confidential the President might wish it to be."*

IV. Discussion

To prevail against the Congress's claim, the Executive Department must prevail on two points:

A) that the agreements are authorized by the Constitution; and,

B) that Congress lacks constitutional power to insist that the Senate and House committees be given copies of agreements.

It is easier to establish the first than the second.

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* Arguably the reliability of such a firm statement as is found in Valentine

> "***[although extradition is] a national power, it is not confined to the Executive in the absence of treaty or legislative power."

is weakened by the Pink-Belmont decisions (U.S. v. Belmont, 301 U.S. 324 (1937); U.S. v. Pink 315 U.S. 203 (1942)) which sustained Executive agreements in language that might, if taken literally, offend the 5th Amendment's protection of property from taking without compensation. The Supreme Court has not reconciled the two sets of cases, both of which involve 5th Amendment claims, one of which upholds Executive agreements and the other of which forbids them.

A. Executive Power to Make Secret Agreements

No one seriously claims the President lacks power to make agreements with foreign powers that will be kept secret from the public. Draftsmen of the Constitution foresaw such a need when they allocated advice and consent power to the Senate rather than the House. Secret undertakings are commonly negotiated by all nations, and in our history there appears to be, until very recently, acquiescence by Congress to secret processes.* The military agreements during and after World War II at Cairo, Quebec, Tehran, Yalta, and Potsdan remained secret for several years and Congress made no contemporaneous objections, but the insistence on secrecy has lead to legislative efforts to require disclosure. The issue is whether any agreements involving military-diplomatic intelligence exchanges made hereafter can be withheld from Senate and from House committees.

If the subject of "defense intelligence agreements" involved a power constitutionally committed to the President such as the power to receive an ambassador, or the power to grant pardons, the President's claim to withhold would be paramount because the powers are specifically vested exclusively in the President, (See Schick v. Reed 419 U.S. 256, (1974), and neither the Congress nor the judiciary can interfere. An agreement, therefore, to obtain intelligence information in return for a secret pardon or involving the exchange of emissaries would clearly be within the President's exclusive perogative.

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* In 1924 an examination of President Theodore Roosevelt's private papers revealed several secret exchanges with Japan, Germany and France, which today might be within the terms of the Case Act. See Corwin, The President, His Office and Powers, p. 443 (4th Ed. 1957).

Although the House in 1948 passed a joint resolution purporting to require the Executive to furnish any information required by Congressional Committees, the Senate let the resolution die in Committee. H.R.J. Res. 342, 80th Cong. 2d Sess. Some Representatives expressed the view that the President need not disclose agreements made with the British Prime Minister, 98 Cong. Rec. 1205, 1215.

B. Power To Withhold From Congress

1. The Constitutional Power to Defy Congress

The core issue here is whether the President can ignore the express direction of Congress. When he does so according to the Supreme Court, his power "is at its lowest ebb;"

> "When the President takes measures incompatible with the expressed *** will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Jackson concurring in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637 (1952).

Examples of outright refusal of the Executive to follow an act of Congress in foreign affairs matters are relatively rare, and some examples suggested by scholars turn out to be erroneous because examination of facts reveal compliance rather than defiance.*

A "defense intelligence agreement" is negotiated pursuant to the President's powers as Commander-in-Chief, (intelligence information is essential to consider, to plan and to execute military action), his power to represent the United States in foreign relations, and his duty to faithfully execute the laws (those establishing the Central Intelligence Agency and the National Security Council).

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* Two scholars claim that "In 1940 President Roosevelt sent troops to Greenland and Iceland in the face of legislation that seemed to forbid it." Henkin, Foreign Affairs and the Constitution 106 (1972); Schlesinger, The Imperial Presidency, Ch. 9 (1973). Professors Henkin and Schlesinger are mistaken! The legislation was the Selective Service Act of 1940 which forbade sending inducted men outside the hemisphere (54 Stat. 886), but the troops which were stationed in Iceland were Marines who were, at the time, entirely composed of volunteers. No forces including inductees arrived in Iceland until 1942. Only 486 Army troops were sent to Greenland, mostly engineers -- none were inducted. Indeed, the legal restrictions imposed on troop assignment by the Selective Service Act did influence planning. General Marshall had directed that selectees not be in any contingent sent abroad. (See Matloff & Snell, Strategic Planning for Coalition Warfare 1941-42, (U.S. Army in World War II, 1953 p. 50, 111)).

However, Congress also has constitutional functions which blend, overlap, and possibly conflict with Presidential functions. Hence, in order to achieve a workable government, a balancing of the respective constitutional interests is necessary.

2. The Balancing Test

To prevail on the second point the Executive Department must show the separation of powers doctrine demands total confidentiality. That doctrine is not absolute as the history of Presidential-Congressional relations shows, and as the Supreme Court in U.S. v. Nixon reaffirms. Ordinarily, conflicts between the Executive and the Legislative branch are settled through the political process which calls for the forebearance of the judiciary. In a proper case, however, the Supreme Court may act as an umpire. When the Court so acts, its opinions form the raw material by which future non-justiciable controversies are evaluated. It is appropriate, therefore, to examine the opinions of the Supreme Court which might be relevant to the application of the Case Act.

The Supreme Court opinion in U.S. v. Nixon suggests an instructive test to determine whether or not a valid claim to withhold information exists. The Court noted and rejected the underlying premise and two further grounds advanced to protect the Nixon tapes from in camera inspection by the District Court.

a) The need to protect communications between government officials.*

b) That the doctrine of separation of powers requires secrecy.

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* Marbury v. Madison, 1 Cranch 137, 143-45 (U.S. 1803) contains the first judicial consideration of a confidentiality claim by the Executive. The Attorney General refused to testify to anything relating to his official transactions. Chief Justice John Marshall recognized that there might be a privilege to refuse if confidential undertakings were involved, stating: "if he thought that anything was communicated to him in confidence he was not bound to disclose it." Subsequent cases indicate that the threshold issue of whether or not the issue is confidential is a question for the Courts.

The underlying premise turned out to be the major weakness in the brief submitted on behalf of the President, namely; insistence that Executive claims should be honored simply because the Executive said so. "The ultimate authority over all Executive decisions is, under Article II, vested exclusively in the President of the United States."*

The process by which these claims were rejected in the Nixon case is applicable to the Case Act problem. The Court instead of accepting or totally rejecting the asserted claims engaged in a balancing-functional analysis rather than in a doctrinal mechanical approach.**

> "We address *** the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials." 418 U.S. 683, 712, footnote 19, (1974).

In so speaking the Court rejected the President's (Nixon's) major premise that his opponents had to establish a compelling need before the Court could engage in balancing. The Court struck the balance by contrasting the specific need for the information in a criminal trial with "the [President's] broad, undifferentiated claim of public interest in confidentiality." At critical points in the opinion the Court indicated that it might have ruled in favor of confidentiality if the

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* Brief for respondent at pp. 27-28; see Westin & Friedman, ed. United States v. Nixon p. 337 (1974). The authorities cited on the brief for this proposition in reality support the opposite, namely that ultimate authority rests in no single branch of the government. See Federalist #48; 1 Story, The Constitution 530 (4th ed.).

** Significant in the opinion is its omission of any reference to the diligent work of Raoul Berger, Executive Privilege, A Constitutional Myth (1974). Berger rejected a functional analysis of what is needed to make the Constitution work in favor of a firm doctrinal and mechanical support of total legislative supremacy. For a criticism of Berger's approach see Soefer, 88 Harvard Law Review 181 (1974). Professor Soefer concludes that Berger's work is wholly one-sided, "incomplete and biased," despite his impressive research. The same can be said for the brief submitted on behalf of President Nixon's claims. The Court's opinion is a compromise which rejects the extreme claims of advocates of legislative supremacy (Berger) and of Presidential supremacy (the St. Clair brief).

interest in disclosure in a criminal trial had been less strong and the need for confidentiality more specific. A major weakness of the President's position was the broad and undifferentiated nature of his claims. A need for confidentiality might arise and might be honored, said the Court, if the subject matter sought involved military-diplomatic or "sensitive" material.

> "Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material of in camera inspection ***."

The Court was not called upon to tell what matter might fall within the classification of diplomatic or military matters, and hence only case-by-case adjudication will supply definitions. However, in these areas the deference to Executive needs for confidentiality will be entitled to the "utmost deference."

> "In this case the President *** does not place his claim of privilege on the ground [that the material involves] military or diplomatic secrets. As to these areas of Article II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. 683, 710.*

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* The Court only cited C & S Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948). Wherein the Court stated:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." Id. at 111. This is dicta which is qualified by the Nixon and Reynolds cases. See also U.S. v. Curtiss-Wright Export, 299 U.S. 304, 320 (1936); Zemel v. Rusk 381 U.S. 1, 17 (1963).

To support confidentiality in the face of a competing claim the Nixon case required a showing that the confidentiality claim "relates to the effective discharge of a President's power." (418 U.S. at 711.) How can such a showing be made? Older cases supply helpful hints.

A naked claim that military or diplomatic matter would be divulged is not enough to avoid balancing the particulars. The Nixon opinion cited U.S. v. Reynolds 345 U.S. 1 (1953) wherein the Court confronted a plaintiff's demand for certain classified material relating to a crashed B-29. The Court, Black, Frankfuter, and Jackson dissenting, reversed an order that classified material be tendered to the trial judge in camera inspection because:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. 1 at 10. [Emphasis supplied].

The Reynolds test does require balancing in that the trial judge must be satisfied that national security required confidentiality. The courts have not told us precisely how satisfaction will be achieved, but leave the issue for case-by-case determination. It is clear that legislative interests differ from judicial claims and must be examined.* Here unlike the Nixon, the Reynolds and the C & S Airlines cases which involved claims for disclosure by the judiciary in civil or criminal litigation:

1. Congress seeks information, not the courts, and Congress, unlike the courts has significant authority in the area of military and diplomatic affairs;

2. Congress does not seek substantive intelligence information; it wishes to know about the process by which information is obtained, and what price, if any, is extracted from the United States; **

3. The information sought will not, says the Case Act, be "published to the world." It will remain confidential and within the Congress (in theory at any rate).

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* Robert Jackson, while Attorney General, and with the President's approval, refused to disclose FBI reports to a House Committee. See 40 Op. A.G. 45 (1941) which contains many examples of similar refusals to furnish specific substantive information. None of the examples, however, involve an inquiry into whether or not a secret agreement existed.

** Congress, over the President's veto allows the judiciary to determine de novo whether or not material is properly declassified. See PL 93-502 Act of November 21, 1974 amending the Freedom of Information Act, 5 U.S.C. 552. The constitutionality of this power has not been determined.

Therefore the reasons that allowed an Executive claim to prevail or be subordinate to a judicial claim, do not automatically apply to overcome or be inferior to a legislative claim.*

The supremacy of Congress has strong advocates today whose arguments must be conquered if the Executive is to establish authority to withhold. Raoul Berger in his recent book Executive Privilege insists that the Executive must disclose the products of intelligence exchange agreements.** The surrender he asserts, is required to fulfill Congress's legislative responsibilities to support and maintain the defense establishment, and because Congress created the Central Intelligence Agency and the National Security Council. To aid its legislative task in supervising these agencies and in overseeing their ability to fulfill their statutory mandate, he claims, that Congress must have these data.

Berger confuses the obligation to disclose the agreements with the right to the substantive content of intelligency information. He claims, without differentiation, that Congress has a right to both. But the claim to substantive information raises different constitutional questions than a claim of access by both Houses of Congress to international agreements. If the Case Act only obliged the disclosure of the agreements to the Senate or to a Senate committee then the Executive claim would be weaker, because of the constitutional commitment only to the Senate of power to advice and consent to treaties.

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* The privilege of withholding state secrets has long been recognized by courts: see Totten v. U.S. 92 U.S. 105 (1825); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C.), aff'd sub nom V.E.B. Carl Zeiss, Jena v. Clark, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied 389 U.S. 952 (1967), and in camera inspection has been denied; see U.S. v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944); Pallen v. Ford Instrument Co. 26 F. Supp. 583 (E.D. N.Y. 1939); Firth Sterling Co. v. Bethlehem Steel, 199 F. 2d 353 (E.D. Pa. 1912). But see Halpern v. U.S. 258 F. 2d 36 (2d Cir. 1958) and Cresmer v. U.S., 9 F.R.D. 203 (E.D. N.Y. 1949).

** Berger, Executive Privilege 154 (1974).

One of the earliest constitutional precedents for refusing to disclose treaty-type information to Congress was when President Washington declined to furnish the House of Representatives with copies of instructions to John Jay who negotiated a treaty with Great Britain. President Washington claimed that this inspection would not be asked by the House because it was only the responsibility of the Senate.* The Case Act, however, purports to require surrender of agreements to both Houses - it represents, therefore, an undifferentiated claim of legislative power. A number of bills presented in 1975 are making more sweeping claims to disapprove of Executive Agreements by concurrent resolutions.**

In our early history the Congress was more diffident. In 1790 Congress appropriated a lump sum for the conduct of foreign affairs, and required the President to account specifically for all expenditures "as in his judgment may be made public."*** Frequently in the early days Congress would request the President to send foreign affairs information to Congress, but with qualifications that allowed withholding of material which might prejudice national interests.****

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* 5 Annals of Congress 760-762 (1796) President Washington's position is frequently cited as authority for denying information to Congress generally. Actually he was only resisting the House of Representatives.

** See for example, the proposed Executive Agreements Review Act, H.R. 7051, 94th Cong. 1st Sess.

*** Act of 1 July 1790, 1 Stat. 128-9.

**** See 4 Annals of Congress 251 (1849) Madison's statement of January 1794 indicating that the President might give "reasons" for refusing to disclose communications received from Great Britain.

10 Annals of Congress 773 (1851). On January 20, 1800 the Senate requested the President to give "such information *** as *** may in his opinion be proper" to give the Senate regarding a treaty with Francy.

15 Annals of Congress 67, 70 (1852). On January 22, 1806 a request that the President disclose a letter from James Monroe to the Secretary of State was modified by the qualification that the President should first judge it "proper."

The first Congresses contained many of the Constitution's draftsmen and more often than not a heavy presumption of constitutionality is accorded to their opinions - Marbury v. Madison to the contrary notwithstanding (before 1860 only three acts of Congress were held unconstitutional). More recently the State Department has successfully resisted some requests by Congressmen that an Ambassador arrange meetings with foreign officials.*

3. The Authority of Congress Which Must Be Weighed in the Balance

In order to prevail over Congress the Executive need not, and should not, argue that Congress totally lacks power to inquire into the existence of international agreements. Nor should the Executive rely on broad statements of inherent Executive power traceable to the opinion of the Supreme Court in U.S. v. Curtiss-Wright Export, 299 U.S. 304 (1936).** That opinion, however, does stress in dicta the fact that the President necessarily has informational facilities not available to Congress, and it implies his power to keep secrets from Congress.

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* See Bohlen, Witness to History, 390 (1973), who states that while Ambassador to the Soviet Union he forbade such contacts on instructions from Washington.

** The Court in Curtiss-Wright faced the issue of the scope of combined Presidential-legislative power, and the Court found inherent federal power to deal with foreign relations. See Lafgren, U.S. v. Curtiss-Wright Export Corp.: An Historical Reassessment 83 Yale L. J. 1 (1973).

The opinion of Justice Sutherland is neither good history, nor is it based on the plain meaning of the Constitution. For example, Congress, not the President, must consent to any international agreements made by the States, and after American independence, but before the Constitution was adopted, several of the States made international engagements.

Sutherland's inherent power of the Executive language was a product of the need to show that delegation of power constraints applicable to domestic problems (see Schecter Poultry Corp. v. U.S. 295 U.S. 495 (1935)) do not apply in the foreign arena.

> "[The President] not the Congress *** has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

Because the President has facilities to obtain information necessary to fulfill the foreign affairs responsibilities of both the Congress and the Executive, and because those facilities may be jeopardized by disclosure, the President can properly claim that it is in the mutual interest of both branches of the Government to protect confidentiality. That mutuality is supported by two statutes which recognize the need for foreign intelligence and for its protection.

a) Sec. 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 which states that Congress did not intend "to limit the constitutional power of the President to *** obtain foreign intelligence information ***."*

b) The Central Intelligence Act of 1949 (50 U.S.C. 403(d)(3)) stating that: "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

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* "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by the authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

Arguably the preceding statutes conflict with the Case Act. However, courts seek to construe statutes harmoniously and hesitate to ignore or strike one down if it is possible to preserve all.*

It is an appropriate rule of statutory construction, therefore, to construe a general obligation as qualified by more specific limitations. The general and undifferentiated language of the Case Act is constitutional only if it is qualified, therefore, by the constitutional power of the President recognized in the Safe Streets Act to obtain foreign intelligence information, and by the specific obligation of the Director of Central Intelligence to protect it from disclosure. The Case Act, furthermore, on its face is only directed at the Secretary of State. Nothing in the history of the Case Act reveals any specific concern about "defense intelligence agreements" which are not ordinarily negotiated by the Department of State and which by definition are likely to be both sensitive and classified. Furthermore, if disclosure constituted a breach of an international agreement, and hence a breach of international law, there is additional ground for qualifying the broad language of the Case Act.** A recent lower federal court supports this argument in refusing access to documents because granting access would breach an international understanding.***

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* See Regional Rail Reorganizational Cases, 419 U.S. 102 at 133 (1974) "repeals by implication are disfavored;" also FAA v. Robertson. 43 L.W. 4833, 24 June 1975.

** While Congress has the power to breach an agreement by a subsequent statute (see the Chinese Exclusion Cases 130 U.S. 581 (1889). Courts seek to avoid such a result.

*** Wolfe v. Froehlke. 358 F. Supp. 1318 (D.D.C. 1973), aff'd 510 F. 2d 654 (D.C. Cir. 1974) where the Army refused to disclose documents requested under the Freedom of Information Act because the British with whom the requested file had been jointly created did not agree to declassification. The court upheld the Army.

The Executive must concede Congress's general interest in learning about significant international agreements. That Congressional power must, in general terms, be recognized because of the following delegated powers:

a) authority to regulate foreign commerce (Art. 1 Sec. 7 cl. 3);

b) authority to appropriate funds and require an account of their use (Art. 1 Sec. 9 cl. 7, cf. U.S. v. Richardson 418 U.S. 166 (1974));

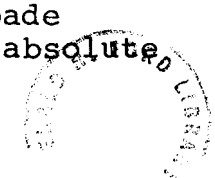
c) it is authorized to seek ways to reduce waste and inefficiency by investigating the behavior of those receiving government funds, and it may examine the national defense posture including the wisdom of commitments that might involve the United States in foreign conflicts.

d) Congress, not the President, may constitutionally consent to States seeking to "enter into any Agreement or Compact with *** a foreign Power." (Art. 1 Sec. 10, cl. 3).

However, the general interest of Congress can be overcome by the more specific needs of the Executive branch, already recognized by statute and rooted in Article II of the Constitution.

4. Balancing -- The Role of the Judicial Branch

The resolution of the competing Executive and Legislative Department claims, presented in a case or controversy (a contempt of Congress citation or a prosecution against an Executive Department official) is a judicial function.* Several important recent cases reveal that the Supreme Court is not reluctant to act as an umpire in cases involving competing separation of powers claims: U.S. v. Nixon (Executive vs. Judiciary); Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952) (Executive vs. Congress); Powell v. McCormick 395 U.S. 486 (1969) (Congressman vs. Congress); N.Y. Times v. U.S. (the Pentagon Papers case) 403 U.S. 713 (1971) (Executive vs. First Amendment), Gravel v. U.S. 408 U.S. 606 (1973).** In all of these cases the Court rejected an argument that the separation of powers doctrine forbade judicial inquiry. In all of these the proponent of absolute power to forbid judicial review lost!



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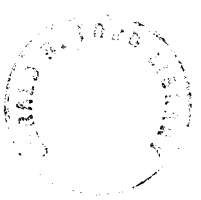
* Professor Freund points this out in On Presidential Privilege, 88 Harvard Law Review 13, 38 (1974).

** See also Sun Oil Co. v. U.S. 514 F. 2d 1020 (Ct. Cl. 1975).

To replace separation of powers as an absolute doctrine, the Court in Nixon approved Justice Jackson's observation that:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

A major function of the Supreme Court is, through the adjudication of cases and controversies, to develop doctrines that "integrate the dispersed powers into a workable government." "Executive privilege" is one of those doctrines - the Constitution contains no reference to it, it must be implied and its parameters described incrementally as experience dictates. The evidence that the Court needs in shaping applicable doctrines here must be facts showing precisely how the proper functions of both the Executive and Legislative branches will be frustrated by disclosure of "defense intelligence agreements" to committees of Congress. One critical fact is that compliance with the demand will force Congress to breach an international agreement. The justification for preferring one constitutional claim against another is always that the interests of all will be served by honoring the demand of one. That justification underlies the Court's opinions in civil rights litigation. When an individual's claim to liberty or property is supported, it is because of an overriding conclusion that the public interest is served by protecting that private interest in liberty or property. Similarly a government agency's claim for confidentiality can only prevail over an act of Congress by showing that there is a larger public interest favoring total confidentiality. Confidentiality frequently is favored in other contexts. For example, there is a community interest in the inviolability of the jury room; in the privileges of a judicial conference; in the common law of privileged communications; and in a prohibition against disclosure of judicial rulings until authorized by the Court. Any legislation seeking to forbid secret jury or judicial deliberation would be totally unconstitutional because it would impinge upon the ability of judge and jury to function effectively.



C. Facts Which Support Confidentiality

The following hypothetical situations illustrate the kinds of facts that a Court would find persuasive in permitting non-compliance with the Case Act.

1. An assurance to the foreign party to the agreement that its contents would NOT be disclosed to another branch of our Government, coupled with some solid reasons for that assurance, for example:

   i. the Ruritanian Government wishes to maintain a public posture of neutrality among so-called super powers, and the disclosure of any benefit given to the United States would trigger comparable demands from a third power;

   ii. the Ruritanian Government in power would suffer a severe political embarrassment if the agreement were disclosed, and it is in the United States' interest that this government not be so embarrassed. Such an agreement, however, must be made clearly within the lawful power of the United States Government.

   It may not be enough that the Executive Department alone wants to keep the agreement secret without specifying reasons.

2. The agreement involves the location, duties and safety of military and other personnel who are under the orders of the President -- i.e., their direction is based on the President's power as Commander-in-Chief.

3. That inextricably linked with the agreement is information supplied by associates and advisers of the President which was intended to help the President in international policy planning. Here the President can rely directly on the opinion of the Court in Nixon v. U.S.; and on Marbury v. Madison.

4. A showing that disclosure of one agreement will trigger demands on the United States to enter into similar agreements with other nations. Example: that if the agreement with Ruritania, by which Ruritania obtains certain technical advice, were disclosed, then Lilliput, Ruritania's adversary, will make similar demands which for some stated reasons (cost too much, Rurtanians are friends and gentlemen, Lilliputians are bastards, etc.) the United States does not wish to honor.

5. That the agreement was achieved by "bribing" the President, King or whatever, of Ruritania in such a manner that U.S. law was not violated although Ruritanian law might have been.

To mention these possible facts does not exclude the possibility of other persuasive facts, but they must be persuasive facts, not naked assertions!

Gordon B. Baldwin
Counselor on International Law

THE NEW YORK TIMES,
TUESDAY, AUGUST 26, 1975

The Two Messrs. Ford

Repealing the Federal Government in all fields except

MEMORANDUM

NATIONAL SECURITY COUNCIL

September 8, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: LES JANKA *for*

SUBJECT: Executive Agreements

Attached for your information is the latest version of what Senator Case intends to propose on the Executive Agreement issue. It is a new departure in that it does not require all agreements to be sent for Congressional approval. Rather, it provides a preliminary step whereby either House could determine by majority vote whether any particular agreement is of "sufficient importance" to require some form of Congressional approval.

I am told that Senator Case hopes the Administration can bring itself to view his efforts with an open mind and to work with him on some mutually acceptable compromise. If we try to oppose his initiative outright, he will react strongly and support even stronger legislation.

General Scowcroft has asked me to monitor developments on all such legislation. I would appreciate the opportunity to participate in meetings or efforts your office may undertake on this subject.

cc: Jack Marsh

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NUTSHELL SUMMARY OF THE CASE-GLENN BILL ON
EXECUTIVE AGREEMENTS OR INTERNATIONAL AGREEMENTS

The object of this legislation is to require Congressional approval of international agreements the Congress finds of "sufficient importance" as to require Congressional action.

The legislation does not specify whether the approval is to be by treaty only, or by a majority of both Houses approving "by law." Instead the legislation only specifies that Congress must approve in the case where Congress determines any agreement to be of sufficient importance.

Mechanically, Congress has sixty days to determine importance and to act on any resolution of importance after the executive agreement is transmitted to the Congress pursuant to PL 92-403. It is assumed that some rewording of PL-92-403 may be necessary --or some language amending it inserted in this act= to clear up an ambiguity under PL-92-403 which gives the Executive Branch sixty days to transmit an agreement to the Congress "after" it has entered into force.

Under this proposed Act, either House can determine whether an agreement is of "sufficient importance" by a majority vote. Each Committee has twenty days after transmittal to report out a resolution; if this is not done a highly priviledged motion can be brought in any house to discharge the resolution from Committee.

Once a resolution of importance is approved by either House, the international agreement cannot enter into force until after Congress has acted affirmatively on its consideration.

There is a secrecy provision in the act.

The legislation of itself does not require treaty approval through the mechanism of "advice and consent." If the Senate brought a resolution of importance successfully, the Committee on Foreign Relations could begin consideration of the measure as a treaty. If the House acted first, the international agreement might be considered in the form of a concurrent resolution of approval in which case both Houses would act.

Comment

This legislation should have a fair chance of favorable consideration in the House of Representatives because it does include the House in the process of approving international agreements and it does conform in its intent with the proposed Morgan-Zablocki bill which attempts to single out "significant" or "important " international agreements for the approval process.

It should be pointed out, as well, that the "advice and consent" function of the Senate originates, in part, from the transition of the old "Confederation" to the Federal system and from the need for the individual States, under the FederaL Government, to surrender their "independence" in the conduct of foreign policy. In short, the preogative of the Senate as opposed to the prerogative of the Congress was part of the settlement needed to approve the Constitution of 1789. Under the Articles of Confederation, the "advice and consent function" was exercised merely by the legislature and not by one part of the legislature. While the origins of the advice and consent concept go well back into English history and the emergence of the Parliamentary process, this legislation merely modernizes and enlarges on the intent of legislative participation in the approval of international agreements.

[illegible]th CONGRESS
1st SESSION

S. _____

(Do not write above this line except those provided for the date, number, and reference of bill.)

IN THE SENATE OF THE UNITED STATES

Mr. CASE (for himself and Mr. GLENN)

introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To require the approval by law of certain international agreements.

(Insert title of bill here)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 112b of title 1, United States Code, is amended as follows:

(a) The section caption is amended by adding at the end thereof a semicolon and "APPROVAL".

(b) At the end thereof add the following new subsections:

"(b) Except as otherwise provided under subsection (d) of this section, any such international 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 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, either House agrees to a resolution stating in substance that it is the sense of such House that such agreement is of sufficient importance as to require the approval of the Congress.

"(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 international 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.

"(e) For purposes of this Act, the term 'international agreement' means any bilateral or multilateral 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.

"(f) (1) This section is enacted by Congress--

"(A) 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 procedure to be followed in that House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that they are inconsistent therewith; and

"(B) 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.

"(2) For the purposes of this section, 'resolution' means only a simple resolution of either House of Congress, the matter after the resolving clause of which is as follows:
'That it is the sense of the (Senate) (House of Representatives) that the international agreement numbered transmitted to (Congress) (the Committee on Foreign Relations of the Senate

and the Committee on International Relations of the House of Representatives) by the President on , 19 is of sufficient importance as to require the approval of the Congress'; the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a simple resolution which specifies more than one international agreement.

"(3) A resolution with respect to an international agreement shall be referred to the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives.

"(4) (A) If the committee to which a resolution with respect to an international 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 of the resolution or to discharge the committee from further consideration of any other resolution with respect to the international agreement which has been referred to the committee.

"(B) 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 resolution with respect to the same international 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.

"(C) 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 international agreement.

"(5) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to an international 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.

"(B) 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 resolution is agreed to or disagreed to.

"(6) (A) 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.

"(B) 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 resolution with respect to an international agreement shall be decided without debate.

"(g) In the event that either House has agreed to a resolution under subsection (b) of this section stating in substance that it is the sense of such House that an international agreement is of sufficient importance as to require the approval of the Congress, such international agreement shall not come into force with respect to the United States until the Congress by law approves.

"(h) In the event that the President determines under subsection (a) of this section that the immediate public disclosure of an international agreement would be prejudicial to the national security of the United States, the consideration of a resolution by either House purusant to subsection (f) of this section shall

be in executive session, and no record of such session shall be made available to the public until such date as the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives may determine.

"(i) The provisions of subsections (b)-(g) of this Act shall not apply to any international agreement entered into by the President pursuant to specific authority given the President by any prior treaty or law."

(c) Item 112b in the analysis of chapter 2 of title 1, United States Code, is amended by inserting immediately before the period at the end thereof the word "approval".

MEMORANDUM

NATIONAL SECURITY COUNCIL

Exec Agreements

September 8, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: LES JANKA *for*

SUBJECT: Executive Agreements

Attached for your information is the latest version of what Senator Case intends to propose on the Executive Agreement issue. It is a new departure in that it does not require all agreements to be sent for Congressional approval. Rather, it provides a preliminary step whereby either House could determine by majority vote whether any particular agreement is of "sufficient importance" to require some form of Congressional approval.

I am told that Senator Case hopes the Administration can bring itself to view his efforts with an open mind and to work with him on some mutually acceptable compromise. If we try to oppose his initiative outright, he will react strongly and support even stronger legislation.

General Scowcroft has asked me to monitor developments on all such legislation. I would appreciate the opportunity to participate in meetings or efforts your office may undertake on this subject.

cc: Jack Marsh