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EXECUTIVE AGREEMENTS, THE TREATY-MAKING CLAUSE, AND STRICT CONSTRUCTIONISM*

I

It is often the case that the strongest points supporting one's claim can become the very basis for the strongest arguments against it. So it is when the arguments justifying presidential power to enter into executive agreements are examined.¹ A "strict construction" of the Constitution, be it an interpretation either in terms of the intent of the Framers, or a search for the meaning of the words actually employed,² affords no basis of support for expanded executive prerogatives in the area of foreign relations. The Constitution is explicit in its terms delineating the powers assigned to each branch of government, and fidelity to those terms, the tenet of "strict constructionism," leads one to doubt, if not reject, the claims made for adaptation through use and practice.³

Leading advocates of expanding presidential power, albeit writing a number of years prior to the new wave of literal interpretation of the Constitution, would no doubt reject the legal philosophy of an administration that seemingly implements the very proposals they demand. Specifically, McDougal and Lans decry the restrictions placed on the President by the many who "have followed the Pied Pipers of strict constructionism in attempting a literal construction of a non-existent text"⁴ While fidelity to the Constitution demands no less than the acceptance of the words it contains, one must certainly

* The author wishes to express his indebtedness and appreciation to Professor C. Herman Pritchett for his remarks on an earlier draft of this Comment.

1. The major concern of this Comment is to deal with "sole" executive agreements, *i.e.*, those agreements that are entered into by the President alone under powers supposedly found in the Constitution.

2. See C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 153-54 (1969) [hereinafter cited as MILLER]. See generally Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. OF BOOKS, May, 1972, at 26 [hereinafter cited as Dworkin]; text accompanying note 227 *infra*.

3. The most extensive claim for such an interpretation is found in McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 YALE L.J. 181, 534 (1945) [hereinafter cited as *Treaties*]. The most restrictive view of the President's power to make executive agreements can be found in Fraser, *Treaties and Executive Agreements*, S. Doc. No. 244, 78th Cong., 2d Sess. (1944).

4. *Treaties*, *supra* note 3, at 217.

start with the assumption that such a text exists before an interpretation is attempted.

No less interesting is the following statement by McClure:

Certainly the *specified* rule regarding treaties has not heretofore been construed as denying or disparaging the right of the President to retain his inheritance from the government under the Articles of Confederation and British constitutional practice of using executive agreements in the conduct of international relations.⁵

A strong expounder of executive agreements, McClure not only would deny a literal construction of the Constitution, but also would advocate fidelity to a text that was conclusively reformed because of weaknesses in the field of foreign relations,⁶ as well as supporting a practice that was definitely a point of contention with Great Britain at the time of the American Revolution.⁷

A theme which dominates those writers who simply pay the piper to play another tune is that the constitutional text "permits what it does not prohibit."⁸ Thus, one finds that "the Constitution does not provide

5. W. MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 279 (1941) (emphasis added) [hereinafter cited as *AGREEMENTS*].

6. On a general level, the call for a federal constitutional convention was made "for the sole and express purpose of revising the Articles of Confederation . . . to . . . render the federal constitution adequate to the exigencies of Government & the preservation of the Union." 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 14 (rev. ed. 1937). Fortunately, this point did not escape McDougal and Lans. See *Treaties*, *supra* note 3, at 258. See also text accompanying note 167 *infra*.

7. The colonists felt compelled to reject the "constitutional practice" of the British government in the conduct of its foreign affairs. See B. BILLYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) [hereinafter cited as *BILLYN*]; text accompanying note 185 *infra*.

8. A parallel theme is found in international law. In *Case of the S.S. "Lotus,"* [1927] P.C.I.J., ser. A, No. 9, the court stated that, absent a written "constitution" with explicit provisions prohibiting actions, such actions are permitted. Indeed, in *Missouri v. Holland*, 252 U.S. 416 (1920), the Court found that "[t]he treaty in question [did] not contravene any prohibitory words to be found in the Constitution." *Id.* at 433. Thus, McDougal and Lans state, as the extension of the argument, that the treaty-making clause "[d]oes not exhaust the provisions of the Constitution . . . which grant equally broad powers . . ." *Treaties*, *supra* note 3, at 217. See also *AGREEMENTS*, *supra* note 5, at 243.

The clearest expression of the divergence of views of the type of actions constitutionally permissible where there is no express provision governing it, can be seen in the following statements of two former Presidents:

. . . [Theodore] Roosevelt said that it was not only the President's "right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." Pursuant to that view he acts "for the common well-being of all our people, whenever and in whatever manner . . . necessary, unless prevented by direct constitutional or legislative prohibition."

On the other side, William Howard Taft wrote: "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot

that the treaty-making procedure is to be the exclusive mode [by which] the federal government can, under the Constitution, make international agreements."⁹ This is because the "language is permissive rather than mandatory."¹⁰ It is therefore argued that because the phrase "he shall have power" in the treaty-making clause¹¹ differs from the phrase "he shall," as used in the clause dealing with nominations and appointments,¹² the treaty-making power grants discretion in determining which procedure to use:¹³

The constitutional specification of a procedure whereby he *may*, or has power to, make treaties, certainly leaves no room for inference that he may not make other varieties of international acts, for that matter treaties also, if there is an essential distinction, by other recognized procedures.¹⁴

Those other procedures are the product of an unjustified "loose" interpretation of the Constitution, which derive their force from the language of other clauses of the text. Yet, a full examination of sections 2 and 3 of article II discloses a difference between discretionary and mandatory powers;¹⁵ thus, the President "shall have power" to grant

be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. . . . There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."

Quoted in G. GUNTHER & N. DOWLING, *CONSTITUTIONAL LAW, CASES AND MATERIALS* 556 (8th ed. 1970).

9. *Treaties*, *supra* note 3, at 216.

10. *Id.*

11. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2.

12. "[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ." U.S. CONST. art. II, § 2.

13. In reference to article II, section 2, dealing with the power and procedure of nominating ambassadors, McClure states that "in contradistinction to the permissive power to make treaties, which immediately precedes it in the same clause . . . there appears to be definite compulsion attached to this passage. In neither case, however, is there a stated negative." *AGREEMENTS*, *supra* note 5, at 243. See also Comment, *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 MICH. L. REV. 1202, 1206 (1953). The treaty-making clause has never been interpreted to be an exclusive mode, and it is considered a "permissive grant" in that it does not preclude the making of agreements not considered treaties, but which are equally binding. 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 397 (1943).

14. *AGREEMENTS*, *supra* note 5, at 279.

15. Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 342-43 n.5 (1944) [hereinafter cited as Wright]. See also Catudal, *Executive Agree-*

reprieves and pardons, but he "shall" be Commander-in-Chief, receive Ambassadors, and "take Care that the Laws be faithfully executed"¹⁶ Where a discretionary power was conferred on the President, the phrase "he may" is used, as in section 2 requiring the opinions of principal executive officers¹⁷ and in section 3 with the convening and adjourning of Congress.¹⁸ Nowhere do the proponents of an alternative method explain how the phrase "he shall have power" signifies a permissive grant to use other procedures for making international agreements. Rather, it seems apparent in light of the wording of other clauses of the section that the President is to have discretion in determining when he would make use of the power, not that he had discretion in determining if another method was equally constitutionally permissible.

Whether the language of the Constitution is permissive enough to allow for executive agreements is a focal point of the issues that surround the legal basis for such action. President Monroe, for one, had difficulty in deciding just how permissive the Constitution is. Although Monroe, as a delegate to the Virginia Ratifying Convention in 1788, thought the Senate might come to "direct the affairs of the executive,"¹⁹ he felt it necessary to submit to the Senate the Rush-Bagot agreement.²⁰ His words are telling evidence of the uncertainty that surrounds the scope of executive prerogative:²¹

ments: A Supplement to the Treaty Making Procedure, 10 GEO. WASH. L. REV. 653 (1942).

16. U.S. CONST. art. II, §§ 2-3.

17. "[H]e may require the Opinion, in writing, of the [principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" U.S. CONST. art. II, § 2.

18. "[H]e may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper" U.S. CONST. art. II, § 3. It should be noted, however, that this grant of permissive power is to take effect only upon the happening of stated contingencies.

19. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 221-22 (2d ed. 1836).

20. Arrangement with Great Britain, Apr., 1817, 8 Stat. 231, T.S. No. 110½. The agreement, entered into by the United States and Canada, dealt with limitations of naval armaments on the Great Lakes. The Senate's approval and consent implies that it was in the nature of a treaty. "However, most commentators have treated it as an executive agreement, since ratifications were never exchanged." *Treaties*, *supra* note 3, at 247 n.138. See generally H.R. DOC. NO. 471, 56th Cong., 1st Sess. (1900).

21. Apparently Theodore Roosevelt had less difficulty in understanding the *significance* of constitutional language. Acting under a *modus vendi*, in establishing an agreement with Santo Domingo, he said that "[t]he Constitution did not explicitly [*sic*] give me power to bring about the necessary agreement with Santo Domingo. But the Consti-

I submit it to the consideration of the Senate, whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an [*sic*] one as requires the advice and consent of the Senate.²²

The problem with language is reflected in a more general problem which pervades the entire issue of executive agreements. While even the strongest advocates of executive agreements agree that there is a difference between agreements and treaties,²³ one cannot determine "which are which."²⁴ Often the problem with definition has expanded into two more specific, though interrelated, questions which serve as a delineation: questions about subject matter and questions about process. At one point, McDougal and Lans claim

there are no significant criterion [*sic*] under the Constitution of the United States or in the diplomatic practice of this government, by which the *genus* "treaty" can be distinguished from the *genus* "executive agreement," other than the single criterion of the procedure or authority by which the United States' consent to ratification is obtained.²⁵

Four pages later, however, they state that "it is only . . . in terms of the power by which they are authorized and validated that international agreements can be distinguished under our Constitution."²⁶ Clearly, much more is involved here than mere differences in nomenclature or phraseology. The political process which vests power in the different branches of government is the basis by which a treaty can be distinguished from an executive agreement. And within the confines of situational powers, as established by the Constitution, there is only one procedure that is sanctioned by the Constitution. Because it is a question of power,²⁷ and how that power is to be exercised, one must turn

tution did not forbid my doing what I did." Quoted in Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 676 (1944) [hereinafter cited as Borchard]. It might be remarked that Borchard's piece was the stimulus for McDougal and Lans.

22. Quoted in AGREEMENTS, *supra* note 5, at 31.

23. Sutherland states that a precise dividing line has never been determined, but suggests a possible distinction in terms of the significance of subject matter and scope. G. SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 119-20 (1919).

24. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 179 (1972) [hereinafter cited as HENKIN] (speaking on the extent to which the treaty is interchangeable with the executive agreement).

25. *Treaties*, *supra* note 3, at 199 (emphasis added). In relation to the diplomatic practice of the United States and the role of ambassadors and envoys in making executive agreements, see text accompanying note 194 *infra*.

26. *Treaties*, *supra* note 3, at 203 (emphasis added and footnote omitted).

27. Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 51 (1972) [hereinafter cited as *Presidential Monopoly*]. McDougal and Lans seem to rec-

to the Constitution to learn the proper limits assigned the Senate and the President within the political process.²⁸

While the Constitution is without direction regarding the subject matter of international acts that fall under the treaty-making clause, it is thought that the treaty-making process is to be invoked only when the agreement is of major or significant importance to the country.²⁹ Presumably, treaties take on a "special significance" in that they alone are mentioned by the Constitution, and as such they possess a "special constitutional protection."³⁰ However, this distinction affords us little in that congressionally authorized agreements have achieved the status of a treaty,³¹ and it is now assumed that executive agreements have the status of a treaty as supreme law of the land.³² It is all too apparent, then, that the basis upon which either mode will be used is determined by the subject matter,³³ but it is the President who has be-

ognize that "political judgment" is the decisive factor in determining the difference between agreements and treaties. *Treaties*, *supra* note 3, at 231.

28. See Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955) [hereinafter cited as Mathews]. Mathews, a strong proponent of executive agreements, offers a counterbalancing view of what is at stake: "It is as futile to attempt to extract logical consistency from the literal provisions of the Constitution as it is dangerous to over-emphasize the powers of one branch of the government at the expense of another." *Id.* at 347-48. He ultimately falls back on a claim of usage and practice, as do McDougal and Lans. See note 221 *infra*.

29. Even Senator Case was willing to recognize this distinction:

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. Certainly they did not intend that the President must get Senate approval of perfunctory routine minor agreements

Hearings on S. R. 214 Before the Senate Comm. on Foreign Relations, 92d Cong., 2d Sess. 3 (1972) (emphasis added) [hereinafter cited as *Hearings*]. See also 66 DEP'T STATE BULL. 840 (1972); Borchard, *supra* note 21, at 669 n.20.

30. Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 628 (1945) [hereinafter cited as Borchard, *Treaties*].

31. *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912).

32. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

33. Corwin hints at this practice:

[T]he record of constitutional practice makes it clear that any agreement with a foreign government in the making of which the advice and consent of the Senate is sought is, for that reason if no other, a "treaty" in the sense of Article II, section 2, paragraph 2. The sole importance which the distinction in question retains today arises from the support which it lends to the position that there are types of international agreements into which the United States cannot constitutionally enter *except* by the treaty-making route

E. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 32 (1944) [hereinafter cited as *WORLD ORGANIZATION*].

Henkin shows the precariousness of any distinction grounded on subject matter: "One might suggest that the President must go to the Senate with 'important' agreements, but

come the sole judge of what is or is not of requisite significance to require Senate participation.

It is generally agreed that the Founders were aware of a difference between an agreement and a treaty.³⁴ Constant reference is made to article I, section 10 of the Constitution which provides that "No State shall enter into any Treaty, Alliance or Confederation: . . . [and] No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power."³⁵ What advocates of international agreements, made under the President's power, fail to recognize is that this distinction mitigates any claim that the President has exclusive power to exercise his prerogatives in making executive agreements. In addition, such a distinction allows us to discern the scope given to the term "treaty" by the Framers. In *Federalist 75*, Hamilton stated that treaties are "agreements between sovereign and sovereign."³⁶ Elsewhere, Hamilton extended the definition to be a broad mandate "[t]o give to that power the most ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require . . ."³⁷ The lines of difference were probably drawn on the basis of Vattel's *Le Droit des Gens*,³⁸ which defines "agreements" as embracing "continuous executory obligations of future duration," including permanent, long-standing agreements, and "compacts" as "those agreements of temporary, non-continuous, single acts."³⁹ While a more extensive reading of the "compact clause" has been advanced,⁴⁰ a strict reading of the Constitu-

even that 'definition' would have at least one major qualification: executive agreements have been used for some very important agreements where either or both parties desired that the agreement remain confidential." HENKIN, *supra* note 24, at 181-82. "In some instances we have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one." *Id.* at 430 n.31, quoting SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, 91st Cong., 1st Sess. 28 (1969). See generally Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939).

34. Borchard, *supra* note 21, at 667-68; Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?*, 3 U. CHI. L. REV. 453 (1936).

35. U.S. CONST. art. I, § 10; see Borchard, *Treaties*, *supra* note 30, at 627-28; *Presidential Monopoly*, *supra* note 27, at 42; *Treaties*, *supra* note 3, at 221.

36. THE FEDERALIST No. 75, at 486 (Mod. Lib. ed. 1937) (A. Hamilton) [hereinafter cited as THE FEDERALIST].

37. *Letters of Camillus*, in 6 A. HAMILTON, THE WORKS OF ALEXANDER HAMILTON 183 (H. Lodge ed. 1904) [hereinafter cited as WORKS].

38. E. VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE (1916).

39. *Id.* §§ 152-54, 160. See also Borchard, *supra* note 21, at 668-70; Wright, *supra* note 15, at 344 n.11.

40. See Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925).

tion, as well as a clear understanding of the intent of the Framers, precludes any thought that the term treaty was meant to be limited in scope and subject matter to such extent that it was permissible in allowing an alternative method for binding the United States by international agreements.⁴¹

The concern here over definition should not be dismissed as mere academic verbiage. Chief Justice Taney once remarked that "every word must have its due force No word in the [Constitution] can be rejected as superfluous or unmeaning" ⁴² Yet, the writers of a more permissive interpretation have taken the privilege of defining the subject matter of agreements and carried it to a point of such expanded presidential power that the words of the Constitution are defined away. McClure, for example, understood the words of Chief Justice Taney to mean that "since the Constitution sets forth no directions regarding the use or content of either [agreements or treaties], it would seem to leave clear the path for their alternative use at the discretion of the national government."⁴³ Far from it: Chief Justice

41. It is generally assumed by most nations that when a representative having status of ambassador or special envoy gives guarantees as to the validity of his action, the reciprocal nations can rely on such assurances and consider the agreement binding. While the foreign country need not concern itself with the "internal" processes of the agreeing nation in order for the agreement to be binding, this can result in the President conceivably engaging the country in long-range obligations from which the United States could not, internationally, extricate itself. Although the subject matter of the agreement is seemingly definitive on the question of the method to be used, it must be recognized that there is overlapping authority governing spheres of operation within the government. The President and the Senate can make agreements on any matter which is properly the subject of negotiation with a foreign country. *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890). Congress can authorize agreements on subject matter within the scope of its legislative powers. *Cf.* text accompanying note 148 *infra*. Such overlapping presumably grants the President discretion as to the method to be used. However, domestically, the definitional limitations of the subject matter vitiates claims by the executive allowing a circumvention of the treaty-making process except for minor, routine matters, while internationally, it is the responsibility of the agreeing nation to be aware of the internal laws validating any agreement:

To know the powers of him with whom negotiations are conducted requires a knowledge not only of his special mandate and powers, the exhibition of which may always be demanded before the opening of negotiations, but also of the fundamental law, or constitution of the state which he professes to represent.

S. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 2-3 (2d ed. 1916) [hereinafter cited as CRANDALL]. Clearly, practice has dictated otherwise.

42. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840).

43. AGREEMENTS, *supra* note 5, at 277. McClure totally overlooks the import of his own statement. If the discretion is to be left to the "national government," who is to decide that the President alone shall determine the method to be used? *See* text accompanying notes 106 & 113 *infra*. The purpose of a written constitution would seemingly be to alleviate this very problem.

Taney's words in no way reflect this open-ended interpretation of the Constitution.⁴⁴

If the executive branch and the surrogates of executive agreements are allowed free reign to establish the scope, meaning, and definition of the terms of the compact, there is little that the Senate or the courts can do in response.⁴⁵ However, because such vast importance was attached to treaties, both in scope and subject matter, the Founders incorporated Senate participation in the treaty-making process. Precisely because the actions of the United States are crucial to world affairs and because executive agreements of any type have a direct bearing on the national conduct in international relations,⁴⁶ one must examine the reason why the Framers divided the power of treaty-making, a power to be shared jointly by the Senate and the President, in order to "afford a greater prospect of security, than the separate possession of it by either of them."⁴⁷

II

Leading advocates of expanding presidential power, such as McDougal and Lans, concede that the presidential agreement is limited in scope.⁴⁸ But the same authors characterize the treaty-making process as a needless encumbrance, "a sort of constitutional vermiform appendix."⁴⁹ This last statement is suggestive in its approach to a political problem: while the executive agreement is not always a viable alternative to the treaty, we can blur whatever distinctions might exist, and in so doing, the political process in which the Senate is a participant, becomes itself the very reason for transforming the process into one in which the President exercises full power. Whatever political problems arise because of the treaty-making clause, we can simply skirt the issues by ignoring the treaty-making process. The "vermiform appendix" is thus surgically removed with the scalpel of "loose construc-

44. See MILLER, *supra* note 2, at 165.

45. Senator Fulbright adequately expressed the sentiment: "There is nothing really we can do about it if the executive branch insists upon that term [executive agreement]. Nothing directly. We can only approach it indirectly, obliquely and in a very unsatisfactory way." *Hearings*, *supra* note 29, at 6.

46. For a reference to the views of Senator Harry Byrd, suggesting that any agreement deals with United States foreign policy and hence effects the nation as a whole, see *id.* at 5.

47. THE FEDERALIST No. 75, *supra* note 36, at 488 (A. Hamilton).

48. *Treaties*, *supra* note 3, at 187, 225, 311, 317.

49. *Id.* at 535.

tionism" and is replaced instead with a deformity in the Constitution that seriously jeopardizes the working of the organ.

The basic theory of separation of powers helps explain why the power of treaty-making was distributed between the President and the Senate. The primary function of the Constitution is to establish the boundaries of governmental power.⁵⁰ Indeed, the colonists had been compelled to put into a written form the limits of power to be exercised by each branch of government.⁵¹ They had been witness to what was, in their minds, a definite manipulation of Parliament by a corrupt and power-hungry monarchy and ministry.⁵² It was the belief of the Framers that the matters concerning foreign affairs were so vitally important that the need for restraint, as well as senatorial input, was essential.⁵³ From the very beginning, the Congress was meant to have full power over the foreign affairs of the country,⁵⁴ and it was only after they understood the need for a single *representative* that the President was included in the making of treaties.⁵⁵ The constitutional language of the treaty-making clause suggests that both the President and the Senate, "throughout the entire process of treaty-making,"⁵⁶ were to share in the procedure. Indeed, the Constitutional Convention had "done well . . . in so disposing of the power of making treaties [T]he President must, in forming them, act by the advice and consent of the Senate" ⁵⁷

50. See THE FEDERALIST No. 47, *supra* note 36 (J. Madison).

51. *Id.* See also BAILYN, *supra* note 7, at 182-83.

52. BAILYN, *supra* note 7, at 170-71 (especially chapter 5). A quick glance at the Declaration of Independence confirms the idea that the colonists felt themselves to be in the midst of a "conspiracy" at the hands of the British ministry:

[A] long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

There is then set forth a series of "Facts" to support these contentions.

53. *Presidential Monopoly*, *supra* note 27, at 7-12, 55-58. See also THE FEDERALIST No. 75, *supra* note 36 (A. Hamilton).

54. See ARTICLES OF CONFEDERATION art. VI, IX; CRANDALL, *supra* note 41, at 27.

55. *Presidential Monopoly*, *supra* note 27, at 10-11. See also J. SANDERS, *EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789*, at 124-27 (1935) [hereinafter cited as SANDERS].

56. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 207 (1957) [hereinafter cited as CORWIN]. He further cites the first Outstanding Committee on Foreign Relations:

The President is the constitutional representative of the United States with regard to foreign nations For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty.

Id. at 441 n.114. Why can we not also assume that the Senate will faithfully discharge its constitutional duties without sacrificing the national interest?

57. THE FEDERALIST No. 64, *supra* note 36, at 419 (J. Jay).

In *Federalist 64*, John Jay stated that

the power of making treaties is an important one . . . and it should not be delegated but in such a mode and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in a manner most conducive to the public good.⁵⁸

Hamilton, a warm advocate for limited monarchy,⁵⁹ who had thought that the powers in the Constitution ought to be construed liberally, for the public good,⁶⁰ never lost sight of the inherent dangers of investing in the President full power over the making of treaties.⁶¹

While the Framers sought to place upon the exercise of power all conceivable, yet practical, checks, advocates of executive agreements recognize that the President, in negotiating and consummating treaties alone, is violating the constitutional text, and “[i]n this respect the expectations of the Framers have not been realized, and the procedures prescribed in the Constitution have been drastically altered”⁶² Perhaps this has resulted because that which was conceivable by our Founding Fathers in the eighteenth century is far from what is politically practical in the twentieth century.⁶³ But such a view of the treaty-making process attempts, on the very basis of that same process, to explain away any function and political benefit of the Senate’s participation.⁶⁴

Writing in the *Federalist*, Hamilton calls attention to the difference between the King of England and the President with respect to making treaties:

58. *Id.* at 417.

59. *The Farmer Refuted*, in 1 WORKS, *supra* note 37, at 168.

60. 3 WORKS, *supra* note 37, at 455.

61. Hamilton states:

[T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

. . . .

[T]he joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them.

THE FEDERALIST NO. 75, *supra* note 36, at 486, 488. See also *Presidential Monopoly*, *supra* note 27, at 11.

62. *Treaties*, *supra* note 3, at 206. The attitude of McDougal and Lans is the paradigm cavalier approach to the efficacy of the Constitution: What has worked by way of “diplomatic practice,” and the treatment of agreements in foreign affairs, justifies aberrations of the text. *Cf. id.* at 307.

63. McDougal and Lans argue against the political practicality of having Senate participation. *Id.* at 536-82. But their notion of cooperation boils down to a stringent demand for mere agreement with the President.

64. McDougal and Lans do see a political advantage to the inclusion of Senate participation in that the President has used the modification power of the Senate “to attempt

The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions.⁶⁵ He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But . . . every jurist of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction In this respect . . . there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature.⁶⁶

The incorporation of the Senate in the making of treaties was established because it was the firm hope of the Framers to bring to bear upon the decision-making process a wider range of knowledge, inculcating any decision with the force of public backing. Advocates of executive agreements, in arguing for their constitutional basis, have completely overlooked the function of the Senate as an advisory body.⁶⁷ McClure considers the Senate incapable of meaningful participation in any agreements but those of an insignificant nature.⁶⁸ But the Senate's real power in the treaty-making process lies in its ability to set forth an adequate forum for public debate.⁶⁹

It might, then, be argued that if public debate is the controlling or dominant factor for including the Senate, a more logical participant

to obtain concessions not secured by the original negotiators or to include provisions suggested by the other signatory after negotiation." *Id.* at 208-09 n.61.

65. For a further discussion of the significance of the President as the "sole representative," see text accompanying note 113 *infra*.

66. THE FEDERALIST No. 69, *supra* note 36, at 450-51 (A. Hamilton). See also AGREEMENTS, *supra* note 5, at 259; *Presidential Monopoly*, *supra* note 27, at 9. While it might be argued that the minister, and not the King, was responsible for foreign affairs, this is no less a reason to be concerned. See text accompanying note 52 *supra*. Furthermore, even though the Framers might have had an overextended conception of their Senators, it is a safe assumption to view the Senate as exercising more power than the Parliament in regard to foreign affairs. See THE FEDERALIST No. 64, *supra* note 36 (in which Jay seemingly refers to the Senate as a body of "august men").

67. McDougal and Lans describe the process of senatorial participation but "neglect" to include the advisory function. *Treaties*, *supra* note 3, at 197-99.

68. AGREEMENTS, *supra* note 5, at 363.

69. "The Senate's real power in treaty making is not merely a mechanical one; it resides in the Senate's ability to force public debate, awake doubts and secure popular support for other courses than those proposed by the Executive." Borchard, *supra* note

would be the House of Representatives.⁷⁰ But the House was excluded by the Constitutional Convention on grounds of secrecy and speed. As James Iredell, then a delegate to the North Carolina Ratifying Convention, and later a Supreme Court Justice, pointed out:

The power of making treaties is so important that it would have been highly dangerous to invest it in the Executive alone, and would have been subject of much greater clamor. From the nature of the thing, it could not have been vested in the popular representative. It must, therefore, have been provided, for with the Senate's concurrence or the concurrence of a Privy council, (a thing which I believe nobody has been mad enough to propose), or the power, the greatest monarchical power that can be exercised, must have been vested in a manner that would have excited universal indignation, in the President alone.⁷¹

A further justification for excluding the Senate usually stems from the Senate's ability to block the consummation of a treaty. Claims for efficiency, no less than demands for a more "democratic" method, are often heard in connection with the advocacy of executive agreements. Proponents of expanded presidential power claim that "[t]he executive, set up for action, is usually a better agency for negotiation than is a body set up primarily for deliberation; it is through negotiation, not primarily deliberation, that international affairs are conducted."⁷² It takes no imagination to see that this argument is self-defeating. Not only is it a statement about what is *wrong* with the present state of world affairs, but it also totally neglects the very reason for the Senate's role. There is no doubting that the President must start the negotia-

21, at 667 n.12, quoting N.Y. Herald Tribune, Apr. 17, 1944, at 14, col. 1. See also I. MATHEWS, *AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES* 545-46 (1938) (suggesting that agreements, like treaties, should be subject to the "salutary influence of public opinion," and that "the country should not . . . be bound by the stipulations of executive agreements without its knowledge and without opportunity to protest"). In light of the fact that the President might indeed be far removed from the reality of the political process, it would be wise to incorporate another voice into the decision-making process. Cf. G. REEDY, *THE TWILIGHT OF THE PRESIDENCY passim* (1970). We need not accept Jay's characterization (see note 66 *supra*) in order to believe the Senate capable of providing beneficial, rational input into the process. See *Presidential Monopoly*, *supra* note 27, at 55-58; note 53 *supra*.

70. This is the thesis of McDougal and Lans. However, because they often interchange the terms "Congressional-Executive" agreements with "Executive" or "Presidential" agreements, usually in the same phrase, one is hard-pressed to comprehend the respective constitutional significance given to each. See *Treaties*, *supra* note 3, at 194, 195, 216, 217, 226, *passim*.

71. Quoted in *Hearings on S. 3475 Before the Senate Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 3 (1972) [hereinafter cited as *Hearings on S. 3475*]. See generally the statement by Senator Ervin, *id.* at 1-7.

72. *AGREEMENTS*, *supra* note 5, at 257.

tions, but "otherwise all negotiations of treaties will be the joint concern of President and Senate."⁷³ McDougal and Lans go further, however, and attack the two-third rule of Senate consent. Suggesting that the President must be able to act without delays, "obstructions, and disintegrating efforts by minorities," McDougal and Lans strike out against the two-third rule of Senate consent, finding the role of the Senate to be one in which those "who conceive their interests to be different from the interests of the rest of the nation"⁷⁴ will adequately and effectively block the majority will. One can certainly question this assessment of the President's ability to be an accurate gauge of the majority interests. More importantly, the issues contained in any decision relating to the making of treaties dictate that more than one voice should be heard. At the heart of their contention is the notion that the House should be favored over the Senate for participation because a majority concurrence in the House is easier to obtain than two-thirds of the Senate. While there are several reasons why the Framers wrote into the treaty-making process the two-third rule,⁷⁵ it should be mentioned that arguments against the two-third rule are misdirected when they are used to claim for the House greater expediency in the resolution of issues. Secrecy would be as much a problem, if not more so, for the House than the Senate. But the Framers were well aware of both these problems, and in *Federalist 64*, Jay explains that the Senate would be most capable of providing public discussion while guaranteeing expediency and secrecy.⁷⁶ Justice Brandeis put into bold relief the central issues involved:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.⁷⁷

73. CORWIN, *supra* note 56, at 208.

74. *Treaties*, *supra* note 3, at 185-86.

75. Most often stated is that the two-third rule is a carry-over from the Continental Congress' practice of requiring two-thirds of the states to ratify a treaty. Also, the rule was seen as a compromise between the large and small states, as well as a parlay of sectional interests that were meant to be protected by this compromise. McClure claims that none of the reasons for the rule are "in any realistic sense pertinent to the situation that exists in the twentieth century." AGREEMENTS, *supra* note 5, at 265. Yet, the clearest response, for all ages and time, was given by Borchard: "A treaty should be convincing enough to command a two-third vote." Borchard, *supra* note 21, at 667.

76. THE FEDERALIST NO. 64, *supra* note 36, at 419-20 (J. Jay). It should be noted that, when Jay spoke of the Senate, he contemplated a body of twenty-six people.

77. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

III

If other clauses of the Constitution are subject to a more "general" interpretation, there can be no doubt that the treaty-making clause is of a "specific" nature and admits of neither expansion through judicial interpretation; nor does it grant a "permissive" exercise of power that would circumvent its very intention.⁷⁸ Yet, proponents of executive agreements have frequently pointed to certain Supreme Court decisions as affording ample grounds for expanded presidential power.⁷⁹ However, a closer examination of those decisions will show that "the firm judicial support that has been accorded"⁸⁰ is not only a distortion of constitutional history, but also greatly misrepresents the text itself.

That the Constitution vests in the national government power over foreign affairs is undoubted. "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."⁸¹ While a demarcation was established between powers over domestic affairs and those pertaining to foreign affairs,⁸² it has been assumed that the powers of the federal government, in the latter respect, are inherent:⁸³

It is no longer open to question that the general government, unlike the states, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter⁸⁴

78. For an explanation on the difference between a "general" clause of the Constitution, as opposed to those of a more "specific" nature, see MILLER, *supra* note 2, at 162-65, citing *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring); see text accompanying note 232 *infra*.

79. Most often cited is *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Myers v. United States*, 272 U.S. 52 (1926). Usually, however, the discussion of these cases is cast in language of the powers of the "federal government" and not the President alone.

80. AGREEMENTS, *supra* note 5, at 283.

81. *Burnet v. Brooks*, 288 U.S. 378, 396 (1933), cited in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). See also CORWIN, *supra* note 56, at 170-226.

82. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

83. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chinese Exclusion Case*, 130 U.S. 581 (1889).

84. *Carter v. Carter Coal Co.*, 298 U.S. 238, 295 (1936) (citations omitted). See also *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918), *overruled in United States v. Darby Lumber Co.*, 312 U.S. 100 (1941); *Jones v. United States*, 137 U.S. 202, 212 (1890).

The basis for this comprehensive national power has led to certain disputes which are of fundamental concern to both the scope of power to be exercised, as well as the power that is assigned to the various branches of government. The origin of this debate can be traced to the opinions of Justices Iredell and Patterson in the case of *Penhallow v. Doane*,⁸⁵ in which they found themselves in disagreement as to whether the power over foreign affairs originated in the several states, passing to the national government with ratification of the Constitution, or whether the national government, in the form of the Continental Congress, had the original power. The theory that the national government, and not the states, was the original possessor of authority to deal with foreign relations reached its most advanced exposition in the opinion of Justice Sutherland in *United States v. Curtiss-Wright Export Corporation*.⁸⁶

Although *Curtiss-Wright* dealt exclusively with the question of the legality of a congressional delegation of power,⁸⁷ Justice Sutherland used the opinion as a platform for wide-ranging dicta that has served as the basis for claims by the executive branch justifying executive agreements.⁸⁸ To quote in part from the Sutherland opinion:

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress It results that 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,

85. 3 U.S. (3 Dall.) 54 (1795).

86. 299 U.S. 304 (1936). The case concerned a Joint Resolution of Congress which provided, in part:

[I]f the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if . . . he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war

Cong. J. Res., ch. 365, 48 Stat. 811 (1934). The President issued a proclamation, and *Curtiss-Wright Export Corp.* was indicted for conspiracy to sell arms in violation thereof. It contended that the resolution contained an unwarranted and unconstitutional delegation of legislative power to the President. 299 U.S. at 314-15. The district court sustained the demurrer, but the Supreme Court reversed, holding the actions of the President to be within constitutionally prescribed limits.

87. 299 U.S. 304 (1936).

88. Cf. *Hearings, supra* note 29; *Hearings on S. 3475, supra* note 71, *passim*.

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.⁸⁹

Followers of the Sutherland reading have gone to great lengths to justify his interpretation of constitutional history. But they have failed to recognize the overriding fallacies which argue against any claim made in behalf of the exercise of these powers. Justice Sutherland was not oblivious to the fact that the states, as members of the Continental Congress, adopted the Declaration of Independence.⁹⁰ But a reading of that document convincingly demonstrates that the "United Colonies" were free and independent states.⁹¹ In addition, the Articles of Confederation stipulated that: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."⁹²

In what is perhaps his most eloquent effort of the *Federalist*, Hamilton argues against the "political monster of an *imperium in imperio*,"⁹³ and the resulting defects of a government in which "the concurrence of thirteen distinct sovereign wills is requisite under the Confederation, to the complete execution of every important measure that proceeds from the Union."⁹⁴

A further aspect of Justice Sutherland's opinion deserves some mention. In stating that the "powers of external sovereignty did not depend upon the affirmative grants of the Constitution,"⁹⁵ Justice Sutherland reflects that school of constitutional interpretation which sees in the Constitution grants of power not expressly prohibited therein.⁹⁶ It is supposedly because the enumerated powers are limiting that the govern-

89. 299 U.S. at 316, 318.

90. *Id.* at 316.

91. [T]hese United Colonies are, and of Right ought to be Free and Independent States . . . and that, as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

DECLARATION OF INDEPENDENCE. The fact that the Declaration was written eleven years before the Constitution is of no mean significance.

92. ARTICLES OF CONFEDERATION art. II. This language later served as the basis for the tenth amendment to the Constitution.

93. "A sovereign within a sovereign." THE FEDERALIST NO. 15, *supra* note 36, at 89 (A. Hamilton).

94. *Id.* at 94.

95. 299 U.S. at 318.

96. See text accompanying note 8 *supra*.

ment can turn to its inherent powers for an "affirmance of power."⁹⁷ However, it is not "silence on the part of the Constitution as to the power of the national government"⁹⁸ that was meant to dictate the scope in which the President could exercise his powers. Rather, it was the "intention of the Framers to create a federal government of limited and enumerated powers."⁹⁹ We are told, however, that a different reading and understanding of the Constitution is justified because of the position of the United States in world affairs.¹⁰⁰ We learn that "the requirements of survival as a democratic body politic in the contemporary arena," are far different from the demands of 1787.¹⁰¹ But then the very support given to this position is derived from the opinion of Justice Patterson in *Penhallow v. Doane*,¹⁰² a scant eight years after the Constitution was written: "The powers of Congress were revolutionary in their nature, arising out of events, adequate to every national emergency, and co-extensive with the object to be attained."¹⁰³ True enough, if one considers that centralization is the key to an effective conduct of the war.¹⁰⁴ However much this remains the case, we are never told how the powers vested in Congress to conduct a war were meant to be continued once the "necessities of the case"¹⁰⁵ no longer presented themselves.

97. Corwin suggests that "silence on the part of the Constitution as to the power of the national government to adopt any particular measure . . . is not a denial of such power, as it would be if the doctrine of Enumerated powers applied, but is, on the contrary, an affirmance of power." WORLD ORGANIZATION, *supra* note 33, at 19. McDougal and Lans argue that even if the enumerated powers are not enough to grant the exercise of power to make executive agreements, the inherent powers are. *Treaties, supra* note 3, at 256-57.

98. WORLD ORGANIZATION, *supra* note 33, at 19.

99. *Presidential Monopoly, supra* note 27, at 27.

100. *Cf. Mathews, supra* note 28, at 345.

101. *Id.* A similar line of reasoning was set forth by McDougal and Lans, *Treaties, supra* note 3, at 185. Hamilton certainly recognized the logical extension of this power: "It is of the nature of war to increase the executive at the expense of the legislative authority." THE FEDERALIST No. 8, *supra* note 36, at 43.

102. 3 U.S. (3 Dall.) 54 (1795). Justice Chase rephrased Patterson's statement to read: "The powers of Congress originated from necessity . . . they were revolutionary in their very nature It was absolutely and indispensably necessary that Congress should possess the power of conducting the war against Great Britain" *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796).

103. 3 U.S. (3 Dall.) 54, 80 (1795).

104. *See Presidential Monopoly, supra* note 27, at 31.

105. McDougal and Lans state that

[w]hatever the rationale used, it is perfectly clear that in the conduct of our international relations, the powers of the Federal Government are ample to deal with any problem, because they derive not only from the Constitution, "but from the necessities of the case."

Treaties, supra note 3, at 260; *see Mathews, supra* note 28, at 348. *See also* CORWIN, *supra* note 56, at 201.

What Justice Sutherland confused for exclusive jurisdiction of the government in foreign relations was an absolute and unlimited jurisdiction that never existed. Successive repetition of his mistake has not rendered the misinterpretation any nearer to the facts of constitutional history. In words that are more than appropriate, Chief Justice Taney remarked:

Every part of . . . [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government: and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors; both of which . . . undoubtedly belong *exclusively* to the federal government.¹⁰⁶

What is significant is that Justice Taney recognized the powers of the national government to be limited, and they are limited precisely because they are enumerated in the Constitution.¹⁰⁷

Even if the idea of inherent powers could be given a more favorable reading, it would be difficult to accept a far greater mistake on the part of Justice Sutherland and his successors. The philosophy of separation of powers dictates that we refrain from transferring power in the national government to any one branch. However, most of the constitutional arguments favoring executive agreements stem from this very transference. It is often said that "in the field of foreign affairs . . . the doctrine of enumerated powers has always had a difficult row to hoe, and today may be unqualifiedly asserted to be defunct."¹⁰⁸ Fortunately, the Constitution has been revived by a simple superimposition of the enumerated powers upon the inherent powers, resulting in constitutionally justifiable power of the President to make executive agreements.¹⁰⁹ Indeed, it is even argued that the powers of the President

106. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840) (emphasis added). Justice Taney continued:

It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states, is utterly incompatible with this evident intention; and would expose us to one of those dangers, against which the framers . . . have so anxiously endeavoured to guard.

Id. at 575-76. It is worth noting, however, that the case before him dealt with the definitional scope of the word "agreement" as contained in article I, section 10, clause 3. See *WORLD ORGANIZATION*, *supra* note 33, at 9-10.

On the question of the President speaking as the voice of the country, see text accompanying note 117 *infra*.

107. For a more detailed examination of the questions surrounding inherent powers, see *Presidential Monopoly*, *supra* note 27, at 26-33.

108. *WORLD ORGANIZATION*, *supra* note 33, at 17.

109. McDougal and Lans throughout their work suggest that the powers of Congress

are in some aspects inoperative and ineffective without such a superimposition.¹¹⁰ Once again one finds Justice Sutherland as the chief advocate of such a view:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress¹¹¹

Yet, he continues, qualifying his assertion in the same sentence: “but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”¹¹² Now clearly, one of the most “applicable” provisions of the Constitution is article I, section 8, empowering Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The effect of this provision, in terms of Justice Sutherland’s own assertion, is to remove the constitutional effectiveness of the President’s power when Congress should choose to exercise its own constitutional prerogatives.

Justice Sutherland is wrong on still other grounds. For what he has done is to deposit in the hands of the executive branch the full powers

“superadded” to the powers of the President make “plenary” power. *Treaties, supra* note 3, at 246. Least of all, does this rest on a false assumption about the nature of inherent powers. More importantly, it seems to indicate that the authors view the Constitution as interpretable as some alchemist’s formula for political power. In passing, it should be noted that it is questionable whether congressional powers are of the type that would allow for an expansion of presidential powers, ultimately resulting in power to make executive agreements. That is, Congress can not deal with foreign nations directly, and thus could delegate no such power to the President. See text accompanying note 131 *infra*.

110. McDougal and Lans characterize the attempts of those who seek to confine the President’s power to making unimportant, temporary agreements:

Their first effort is to secure a focus of attention solely upon the single, explicitly discretionary, and ambiguous “treaty-making” clause of the Constitution to the exclusion of all other relevant clauses of the Constitution granting powers to the Congress and the President, which are meaningful only if they include the authorizing or sanctioning of international agreements.

Treaties, supra note 3, at 211-12. Elsewhere, they claim that the broad powers given by the Constitution to the President and Congress over external affairs are meaningless without instrumental powers to make agreements and to have them as the law of the land. *Id.* at 187.

111. 299 U.S. at 319-20.

112. *Id.* at 320. For a discussion about the President’s power as the “sole organ of the federal government,” see text accompanying note 113 *infra*.

of the national government. Thus, he tells us that the federal power over external affairs is "different from that over internal affairs," in that

participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹¹³

The same line of reasoning was followed in *United States v. Belmont*¹¹⁴ and *United States v. Pink*.¹¹⁵ But, as Raoul Berger demonstrates,¹¹⁶ Marshall was speaking on the matter of extradition under terms of a treaty with Great Britain. The question was one simply of the President's function to execute the law. In no way was the question of Senate participation in the making of a treaty involved, nor was there doubt as to which branch of government there devolved certain powers under the Constitution.

What can be distilled from the Sutherland opinion, and which is consistent with the intent of the Framers, is that the executive is to function as an "*instrument of communications* with other governments."¹¹⁷ The President, as the spokesman of the United States in diplomatic relations, was to be the agent of Congress, representing the will of Congress as the liaison with foreign governments.¹¹⁸ As such, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹¹⁹

113. 299 U.S. at 319-20.

114. 301 U.S. 324, 330 (1937). See also text accompanying note 200 *infra*.

115. 315 U.S. 203, 229 (1941). See also text accompanying note 201 *infra*.

116. *Presidential Monopoly*, *supra* note 27, at 16.

117. CORWIN, *supra* note 56, at 216 n.6.

118. *Presidential Monopoly*, *supra* note 27, at 16.

119. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *cf.* *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) ("[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power"). See also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); Note, *Effect of Executive Agreements on Acts of Congress*, 8 U. FLA. L. REV. 216 (1955).

The Senate is fully aware of the proper sphere of action assigned to the President. As Senator Ervin has stated:

[T]he President should be the channel of communication between the United States and foreign nations, but, in fulfilling that function, he should be merely the executor of a power of decision that rests elsewhere, that is, in the Congress. This was the balance of power between the President and Congress intended by the Con-

It is interesting to note that Justice Sutherland, in his argument for national supremacy over foreign affairs, cites the practice in use by England at the time of the American Revolution. "During the colonial period [international powers] were possessed exclusively by and were entirely under the control of the Crown."¹²⁰ But in his very argument to secure sovereign power in the national government, he denies exclusive power in the executive branch.¹²¹ It is not clear, if ever it could be, how the power vested in the national government was transformed into the President's sole power.¹²² It is assumed that the power passed

stitution. This is the balance of power that Congress can enforce if it is only willing to do so.

Hearings on S. 3475, supra note 71, at 6.

It is interesting to compare these notions with those of John Locke, who was of fundamental influence on the framing of the Constitution. In his *Second Treatise on Government* Locke makes a statement that should forever serve as a warning to those advocates of expanded Presidential power:

[B]ecause it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative Power* is put into hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the publick good.

J. LOCKE, *TWO TREATISES OF GOVERNMENT* 410 (Laslett ed. 1960) [hereinafter cited as LOCKE].

Locke also distinguished between an "executive" power and a "federative" power, the former being directed to the execution of municipal laws within society, while the other is concerned with the security of the public from without. The federative power, being "much less capable to be directed by antecedent, standing, positive laws, than the *Executive*; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good." *Id.* at 411. In addition, Locke suggested that the two powers be combined in one agent. *Id.* at 412. McClure emphasizes this last point, attempting to justify the power of the President to make executive agreements as a power resulting from the two powers expressed by Locke. *AGREEMENTS, supra* note 5, at 411-12. He does not account for the fact that even though combined, the power was to be exercised as the execution of laws made by the legislature.

120. 299 U.S. at 316.

121. Consider the language of Chief Justice Hughes in *Monaco v. Mississippi*, 292 U.S. 313 (1934):

The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise.

Id. at 331. The President is not singled out for the exclusive exercise of the power.

122. Corwin suggests that the "President's powers in the international field came early to approximate the prerogative of the British Crown . . ." *WORLD ORGANIZATION, supra* note 33, at 38.

to the President as the natural head of the government:

It is to the heads of states that representatives of other states primarily address themselves . . . since the head of state is in fact the executive, the power and practice of contacting other governments is a prerogative of the executive.¹²³

No critic of executive agreements has yet to dispute this point. It is certainly the President who starts the negotiations, and with whom other nations communicate. But that "power" had been circumscribed within a sphere of limitations that precluded the President from acting other than as a communicator. McClure, however, suggests that "[h]istory and political science unite in bearing testimony to the fact that the power to conduct international relations is a power pertaining to the executive."¹²⁴ He then cites Blackstone and *Curtiss-Wright* as his support.¹²⁵ But Blackstone was talking about the powers of the King, not about the executive branch of the United States.¹²⁶

The problem is that there is virtually always a missing link in the arguments supporting executive agreements. Their words are evidence enough to show that the language of the Constitution is transliterated to pronounce powers for the President that were never meant to exist. Proponents of executive agreements argue from a basis of residual national powers to sole presidential powers. So far has Chief Justice Marshall's notion of the President as the "sole organ" of the national government been expanded, that the President is now able to exclude other branches of government in the very exercise of power that Chief Justice Marshall was trying to limit.¹²⁷

IV

While many of the arguments favoring executive agreements normally rest on some constitutional provisions empowering the President to discharge various executive duties, a call is often made to the Suther-

123. AGREEMENTS, *supra* note 5, at 258.

124. *Id.* at 255.

125. *Id.*

126. Blackstone stated that

with regard to foreign concerns . . . the King is the delegate or representative of his people In the King therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence, is the act only of private men.

Quoted in AGREEMENTS, *supra* note 5, at 255 (footnote omitted).

127. See *Presidential Monopoly*, *supra* note 27, at 17.

land reading for added support. However, having shown that the powers of the national government are exclusive and plenary, and further, that whatever those powers may include, they were not intended to reside solely in the executive branch, it remains to consider those explicit provisions of the Constitution which supposedly grant the President power to enter into executive agreements.¹²⁸

Executive agreements that are authorized by Congress either prior to an agreement, or subsequent to it, but prior to implementation can be distinguished.¹²⁹ There is no question that the separation of powers theory established in the Congress the sole power of legislation.¹³⁰ The constitutional issue centers on the degree to which Congress has transferred or acquiesced in its essential legislative functions when delegating power to another branch of government. The distinction is

between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.¹³¹

The court has had ample opportunity to discuss the question of congressional delegation.¹³² In one such case, *Panama Refining Co. v. Ryan*,¹³³ dealing with the National Industrial Recovery Act of 1933, the Court declared invalid a portion of the Act¹³⁴ on the grounds that it was an unwarranted delegation of the legislative function to the executive.¹³⁵ Chief Justice Hughes defined the issue at hand:

128. "The Supreme Court has not held any executive agreement ultra vires for lack of Senate consent nor has it given other guidance that might define the President's power to act alone." HENKIN, *supra* note 24, at 179.

129. *Treaties*, *supra* note 3, at 204-06.

130. See THE FEDERALIST No. 47, *supra* note 36 (J. Madison). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

131. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928) quoting *Cincinnati, Wilmington & Zanesville R.R. v. Comm'rs*, 1 Ohio St. 77, 88 (1852).

132. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *United States v. Chicago, M., St. P. & Pac. R.R. Co.*, 282 U.S. 311 (1931); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); *Federal Trade Comm'n v. Gratz*, 253 U.S. 421 (1920); *Field v. Clark*, 143 U.S. 649 (1892).

133. 293 U.S. 388 (1934).

134. Act of June 16, 1933, ch. 90, § 9, 48 Stat. 195, 200.

135. 293 U.S. at 420-21, 433.

The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. . . . But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.¹³⁶

What is important is that Congress, though denied the abrogation of its legislative function, was left free to exercise its power in establishing policies and erecting standards which allowed the "selected instrumentalities" to make for themselves subordinate rules with precise limits. In addition, the policy as formulated by Congress was to be the standard to which subsequent executing authorities were to refer.¹³⁷

The basis of the *Curtiss-Wright* case was also a question of congressionally delegated powers.¹³⁸ However, in upholding the Joint Resolution of Congress authorizing the President to establish an embargo on arms,¹³⁹ the *Curtiss-Wright* Court went further and distinguished the scope of powers to be exercised over internal as opposed to external affairs.¹⁴⁰ The Court relied upon a statement by Chief Justice Hughes in *Panama Refining Co. v. Ryan*,¹⁴¹ asserting that in the realm of external affairs, for the effective execution of policies, Congress could rightfully confide in the President "an authority which was cognate to the conduct by him of the foreign relations of the Government."¹⁴²

136. *Id.* at 421-22. See also *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating a delegation to the President to make and approve "codes of fair competition" among business and industry). While these are the only Supreme Court decisions invalidating congressional delegations, they are instructive in that they reaffirm the basic principles of separation of powers, and, at the least, reestablish Congress as the sole organ of legislative policy. See also *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 352 (1974) (Marshall, J., dissenting).

137. *But see United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (after requesting and being denied the power to regulate CATV, the FCC did so, and was upheld by the Supreme Court).

138. 299 U.S. 304, 315 (1936).

139. J. Res. of May 28, 1934, ch. 365, § 1, 48 Stat. 811.

140. 299 U.S. at 315-29.

141. 293 U.S. 388 (1935).

142. *Id.* at 422, quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327 (1936).

Justice Sutherland, after relieving himself of his wide-ranging dicta,¹⁴³ took notice of the "marked difference between foreign affairs and domestic affairs," and because the former is of such far-reaching effect, this consideration "discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."¹⁴⁴ The wisdom of Sutherland's opinion, however, rests upon a distinction that he never makes. His understanding of valid authorization of power assumes that the delegation of power is one which gives power to make agreements, thus granting the President some discretion. But, if the congressional authorization is a directed action, that is, specifically directing the President to make a certain type of agreement, then it is not a proper authorization. When we look at the various agreements authorized by Congress, we find that in virtually every instance the subject matter was within the confines of congressional power.¹⁴⁵

But even if we accept the view that the authority was "cognate" and beyond the realm of the enumerated powers granted Congress by the Constitution, from where does Congress derive the power to authorize or delegate power to the President to make executive agreements? Clearly, Congress has no authority to negotiate with foreign powers,¹⁴⁶ let alone enter into agreements. It is far from certain how Congress, constitutionally unable to ratify a treaty, can instead authorize the President to make an agreement. Congress could enact legislation, under the "necessary and proper" clause, authorizing the President to make certain agreements in fulfilling its duty to see that the powers of the various branches are carried into execution. But, *Missouri v. Holland*,¹⁴⁷ is to be distinguished in that, in absence of the treaty en-

143. See text accompanying note 88 *supra*.

144. 299 U.S. at 321-22. McClure relies heavily on this position. AGREEMENTS, *supra* note 5, at 298.

145. See, e.g., Act of Feb. 20, 1792, ch. 7, 1 Stat. 232 (establishing post offices and post roads); Act of July 4, 1897, ch. 11, 30 Stat. 151 (giving the President power to make reciprocal trade agreements). The Act of July 4, 1897 was subject to judicial review in *B. Altman & Co. v. United States*, 244 U.S. 583 (1912). The Court found that the agreements "authorized by the Congress . . . negotiated and proclaimed under the authority of its President," were constitutional. *Id.* at 601. See also *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892). Further examples can be found in *Treaties, supra* note 3, at 204-05.

146. See HENKIN, *supra* note 24, at 174; *Treaties, supra* note 3, at 203.

147. 252 U.S. 416 (1920). The case arose from the efforts of the President and Congress to set certain limits on the shooting of migratory birds. After the President had signed a treaty with Great Britain to that effect, Congress passed the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918), which was challenged by Missouri on the

abling legislation, Congress would have no constitutional power to enact laws concerning the subject matter of the treaty. Congress' power, therefore, in authorizing agreements must be limited to situations in which it could act under its enumerated legislative powers.¹⁴⁸

To return to a point alluded to earlier,¹⁴⁹ Congress certainly has within its power the right to establish precise guidelines, policies, or standards accompanying an authorization of power.¹⁵⁰ Indeed, the existence of such standards very often determines the issue as to whether Congress has in fact delegated away its legislative function.¹⁵¹ While too little may be found unwarranted, it appears that the Congress is not to be precluded from instituting "too many" guidelines, or at least

grounds that it was "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" *Id.* at 436. In upholding the Act as constitutional, Justice Holmes, speaking for the Court, stated that what was involved was a "national interest of very nearly the first magnitude" *Id.* at 435. Holmes found authority for the Act in the treaty power:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

Id. at 433 (citations omitted). The clear effect of the holding was to give Congress constitutional powers "it did not possess in the absence of the treaty. But this result is an inevitable consequence of the plenary nature of federal power over foreign affairs." C. PRITCHETT, *THE AMERICAN CONSTITUTION* 363-64 (1968).

148. In *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), Chief Judge Parker declined to give effect to an agreement by the President regulating the export of potatoes by Canada to the United States. Judge Parker suggested that the President has no power where Congress does. "[T]he power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress" *Id.* at 659. "Parker's suggestion, it should be clear, would not only deny to many executive agreements effect as domestic law in the United States; it denies the President's power to make them at all." HENKIN, *supra* note 24, at 181 (footnote omitted). Henkin goes further, criticizing the decision in that it drew a line between express and implied powers of Congress "that makes little sense for any purpose." *Id.* Parker does take a very strict interpretation of the President's powers, but it is instructive to note that he cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), using the distinction between enacting laws and executing laws. 204 F.2d at 659. *See also* Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953); Note, *Effect of Executive Agreements on Acts of Congress*, 8 U. FLA. L. REV. 216 (1955).

149. *See* text accompanying note 131 *supra*.

150. "Where the agreement is negotiated pursuant to delegated Congressional authority, the legislative body may of course set limits beyond which the instrument may not go" *Treaties, supra* note 3, at 206 n.51. McDougal and Lans continue, "[b]ut within the area of allowable discretion, choice of both policy and details belongs to the Executive." *Id.* *See* text accompanying note 144 *supra*.

151. *See* cases cited note 132 *supra*.

stringent limits on the exercise of power. If a solution to future congressional authorizations lies in the political process,¹⁵² then Congress should follow through with its present initiative and begin establishing, as a practice, the use of clear guidelines, somewhat along the lines laid out in the case of *Schechter Poultry Corp. v. United States*.¹⁵³ In at least one situation Congress did just that,¹⁵⁴ and it does not appear as though the President could constitutionally circumvent the legislative will of Congress should it choose to exercise its full legislative power.¹⁵⁵

It is generally considered appropriate for the President to enter into executive agreements in order to make operative, or to implement, a treaty. Numerous examples seemingly sanction this practice.¹⁵⁶ It is assumed that the use of such agreements are "indispensable to the general conduct of diplomacy, by which the executive has sought to make the nation's foreign policy effective."¹⁵⁷ Such agreements are the outgrowth and the effectuation of a policy enunciated in a treaty. The significant factor is the pre-existing policy upon which the agreement is made. Where no new obligation is incurred,¹⁵⁸ or where no new

152. Cf. Mathews, *supra* note 28, *passim*; *Treaties*, *supra* note 3, *passim*.

153. 295 U.S. 495 (1935). See also T. LOWI, *THE END OF LIBERALISM* ch. 5 (1969); Borchard, *supra* note 30, at 645.

154. See Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 681. Attorney General Jackson, speaking on the President's authority to acquire, by agreement, naval and air bases from Britain, stated that he found

in no other statute or in the decisions any attempted limitations upon the plenary powers of the President as Commander in Chief . . . and as the head of the State in its relations with foreign countries to enter into the proposed arrangement . . . except the limitations recently imposed. . . . [This limitation], it will be noted, clearly recognizes the authority to make transfers and seeks only to impose certain restrictions thereon.

39 OP. ATT'Y GEN. 484, 489-90 (1940).

155. Consider the reasoning by Judge Parker in *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955):

The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of such agreements.

Id. at 658. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

156. One such example is the executive agreement to lease Guantanamo base under a 1903 treaty with Cuba. For an extensive list of examples, see CRANDALL, *supra* note 41, at 102.

157. *Treaties*, *supra* note 3, at 346.

158. One of the standard justifications for executive agreements is based on whether an obligation is established by the United States. It is thought that the consent of the Senate is not needed for agreements that involve only obligations and concessions by the other country. See 39 OP. ATT'Y GEN. 484, 487 (1940); *Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968); HENKIN, *supra* note 24, at 430 n.30.

The President's power over foreign relations while "delicate, plenary, and exclusive" is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presi-

policy is established,¹⁵⁹ it is thought that the President has power to act. However, there are a number of countervailing questions which mitigate the validity of these claims. There is no question that treaties are accorded the status of "law of the land,"¹⁶⁰ nor is there any doubt as to the Senate's constitutional right to alter a treaty.¹⁶¹ However, it is admitted that "numerous precedents sanction use of a simple executive agreement to alter a treaty or any other international compact."¹⁶² What is more, executive agreements are now considered to be of the same internal legal status as treaties.¹⁶³ What results is a situation in which the President could commit the United States to a policy, from which the Senate would be unable to make changes or alterations. As Woodrow Wilson so poignantly stated:

The President . . . may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.¹⁶⁴

The President, simply by his day-to-day conduct of our foreign relations, need only consummate any agreement and present it as a *fait*

dential arrangements are customarily submitted . . . [t]o the Senate before the future legislative power of the country is committed. . . . It is not necessary for the Senate to ratify an opportunity that entails no obligation.

39 OP. ATT'Y GEN. 484, 487 (1940). Some commitment is normally established in regard to appropriations that are needed for implementation. As yet, the House has not refrained from withholding money for an agreement it was not in favor of. In *DeLima v. Bidwill*, 182 U.S. 1, 198 (1901), the Supreme Court avoided the question of whether the House was required under the Constitution to appropriate money to effectuate a treaty.

159. Undersecretary Alexis Johnson argued that the agreement with Bahrain involved "no new policy on the part of the United States." *Hearings, supra* note 29, at 13. Senator Fulbright provided a contrary view: "The two agreements, with Portugal and Bahrain, "are not insignificant or minor questions, but ones which involve the heart of our foreign policy. Either could possibly lead to further trouble. Accordingly, they should be considered by the United States Senate through the regular treaty mechanisms." *Id.* at 2.

160. *Missouri v. Holland*, 252 U.S. 416 (1920); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1795).

161. *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869).

162. *Treaties, supra* note 3, at 209. On the question of "usage" creating constitutional justiciability, see text accompanying note 221 *infra*.

163. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). However, executive agreements must respect fundamental guarantees found in the Constitution. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (respecting right to a jury trial); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (respecting fifth amendment rights).

164. *Quoted in Presidential Monopoly, supra* note 27, at 1.

accompli. Once the Senate has consented to a treaty, it is virtually prevented from exercising control over future agreements.¹⁶⁵

Closely tied to the question of presidential implementation is the duty of the President to "take care that the laws be faithfully executed." Some advocates of executive agreements have found this to be a proper residuum of presidential power.¹⁶⁶ However, it is certain that "[o]ne of the main weaknesses of the Continental Congress and the Congress under the Articles of Confederation was . . . its inability to enforce treaties . . ." ¹⁶⁷ The supremacy clause was designed to give effect to those arrangements concluded prior to the ratification of the Constitution.¹⁶⁸ But, in addition to this, the President was empowered to see that the laws be executed in accordance with congressional acts. We only need recall the words of Justice Black in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁶⁹ to see that the duty to execute the laws refutes the idea that the President is in any way responsible for making the laws, and indeed to do so would be violative of his constitutional obligations.¹⁷⁰

Intimately connected with claims made under the President's power to execute the laws are claims that stem from the opening sentence of article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." No less than the debate centering on inherent powers,¹⁷¹ this clause has been subject to constant constitutional discussion.

165. *Wilson v. Girard*, 354 U.S. 524 (1957) (initial senatorial consent implies consent to supplementary agreements). However, it does seem possible that if the Senate can alter a treaty, it can so change it as to prohibit types of executive agreements in the future.

166. See *Treaties*, *supra* note 3, at 248; AGREEMENTS, *supra* note 5, at 312-16; Mathews, *supra* note 28, at 366-70.

167. *Treaties*, *supra* note 3, at 258; see note 6 *supra*.

168. A distinction is made by the Supremacy Clause between "laws" and "treaties": laws made "in pursuance" of the Constitution are to be the "supreme law," in contrast to treaties "made, or which shall be made, under the authority of the United States." As the differentiation in the treaty phrase between "made" and "which shall be made" immediately suggests, the phrase was to comprehend subsisting treaties which had been made under the Articles of Confederation, as well as post-Convention treaties.

R. BERGER, CONGRESS V. THE SUPREME COURT 234 (1969). See also *id.* at 369-72; *Treaties*, *supra* note 3, at 259; *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271 (1817). For a historical view of the supremacy clause and treaties, see Burr, *The Treaty-Making Power of the United States and the Methods of Enforcement as Affecting the Police Powers of the States*, 51 PROCEEDINGS AM. PHILOSOPHICAL SOC'Y 271, 327-56 (1912).

169. 343 U.S. 579, 587-89 (1952).

170. See text accompanying note 119 *supra*.

171. See text accompanying note 83 *supra*.

The first real debate occurred between Hamilton and Madison, following Washington's issuance of a proclamation of neutrality at the outbreak of war between France and Great Britain in 1793. Hamilton, writing as "Pacificus," claimed that Washington's action was defensible in that the conduct of foreign relations was inherently an executive function, deriving from the opening clause of article II.¹⁷² Madison, under the name of "Helvidius," contended that "Pacificus" himself had assented to the notion that whatever powers are to accrue as a result of the clause, they were to be limited by the Constitution as it might more precisely set the boundaries of the "executive power." Madison further contended that Congress was the resting place for decisions concerning the scope of American foreign policy¹⁷³ and that the President's sole exclusive power was that of receiving foreign representatives, "a merely 'ceremonial' power."¹⁷⁴ Madison charged that Hamilton's argument was, indeed, nothing more or less than a "brazen attempt to foist upon the Constitution the prerogatives of the British King, the very thing which the Philadelphia Convention had thought to forestall by the war-declaring provision."¹⁷⁵ Basically, Hamilton's position rested on an interpretation of article II, suggesting that:

The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. . . .

The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument.¹⁷⁶

From this Corwin has distilled two propositions: "[F]irst, that the conduct of the foreign relations of a state is in its nature an executive function and therefore, except where the Constitution provides otherwise, belongs to the President, upon whom the Constitution bestows 'the executive power'"; secondly, the express provisions granting power to Congress do not diminish the constitutional powers belonging to the President.¹⁷⁷ Now, if this sounds very much like the transference of

172. See WORLD ORGANIZATION, *supra* note 33, at 22.

173. *Id.*

174. *Id.*; see text accompanying note 192 *infra*.

175. Quoted in WORLD ORGANIZATION, *supra* note 33, at 23.

176. Quoted in AGREEMENTS, *supra* note 5, at 304.

177. E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 28 (1917) [here-

power from the national government to the President mentioned earlier,¹⁷⁸ it is not to be a subject of wonder. Hamilton, prior to his exposition on constitutional interpretation, talks about the President as "the organ of intercourse between the United States and foreign nations"¹⁷⁹ and concludes, rightfully, that this was not a power vested in the legislature.

While discussion about Hamilton's political psychology across the vista of two hundred years is perhaps dangerous, it should not go unrecognized that he was writing as "Pacificus" nearly six years after the ratification of the Constitution. As Washington's Secretary of the Treasury, Hamilton felt compelled, at a time when the country was just beginning to formulate basic political policies that would carry long into the future, to construe the Constitution as liberally as possible,¹⁸⁰ providing both the necessary and probable means for meeting the demands of a new nation.¹⁸¹ Hamilton had supported the "frail and worthless fabric" in the *Federalist* because "half a loaf is better than none."¹⁸² Hamilton's views on the Constitution are widely known, and are mentioned only because it gives some insight into why he considered it necessary to expand the presidential power, reasons which are far from what would be considered constitutionally justifiable.

But Hamilton also erred in the interpretation he gave to the opening sentence of article II. The enumeration of presidential powers distinguished the powers to be exercised by the President from those that were available to the King of Great Britain. The executive powers of the President were seen as on par with those of the governors of the various states.¹⁸³ Generally, it was thought that the governors would exercise the executive powers of government according to the laws of the constitution of their state, and should not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England.¹⁸⁴ " 'Executive power' . . . was cut off entirely

inafter cited as FOREIGN RELATIONS]. Corwin fails to take notice of the powers belonging to the Congress under the "necessary and proper" clause which can vitiate any claim to Presidential power. See text accompanying note 112 *supra*.

178. See text accompanying note 113 *supra*.

179. Quoted in AGREEMENTS, *supra* note 5, at 303.

180. 3 WORKS, *supra* note 37, at 455; see text accompanying note 59 *supra*.

181. G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 32 (1970).

182. C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 34 (1964) [hereinafter cited as ROSSITER].

183. *Presidential Monopoly*, *supra* note 27, at 19.

184. CORWIN, *supra* note 56, at 6.

from the resources of the common law and of English constitutional usage."¹⁸⁵ The enumerated powers which followed the opening, declaratory statement of article II were considered to be limitations on the President's power, rather than exceptions to it.¹⁸⁶

Ultimately, the questions concerning the President's power as the stated head of the executive branch resolve themselves into nothing more, nor less, than pronouncements on situational power and politics. One also finds that there is a great deal of reliance on the opinion given by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,¹⁸⁷ and hence one hears that "while the legislative power of the federal government is rather clearly confined to the grants of the Constitution, it is arguable that, within the *national sphere* of action, the executive power of the President is unconfined."¹⁸⁸ Once again Justice Sutherland's dicta has been used to stray from the actual wording, meaning, and intention of the Constitution. Indeed, it should be recalled that any attempt to establish in the national government exclusive powers, necessarily denies such powers to the President.¹⁸⁹

Closely related to the President's power as Chief Executive are the functions and duties he performs as Chief of State. Article II, section 3 grants to the President the power to "receive Ambassadors," and this is the only sole power given to the President in terms of foreign affairs. The Founders were explicit in their terms governing the extent of the President's power in this regard. It was to be exercised as a "particular mode of communication . . . for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title."¹⁹⁰ Hamilton, in discussing the "most material points of difference" between the "power of the President" and the "king of Great

185. *Id.* Corwin was speaking of the Virginia Constitution of 1776. Compare his understanding of the use of British constitutional practice with that of McClure's. See text accompanying note 5 *supra*.

186. *Presidential Monopoly*, *supra* note 27, at 22.

187. 299 U.S. 304 (1936); see, e.g., AGREEMENTS, *supra* note 5, at 323.

188. AGREEMENTS, *supra* note 5, at 313 (emphasis added).

189. An often cited case in support of expanded Presidential power under the opening clause of article II is *Myers v. United States*, 272 U.S. 52 (1926). Justice Sutherland's opinion on the powers of the President as Chief Executive was relied on by Attorney General Jackson in his support of the "destroyer-base" deal. See 39 OP. ATT'Y GEN. 484, 486-87 (1940). Interestingly, and most significantly, Jackson later rejected any claim to broad executive powers under this clause, as well as rejecting the stance taken by *Myers*. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

190. 6 J. MADISON, THE WRITINGS OF JAMES MADISON 162 (G. Hunt ed. 1906).

Britain,"¹⁹¹ refers to the President's authorization to receive ambassadors:

[T]hough it has been a rich theme of declamation, it is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the Legislature, or one of its branches, upon every arrival of a foreign minister. . . .¹⁹²

Even though granted this power, the President is not free to appoint ambassadors. He is only to "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers" ¹⁹³ Nowhere was there any inclination that this power was to be the basis for presidential prerogatives.

However, McClure argues that

presidential appointment of individuals who are not ambassadors, public ministers, or consuls to do things that ambassadors, ministers, and consuls are supposed to do is nowhere forbidden. Accordingly, it seems arguable that the practice of making such appointments . . . interprets, perhaps amplifies, but does not necessarily amend, the (specific provisions of) the Fundamental Law.¹⁹⁴

One might justifiably ask which "Fundamental Law" is being referred to. Yet again, we find that advocates of executive agreements have only to resort to silence on the part of the Constitution in order to make good any claim for such agreements. Not even here is there reliance on any "permissive" language!¹⁹⁵ If this position is further examined, we also find that the President is "the organ of diplomatic intercourse," because of "his powers in connection with the reception and dispatch of diplomatic agents and with treaty making . . . [and] because of the tradition of executive power adherent to his office."¹⁹⁶ Thus, the ability to dispatch executive agents, coupled with the supposedly broad powers as Chief Executive, allows the President to conclude agreements under a provision of the Constitution that was never meant to be more than a pronouncement of a titular head of state.

The Founders were quite aware of the ability of an agent to institute, represent, and implement the foreign policy of the United States.

191. THE FEDERALIST No. 69, *supra* note 36, at 448.

192. *Id.* at 451.

193. U.S. CONST. art. II, § 2.

194. AGREEMENTS, *supra* note 5, at 243.

195. *See* text accompanying note 8 *supra*.

196. FOREIGN RELATIONS, *supra* note 177, at 33.

Early in the diplomatic practice of the United States, John Jay was called upon to negotiate and consummate a treaty with Britain. But Jay was firmly guided and strongly influenced by the Senate.¹⁹⁷ Also, Washington appointed special consuls but only with senatorial consent. This appears to be the direct outgrowth of a practice begun under the Continental Congress,¹⁹⁸ and the Senate has undertaken measures to safeguard its role in the appointing and assigning of diplomatic envoys.¹⁹⁹ Never was there an intention that a presidential prerogative would be derived from the Constitution under the President's power to receive ambassadors.

Concomitant with the President's power to receive ambassadors is the power of recognition. The Supreme Court has provided us with two cases in which this power became the basis for executive agreements. Both *United States v. Belmont*²⁰⁰ and *United States v. Pink*²⁰¹ dealt with the internal effect of the Litvinov Assignment, which was an executive agreement concluded in 1933 following the recognition of the Soviet Union. The agreement provided for the relinquishment by the United States of certain claims against the Soviet government in return for a reciprocal relinquishment by the Soviet Union of all property in this country that was in effect nationalized by the U.S.S.R. under its government declarations of 1918 and 1919. The Court, by

197. *Presidential Monopoly*, *supra* note 27, at 15.

198. In the re-organization of the department of foreign affairs on February 22, 1782, it was provided that all communications with diplomatic officers and consular agents . . . should be conducted through the Secretary to the United States for the department of foreign affairs; and that all instructions, communications, letters of credence, plans of treaties and other acts . . . should . . . [be] "submitted to the opinion of Congress"

CRANDALL, *supra* note 41, at 28. See also SANDERS, *supra* note 55. McClure, after recognizing this situation, suggests that the practice under the Articles of Confederation of making agreements, had a steady growth once the country had a President. Such a practice, he says, "would seem to be merely the happening of the natural and inevitable." AGREEMENTS, *supra* note 5, at 261.

199. In the resolutions of January 9, 1883, advising and consenting to the ratification of the treaty with Korea . . . on the part of the United States, by Commodore R.W. Shufeldt, specially commissioned by the President, the Senate declared that it did not by this act "admit or acquiesce in any right or constitutional power in the President to authorize" any person to negotiate treaties . . . unless such person had been appointed for such purpose or clothed with such power by and with the advice and consent of the Senate The purpose of the declaration was to prevent the means employed being drawn into precedent The Executive has recognized no limitation in this respect.

CRANDALL, *supra* note 41, at 65-66. Attorney General Cushing stated that the Constitution required consent of the Senate to all officers having diplomatic functions, whatever title or designation. 7 OP. ATT'Y GEN. 188, 192-93 (1855); see *Treaties*, *supra* note 3, at 207 n.54.

200. 301 U.S. 324 (1937).

201. 315 U.S. 203 (1942).

giving effect to the executive agreements, ipso facto established the agreements as the supreme law of the land. In avoiding any questions about fifth amendment rights,²⁰² the Court, in both cases,²⁰³ reiterated the reasoning of Justice Sutherland in *Curtiss-Wright*.

In *Belmont*, the Court argued that governmental power over external affairs, being vested exclusively in the national government, grants to the executive authority to "speak as the sole organ" of that government.²⁰⁴ Once again we are faced with arguments that grant to the President the entire control over the conduct of foreign relations. Once again, that power is justified through a combination of the President's authority as the stated head of government, and the power flowing from the enumerated power of the clause establishing the "executive power."

In *Pink*, the *Curtiss-Wright* and *Belmont* decisions are echoed with a ring of redundancy.²⁰⁵ But, something else is intimated by Justice Douglas when he reasons that the state of New York is wrong in refusing to give effect to "acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question."²⁰⁶ In effect, the agreement is seen as establishing new policy on the part of the United States, and as such, it should be subject to congressional approval. What is more, executive agreements are accorded the same dignity and status as treaties, in a way, as we have seen, totally unacceptable and violative of the Constitution and the intent of the Framers.

It remains to consider what is perhaps the most far-reaching power which the President can make claim to in justifying executive agreements.²⁰⁷ Such power is said to derive from the President's authority

202. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court explicitly rejected the idea that an agreement could contravene applicable clauses of the Constitution (here, the sixth amendment right to a jury trial). The effect of the Court's ruling is that any agreement or treaty made, although perhaps falling under article VI, must comply with the provisions of the Constitution, including the Bill of Rights, as well as any constitutional prohibitions on the exercise of power. To do otherwise would permit amendments to the Constitution in a way unacceptable to the precise method for such change as established by the Constitution.

203. *United States v. Pink*, 315 U.S. 203, 209 (1941); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

204. 301 U.S. 324, 330 (1937).

205. 315 U.S. 203, 229, 231 (1942).

206. *Id.* at 231.

207. "The President shall be commander-in-chief of the Army and Navy . . . and of the Militia of the several states, when called into actual service of the United States." U.S. CONST. art. II, § 2. "In this language the Constitution confers upon the Exec-

as Commander-in-Chief of the armed forces. As such, the commonly accepted view is that the President has the express power to protect the military security of the United States, both in time of war and in time of peace.²⁰⁸ In times of peace, the President has used executive agreements to reduce armaments,²⁰⁹ and in common defense with other countries, he has used executive agreements to bolster the defensive capabilities of the country.²¹⁰ Examples abound of agreements entered into by the President under this authority.²¹¹ While the use of such agreements is thought to be limited to non-offensive purposes,²¹² the "plenary character and vital significance" of the Commander-in-Chief clause "unite to create in its exercise by the President a natural presupposition in favor of his authority to do anything not forbidden by the Constitution and lying within the field of international affairs."²¹³ With a stroke of a pen, the President can circumvent the Constitution and critically engage the United States in the pursuit of policy matters best left to the Congress.

If it was not clear from the Constitution that Congress was to retain full power over the war-making policies, Hamilton's words should serve as the epitaph for advocacy of executive agreements under the Commander-in-Chief clause. Again, Hamilton is referring to the points of difference between the King and the President:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much in-

utive his most formidable power with respect to the external relations of the country." AGREEMENTS, *supra* note 5, at 321.

208. *Tucker v. Alexandroff*, 183 U.S. 424 (1902). Yet, as Berger points out, such power is confined by legislative delegation. *Presidential Monopoly*, *supra* note 27, at 44-45. See text accompanying note 131 *supra*.

209. See, e.g., the Rush-Bagot Agreement of 1817, Arrangement with Great Britain, Apr., 1817, 8 Stat. 231, T.S. No. 110½. See note 20 *supra*.

210. Often cited is the base destroyer deal with Britain of September, 1940. Jackson cited this clause as his support in his letter to President Roosevelt. 39 OP. ATT'Y GEN. 484, 486 (1940).

211. For extensive examples, see CRANDALL, note 41 *supra*; AGREEMENTS, *supra* note 5. See also Fraser, *The Constitutional Scope of Treaties and Executive Agreements*, 31 A.B.A.J. 286 (1945). Fraser, although viewing the President's power narrowly, concedes a constitutional basis for agreements entered into under the diplomatic and commander-in-chief powers. *Id.* at 288.

212. See *Hearings*, *supra* note 29, at 33, 34 (statement by Undersecretary Alexis Johnson).

213. AGREEMENTS, *supra* note 5, at 321. Henkin warns that the President, as commander-in-chief, could make armistice agreements which, when viewed broadly, could include war-time commitments on territorial and political issues, which would take effect after the war, such as Yalta and Potsdam. HENKIN, *supra* note 24, at 177.

ferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—*all which, by the Constitution . . . would appertain to the legislature.*²¹⁴

Thus, Congress under article I, section 8, clause 1, is to “provide for the common Defense,” and in the same section, clause 11, it shall “declare War.” The next clause states that Congress shall have power “to raise and support Armies” Congress shall “provide and maintain a Navy” and shall “provide for calling forth the Militia” The President as Commander-in-Chief could not, initially, begin to exercise those powers unless Congress had first acted. From where, then, does he ascertain the power to make executive agreements? From which provision of the Constitution is the President given the power to make agreements, when the law-making function is explicitly confided in the Congress?

V

Will any man, who entertains a wish for the safety of his country, trust the sword and the purse with a single assembly organized on principles so defective—so rotten? Though we might give to such a government certain powers with safety, yet to give them full and unlimited powers of taxation and the national forces, would be to establish a despotism; the definition of which is, a government in which all power is concentrated in a single body.²¹⁵

On the basis of the growing use of executive agreements, and the decline in the assertion of senatorial prerogatives, one might easily conclude that the fear of despotism and the power in the hands of one body characterizes the executive branch. But Hamilton was referring to the national assembly, the Congress, and he found it to be fundamentally defective for a want of power.²¹⁶ It is an ironic turn of constitutional intent to find that almost two-hundred years since Hamilton expressed his fears of an imbalance in the constitutional make-up that had characterized the Continental Congress, we now find that the same situation exists.

It is claimed that after Washington first attempted to involve the Senate in the negotiation of a treaty, an attempt that met with little suc-

214. THE FEDERALIST No. 69, *supra* note 36, at 448 (A. Hamilton) (emphasis added).

215. Hamilton, *quoted in* ROSSITER, *supra* note 182, at 233.

216. 3 WORKS, *supra* note 37, at 203-04.

cess,²¹⁷ the Senate's role was reduced from vicarious participation in the making of treaties to that of "exercising a right of giving or withholding consent to agreements, in whose making it had played no direct part."²¹⁸ In the same breath, however, it is admitted that the President and the Senate were to act together in the making of treaties,²¹⁹ but that "subsequent developments" have rendered the constitutional make-up "beyond all possibility of recall."²²⁰ This is not to cause concern, for the practice, as a product of usage, is justified because the "treaty-clause . . . is so flexible that the exact relations of the Senate and the executive in treaty-making could be worked out only in actual practice."²²¹ Furthermore, the practice itself is "the most beneficial type of constitutional change."²²² The reason for this is that "nineteenth-century inhibitions are not to be permitted to block the development of twentieth-century usages that are believed by responsible statesmen to promise practical aid in the attainment of objectives deemed to be in the public interest."²²³ But, when it is asked who shall decide what is in the public interest, we learn that the President and the executive branch are the most capable of determining the course of future affairs. Such reasoning is from the start based on assumptions that go unrefuted and are built upon through the aegises of practice.²²⁴ McDougal and Lans state that the "relevant question, when the discussion is cast in terms of usage is whether there are any differences in policy between what has been done by way of executive agreements and what has not been done."²²⁵ But, certainly, it is they and others who have cast the discussion in terms of usage, and it is they who rely first on usage, through practice, to then justify that very

217. *Presidential Monopoly*, *supra* note 27, at 13, points out that the only thing that failed was the use of oral consultations, and that Washington continued to employ written methods of informing the Senate of his actions.

218. *Treaties*, *supra* note 3, at 207 n.56. Corwin says essentially the same thing: "The Senate's function as an executive council, was from the very beginning put, and largely by its own election, on the way to absorption into its more usual function as a legislative chamber . . ." CORWIN, *supra* note 56, at 211. Corwin attributes this to an insistence on the part of the Senate to assert its independence in the treaty-making process. WORLD ORGANIZATION, *supra* note 33, at 36.

219. "The wording of the Constitution itself visualizes treaty-making as one continuous process to be performed by a single authority, the President acting throughout in consultation with the Senate." CORWIN, *supra* note 33, at 36.

220. *Id.* at 34.

221. R. HAYDEN, *THE SENATE AND TREATIES: 1787-1817*, at ix (1920).

222. CORWIN, *supra* note 33, at 41.

223. *AGREEMENTS*, *supra* note 5, at 238.

224. See text accompanying note 67 *supra*.

225. *Treaties*, *supra* note 3, at 282 n.170.

practice because it has been done. This type of opaque reasoning is characteristic of those who wish to maintain that the treaty-making clause is far from being specifically defined, and thus one is given the mandate to alter the functions of the "government without perceptibly affecting the vocabulary of our constitutional language."²²⁶ It is difficult indeed to attempt to measure discernible differences between what is and what could have been. It is precisely because we must account for our constitutional language in light of a practice that we call into question the very practice itself.

The question we must deal with, then, is more jurisprudential in nature than the other problems we have so far discussed. Does a "strict interpretation" of the Constitution, and specifically the treaty-making clause, allow for the justification of the practice of executive agreements as a "rule"? That is, would an interpretation which faithfully adheres to the text of the Constitution permit one to justify the use of executive agreements as a historical practice constituting a rule under the Constitution?²²⁷ McDougal and Lans contend that, "[I]n truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution—the President and Congressional leaders, as well as judges—have repeatedly transcended the restrictive interpretations of their predecessors."²²⁸ So that

even if the widespread use of executive agreements in dealing with all kinds of problems was not within the conscious contemplation of the statesmen who foregathered at Philadelphia 158 years ago, the continuance of the practice by successive administrations throughout our history makes its contemporary constitutionally unquestionable.²²⁹

The only thing unquestionable is the acquiescence in ignoring congressional prerogatives.²³⁰ McDougal and Lans realize this and go further in contending that the advisory function of the Senate has been virtually abolished by use of executive agreements.²³¹ Is the criteria of justification simply a good result?

226. W. WILSON, CONGRESSIONAL GOVERNMENT 9 (1913).

227. See Rawls, *Two Concepts of Rules*, in THEORIES OF ETHICS 144 (P. Foot ed. 1967) [hereinafter cited as Rawls].

228. *Treaties*, *supra* note 3, at 215 (footnotes omitted).

229. *Id.* at 291. Contrast this with what the Court said in *Powell v. McCormack*, 395 U.S. 486 (1969): "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Id.* at 546-47.

230. The Senate clearly recognizes this. See the statement by Senator Fulbright, *Hearings*, *supra* note 29, at 1.

231. *Treaties*, *supra* note 3, at 207-08, 304.

The problem is that advocates of this kind of view may be said to translate the more specific clause of the Constitution dealing with treaty-making into a general statement about political realism and policy considerations.

It should, however, be no cause for wonder, since theories of constitutional interpretation like other legal and governmental theories must often serve as "handmaidens to political necessity". . . . [I]t is utterly fantastic to suppose that a document framed 150 years ago . . . could be interpreted today by contemporary judges in terms of the "true meaning" of its original Framers²³²

232. *Id.* at 214. For a similar view, see Mathews, *supra* note 28. At the heart of their contention, McDougal and Lans find the Court an unwarranted agent as the proper interpreter of the Constitution: "It would appear arguable that, just as Congress has no authority to direct or coerce the Executive in the conduct of international relations, so the courts have no authority to question the validity of an international act made 'under the authority of the United States.'" *Treaties, supra* note 3, at 299. Their citation of a portion of article VI is misplaced. The "supremacy clause" was enacted to give effect to treaties and agreements concluded prior to ratification of the Constitution. For an historical review of the supremacy clause, see note 168 *supra*. In addition, their reasoning flies in the face of the powers given to Congress under article I, section 8, empowering it to "make all Laws which shall be necessary and proper for carrying into Execution" all other powers. See text accompanying note 113 *supra*. Furthermore, they conclude this after citing numerous cases which say that the courts should not interpret treaties differently from the Executive. Assuming even this, there is no way in which we can take it to mean that the very *act* of establishing the agreement is beyond judicial scrutiny. Finally, they suggest that the answer is a political one, residing in the electorate, where the President is ultimately responsible.

The Supreme Court has indeed declined to decide cases involving "political questions." Thus, even though a case be otherwise justiciable, the Court will not review such cases "primarily because of the separation of powers within the Federal Government." *Powell v. McCormack*, 395 U.S. 486, 518 (1969). In *Baker v. Carr*, 369 U.S. 186 (1962), the Court laid out various considerations to be accounted for in determining if a political question is involved:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Given the test of whether there is a "textually demonstrable commitment," *Powell v. McCormack*, 395 U.S. 486, 519 (1969), it would seem that the Senate would have to be included in the treaty making process, and as such, the President could not circumvent it by means of executive agreements.

Locke stated that:

The old Question will be asked in this matter of *Prerogative*, But *who shall be Judge* when this Power is made a right use of? I Answer: Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth*: As there can be none, between the Legislative, and the People, should either the Executive, or the Legislative, when

While there are some valid reasons for accepting such a view,²³³ it is more important to keep in mind an intrinsic characteristic of the American Constitution; *i.e.*, that the Constitution is a legal document supposedly transcending the fluctuations of history.²³⁴ To adopt an interpretation of the Constitution based upon policy considerations and "political necessity," is to abandon this intrinsic aspect of American law. Law is not the mere implementation of governmental policies, formulated in response to the dictates of the political process at the time. One who intends to interpret the Constitution with fidelity must give a faithful reading to the text itself.

What writers like McDougal, Lans and Mathews obscure, if not neglect, is a distinction between (1) the "Constitution" as an unchanging formal document, "describing a pattern of legal rules and institutions that function *for* political purposes," and (2) the "constitution" as "a pattern of political relationships which may be, but need not be, defined in legal instruments."²³⁵ The difference in orthography may be understood in two ways. First, it may be viewed as the distinction between those constitutional provisions which specify and are constitutive of the governmental institutions and power processes, and those "situational powers" implied by the Constitution in the establishment of a federal system of separate institutions sharing power "autonomously"

they have got the Power in their hands, design, or go about to enslave, or destroy them. The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal* to Heaven.

LOCKE, *supra* note 119, at 425-26.

In *B. Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912), the Court viewed as part of its constitutional responsibility, the right to review "constructions of international compacts." Certainly, the doctrine of political questions must be accounted for, but it seems that the Court could, if it feels it is within its function and power, make executive agreements subject to constitutional justification. There is nothing inherent in the question of executive agreements that would preclude the Court from exercising this function, and certainly it is preferable to the solution suggested by Locke. *See* Note, *Executive Agreements and the Treaty Power*, 42 COLUM. L. REV. 831, 832-33 (1942).

233. On one hand, there is political realism, recognizing the expediency of the President in international affairs; on the other hand, one must realize the difficulty of interpreting the intention of the Framers, which involves an interpretation of the social-psychology of the Framers.

234. Miller states that "[l]egal theory is presumably indifferent to time." MILLER, *supra* note 2, at 160. Corwin understands the distinction being made:

The fact that the Constitutional Document has not been greatly altered by formal amendment so far as the make-up and powers of the National Government are concerned ought not to be permitted to obscure the further fact that the *working* constitution to which the Document lends legal and moral sanction has from the first undergone constant changes.

WORLD ORGANIZATION, *supra* note 33, at 37 (emphasis added).

235. MILLER, *supra* note 2, at 150 (emphasis added).

though "interdependently."²³⁶ Second, this orthographical difference may be viewed as embracing the distinction, made by Ronald Dworkin, between a "strict interpretation" of the Constitution as giving a faithful adherence to the text itself; and a strict or narrow interpretation as viewing in a limited way the various rights and privileges delineated in the Constitution, given the political necessities and policy considerations of the time.²³⁷

Thus, writers who attempt to justify executive agreements upon historical practice seem to be construing the constitution, and applying a "strict interpretation" of the Constitution in the latter of Dworkin's senses. Part of the problem with this kind of argument and interpretation is that it fails to distinguish between a "concept" and a "conception." Adherence to the constitution views the Constitution as an historically evolving, or evolutionary document; and interpretations based upon fidelity to policy considerations, must be made upon "specific conceptions" as founded in the constitutional provisions, such as the treaty-making clause. Hence, interpreters of the Constitution, be they presidents, congressional leaders, or judges, only substitute and evolve their conceptions of the provisions of the Constitution. Consequently, the Constitution may be said to permit whatever it does not strictly prohibit.²³⁸ And that which it does "permit" is to be interpreted according to historic usage and contemporary conceptions of the provisions of the Constitution.²³⁹ In this connection, McDougal and Lans state that changes by usage "furnish ample proof of the proposition that the Constitution may be modified or supplemented by practice in any desired manner, except where there are express prohibitions in the text of the document."²⁴⁰ Clearly, however, here they are talking in terms of the constitution and not the Constitution. In addition, what they neglect is the fact that the "vague" clauses of constitutional provisions must be interpreted according to the Constitution, which must be seen as a timeless document, providing "concepts" which are guides for the workings of the constitution and the institutions established under it.²⁴¹ As Justice Holmes stated: "[Any] case before us must be considered in the light of our whole experience

236. *Id.* at 150-61.

237. Dworkin, *supra* note 2, at 26.

238. See text accompanying note 8 *supra*.

239. *Id.*

240. *Treaties, supra* note 3, at 306.

241. See Dworkin, *supra* note 2, at 27.

and not merely in that of what was said a hundred years ago,"²⁴² but also the concepts of constitutional provisions must be interpreted "by considering their origin and the line of their growth."²⁴³ As Miller states:

the Court's most successful attempt to overcome the problems of constitutional intent and constitutional change . . . recognizes that the Constitution does not usually change according to its own plan of amendment, yet constitutional change is continual. When the Constitution is discussed in terms of a theory (that of evolution) to which change itself is integral, then the "Constitution" has become once more the "constitution" that John Marshall said he was expounding. And yet justices have by no means surrendered their "sworn duty to construe the Constitution . . . to effectuate the intent and purposes of the Framers."²⁴⁴

What Miller says about constitutional intent and change within the context of judicial review is clearly something quite different from that of advocates of executive agreements. What these advocates lack is a concise theory of constitutional interpretation that would make lucid the concepts embedded in the Constitution. Instead, they substitute their own form of "strict constructionism" based upon policy considerations and political expediency which serves as a guide and standard for what they conceive to be the conceptions of the Framers' non-prohibitory clauses and provisions. Such an argument can only be given if one abandons a "strict interpretation" and adherence to the constitutional text itself.

In addition to these problems of interpretation, and theories of meaning and intention, the position advocating the practice of executive agreements as constituting a constitutional practice or "rule" is itself muddled. First, in maintaining this position the advocate must be talking about the constitution and not the Constitution. Secondly, and more importantly, their notion of usage as constituting a "rule" is not the conception of a rule as a "practice," but it is really what John Rawls terms the "summary view of a general rule."²⁴⁵ The "summary view" of a general rule is such that particular cases are logically prior to rules; and the "rules are formulated to serve as aids in reaching these ideally rational decisions on particular cases, guides which have been built up and tested by the experience of generations."²⁴⁶ Contrast,

242. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

243. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

244. MILLER, *supra* note 2, at 169, quoting *Bell v. Maryland*, 378 U.S. 226, 288-89 (1964) (Goldberg, J., concurring).

245. Rawls, *supra* note 227, at 158. See also *id.* at 160-67.

246. *Id.* at 162. Henkin suggests that "ad hoc" agreements governing single instances

however, the conception of rules as practices, which recognizes the rules as defining and constituting the practice. As Rawls states "the rules of practices are logically prior to particular cases."²⁴⁷

Those engaged in a practice recognize the rules as defining it. The rules cannot be taken as simply describing how those engaged in the practice in fact behave: it is not simply that they act as if they were obeying the rules. Thus, it is essential to the notion of a practice that the rules are publicly known and understood as definitive On this conception, then, rules are not generalizations from the decisions of individuals²⁴⁸

VI

What then can be said for executive agreements? It seems clear that the Framers, in enacting the specific language of the treaty-making provisions, intended to guard against the practice of Presidential agreements. The use of executive agreements as a method for circumventing the specific "rules" of the Constitution cannot be justified by resort to long-standing practice. Nor, as we have seen can the proponents of executive agreements find support in other constitutional provisions which grant power to the President. While it cannot be denied that the position of the United States in world affairs is today far different from that which existed when the Document was first established, fidelity to the Constitution demands that the Senate be made a part of the process by which the United States commits itself to international agreements. The Founders provided for such participation, and as such, there can be no justifying a contrary practice by a set of so-called rules that are themselves ultimately responsible to the constitutional text.

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would rarely require senatorial consent. HENKIN, *supra* note 24, at 432 n.39. However, in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), the Court seemingly rejected an "ad hoc" agreement as making law for a particular case.

247. Rawls, *supra* note 227, at 163.

248. *Id.*