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Joseph P. Tomain

University of Cincinnati College of Law, joseph.tomain@uc.edu

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EXECUTIVE AGREEMENTS AND THE BYPASSING OF CONGRESS¹

*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*²

The United States Constitution loosely defines the respective roles of the President and the Congress in the treaty making process.³ The power to determine U.S. foreign policy is thus a divided one, but with far greater power held by the Executive. The Congressional role is relegated to the exercise of a veto power that can be applied only to those agreements which are classified as "treaties" and submitted by the President for Senate

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1. This note expands upon the internal processes of treaty making discussed in the note entitled *The Colombian Supreme Court Decision on the Andean Common Market and Implications for the Law of Treaties* in this issue.
 2. U.S. Const. art. II, § 2.
 3. McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, (pts. 1-2), 54 *YALE L. J.* 181, 534 (1945). *But see* Borchard, *Treaties and Executive Agreements — A Reply*, 54 *YALE L. J.* 616 (1945). These articles give a thorough historical and constitutional analysis of the treaty-making process. The authors' research includes an analysis of the Founding Fathers' views on the subject as well as extensive use of the records of the constitutional debates. The McDougal & Lans - Borchard articles debate the question of the constitutionality of the use of executive agreements as a means of bypassing the two-thirds requirement. That is, the Executive enters into an agreement under some form of authorization from Congress. The agreement is concluded pursuant to a former treaty or other legislation. Where legislation is used as the authorization only a simple majority of Congress is needed. Today the problem is viewed not as a mere numbers game in tallying votes for ratification but whether Congress has an opportunity to participate at all.

concurrence.⁴ The use of executive agreements,⁵ through which the President may conclude international accords without consideration by the Senate, has proved increasingly troublesome for the Congress.⁶ The vast majority of executive agreements are eventually sent to the Congress;⁷ there is, however, no Congressional participation in the formulation of executive agreements since the Secretary of State does not publish them and transmit

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4. CORWIN, *THE PRESIDENCY: OFFICE AND POWERS, 1787-1957* (1957). This work develops the legal history behind the presidency. See also Schlesinger, *Congress and the Making of American Foreign Policy*, 51 *FOREIGN AFFAIRS* 78 (1972); VELVEL, *UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS*, 15 (1970), this work deals with the use of Presidential power during the Vietnam conflict; HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1973).
 5. The President's exercise of power in foreign affairs has expanded considerably with Congress being all but precluded from acting on some major foreign policy issues. Ostensibly, Congress should play a key role in the formulation of foreign policy. The argument is put forth that major policy actions, e.g., defense related agreements, should involve Congress while implementing agreements should be carried out by the President independently. See Congressional Oversight of Executive Agreements, *Hearings on S. 3475 Before the Subcomm. on the Separation of Powers of the Sen. Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings on S. 3475*], which contain an extensive bibliography on executive agreements at 659. The thrust of these hearings is that the President has the dominant role in major policy making instead of Congress.

What then, is a major foreign policy issue? The Senate report on Senator Fulbright's National Commitments Resolution suggested that the use of military forces in a foreign territory should be undertaken only by treaty. The Executive Branch argues that agreements to use military facilities in other countries do not necessarily require the deployment of forces, and should not be considered a major policy action. The counterargument is that an option to use military facilities could become a long-term security decision which should involve Congress. See *infra* note 33 and accompanying text.

In S. Rep. No. 797, 90th Cong., 1st Sess. (1967), Senator Fulbright first proposed the "national commitments" resolution as a means of reasserting Congressional voice in decisions committing the United States to the defense of foreign nations. The proposal was adopted as a "sense of the Senate" resolution, (S. Res. 85) on June 25, 1969. See S. Rep 91-129, 91st Cong., 1st Sess. (1969).

6. See McGovern, *The Imbalance of Power*, Washington Post, January 28, 1973, § B, at 5, col. 1. These remarks delivered by Senator McGovern at Oxford University reflect the concern of one Senator over the, "impotence of Congress and the omnipotence of the presidency," in the field of foreign affairs.

The last two Congresses have sought to reassert their traditional role in the foreign policy decision-making process through War Powers legislation. See *Hearings Before the Sen. Foreign Rel. Comm. on S. 2956*, 92d Cong., 2d Sess. (1972); *Hearings Before the Subcomm. of National Security and Scientific Development of the House Foreign Affairs Comm. on S. 440 and H. Res. 317*, 93d Cong., 1st Sess. (1973). Each version of this legislation was designed to have the President consult with Congress before engaging the United States in hostilities abroad.

7. Transmittal of Executive Agreements to Congress *Hearings Before the Sen. Comm. on Foreign Relations on S. 596*, 92d Cong., 1st Sess. 2 (1972) [hereinafter cited as *Hearings on S. 596*].

copies to the Congress until the agreements have gone into force.⁸ The problem surrounding this imbalance of power between the Legislature and the Executive in foreign policy decision making is not the constitutionality of executive agreements;⁹ rather, congressional concern is with the expanded scope and use of the device. By increasing its resort to executive agreements, the Executive Branch has significantly increased its power in foreign affairs.

The current rise in the proportion of the numbers of executive agreements to the number of treaties serves as an indication of the Congress' weakened position in foreign relations. For example, in 1930 the United States concluded 25 treaties and only nine executive agreements. In contrast, in 1968 the United States concluded 16 treaties and executive agreements. By January 1, 1972, there were in force a total of 947 treaties and 4,359

8. On May 22, 1972, The Supreme Court denied a motion for leave to file a bill of complaint in the case of *Webb v. Porter*, 409 U.S. 491 (1972). This case attempted to challenge the President's appointment of Ambassador Porter to the Paris Peace Talks. Petitioner Webb alleged that the appointment was unauthorized by the U.S. Const. Art II, section 2 dealing with private ministers. Webb maintained that by "advice and consent" the Constitution meant that the President must seek the advice of the Senate both before entering into substantive treaty negotiations and also during their course, and the consent of the Senate when specific agreements are to be pursued. The case continues in the Sixth Circuit, *Webb v. Porter* No. 72-2082 (1972). S. Res. 99, 93d Cong., 1st Sess. (1973), attempts to implement Mr. Webb's thesis that the "advice and consent" of the Senate is required throughout negotiations, not only as an affirmation of what the Executive has independently concluded. See 19 Cong. Rec. S7273-S7283 (Daily ed. April 12, 1973).

The latest treaty sent to the Senate for their advice and consent was entitled Convention on International Trade in Endangered Species of Wild Fauna and Flora. This points out the type of agreements the Executive is willing to forward to Congress. 119 Cong. Rec. S7421 (Daily ed. April 13, 1973).

9. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-319 (1936). In *Curtiss-Wright* Justice Sutherland felt that the concomitants of nationality required a nation to speak with a single voice, the President's. See also *United States v. Belmont*, 301 U.S. 324, 330 (1937) and *United States v. Pink*, 315 U.S. 203,229 (1942) upholding the Roosevelt-Litvinov Assignment. Both cases state that the President has the authority to enter into an international agreement without the consent of the Senate. Justice Douglas in *Pink* at 230, stated that an executive agreement was to have a similar dignity with that of a treaty but maintained that the bypassing of Congress was valid as long as the Executive acted with his constitutional sphere. In *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 affirmed on other grounds, 348 U.S. 296 (1955), the court overturned an executive agreement because it was unauthorized and contravened a statute in existence.

The courts have expounded only a vague general limitation on the President's use of executive agreements. Such agreements cannot destroy the constitutional rights of a citizen. See also *United States v. Seery*, 127 F.Supp. 601 (Ct. Cl. 1955); *Reid v. Covert*, 354 U.S. 1 (1957); but see *Wilson v. Girard*, 354 U.S. 524 (1957).

Also, Congressional delegation of authority to the Executive to enter into supplemental agreements has generally been upheld, *Star-Kist Foods, Inc. v. United States*, 169 F.Supp 268 (Cust. Ct. 1958); *Field v. Clark*, 143 U.S. 649 (1892); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912). But see *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

executive agreements.¹⁰ Executive agreements now outnumber treaties four-to-one and are used more and more frequently. It must be noted that these figures deal only with published agreements. Classified agreements, which have not been available even to members of Congress, are not reflected in these statistics.¹¹ It is these classified agreements that are the particular focus of Congressional concern.

The Transmittal Act of 1972

One step in formally recognizing the reduction of congressional power in the transnational arena is the recent passage of the Transmittal Act. The Act, simple in scope but long in history, reads in full:

The Secretary of State shall transmit to the Congress, the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would in the opinion of the President, be prejudicial to the national security of the United States shall not be transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.¹²

A similar provision was first introduced in 1954 by Senators Knowland and Ferguson as an alternative to the Bricker Amendment.¹³ Section three of the latter would have provided Congress with the power to regulate all executive agreements with foreign powers. In addition, all such agreements would have been subject to the same limitations imposed upon treaties. The Knowland bill was not acted upon in the Senate until 1956 when it was approved only to be defeated in the House. The present version, introduced by Senator Case in 1971, was unanimously approved in the Senate and passed the House on August 22, 1972.¹⁴

The Act simply requires the Secretary of State to transmit to Congress the text of all executive agreements within 60 days after passage. The acid test of the Act will come when the Executive enters into an international

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10. DEP'T STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1972. It is curious to note that the trend away from the use of treaties and toward an expanded use of executive agreements occurred during the period in which the courts acceded to the preeminence of the Executive in foreign affairs. See *Hearings on S. 3475, supra* note 5 at 3.
 11. *Hearings on S. 596, supra* note 7, at 61. The State Department procedure for sensitive agreements is set out in the Circular 175 Procedure, *infra* note 22 and accompanying text. See also, 11 Foreign Affairs Manual (FAM) 731.4.
 12. 1 U.S.C. § 112b (1972) [hereinafter referred to as the Transmittal Act].
 13. S.J. Res. 1, 83d Cong., 1st Sess. (1953).
 14. U.S. Code Cong. Rec. & Ad. News. 3983 (1972).

agreement it believes is so highly sensitive that it must be kept from the select committees mentioned in the Act.

The Transmittal Act was designed as a step in redressing the imbalance of power between the President and the Congress. It was not intended to resolve fundamental questions relating to the treaty making power of the Senate or Executive authority to enter into binding agreements with foreign countries without the consent of Congress.¹⁵ It was designed only to recognize formally the lack of coordination between Congress and the President in the conduct of foreign relations.¹⁶

The Act specifically deals with the crucial question of secrecy. Both the Senate and House reports reveal that members of Congress are concerned about not having been informed about the negotiation of international executive agreements.¹⁷ The Senate report mentions that the Symington Subcommittee on Security Agreements and Commitments Abroad uncovered agreements with Ethiopia (1960), Laos (1963), Thailand (1964, 1967), Korea (1966), and Spain that had never been revealed to Congress.¹⁸ It is precisely this practice of avoiding Congress that the Transmittal Act proposes to eliminate. The Act does not require full public disclosure of sensitive agreements, but it does require that Congress be made aware of them.

The Transmittal Act accepts the view that, at times, premature public disclosure of certain international agreements may be unwise. But the Act takes a qualified view of secrecy by limiting those instances in which the Executive may use secrecy to mask international agreements from Congress. Any agreement that would prejudice national security by immediate public disclosure is not to go to Congress as a whole. Rather, such sensitive agreements will be transmitted only to the Senate Committee on Foreign Relations and the Committee on Foreign Affairs of the House.

The Transmittal Act does not fully resolve the problem of Executive secrecy in foreign policy issues. If the President decides to keep an agreement secret, and refuses to divulge its existence even to select committees of the Congress, the Act has no provision for compelling the Executive to do so. The State Department has expressed reluctance to avail Congress of classified documents based on the fear that to do so would subject State Department employees to criminal sanctions under the

15. S. Rep. No. 92-591, 92d Cong., 2d Sess. 3 (1972).

16. *Id.*

17. *Id.* at 4, H.R. Rep. No. 92-1301, 92d Cong., 2d Sess. 2 (1972).

18. Security Agreements and Commitments Abroad, *Rep. to Sen. Comm. on Foreign Relations by the Subcomm. on Security Agreements and Commitments Abroad*, 91st Cong., 2d Sess. (1970).

Espionage Act of 1917¹⁹ or under Executive Order 10501.²⁰ Furthermore, it has been suggested that by use of executive privilege²¹ the President may also withhold this type of information from the Congress.

Classification of Agreements

If an international agreement is classified as a treaty it must be ratified by the Senate. An executive agreement requires no consultation with the Congress. At best, the Legislature will learn of the agreement after it has become effective. The method and procedure by which agreements are classified is therefore crucial in determining the extent of the Congress' participation in international agreements. Conveniently, the Executive Branch has taken it upon itself to make these decisions. The State Department employs what is known as the Circular 175 Procedure,²² the objective of which is to insure that the making of treaties and other international agreements is effected within constitutional limits.²³

The State Department Legal Adviser's office examines a proposed agreement to determine the legal and constitutional authority for entering into it. In the case of a treaty, the Legal Adviser is required to show whether or not the subject matter is within traditional limits; whether or not the treaty is self-executing and, if not, what type of additional legislation would be required; and the extent to which the treaty will prevail over federal or state law. The decision to conclude an international agreement as a treaty

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19. 18 U.S.C. §§ 791-794 (1970). In particular § 793d provides that whoever transmits classified information that could be used to injure the United States to any person not entitled to receive it becomes subject to a \$10,000 fine or 10 years in jail or both. The Transmittal Act may be self-executing in this respect. That is, by expressly authorizing the State Department to transmit agreements to the foreign policy committees of the House and Senate the Act proclaims a congressional committee-man's "need to know". See also, *Hearings on S. 596, supra* note 7, at 83.
 20. 3 C.F.R. E.O. 10501 (1972). Again the argument that a congressman would be unauthorized to receive an executive agreement is specious. However, were the text of a classified agreement to go outside the committee then the Espionage Act and Executive Order 10501 would have to confront the congressional privileges and immunities clause of the Constitution, Art. I, Sec. 6, Cl. 1.
 21. *Hearings on S. 595, supra* note 7, at 87-88; H. Rep. No. 92-1301 (1972) at 3-4, states that the Foreign Affairs Committee commissioned a study of this topic to be done by the Law Division of the Congressional Research Service, Library of Congress. The study concluded that there was no constitutional basis by which executive privilege could be used to keep this information from Congress, see also *Executive Privilege: The Withholding of Information by the Executive, Hearings Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, 92d Cong., 1st Sess. (1971)*: Schlesinger, *Executive Privilege: A Murky History*, Wall Street Journal, March 30, 1973, at 8, col. 3.
 22. Dep't State, 11 FOREIGN AFFAIRS MANUAL (1969). It will be seen that this procedure is a masterpiece of circularity. It provides that executive agreements are not used where the subject matter is of such a nature that it should be covered by a treaty, 11 FAM § 722, and then proceeds to categorize executive agreements, see *infra* note 26 and accompanying text.
 23. 11 FAM § 720.2.

also includes certain policy standards. The Legal Adviser must consider the extent to which the agreement involves commitments affecting the nation as a whole. Another factor taken into account in the classification process is the extent to which formality is desired. Do the other parties to the agreement accord it a similar dignity and formality?²⁴ In the case of an executive agreement, the State Department must show the type of authorization upon which the agreement is based. If there is no prior treaty, antecedent legislation, or clear constitutional power of the President upon which the agreement is authorized, the agreement must be made subject to legislation sent to Congress.²⁵

Executive agreements come under three headings:

- A) Agreements which are made pursuant to or in accordance with existing Legislation or a treaty;
- B) Agreements which are made subject to congressional approval or implementation; or;
- C) Agreements which are made under and in accordance with the President's constitutional power.²⁶

Whenever the classification of an agreement presents any "serious problem," it is brought to the attention of the Legal Adviser of the State Department.²⁷ He prepares a memorandum of law indicating whether an international agreement should be classified as a treaty to be ratified with the advice and consent of the Senate or as an executive agreement made either solely under the President's constitutional authority or under the authority of existing legislation. The memorandum is then routed to the Assistant Secretary of State for Congressional Relations for clearance and comment. Then, "whenever circumstances permit," consultations are held with appropriate congressional leaders and committees.²⁸ Only after this "authorization" is obtained do negotiations commence.²⁹

If, prior to these negotiations, it appears to State Department representatives that the immediate public disclosure of an agreement would

24. *Hearings on S. 214, infra* note 33, at 15. This is part of the Legal Adviser's memorandum on the agreements with Portugal and Bahrain.

25. *Id.*

26. 11 FAM § 722. The leading case on a President's constitutional powers is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Mr. Justice Jackson's opinion outlines three instances where Presidential power may be exercised. He notes, at 637, that when the President acts without congressional authorization he acts in a "zone of twilight" and must depend on his own independent powers. Again the circularity of this procedure becomes apparent, for § 722c, above, as in Justice Jackson's zone of twilight, begs the question concerning the scope of the President's constitutional powers vis-a-vis executive agreements. The answer is that if the agreement is not authorized and is not a treaty it rests on his independent powers. See also 39 Op. Att'y Gen. 484 (1940); NEUSTADT, *PRESIDENTIAL POWER* (1960).

27. 11 FAM § 723.1.

28. *Id.*

29. 11 FAM § 723.2.

be prejudicial to national security, these circumstances are outlined in the required authorization.³⁰ Thus, those agreements or portions of agreements that are too sensitive to publish upon their entry into force are still given authorization but are kept from the public and, at times, Congress. The Transmittal Act would not abrogate the procedure authorizing secret agreements. It seeks only to permit select Congressional committees to become aware of their existence.

The number of agreements that the Executive has concluded by the exercise of his constitutional prerogatives, and with which Congress cannot interfere, is thought to be small.³¹ Accordingly, an argument may be fashioned that the role of Congress in the conduct of foreign affairs has been only minimally diminished. But these figures can be misleading. An international agreement is either a treaty or executive agreement. Executive agreements are concluded either through the express or implied authorization of Congress or through the President's independent constitutional powers. To say that the bulk of executive agreements have been "authorized" by Congress is not completely accurate since the "authorization" may be quite nebulous.³² Two examples in which executive agreements, possibly of wide policy implications, were concluded with a vague congressional "authorization" are the agreements with Portugal and Bahrain.

Executive Agreements with Portugal and Bahrain

At the end of 1971 the United States entered into two executive agreements, through an exchange of notes, with Portugal and Bahrain. Both agreements concerned the use of military facilities and neither was subjected to Senate ratification. The ramifications of these agreements were disclosed in hearings on a Senate resolution suggesting that both of them be submitted

30. 11 FAM § 731.4.

31. *Hearings on S. 3475, supra* note 5, at 153. The overwhelming bulk of executive agreements are concluded pursuant to prior treaties or other legislation. For example, of the 5,591 executive agreements concluded between 1955 and April, 1972 only 64 or a fraction over 1% were concluded on the "independent powers of the President." Presumably, this figure does not include informal agreements concluded in the day-to-day operations of the Executive Branch nor does it include classified agreements not reported in T.I.A.S. Even if these figures were accurate the numbers themselves are misleading. Those executive agreements which are made pursuant to prior legislation may be playing lip service to the legislation so as to avoid going the route of constitutional treaty-making.

32. There are relatively few court cases on the question of the extent to which Congress is constitutionally precluded from interfering with the exercise by the President of his independent powers, *see e.g., Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Meyers v. United States*, 272 U.S. 52 (1926).

to the treaty process.³³ These agreements serve to illustrate that, while an executive agreement may be labelled as one "authorized" by Congress, Congress nonetheless may be completely divorced from participating in its negotiation.

These agreements provide for continued U.S. use of military bases in the Azores³⁴ and in Bahrain.³⁵ The executive agreement with Portugal was to allow the United States the use of military facilities at Lajes Airbase in the Azores. Even though the primary purpose of the agreement was for the continued use of these facilities as a submarine observation point the State Department contended that this was *not* a defense commitment. They maintained³⁶ that Senate approval of the agreement was unnecessary because an executive agreement was the traditional means of implementing an existing treaty.³⁷ Since this agreement was entered into pursuant to Article Three³⁸ of the NATO Treaty³⁹ congressional authorization was deemed to have existed.⁴⁰ It was also contended that the President, as

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33. Executive Agreements with Portugal and Bahrain, *Hearings Before the Sen. Foreign Relations Comm. on S. 214*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings on S. 214*]. The resolving clause of S. 214 reads, "any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for Advice and Consent." While the Transmittal Act would not cure the fact that the Senate does not exercise its ratification powers it does put it on notice, albeit 60 days late, of what U.S. commitments are.
 34. T.I.A.S. 7254 (1971).
 35. T.I.A.S. 7263 (1971).
 36. The memorandum of law written by the Legal Adviser of the State Department regarding these agreements is reported in *Hearings on S. 214*, *supra* note 33 at 14; *Hearings on S. 3475*, *supra* note 5, at 417. The memorandum outlines the Circular 175 Procedure and then concludes that since the agreements contain no new policy nor defense commitments that, "To have concluded these agreements as treaties would have given them a formality which implied an importance and a U.S. commitment which are neither involved nor desired." *Id.* at 417.
 37. *Hearings on S. 214*, *supra* note 33 at 4.
 38. Article Three reads in part, "... the Parties separately and jointly by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack." This language clearly speaks of defense agreements. The same line of argument using the SEATO Treaty led to the Southeast Asia (Tonkin Gulf) Resolution, H.J. Res. 1145, 73 Stat. 384 (1964); repealed by P.L. 91-672, 84 Stat. 2053 (1971).
 39. 63 Stat. 2241, T.I.A.S. 1964 (1949).
 40. *Hearings on S. 214*, *supra* note 33 at 14. The procedure for implementing the NATO Treaty was outlined in a State Department memorandum of law. Essentially, the memorandum concludes that Article Three and Article Five of the NATO Treaty are to be implemented by constitutional means. Should a signatory come under attack it is considered an aggression against all the members and the self-help provision of the United Nations Charter (Article 51) allows for collective self-defense. Furthermore, assistance to be rendered is left to the discretion of the parties. The memorandum concluded that since the implementation of the NATO Treaty is left to the constitutional process that the use of an executive agreement is valid.

Commander in Chief, had the constitutional power to conclude agreements involving the use of military facilities. One of the major concerns of Congress, in addition to the international impact present with every such agreement,⁴¹ was the use of funds.⁴² The State Department noted that Congress alone has the right to authorize and appropriate funds and that this limitation on the Executive sufficiently ensures the separation of powers.

The accord with Portugal points out how far the State Department may go to find congressional authorization for the use of an executive agreement. The general language of the NATO Treaty is read as a specific delegation of authority to the Executive to conclude an agreement regarding the use of military facilities in a foreign country. Congressional debate on the agreement prior to and during the negotiations was non-existent. As a consequence the Legislature is effectively precluded from participation in this segment of U.S. foreign policy.

In the case of Bahrain, the State Department contended that, although there had been no previous treaty, the lack of Senate participation was justified by the earlier use of facilities on an informal basis and the comparatively small number of U.S. personnel involved. The agreement with Bahrain provided for the continued use of military facilities by the U.S. Navy's Middle East Force. Even though the U.S. presence in the Persian Gulf had wide policy implications,⁴³ it was felt that an executive agreement, bypassing Senatorial ratification, was the proper means to conclude this accord. The State Department's reasons for using an executive agreement instead of a treaty were that authority to enter into the agreement was derived from the President's role as Commander in Chief, and it was concluded pursuant to an informal agreement with Britain.⁴⁴

Since Britain had ended its treaty relationship with Bahrain, giving it independent status, this was really the first time the United States had entered into direct formal contact with the new state.⁴⁵ Such a situation has more effect than a mere change in landlords. The "continued use of facilities" under an agreement with Britain may not carry the same connotations as it might in an agreement with Bahrain. In other words, in dealing with a new state of 250,000 people in the Persian Gulf, a state with no military establishment of any importance, the agreement assumes a new dimension. The United States could later find itself in a role not contemplated by the terms of the agreement — and one certainly not contemplated by Congress.

Thus, these two agreements demonstrate that, although the President may act on an implied authorization, the entire process is likely to be far

41. *Hearings on S. 214, supra* note 33 at 80. Part of the agreement was for the United States to advance Portugal \$400 million of credit and loans. Objection to this credit was based on the implied support of the United States in Portuguese colonization efforts in Africa, most notably in Mozambique.

42. *Id.* at 48-50. Use of facilities in the Azores was expected to cost \$20 million per annum.

43. *Hearings on S. 214 supra* note 33 at 20-32.

44. *Id.* at 14.

45. *Id.* at 18.

removed from the check of the Senate on the Executive. By employing the general language of the NATO Treaty, the Executive offered the extension of over \$400 million of credit to Portugal. It seems the question is fairly raised as to whether or not Congress should have a hand in molding agreements of such magnitude. In the case of Bahrain, the United States substituted an agreement with Britain for an agreement with a new nation. The agreement simply provided for the use of military facilities. Since Bahrain is situated in the Persian Gulf, however, the Executive placed U.S. forces in one of the most potentially volatile areas of the world. Both of these measures were taken without either the advice or consent of the Senate.

Conclusion

The Transmittal Act has revealed a thorny issue for United States constitutional law. Specifically, the Act seeks to obviate those instances in which the Executive Branch attempts to abrogate fully the Legislature's role in foreign policy. The Constitution requires that all treaties be ratified by the Senate. Nevertheless, the Executive, simply by calling an international agreement a different name, may effectively bypass Congress. The Transmittal Act does not attempt to halt the Executive's use of power in foreign affairs. Indeed, at times swift action is necessary, and the nation must speak with a single voice: The Cuban Missile Crisis, the Invasion of the Bay of Pigs, and the Dominican Republic Intervention are often cited as examples in which Legislative debate would have crippled the decision making process. But these situations are not really the ones about which Congress complains. Congress fears those situations, as with the agreements with Portugal and Bahrain, in which the Executive bases its actions upon the theory that previous legislation has authorized it, when in fact that is not so. The Executive and Congress become adversaries and do not act in the complementary manner contemplated by the Constitution. One factor adding to the polarization of the political branches of Government is that the classification system is entirely within the Executive Branch. In order to avoid legislation by Executive fiat, Congress must be made aware of the United States' role in world affairs. In seeking this objective the Transmittal Act is a step toward redressing one imbalance in the separation of powers.

Joseph P. Tomain

