


1-1-1996

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Recommended Citation

Dana C. Makielski, *Foreign Policy: Can the President Act Alone? Gaps and Conflicts in the Constitutional Grants of Power*, 1 RICH. J.L. & PUB. INT. 87 (1996).

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FOREIGN POLICY: CAN THE PRESIDENT ACT ALONE?

GAPS AND CONFLICTS IN THE CONSTITUTIONAL GRANTS OF POWER

Dana C. Makielski*

"When the President does it, that means that it is not illegal"

- Richard Milhous Nixon⁴²⁷

Nowhere in the Constitution are the terms "foreign affairs" or "foreign policy" mentioned. The Framers included in this crucial document no power to make peace; no power to break, terminate, or suspend a treaty; no power to "make" foreign policy in any manner other than war, treaties, or commerce; no mention of conducting intelligence operations; nothing about protecting or rescuing hostages; no authority to make international agreements other than treaties; and no power to deploy forces in situations other than in war. Not surprisingly, the drafters also left out the power to launch a nuclear attack.

The Framers did not intend the Constitution to be an all-inclusive "bill of lading," for we cannot forget John Marshall's famous admonition "that it is a *constitution* we are expounding."⁴²⁸ Nonetheless, there are many large gaps and conflicts in the allocation of power among the three branches, most in the area of foreign relations, that have caused serious problems for our nation's leaders and constitutional scholars over the past two centuries.

How have our presidents reacted? Certainly the President can and has acted on his own in negotiating, enacting, and implementing foreign policy, despite the lack of any express executive authority to do so. But were his actions always constitutional? This article examines the express and implied grants of power to conduct foreign affairs, the gaps left noticeably behind, and the concurrent powers of the President and Congress in this area. Further, this article explores alternatives applied by our nation's leaders and suggestions for the future as the next President

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⁴²⁷ DAVID FROST, *I GAVE THEM A SWORD* ch. 8 (1978).

⁴²⁸ *McCullough v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819) (emphasis in original).

addresses foreign policy issues in the close-knit international community of the twenty-first century.

I. CONSTITUTIONAL GRANTS OF POWER

For domestic affairs, the authors of the Constitution distributed authority between the federal government and the states by expressly conferring certain powers to the federal government, with the remainder reserved to the people. However, in terms of foreign affairs, it is accepted that the delegation of power to the federal government was intended to be virtually plenary.⁴²⁹ The Constitution expressly grants powers that *relate* to foreign affairs, but there is much uncertainty about the distribution of authority among the political branches of the federal government in the actual determination of foreign policy.

A. Express Grants

Of the eighteen powers granted to Congress in Article 1, Section 8, seven are directly related to foreign policy: the power to regulate commerce with foreign nations; define offenses against the Law of Nations; declare war; tax and spend for the common defense and general welfare; raise and support armies; borrow and coin money; and establish a postal system. Last, Congress may wield sweeping legislative powers under the Necessary and Proper Clause.

The President's express powers are much more limited when it comes to foreign affairs. The President is given the power to make treaties with the advice and consent of the Senate provided two-thirds of the senators present concur, appoint ambassadors and other officers, and receive foreign ambassadors and officers. The President is also named Commander-in-Chief of the armed forces.⁴³⁰ Despite this seemingly limited list, presidents, beginning with George Washington, have found broad authority to stretch the boundaries of their constitutional powers.

At the Constitutional Convention, a system of checks and balances was at the heart of the drafters' express grants of power.⁴³¹ Initially, the Articles of Confederation vested a treaty power solely in the hands of the Senate. The drafters soon realized, though, that this body of political men could not effectively govern and negotiate, and they gave the President a

⁴²⁹ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* chs. 1, 9 (1975).

⁴³⁰ U.S. CONST. art. II, §§ 1, 2, 3 (Note that the Commander-in-Chief designation not only gives the President the power to command forces in wars declared by Congress, it also gives him the power to repel sudden attacks on the United States).

⁴³¹ THE FEDERALIST No. 78 (James Madison).

more active and positive role in the treaty power.⁴³² The Founders wanted some foreign policy decisions removed, at least in part, from popular control, but they "did not want a President unchecked in *any* arena of foreign policy power."⁴³³ Thus, the concurrent treaty power was born, with a presidential power of negotiation, assisted by the "advice" of the Senate, and implementation of a binding treaty upon the consent of two-thirds of the Senators present.⁴³⁴

The drafters, however, also took a pragmatic approach. They acknowledged that the express grants of power were ambiguous in some areas and expected that the first President would effectively shape the application of the treaty power, among others.⁴³⁵ History has shown that President Washington, and many others after him, have done just that. For example, in the treaty-making arena, Washington worked out a method for "advice and consent" on treaty negotiations, primarily by trial and error.⁴³⁶ This early practice effectively paved the way for centuries of presidential freedom to negotiate treaties exclusively, subject to, of course, the ultimate consent of two-thirds of the Senate.⁴³⁷

The effects of this practice are procedural. The Senate often gives its consent to a treaty subject to certain conditions. These conditions must have a plausible relation to the treaty: they sometimes take the form of a consent on the basis of a particular understanding of the meaning of the treaty, or on a condition that the United States obtain a modification of its terms or enter a reservation to it.⁴³⁸ However, even if a treaty has received the advice and consent of the Senate, the President still has the discretion to decide whether to make the treaty at all.⁴³⁹

⁴³² EDMUND S. MUSKIE ET AL., *THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY* 41 (1986).

⁴³³ *Id.* (emphasis in original).

⁴³⁴ *Id.*

⁴³⁵ *Id.*; U.S. CONST., art. II, § 2, cl. 2.

⁴³⁶ MUSKIE ET AL., *supra* note 6, at 46 (referring to excerpts of ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* ch. 1 (1976)).

In late 1789, the President began negotiations with the Creek Indians, and before negotiating, attempted to obtain the Senate's advice . . . Washington consulted the Senate directly and in person concerning the possible outlines of a treaty. He got no precise advice from an unprepared Senate, felt his visit was a waste of time and stormed out of the Chamber. A bit frustrated, Washington decided not to pursue consultation in person and instead began to consult in writing. Before too long, Washington was negotiating with his cabinet without consulting the Senate in advance . . . [By] 1794, Washington's agents negotiated without consulting the Senate in order to preserve secrecy.

Id.

⁴³⁷ *Id.* at 46-47.

⁴³⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. D (1986).

⁴³⁹ *Id.*

Despite the refinement of these express powers over time, there are still many gaps in the allocation of the authority to act with respect to foreign affairs, an area intended to be completely delegated to the federal government.⁴⁴⁰ The Founders knew that they had to strike a balance between the ability to respond swiftly to a challenge or attack and the need to make foreign policy that reflects the backing and approval of the American people. They knew, as the debates suggest, that striking a balance would not be easy and would never be perfect.⁴⁴¹

Supreme Court Justice Robert H. Jackson referred to this realm of gaps in express power as the "twilight zone." According to his theory, "history seems to have given the President concurrent authority in a twilight zone in which the President can act when Congress is silent."⁴⁴² Thus, in the realm of foreign affairs powers omitted from the Constitution, Justice Jackson and many others believe that the President is free to act, so long as Congress has not explicitly forbidden him from doing so.

B. Implicit or "Hidden" Grants

Scholars and political leaders have suggested that the Constitution contains implicit or hidden allocations of power that are corollary or incidental to the express powers of Congress over the purse, the power to regulate commerce with foreign nations, or the power to make laws necessary and proper for Congress to carry out its war powers.⁴⁴³ A source of implicit power for the President may be found in the Executive Power Clause in Article II of the Constitution, or in the Commander-in-Chief Clause.⁴⁴⁴ Many presidents have cited these "implicit" powers when acting on behalf of our nation in foreign affairs, including President Carter when he terminated the Mutual Defense Treaty with the Republic of China (Taiwan).⁴⁴⁵

The issue of using the Executive Power Clause as a source of implicit power has been fervently debated throughout American history. Early on, Alexander Hamilton set forth an "executive view of the grand design of the Constitution for the conduct of foreign affairs."⁴⁴⁶ Hamilton argued that the Executive Power Clause of Article II grants to the President all of

⁴⁴⁰ THE FEDERALIST No. 78 (James Madison).

⁴⁴¹ *Id.* See also MUSKIE ET AL., *supra* note 6.

⁴⁴² LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 29 (1990). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J.).

⁴⁴³ *Id.* at 20.

⁴⁴⁴ *Id.*

⁴⁴⁵ See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (4-3), *rev'g*, 481 F. Supp. 949 (D.D.C. 1979) (concluding that the President had authority to terminate the treaty as he did, without the concurrence of either the Congress or of the Senate).

⁴⁴⁶ HENKIN, *supra* note 16, at 21.

the executive power, including control of foreign relations. For Hamilton, responsibilities and powers of foreign affairs lies with the President, except as expressly modified in the Constitution.⁴⁴⁷

Of course, Hamilton's view was opposed by many, including Thomas Jefferson and James Madison. Madison refused to believe that the Executive Power Clause was a "grant in bulk of all conceivable executive power."⁴⁴⁸ In fact, Madison's view of the grand design of the Constitution was entirely opposite from Hamilton's. For Madison, the President only had express powers, with the rest belonging to Congress.⁴⁴⁹

Madison's view is supported by arguments from the text, design, and intent of the Constitution. However, history and the actions of presidents in foreign affairs support the Hamiltonian view.⁴⁵⁰ The power of the President to act in foreign affairs has undoubtedly grown over the years. Even Madison's supporter, Thomas Jefferson, once noted that "the transaction of business with foreign nations is executive altogether."⁴⁵¹

The issue of the President's implied authority to act was directly addressed by the Supreme Court in 1936. In *United States v. Curtiss-Wright Export Corp.*, the Court recognized the "very delicate, plenary and exclusive power of the President as the sole organ of the [f]ederal government in the field of international relations, a power that does not require as a basis for its exercise an act of Congress."⁴⁵² The Court went on to declare that "the investment of the [f]ederal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."⁴⁵³ The effect of the *Curtiss-Wright* case was to recognize formally the President's implicit power to conduct foreign affairs not mentioned in the Constitution, a power many presidents had been utilizing for nearly two hundred years.

Until about 50 years ago, president after president stretched the boundaries of his power to conduct foreign affairs. Presidents enacted international agreements on their own, ranging from the most routine of agreements, incident to recognizing nations, to armistice agreements.⁴⁵⁴ This type of compact, considered by the President to be wholly different from a treaty, is known as the executive agreement.⁴⁵⁵ Executive

⁴⁴⁷ *Id.*

⁴⁴⁸ THE FEDERALIST No. 78 (James Madison).

⁴⁴⁹ *Id.*

⁴⁵⁰ See MUSKIE ET AL., *supra* note 6, at 38.

⁴⁵¹ *Id.* (citing FRANCIS O. WILCOX, CONGRESS, THE EXECUTIVE AND FOREIGN POLICY 146 (1971)).

⁴⁵² 299 U.S. 304, 320 (1936).

⁴⁵³ *Id.* at 318.

⁴⁵⁴ See generally MUSKIE ET AL., *supra* note 6.

⁴⁵⁵ *Id.*

agreements other than treaties do not technically require the consent of two-thirds of the Senate, and their validity has, from the beginning, been disputed.⁴⁵⁶

Only recently has Congress taken a proactive position in attempting to limit presidential actions in foreign affairs. This new wave of "congressional activism" has in part forced the development of another alternative to the treaty power: the congressional-executive agreement. These developments and alternatives are analyzed in the following sections, along with some thoughts for the future.

II. SOLE EXECUTIVE AGREEMENT

The most controversial vehicle used by past presidents in exercising the nebulous power to conduct foreign affairs is the executive agreement. It is well settled that the President can make agreements incidental to recognizing foreign states or governments, and, as Commander-in-Chief during declared wars, participate in armistice agreements.⁴⁵⁷ Presidents have also asserted a broad authority to make many other international agreements, at least in the absence of inconsistent legislation or of congressional action restricting such agreements.⁴⁵⁸

The earliest "executive agreements" under the Constitution were the Postal Acts of the Washington Administration.⁴⁵⁹ President Reagan saw fit to send marines to Lebanon and troops to Grenada, mine Nicaraguan harbors, and bomb Libya.⁴⁶⁰ Where did these Presidents find the power to make a sole executive agreement? Scholars acknowledge that the Framers themselves recognized that there exist international documents -- other than treaties -- which are not accounted for in the Constitution, and that the federal government was intended to have the power to make these other agreements or compacts.⁴⁶¹ Alexander Hamilton found the power to

⁴⁵⁶ *Id.*; see also U.S. CONST. art. II, § 2, cl. 2 (treaty clause).

⁴⁵⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. g (1986).

⁴⁵⁸ See generally MUSKIE ET AL., *supra* note 5.

⁴⁵⁹ THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 280 (1993) (quoting W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 35, 38 (1941)).

⁴⁶⁰ HENKIN, *supra* note 16, at 17.

⁴⁶¹ Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 351 (1945). Scholars such as McDougal and Lans have made the following deductions:

The Framers themselves explicitly recognized that there are international agreements other than treaties and put this recognition into the document. In Article 1, Section 10 the Constitution . . . provides that "No state shall enter into any treaty, alliance or confederation," but continues that "No state shall, without the consent

make executive agreements in the Executive Power Clause of Article II, Section 1, and still others argue that the President's general powers under Article II, Sections 2 and 3 are sufficient to make such agreements.⁴⁶²

Despite the various sources of support for the sole executive agreement, there are equally as many sources that refute it. Many constitutional scholars believe that Congress can prohibit or regulate the President's actions, which mirrors the Madisonian idea that Congress has the ultimate plenary power in government.⁴⁶³ Congress has assertively regulated the President's activities through the power of the purse, the power to lay and collect taxes for the common defense, and the power to enact preemptive legislation.

For the first 150 years after the Constitutional Convention, however, Congress often supported the President's "expertise" and ratified sole actions. In 1950, for example, Congress appropriated money for the Korean War without questioning the President's authority.⁴⁶⁴ Congress also repeatedly delegated its own huge powers to the President in broad terms, as it did in the Tonkin Gulf Resolution of 1964, that "in effect legitimated the Vietnam War."⁴⁶⁵

The Supreme Court recognized Congress's tradition of support when it upheld President Carter's settlement of the Iran hostage crisis by sole executive agreement. In *Dames & Moore v. Regan*, the Court found that Congress had long acquiesced in and accepted the President's authority to settle international claims by executive agreement.⁴⁶⁶

In reality, the power of the purse may be the ultimate power granted in the Constitution. War, the deployment of troops, and the implementation of foreign policy with other nations all cost money. Scholars believe that the drafters "reinforced congressional control over war-making by giving it the ultimate weapon in Article I, Section 9, Clause 7—the power of the purse," as well as sole power to "lay and collect taxes . . . [to] provide for

of Congress . . . enter into any agreement or compact with another state, or with a foreign power." Unless one takes the position that the Framers sought to deny to the Federal Government the power to use techniques of agreement made available to the state — an argument completely refuted by the debates at the Convention and by contemporaneous history — the conclusion is inescapable that the Federal Government was intended to have the power to make "agreements" or "compacts."

Id.

⁴⁶² *Id.*

⁴⁶³ See THE FEDERALIST No. 78 (James Madison).

⁴⁶⁴ HENKIN, *supra* note 16, at 28.

⁴⁶⁵ *Id.*

⁴⁶⁶ 453 U.S. 654 (1981).

the common defense."⁴⁶⁷ Though the President has the power of veto and the ability to administer expenses, Congress can override his veto by a supermajority, thus reinforcing the concept that Congress has the ultimate say-so in government.⁴⁶⁸

Recently, congressional activism has taken the form of the War Powers Resolution of 1973.⁴⁶⁹ This resolution inhibits the President's authority to make agreements that commit the United States to introduce armed forces into hostilities or situations where involvement in hostilities is likely, or to increase or redeploy United States combat forces abroad. President Nixon vetoed the resolution, asserting only that it was "clearly unconstitutional," but the veto was overridden by Congress two weeks later.⁴⁷⁰

Presidents since Nixon generally have shared the view that the War Powers Resolution is unconstitutional and have acted despite its existence. Regardless, Congress still has demanded that the President comply with its terms. The validity of such restrictions on presidential powers, and of attempts to control and limit sole executive agreements generally, has not been authoritatively determined. However, in the view of at least one scholar, the power to order withdrawal by concurrent resolution has been definitively declared unconstitutional in the *Chadha* case, which outlawed the legislative veto.⁴⁷¹

Another view refuting the validity of sole executive agreements comes from a purely definitional standpoint. While the Constitution distinguishes between a "treaty" and an "international agreement," international law does not. According to the Vienna Convention on the Law of Treaties, which was adopted by the United Nations Conference on the Law of Treaties and signed by the United States in 1970, a "treaty" is an international agreement concluded between States in written form and governed by international law.⁴⁷² Such an equation of terms effectively requires the President to treat *all* agreements as if they were treaties and thus requires him to obtain the consent of two-thirds of the Senate whenever he wishes to enter into one.

⁴⁶⁷ MUSKIE ET AL., *supra* note 6, at 43 (quoting THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 63 (1979)).

⁴⁶⁸ *Id.*

⁴⁶⁹ 50 U.S.C. §§ 1541-48 (1989).

⁴⁷⁰ Richard M. Nixon, War Powers Veto Text, Address Before the House of Representatives (Oct. 24, 1973), in CONG. Q. WEEKLY REP., Oct. 27, 1973, at 2855; 119 CONG. REC. 36, 201, 36, 221-22 (override of Presidential veto).

⁴⁷¹ Monroe Leigh, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unwise*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY (Steven P. Soper ed., 1984) (referring to *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944-59 (1982)).

⁴⁷² FRANCK & AMP GLENNON, *supra* note 33, at 282 (emphasis added).

Such an approach is overly burdensome. Even the drafters realized that there are some circumstances that require quick action by a competent representative of the United States, disallowing involvement by a deliberative, political Congress.⁴⁷³ Nonetheless, presidents have been somewhat willing to accommodate those who harbor a distaste for sole executive agreements.⁴⁷⁴ This additional alternative to the treaty power is known as the congressional-executive agreement, or the executive-legislative agreement.

III. CONGRESSIONAL-EXECUTIVE AGREEMENT

Although Article II, Section 2 of the Constitution requires treaties to be approved by two-thirds of the Senate, many international agreements, including North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), are approved as congressional-executive agreements by simple majorities of both houses of Congress. This process, similar to the legislative process in passing statutes, is a modern development. The President simply makes the political decision to submit the agreement to both houses of Congress for action by joint resolution instead of navigating the treaty process. President Truman's view was that this type of agreement was constitutionally permissible under the Supremacy Clause.⁴⁷⁵

The congressional-executive agreement arose as a part of the "constitutional revolution" of the Roosevelt years, which, by the end of Roosevelt's fourth term, gave rise to the "modern Constitution" in which the President and Congress as a team may commit the nation in matters of foreign policy.⁴⁷⁶ Congress may enact legislation that requires agreement to execute the legislation. Congress may authorize the President to negotiate and conclude an agreement, or to bring into force an agreement

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 405-06.

⁴⁷⁶ Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801 (1995) (This development began with The Trade Act of 1947, which was an effort to restructure the modern two-House procedure to suit the needs of economic diplomacy.).

Using the transformative techniques developed during the conflict between the New Deal and the Old Court in the 1930s, the President and the House of Representatives gained the consent of the Senate to a revision of the foreign affairs power in the aftermath of the Second World War. The end of Roosevelt's fourth term saw the dawn of the modern Constitution – in which President and Congress have the authority to commit the nation on any important matter of . . . foreign policy.

Id.

already negotiated, and may require the President to enter reservations.⁴⁷⁷ Congress may also approve an agreement already concluded by the President.

However, Congress cannot itself conclude such an agreement; this power belongs to the President, who alone can negotiate with other governments.⁴⁷⁸ The prevailing view is that the congressional-executive agreement can be used as an alternative to the treaty method in every instance.⁴⁷⁹ Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.⁴⁸⁰

A slight variation on the congressional-executive agreement process is the "fast-track" legislation procedure.⁴⁸¹ Since the late 1980's, the President has increasingly relied on fast-track procedures to conduct international trade negotiations, ensuring expedited congressional treatment for international trade agreements negotiated by the President that reduce barriers to trade. In exchange for advance notice from the President, the fast-track procedures include a set time-limit within which an agreement must be discharged from the congressional committee, limited floor debate, and a vote without amendment.⁴⁸² During these time periods, either Committee may object to the negotiations and withdraw the agreement from fast-track consideration. Congress may also set time limits on negotiations, specify negotiation objectives, and require Executive consultation with congressional and private trade experts.⁴⁸³

Agreements negotiated under fast-track legislation procedures include General Agreement on Tariffs and Trade (GATT), NAFTA, the United States-Canada Free Trade Agreement, and the United States-Israel Free Trade Agreement. To date, no constitutional challenges have been brought against the fast-track system. However, scholars still contend that, similar to the constitutional challenges to the War Powers Resolution, the single committee objection causing the derailment of the fast-track procedure

⁴⁷⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1986).

⁴⁷⁸ *Id.*

⁴⁷⁹ *See generally* FRANCK & AMP GLENNON, *supra* note 33.

⁴⁸⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 cmt. e (1986).

⁴⁸¹ *See* FRANCK & AMP GLENNON, *supra* note 33.

⁴⁸² *Id.* at 416 (When an agreement reaches Congress, it is guaranteed, within a set time period, automatic discharge from committee, limited floor debate, and an up or down vote without amendment. In exchange for Congress' accelerated treatment, the President is required (1) to consult with the House Ways and Means Committee and the Senate Finance Committee for sixty days before notifying Congress of an intent to enter an agreement; and (2) to notify these same Committees at least ninety days before entering into an agreement).

⁴⁸³ *Id.* at 416-17.

amounts to an informal "legislative veto," which is unconstitutional according to the *Chadha* case.⁴⁸⁴

In essence, the congressional-executive agreement, although a radical departure from the constitutional practice of the first 150 years of the nation, appeases members of the Senate who do not approve of the President acting alone in foreign policy matters. It also appeases the members of the House of Representatives, who have historically been excluded (much to their chagrin) from the treaty-making process.⁴⁸⁵ The congressional-executive agreement procedures support more collaboration and cooperation in the negotiation process between Congress and the President and come much closer to fulfilling the drafters' intentions when they enacted our complex system of checks and balances, ensuring our democracy.⁴⁸⁶

The criticism of the international congressional-executive agreement is based mostly upon a lack of support in the Constitution. Originalist accounts suppose the Treaty Clause has a plain meaning that cannot be altered without formal amendment.⁴⁸⁷ Still, the congressional-executive agreement framework has proved so remarkably successful that it is taken for granted by all foreign-trade professionals.⁴⁸⁸

IV. A LOOK INTO THE FUTURE

Louis Henkin often refers to the struggle in dealing with foreign policy as a "tug-of-war" between the President and Congress in Justice Jackson's "twilight zone."⁴⁸⁹ However, it seems that only in the last 50 years has Congress actually "pulled back" rather than simply held fast to its end of the proverbial rope. The President has acted without congressional approval many times when dealing with foreign affairs, and Congress usually has not questioned him.

The historical debates about presidential authority to act in foreign affairs have always made one crucial assumption: that Congress has remained silent on the action in question. The issue becomes much more complex in the "twilight zone" when Congress actually moves to prohibit the President's actions. The real problem arises when the President feels he is acting within his constitutional authority and Congress thinks

⁴⁸⁴ See Leigh, *supra* note 45.

⁴⁸⁵ See U.S. CONST. art. II, § 2, cl. 2 (treaty power reserved for two-thirds of Senate).

⁴⁸⁶ See THE FEDERALIST No. 78 (James Madison).

⁴⁸⁷ Ackerman & Golove, *supra* note 50, at 801.

⁴⁸⁸ *Id.* at 803.

⁴⁸⁹ See HENKIN, *supra* note 16, ch.1.

otherwise (and vice versa). What are the true boundaries of the President's exclusive domain?

Perhaps this uncertain tension is exactly what the drafters intended. The tension is a consequence of the separation of powers, the system of checks and balances designed to protect our nation's people from autocracy. Justice Brandeis once wrote that "[t]he 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."⁴⁹⁰ If he is right, the drafters have accomplished exactly what they intended. Congress and the President are virtually deadlocked in their views of constitutional authority.

The more important question now is not *whether* the President can act alone but should he act alone in dealing with foreign affairs? We are a nation that has committed itself to the ideal of the separation of powers and the system of checks and balances. We are a republic that has become a democracy. Congress is charged with the responsibility of assuring both checks and balances and democracy in foreign affairs. It can exercise that responsibility by regulation, by delegation, by oversight, or even by abstinence and acquiescence, but in all cases, the decision should be knowing, intentional, and purposeful.

Not only do our government's decisions in foreign affairs affect our citizen's lives; they also affect the lives of the citizens in the world community. The world community today is closer together in an age of information superhighways and the telecommunication revolution, but it is also distrustingly further apart with the threat of catastrophic forms of war hanging overhead. The decisions that are made on behalf of the United States carry with them more ramifications than ever before. A more coherent, consistent foreign policy is essential for the welfare of our nation and for the world.

Scholars have suggested that a constitutional amendment specifically delegating newly-refined foreign policy powers is the only way to alleviate the problem.⁴⁹¹ However, the drafters did not intend for our Constitution to be a "bill of lading;" rather, they intended a general framework from within which to work. The Constitution must continue to be interpreted in ways that fit our ever-changing society.

Still others suggest the answer is to appoint a congressional subcommittee to work with the President when negotiating international agreements.⁴⁹² This solution is also impractical. Subcommittees tend to

⁴⁹⁰ *Myers v. United States*, 272 U.S. 52, 93 (1926) (Brandeis, J., dissenting).

⁴⁹¹ See generally MUSKIE ET AL., *supra* note 6.

⁴⁹² FRANCK & AMP GLENNON, *supra* note 21.

bog down the process. The likely result will be similar to what we have now, since one-half of the subcommittee members would be appointed by the President and one-half by Congress.

The system developed over the years is workable. The procedures within the system merely have to be fine tuned to reflect the goals that the Framers of the Constitution had in mind. Congress and the President should both take responsibility for open and honest communication between themselves. They should not be concerned with reelection by popular vote, but with what is best for our nation.

The President needs to be more candid with members of Congress when negotiating crucial international agreements. The policy of secrecy in international negotiations should be minimized, for then our nation might be viewed as a coherent unit in the international community, rather than one that is so ridden with internal power struggles that a presidentially-completed international agreement faces difficulty securing the approval of a combative Congress. Politicians must minimize the national embarrassment that occurs when the President is forced to return to the international bargaining table after a settlement has been reached, now holding a new condition-laden "agreement" in his hand.

In return, Congress (and in the case of a treaty, the Senate) should be less restrictive. The conditions placed on the consent of treaties and other international agreements should be minor, clear, and concise, not crippling in their practical effect. For this to occur, however, Congress must be apprised of the reasons and motivations behind international agreements while they are being negotiated. Politicians need to strike the balance between constitutionalism and democracy that makes our system of government so effective.

Certainly, the President must act alone in certain situations: in representing the United States in foreign affairs; in communicating and directly negotiating with foreign nations; and in repelling sudden attacks on our country. But outside these basic needs for a single voice, the President should fully involve Congress in his international activities whenever possible. This may mean collaborating with key members of Congress, or presenting the key issues as he sees them to the entire body. Whatever the method, the decisions that bind our nation should be knowing, intentional, purposeful, and informed.

If a substitute is needed, the congressional-executive agreement is a far better alternative to the Treaty Clause than the sole executive agreement. With the congressional-executive agreement, the President still has the ability to initiate the agreement and conduct the negotiations, but he must do so with the involvement of Congress throughout the entire process. The

difficulty of obtaining two-thirds consent of the Senate is removed, but the majority consent of Congress still functions as a check on presidential power.

The recent development of the "fast-track" legislation procedure is a step in the right direction. While fast-track procedures are currently limited to agreements that harmonize, reduce, or eliminate barriers to trade, their effectiveness should be shared with other areas of foreign affairs. The fast-track system of communication and informed negotiation involving Congress and the President is exactly what the Framers had in mind.

V. CONCLUSION

Although he can, the President should not act alone in determining foreign policy. The authority to determine foreign policy should be shared equally and openly with Congress. Only then will the intent of the Framers be fulfilled, and the protection of our nation's ideals be ensured, as we cope with the complications of the twenty-first century and the next.