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The Scope of the Treaty
Power in the United States II†

Professor McLaughlin here continues the discussion he began in our preceding volume. Prefacing his remarks with the conclusions reached in part I, he goes on to examine recent treaty and executive agreement practice. He concludes that there are indeed problems to be solved with respect to the Congress' participation in treaty making. Measuring the validity of recent proposals to amend the Constitution by the extent to which those proposals solve the problems, he suggests that they have merely confused the real problems at issue.

C. H. McLaughlin*

The examination in preceding sections of this Article of the constitutional provisions affecting the treaty power and of judicial constructions of them developed the following propositions: (1) It was the intention of the framers of the Constitution to withdraw the exercise of the treaty power wholly from the states and to delegate it exclusively to the national government in order to prevent continuance of the obstruction by the states of the effective conduct of foreign relations which had occurred under the Articles of Confederation. (2) The procedural requirement that treaties be made by the President with the advice and consent of the Senate, two-thirds of the senators present concurring, was a compromise intended to reconcile divergent political interests—the interest in strong national leadership, secrecy, and dispatch, to be secured by presidential negotiation, with the interest


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in scrutiny by a body representative at once of the people, the states, and a legislative body having capacity to give effect.  

(3) From this mode of treatment it seems probable that the framers never considered the treaty power to be inherent or unlimited, and the courts, if we except Mr. Justice Sutherland's aberrant view, have consistently stated that the power is limited by express and implied prohibitions of the Constitution and by the purpose for which it was created, i.e., to deal with problems of international rather than domestic character.  

(4) The requirement of constitutionality exists, as it does for statutes, because the Constitution was ordained by the people as a fundamental law to which all governmental enactments were to be subordinated.  

(5) The requirement of constitutionality is therefore not dependent upon the construction to be given to the supremacy clause, which qualifies treaties “made under the authority of the United States” as part of the supreme law of the land; if it be “open to question whether the authority of the United States means more than the formal acts prescribed to make the convention,” this nevertheless cannot be taken “to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.”  

(6) The courts have further construed the supremacy clause to mean that while an international obligation to give effect to a treaty in domestic law arises immediately upon exchange or deposit of ratifications, the method of discharging this obligation depends upon the character of the treaty; if the language imports such an intention and supplies sufficient detail for executive-administrative implementation, the treaty may enter directly into the domestic law (self-executing treaty); if not, it addresses itself to the legislative branch for implementation by statute (non-self-executing treaty) and the good faith of the United States in discharging the international obligation becomes dependent upon the independent will of the Congress.  

(7) Although no specific provision concerning executive agreements was inserted into the Constitution, the language of article I, section 10, shows the framers were conscious of forms of agreement other than treaties, and the powers they vested in the President to negotiate and in the Congress to implement were sufficient to support executive agreements; in practice these have frequently been concluded.  

2. Id. at 732–39.  
3. Id. at 711–20, 741–48, 753–64.  
4. Id. at 731–32. This basis was stated by Mr. Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).  
6. McLaughlin, supra note 1, at 748–53.  
7. Id. at 729–26.
(8) With respect to international legal obligation judicial construction has not distinguished executive agreements from treaties, but in domestic law it tends to assign them a somewhat different position, subject to the requirements not only of constitutionality and relevance to foreign relations but also of consistency with national statutes, yet when qualified on these counts superior to state laws or policies; however it cannot be said that this position has yet been defined with precision.8

In the remainder of the Article consideration will be given to those aspects of recent practice in the conclusion of treaties and executive agreements which seem relevant to an estimate of the adequacy of our constitutional provisions, and to proposals which have been made for amendment of these provisions. In this discussion, however, the focus will continue to be upon the scope of the treaty power. Only to the extent that they affect this question will attention be given to problems of separation of powers and the system of checks and balances in our procedures for concluding international agreements.

III. RECENT PRACTICE WITH RESPECT TO TREATIES AND EXECUTIVE AGREEMENTS

A. EXERCISE OF THE TREATY POWER

Reference has been made to the inability of the framers of the Constitution to anticipate certain historical changes which have affected the Senate's role in giving "advice and consent" to the making of treaties by the President, and which have altered the representational pattern of the two houses of the Congress.9 In fact it is impossible to evaluate the treaty power merely in terms of democratic control, or responsiveness to state interest, or position in the national separation of powers, without further attention to the political processes involved and to institutional changes which have affected them. These are partly domestic changes, but perhaps even more importantly changes of international status and diplomatic method.

(1) Representative Government and the Treaty Process

No recent change has occurred in the method of choosing members of the Congress, so that there can be little reason for extended reconsideration of the representative character of the House and Senate as it relates to procedures in the approval of treaties. A considerable literature has already developed on the question whether there should be a constitutional amendment vesting the

8. Id. at 764-71.
9. Id. at 738-39.
power of consent to ratification in both houses, with a majority vote requirement, or in the Senate under a simple majority rule, or in the Senate under a concurrent majority rule requiring that the numerical majority include the representatives of a majority of the states, or in the House of Representatives alone. It seems unnecessary to repeat the arguments in this familiar debate, but there is perhaps some reason to emphasize that the representative character of the Congress cannot be understood simply in terms of formal rules governing enfranchisement, districting, and apportionment. There is also a problem whether virtual representation corresponds with legal representation, which can be discussed only in the context of systems of communication and influence permeating the legal framework. About these we know much less than about the structures of government.

Today there is no formal channel which assures that the influence of state governments can be brought to bear upon the treaty process. Since the adoption of the seventeenth amendment senators have not been chosen by these governments but by direct election using the states as districts. The question is, therefore, whether the system of nominations and elections or of political party controls assures any correspondence of view upon foreign policy between state officials and congressional delegations. It is certainly true that national political trends are reflected in state elections; for example, it can be demonstrated that in presidential election years the gubernatorial votes tend to follow the presidential returns even though the party alignment within particular states produces a different result in off-year gubernatorial elections. A similar result appears in the elections of senators and representatives. Such an effect is, of course, more significant in states where party strength is nearly evenly divided than in “safe” states. There are also occasional opportunities for national


intervention in the nomination of senators or representatives. But the general pattern in choosing members of Congress has emphasized noninterference with state control, and the problem of securing a unified slate of state and congressional officers is therefore primarily the responsibility of the state party organizations. Their success in achieving this result is subject to many pitfalls. The use of primary elections in nominating has introduced an element of unpredictability beyond that to be expected from state party conventions, particularly in the case of open primary laws which permit members of one party to assist in the choice of another party's candidate. Furthermore, major parties in the United States are notoriously heterogeneous in their composition and therefore harbor conflicting interests which make any sharp definition of policy a difficult and unrewarding task. Platforms are generally a hash of ill-assorted elements designed to contain something pleasing to every palate. No one seriously supposes that the candidates will feel constrained to support any particular plank or that the party will discipline any but the most outrageous deviationists. Certainly vigorous and successful candidates who hold acceptable positions with respect to the more obvious state and local interests have not traditionally been rejected because of opinions upon foreign policies not clearly involving those interests. In the "safe" states there is no question that the dominant party will control the election of both state and national officers, but there the fact that the real contest occurs in the primary rather than the general election is likely to throw the emphasis upon local rather than national or foreign policy issues. The fact that the governor and senator of a southern state agree about segregation is no assurance their views on foreign policy or on specific treaties will correspond. Indeed, elections throughout the country are often determined primarily upon domestic issues, whether of national or local scope, rather than upon foreign policy questions; even the presidential candidates have seemed in recent elections to avoid thorough debate upon these questions. Candidates for state and congressional offices have sometimes shown their sense of the greatly increased importance of foreign policy, but their views upon local issues are so much involved in the election results that it can hardly be said that the electorate expresses clear mandates upon foreign policy. We may concede that it is pointless to have representation of states as such for treaty-making, but we must also conclude from these facts that there is no assurance members of Congress will reflect the public opinion of a state or a district upon particular treaty questions unless these involve dominant issues of state and local politics.
Senators, "the great panjandrums of American politics," enjoy a position of special power. Because of their leadership in state parties based often on experience in other state and national offices, their long term of senatorial office, their free access under present Senate rules to a remarkable national forum for debate and publicity, and their special powers in controlling patronage, they often entrench themselves in a manner which permits individuality, even eccentricity, of conduct. The great influence of Charles Sumner in thwarting President Grant's foreign policy, or of Henry Cabot Lodge in defeating ratification of the Treaty of Versailles, or William E. Borah in preventing adherence to the Statute and Protocol of the World Court, or Arthur E. Vandenberg in bipartisan development of the Economic Recovery Program and the North Atlantic Treaty, or Joseph R. McCarthy in wrecking the United States Information Program, or William F. Knowland in supporting Nationalist China, to mention a few obvious examples, rested not upon the representativeness of their opinions but upon personal prestige and leadership. Whether this responsiveness to individuality means that the Senate as a body is insufficiently representative to be entrusted with the exclusive right of consent to ratification of treaties is not easy to say.

Members of the House of Representatives are by comparison less obtrusive personalities, more constrained by procedural limitations, more imminently exposed to the pressure of a contest for re-election, perhaps better able to reflect the public opinion of their limited constituencies. On the other hand they are more inclined to stand upon local issues in election contests, so that eccentricity in foreign policy views is not excluded. The effective work of John Blatnik in pressing for the St. Lawrence seaway was undoubtedly appreciated by many of his northern Minnesota constituents, since they will be directly affected by it, but it is impossible to suppose that the effectiveness of Dr. Walter H. Judd in supporting the present China policy is especially relevant to his firm grip upon the affections of the Minnesota Fifth District. Furthermore the members of the House are unable under their rules of limited debate to conduct the sort of sustained discussion of a foreign policy issue which stimulates widespread expressions of public opinion. Their facilities for determining a public opinion which is not widely and spontaneously expressed are meager.13

In terms of representative character neither the House, nor the Senate, nor both houses together, quite satisfy proper expecta-

12. The words quoted are from KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 476-77 (4th ed. 1958).
tions. The disfranchisement of southern Negroes, the overrepresentation of rural areas due to inadequacies in reapportionment, the equal representation of states without regard to population in the Senate, the excessive influence of special interest groups upon congressional activity, the difficulties which members of the Congress face in communicating sufficiently with their constituents, the oppressive work load of nonlegislative business which limits their inquiries, are factors too apparent for discussion. They have led some expert observers to conclude that the only hope for channeling and leading public opinion into support of sound foreign policy lies not with Congress but with the President.\(^4\)

In the light of these points it appears to the writer that although the unrepresentative character of the present system of consent to ratification is perfectly clear, it is not equally demonstrable that any of the constitutional amendments suggested would in themselves assure marked improvement. It is unlikely that the use of a majority vote in both houses would, in the case of treaties, produce as much responsiveness to public opinion as in legislation. On the other hand it would probably reduce the danger of arbitrary minority obstruction, and this seems justification enough. More radical correction of deficiencies in the representative character of the Congress is very desirable but would require changes affecting wide areas of our political process.\(^5\) Indeed, the probability of obtaining even a change in the two-thirds rule is remote, especially as the Senate’s handling of treaties in recent years has given rise to little complaint. It could be done only by constitutional amendment, and as Corwin remarked, “when two-thirds of the Senate consent to relax any of that body’s powers something like the millennium will have dawned.”\(^6\) It is likely that efforts to improve can for the present be directed more profitably to procedures within the existing framework.

One argument made for retention of the two-thirds rule is that although it permits abuse of privilege by the minority its operation inspires confidence on the part of other signatories that

\(^{14}\) See Morgenthau, Conduct of American Foreign Policy, 3 PARLIAMENTARY AFFAIRS 147, 160–61 (1949).

\(^{15}\) For an indication of major changes which would be required to import democracy into the determination of foreign policy see the contribution of Sibley to a symposium, Can Foreign Policy Be Democratic?, 2 AMERICAN PERSPECTIVE 147, 155 (1948).

\(^{16}\) Corwin, The President: Office and Powers 235 (2d ed. 1941). The last serious clashes with administration policy were the rejection of the St. Lawrence Waterway Treaty of 1934, and adherence to the Statute and Protocol of the Permanent Court of International Justice in 1935. Since World War II the Senate has deferred action on a number of United Nations and International Labor conventions, but administration policy with respect to them was also vacillating. See section III, A (2), infra at 666.
treaties accepted by two-thirds of the Senate must have firm political support in the United States. In cases where such assurance is particularly wanted the method may therefore give satisfaction. In some respects the argument seems a specious one, for a two-thirds approval of ratification would give as much comfort if only a majority were constitutionally required as when two-thirds are required. If some uncertainty might be felt about treaties accepted by bare majorities, this feeling might still be less disturbing than rejection of the treaties. Nor is it clear why other countries should expect greater assurance about the strength of our convictions than we of theirs; the usual requirement in countries using legislative consent to ratification is a majority vote. However, one aspect of the argument seems sound. Under the present rule we can use treaties in those cases in which we ourselves wish to make the firmness of our international commitments clear and thus to inspire confidence, e.g., in concluding defensive alliances, or associating ourselves with international organizations. No particular embarrassment will result from retention of the two-thirds rule for this purpose provided we are able to utilize joint resolutions or congressionally authorized executive agreements in cases where the assurance of legislative support is needed but the two-thirds rule might prove an obstacle, or presidential agreements when there is proper reason not to consult the Congress. It is at this point that the discussion becomes relevant to the scope of the treaty power. If that power were defined as not exclusive of other types of agreement except as to specified subjects then we should have some basis for retention of the two-thirds rule. Perhaps we are moving toward a practice of differentiating the methods used according to subject matter, but the practice is controlled by executive discretion rather than by law.

(2) The Pattern of Advice and Consent

The record of the Senate in dealing with treaties has not appeared upon statistical analysis to be so inept or obstructive as some critics have suggested. In his careful study of the 832 treaties signed on behalf of the United States from February 6, 1778 to February 6, 1928, Dangerfield corrected a number of misapprehensions. He demonstrated that action upon most of the treaties which were rejected or amended by the Senate would not have

19. DANGERFIELD, IN DEFENSE OF THE SENATE (1933).
been changed had the voting requirement for consent to ratification been a majority rather than two-thirds. He found that delays in ratification were in general attributable even more to the Executive Branch than to the Senate, the interval between consent to ratification and proclamation often exceeding the time required to obtain Senate consent. Instances of Senate delay and amendment were often explicable in terms of party division between administration and Senate, a factor which would also affect legislation, or they reflected personality clashes. Nor in merely mathematical terms could it be said that an unduly large proportion of treaties had been rejected, or approved subject to reservations. Many reservations were technical constructions which did not obstruct the basic policy of the treaties. Many of the amendments proposed were well conceived and upon reopening of the negotiations were accepted by other signatories.

Of course, quantitative measures of the Senate’s work give no help upon qualitative issues, and many observers have continued to feel that a system which permits dilatory or obstructive action by a minority upon even a few treaties of great historical significance should not be tolerated merely because it functions acceptably with respect to routine business. For many years an isolationist minority of the Senate was aided by the two-thirds rule in blocking important commitments to international action: the Texas annexation treaty in 1845 (circumvented by the use of a joint resolution), the arbitration treaties of several administrations in 1897, 1904, 1911–1912, the Treaty of Versailles carrying down adherence to the Covenant of the League of Nations in 1920 (by joint resolution the state of war was terminated and part XIII of the Treaty creating the International Labor Organization was accepted), the St. Law-

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20. Id. at 103–11, 171–79. John Hay’s difficulties with the Senate over the Hay-Pauncefote Treaty and the arbitration treaties were due in part to his inability to meet legislators on their own terms; his continuous literary fusillade directed to the incapacity, insincerity, and general orneriness of the Senate as a whole and many of its members individually (samples id. at 150, 195–97, 199) is amusing to read but cannot have helped his cause. He remarked that “he felt as if he had one hand tied behind his back and a ball and chain about his leg, as he was always hampered by the Senate.” Low, The Usurped Powers of the Senate, 1 AM. POL. SCI. REV. 1, 18 (1906). Again, that he “did not believe another important treaty would ever pass the Senate,” and that there would “always be 34% of the Senate on the blackguard side of every question that comes before them.” 2 THAYER, THE LIFE AND LETTERS OF JOHN HAY 170, 254 (1908). Woodrow Wilson’s stubborn sense of principle, which made it impossible for him to make the concessions which might have divided opponents of the Versailles Treaty, played into the hands of Senator Henry Cabot Lodge, who counted upon the President’s rejecting the proposed reservations to the treaty but was prepared to add to them if necessary to secure that result, so as “to throw on the President the onus of its rejection.” COUNCIL ON FOREIGN RELATIONS, SURVEY OF AMERICAN FOREIGN RELATIONS 1928, at 272 (Howland ed.). See also DANGERFIELD, op. cit. supra note 19, at 249.
rence Waterway Treaty in 1934, adherence to the Statute and Protocol of the Permanent Court of International Justice in 1926 and 1935.\textsuperscript{21}

Some extension of Dangerfield's data has been given by Plischke, who tabulates Senate action upon treaties through 1944 as follows:\textsuperscript{22}

<table>
<thead>
<tr>
<th>Period</th>
<th>Submitted to Senate</th>
<th>Approved</th>
<th>Amended</th>
<th>Rejected</th>
<th>No-final Action</th>
<th>Withdrawn</th>
<th>Transmitted for Information Only</th>
</tr>
</thead>
<tbody>
<tr>
<td>1788–1799</td>
<td>9</td>
<td>7</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1800–1824</td>
<td>23</td>
<td>17</td>
<td>5</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1825–1849</td>
<td>79</td>
<td>62</td>
<td>10</td>
<td>2</td>
<td>4</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1850–1874</td>
<td>171</td>
<td>119</td>
<td>31</td>
<td>4</td>
<td>15</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>1875–1899</td>
<td>115</td>
<td>71</td>
<td>31</td>
<td>4</td>
<td>2</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>1900–1924</td>
<td>371</td>
<td>257</td>
<td>66</td>
<td>1</td>
<td>37</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>1925–1944</td>
<td>278</td>
<td>220</td>
<td>22</td>
<td>2</td>
<td>32</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>TOTALS</td>
<td>1046</td>
<td>753</td>
<td>167</td>
<td>14</td>
<td>90</td>
<td>14</td>
<td>8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Treaties</th>
<th>Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approved without change</td>
<td>753</td>
<td>72.0</td>
</tr>
<tr>
<td>Amended</td>
<td>167</td>
<td>16.0</td>
</tr>
<tr>
<td>Rejected</td>
<td>14</td>
<td>1.3</td>
</tr>
<tr>
<td>No final action by Senate</td>
<td>90</td>
<td>8.6</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>14</td>
<td>1.3</td>
</tr>
<tr>
<td>Submitted for information only</td>
<td>8</td>
<td>0.8</td>
</tr>
<tr>
<td>Total number of treaties submitted to Senate</td>
<td>1046</td>
<td>100.0</td>
</tr>
</tbody>
</table>

These figures show that the Senate resorted to amendment or reservation less frequently during the last quarter century (22 treaties from 1925 through 1944) than in the preceding one (66 from 1900 through 1924). Over the whole period from 1788 only 16 per cent of the treaties were so modified.

It is difficult to carry forward the tabulation with precision for the period since 1944 because neither the Department of State nor the Senate Committee on Foreign Relations has published complete information showing the disposition of all treaties submitted to the Senate.\textsuperscript{23} However, the principal facts can be pieced to-

\textsuperscript{21} See, for further examples and development of the point, Fleming, The Treaty Veto of the American Senate 50–315 (1930); McDougal & Lans, supra note 10, at 556–73.

\textsuperscript{22} Plischke, Conduct of American Diplomacy 288 (1950).

\textsuperscript{23} For the period through 1944 there are two publications: List of Treaties Submitted to the Senate 1789–1934 (State Department Publication No. 765, 1935), and Treaties Submitted to the Senate 1935–1944 (State Department Publication No.
gether by combining several sources. The Treaties and Other International Acts Series (T.I.A.S.) began in 1945 as a combination of the earlier Treaty Series and Executive Agreement Series. In the period from then until the end of 1958 T.I.A.S. contains 153 treaties which entered into force after having received consent to ratification. The distribution of these by years is shown in the table in the appendix. As will be seen, this number is small in comparison with the number of executive agreements in the same period. Nevertheless, it would be too much to assert that the role of the treaty-making power has been negligible since World War II. Qualitatively the agreements have been important.

One significant area has been peace and security.\textsuperscript{24} Another

area of activity has been the continued development of international regulatory conventions and, in some cases, international administrative apparatus to perform related functions. Regulation of production and marketing of international commodities has


produced several agreements, as have the efforts to preserve marine food resources. A very old area of treaty making has been continued and developed in the light of modern problems of the protection of nationals doing business abroad, international commercial relations, and foreign investment, in a series of post-war treaties of "friendship, commerce, and navigation." A substantial


effort has been made to reduce the incidence of double taxation upon incomes and upon estates and inheritances.\textsuperscript{29} Finally, there have been a few miscellaneous agreements.\textsuperscript{30}

Certainly this group of treaties has been of sufficient importance in the conduct of foreign relations that any persistent obstruction or procrastination by the Senate in considering them would have been embarrassing to the executive branch, although it may be conceded that few of them approach the significance of the Treaty of Versailles.\textsuperscript{31}

\begin{itemize}
\item One such treaty has been concluded with a Latin-American Country, Double Taxation Convention with Honduras, June 25, 1956 [1957] 2 U.S.T. & O.I.A. 219, T.I.A.S. No. 3766. This is the only convention thus far made. For comment upon the utility of such agreements with underdeveloped countries, see Kalijarvi, \textit{Department of State Supports Double Tax Treaty with Pakistan}, 37 \textit{Dep't State Bull.} 359 (1957).
\item One treaty has been concluded on the subject of gifts with Australia, May 14, 1953, [1953] 1 U.S.T. & O.I.A. 2284, T.I.A.S. No. 2879.
\item 31. Dahl, \textit{Congress and Foreign Policy} 224-25 (1950) (Yale Int'l Studies Memo.) seems to put his point too strongly in saying that "the treaty power has not been a significant problem in the conduct of American foreign policy since the end of the Second World War. Only one major policy—the North Atlantic
What, then, has been the pattern of Senate activity with respect to treaties? Three points may be considered: instances of failure to act, the length of time required for consideration, and the use of reservations and amendments. From the six legislative histories issued by the Senate Committee on Foreign Relations, from the 80th Congress through the 85th Congress, the following data can be assembled:

<table>
<thead>
<tr>
<th>Congress</th>
<th>Treaty held over from previous Congress</th>
<th>Treaties submitted during Congress</th>
<th>Total before Congress</th>
<th>Withdrew by President</th>
<th>Consent to ratification</th>
<th>Left at end of Congress</th>
</tr>
</thead>
<tbody>
<tr>
<td>80th Congress (1947–1948)</td>
<td>24</td>
<td>45&lt;sup&gt;23&lt;/sup&gt;</td>
<td>69&lt;sup&gt;33&lt;/sup&gt;</td>
<td>19&lt;sup&gt;34&lt;/sup&gt;</td>
<td>23</td>
<td>27&lt;sup&gt;35&lt;/sup&gt;</td>
</tr>
<tr>
<td>81st Congress (1949–1950)</td>
<td>27</td>
<td>40</td>
<td>67</td>
<td>7</td>
<td>25</td>
<td>35</td>
</tr>
<tr>
<td>82d Congress (1951–1952)</td>
<td>34</td>
<td>39</td>
<td>73</td>
<td>4</td>
<td>39</td>
<td>30</td>
</tr>
<tr>
<td>83d Congress (1953–1954)</td>
<td>34</td>
<td>31</td>
<td>65</td>
<td>1</td>
<td>29</td>
<td>35</td>
</tr>
<tr>
<td>84th Congress (1955–1956)</td>
<td>31</td>
<td>20</td>
<td>51</td>
<td>32</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>85th Congress (1957–1958)</td>
<td>18</td>
<td>18</td>
<td>36</td>
<td>10</td>
<td>17</td>
<td>9</td>
</tr>
</tbody>
</table>

Some discrepancies appear in these figures, so that they cannot be taken as perfectly accurate, but they are useful in showing the general pattern of recent Senate action. They show that a good deal of attrition still occurs in the calendar of treaties submitted.

Treaty—has been so effectuated, and that was overwhelmingly approved by the Senate.” Apart from the Treaty of Versailles, the treaties concluded since World War II have been as significant as those which aroused earlier debate over the treaty power, and more important than those which agitated John Hay. Had the Senate acted obstructively with respect to them there might have been continued demand for curtailment of its powers.

32. See note 23 supra.
33. The total in the third column was obtained by adding the figures in the three columns following it. The figure in the second column was then obtained by subtracting that in the first column from the total. For later Congresses, figures in all columns are given in the legislative histories, published by the Senate Committee on Foreign Relations.
34. Withdrawal requested by the president, April 8, 1947, and consent of Senate given April 17, 1947. See U.S. Treaty Developments, App. 1-c; 16 Dep’t State Bull. 726 (1947). One of these treaties, International Labor Organization Convention No. 63, on uniform statistics of wages and hours of work in mining, manufacturing, and construction industries, was resubmitted on Jan. 17, 1949. See 20 Dep’t State Bull. 150 (1949). Others were revised. The treaties withdrawn included
for consent. At the outset this was due principally to the carrying over of a number of treaties submitted before World War II which had become obsolete because of changed conditions. The President's withdrawal of 19 of these in 1948 left only five treaties from previous Congresses on the calendar. Again in 1949 the President withdrew seven treaties, of which four were ILO conventions, the others treaties which were to be replaced by revisions.\textsuperscript{36} Four treaties withdrawn from the 82d Congress and one from the 83d have not been identified. On July 23, 1957 President Eisenhower requested withdrawal of a 1955 treaty of friendship, commerce and navigation with Haiti. On April 22, 1958 he asked the Senate to return nine treaties, of which all but two were ILO conventions.\textsuperscript{37} The others were a conciliation treaty with the Philippines pending since 1946, and an inter-American copyright convention which had been superseded by United States adherence to the Geneva convention of 1952.

There have been several instances of senatorial reluctance. The Anglo-American petroleum agreement of August 8, 1944 was withdrawn in 1945 because of opposition in the Senate, and a revision negotiated.\textsuperscript{38} This was submitted in 1945, but no action was taken by the Senate. ILO conventions have generally failed to obtain consent, but these were in many cases submitted only for information without expectation of Senate action. In the case of Convention No. 63, on uniform statistics of wages and hours of work in mining and manufacturing industries and in agriculture, the Senate delayed from 1939 until 1947. President Truman then withdrew the convention for further study but resubmitted it in 1949 with the information that the Departments of State, Labor, and

\textsuperscript{35} U.S. TREATY DEVELOPMENTS, App. I lists 23 treaties as pending in June, 1948, none of which received consent to ratification during the remainder of the year. T.I.A.S. shows four more submitted during the second half of 1948.

\textsuperscript{36} Withdrawal requested by the President, Aug. 10, 1949, Senate consent given Oct. 13, 1949. See 21 DEP'T STATE BULL. 316 (1949); U.S. TREATY DEVELOPMENTS, App. 1-C.

\textsuperscript{37} See 38 DEP'T STATE BULL. 841 (1958); SEN. DOC. No. 128, 85th Cong., 2d Sess. 40-44 (1959).

\textsuperscript{38} See 13 DEP'T STATE BULL. 481 (1945).
Agriculture had re-studied it and all felt it should be ratified. Nevertheless the Senate Committee on Foreign Relations remained unconvinced, and President Eisenhower finally withdrew the convention in 1958. The UNESCO convention of 1949 for facilitating international circulation of visual and auditory materials of an educational, scientific and cultural character was submitted in 1950 but no action has been taken. The Charter of the International Trade Organization, signed at Havana in 1948, was not handled as a treaty because of the strong interest of the House of Representatives in tariff regulation, but was submitted to both houses in 1949 with a request for approval by joint resolution. The Senate took no action. The House Committee on Foreign Affairs conducted hearings but made no recommendation. In December, 1950, the President decided that in view of the Korean crisis it would be impractical to resubmit the Charter.

In 1949 the United Nations conventions of 1948 on the Political Rights of Women and on Prevention and Punishment of the Crime of Genocide were submitted to the Senate, where they have since languished. It is fair to say that neither is urgent in the sense of a needed corrective of conditions within the United States; ratification has been urged rather in the hope of influencing the establishment of general standards recognized by all countries. More than a year after submission of the Genocide Convention, President Truman wrote to Senator Tom Connally, then chairman of the Committee on Foreign Relations, urging ratification of the convention because of the Korean crisis and inclosing a letter from the Korean ambassador, who expressed alarm at the "imminent danger that the invaders will commit genocide in Communist-controlled Korea on the Christian population...."

Still, no action was taken, and this and other conventions sponsored by the United Nations presently became casualties of the controversy over the Bricker Amendment, for in 1953 Secretary of State Dulles thought it desirable to convince the Senate that the executive branch would not irresponsibly surrender the domestic jurisdiction of the United States by treaty, as the Bricker faction had contended it could. He stated that the proposed United Nations Covenants on Human Rights and the Convention on the Political Rights of Women would not be accepted, nor would other treaties designed to effect internal social changes.

89. See 20 DEP'T STATE BULL. 150 (1949).
41. 23 DEP'T STATE BULL. 379 (1950).
42. Dulles's statement on April 6, 1953 to the Senate Committee on the Judiciary, The Making of Treaties and Executive Agreements, 28 STATE DEP'T BULL. 591, 591-92 (1953):

During recent years there developed a tendency to consider treaty making...
The Department later made it clear that it was no longer pressing for ratification of the Genocide Convention.\textsuperscript{43}

It seems clear that there were complicating factors in our critical external relations and in the domestic debate over the treaty power which explain the delays of some treaties. Sharp attacks in the Senate upon Secretary of State Acheson and upon the Korean policy of President Truman reinforced conservative reluctance to approve United Nations economic and social conventions. With the Eisenhower administration there came an abrupt change in the attitude of the Secretary of State toward these conventions, after which the Senate was no longer under any pressure to act. But the Senate \textit{did} use delay effectively during the Truman administration to block some treaties which were significant though not vital.

Apart from treaties which did not obtain consent to ratification there has not been excessive procrastination. A tabulation of the periods between the signing of treaties and Senate consent to ratification shows that in 59 cases it was less than six months, in 37 cases from six months to one year, in 37 cases from one to two years, and in 20 cases more than two years. Of this last category six periods were only a few weeks or months over two years. The

\textit{\textsuperscript{43}} In a letter of May 10, 1954 to Senator Wiley, Chairman of the Senate Committee on Foreign Relations, Thruston B. Morton, Assistant Secretary for Congressional Relations, said in accordance with Mr. Dulles's remarks of April 6, supra note 42: "[T]he Department of State is not pressing for ratification of the Genocide Convention." He thought it appropriate to add that as the convention had not been ratified "its provisions have no binding effect within the United States and have
only cases of very long delay were the Claims Convention (Hannevig claim) with Norway, a double taxation convention with Belgium which required a supplementary convention (nearly five years), ILO Convention No. 74 on Certification of Able Seamen (six years), and the four Geneva conventions on the amelioration of suffering in time of war (six years, which included the period of the Korean war, perhaps not an appropriate time for definitive treatment of the subject). Although it is desirable to have Senate action upon treaties within the session in which they are submitted, it must be remembered that submission sometimes occurs late in the session, and that in any case, legislative proposals are also not infrequently continued from one session to another or even re-introduced in the next Congress. It seems just to conclude that disposition of treaties within a period of one or two years is consistent with the general tempo of legislative activity, particularly when 63 per cent are approved within one year and 39 per cent within six months. It must be conceded that a few treaties will inevitably present questions because of changed international conditions or suggested revisions which will justify postponement more than two years. As only seven treaties required periods significantly longer, and four of these (the Geneva Conventions) were considered as a single package, their consideration was reasonably expeditious. Nor were any of the treaties which were delayed more than two years matters of any political urgency. The real evidence of delay lies not in the handling of those treaties which eventually obtained consent but in those upon which no action was taken, whether they remain on the calendar or were withdrawn by the President as hopeless cases.

The Senate has not since 1945 formally demanded the amendment of a treaty as a condition of approval, although in several instances the Department of State has undertaken to negotiate revisions because of objections in the Committee on Foreign Relations which led it to delay its report to the Senate. In a number of cases reservations or understandings have been expressed in consenting to ratification. In all of these cases the President has accepted the views expressed and ratified subject to the reservation or understanding. The other signatories have also acquiesced in the reservations. In most of these cases the point has been an objection to a particular separable clause or section in an otherwise acceptable treaty. Thus the Senate rejected clauses in several double taxation conventions relating to the profits of public entertainers, such as actors, musicians, artists, and athletes. It also rejected clauses providing

in no way abridged or affected the rights and freedoms of American citizens.” 30 DEPT STATE BULL. 889, 883 (1954). For consideration of the question whether the convention could infringe domestic jurisdiction if ratified see infra section III, C. 44. See, e.g., Treaty with Switzerland on Double Taxation, May 24, 1951, (1951]
for reciprocal assistance in collection of taxes,\textsuperscript{46} or in some cases limited the application of these clauses to such collections as would "insure that the exemption or reduced rate of tax granted . . . by such other State, shall not be enjoyed by persons not entitled to such benefits."\textsuperscript{46} Reservation was made to clauses in the convention with Ireland which would have exempted residents of Ireland from United States tax on capital gains and Irish corporations from our tax on accumulated or undistributed earnings, profits, income, or surplus.\textsuperscript{47} The clause protecting against translation of literary and artistic productions in the Treaty of Friendship, Commerce, and Navigation concluded with China in 1946 seemed inadequate to the Committee on Foreign Relations. The Senate therefore rejected it and stipulated there should be continued reliance upon the provision in the Treaty of October 8, 1903, until a further agreement could be reached.\textsuperscript{48} In the case of the Buenos Aires Telecommunication Convention of 1952 the Senate reservation took the form of a formal declaration that the United States did not "accept any obligation in respect of the Telephone Regulations or the Additional Radio Regulations referred to in Article 12 of the Buenos Aires Convention."\textsuperscript{49}

A second type of reservation has been used to define more exactly the area of applicability of the agreement or to specify procedural safeguards. In the Mutual Defense Treaty with Korea the Senate obtained a statement that:

It is the understanding of the United States that neither party is obligated, under Article III of the above Treaty, to come to the aid of the other except in case of an external armed attack against such party; nor shall anything in the present treaty be construed as requiring the United


\textsuperscript{46} Treaty with Norway on Double Taxation, supra note 45, at 2349; Treaty with the Union of South Africa on Double Taxation, July 15, 1952, [1952] 3 U.S.T. & O.I.A. 3821, 3848; T.I.A.S. No. 2510; Treaty with Greece on Double Taxation supra note 45, at 81. In the case of double taxation of estates, the reservation confines reciprocal collections to "taxes imposed by the other Party only in the case of a decedent claiming a credit under article V of the convention." Treaty with the Union of South Africa on Double Taxation, July 15, 1952 [1952] 3 U.S.T. & O.I.A. 3816, T.I.A.S. No. 2509.


States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea. This protection against being drawn into a renewed civil war in Korea initiated by the Republic of Korea may have been excess of caution but was neither injudicious nor contrary to the intent of the treaty. A declaration was also made in accepting the Treaty of Peace with Japan that:

[N]othing the treaty contains is deemed to diminish or prejudice, in favor of the Soviet Union, the right, title, and interest of Japan, or the Allied Powers as defined in said treaty, in and to South Sakhalin and its adjacent islands, the Kurile Islands, the Habomai Islands, the island of Shikotan, or any other territory, rights, or interests possessed by Japan on December 7, 1941, or to confer any right, title, or benefit therein or thereto on the Soviet Union; and also that nothing in the said treaty, or the advice and consent of the Senate to the ratification thereof, implies recognition on the part of the United States of the provisions in favor of the Soviet Union contained in the so-called 'Yalta Agreement' regarding Japan of February 11, 1945.

Here the Senate took the opportunity to express its dissatisfaction with the loosely expressed and potentially troublesome territorial provisions of the executive agreement referred to, but it is unlikely that this declaration, made in 1952, was at all in conflict with the views then held in the executive branch, whatever may have been the original intent of the Leaders' Agreement of Yalta; certainly the declaration cannot have been unwelcome to Japan.

As to procedural safeguards, a reservation was made to the treaty with Canada in 1950 on diversion of the waters of the Niagara River for hydroelectric power, which stipulated that development of power uses of the United States' share of the waters must be under authority of an act of the Congress. This was a wholly inappropriate intrusion of a domestic issue and was properly regarded by the Government of Canada as irrelevant to the international obligations of the treaty, and therefore not in a true sense a reservation. A better conceived procedural stipulation

52. On the defective drafting and ambiguities of the Leaders Agreement, see Briggs, The Leader's Agreement of Yalta, 40 Am. J. Int'l L. 376 (1946). Of course the treaty with Japan could not affect any rights which the U.S.S.R. could claim under the Yalta Agreement except as it might be understood as an assertion that the agreement was for independent reasons no longer binding, or as a declaration of abrogation of the agreement.
54. The Canadian government accepted the "reservation" without again submitting the question to Parliament "because its provisions relate only to the internal
was that with respect to the NATO Status of Forces Agreement. This reserved the right to exclude or remove persons whose presence should be deemed prejudicial to national security, stipulated that the jurisdictional provisions should not be considered a precedent for future agreements, required U.S. military commanders to request a waiver of authorized foreign jurisdiction if they found that procedural rights in judicial proceedings similar to those expressed in the Constitution of the United States were absent in that country, and required U.S. military observers to attend trials and report irregularities.

A final category of reservations seems to have been inspired by the movement for the Bricker amendment. One type is the condition stated in accepting the Bogotá Charter of the Organization of American States that "none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the power of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states." More specifically, the convention for the International Maritime Consultative Organization was ratified with the understanding that nothing in it "is intended to alter domestic legislation with respect to restrictive business practices . . ." and therefore ratification "does not and will not have the effect of altering or modifying in any way the application of the anti-trust statutes of the United States of America." A second type is the reservation designed to prevent an international organization created by the treaty from expanding its own powers in relation to the United States by changes of constitution not approved by the United States in the same manner as the original treaty was. This was stipulated in reservations to the International Sugar Agreement of 1953, and the Statute of the International Atomic Energy Agency of 1958.

application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty." The same view had been expressed by the Department of State in a note to the Canadian government on Aug. 17, 1950. For these statements, see Power Authority of New York v. Federal Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957), where it was held that the provision was not a reservation to the treaty in a sense which would give it standing as law of the land. For a discussion of this case see McLaughlin, The Scope of the Treaty Power in the United States, 42 Minn. L. Rev. 709, 753 (1958).

56. For comparable jurisdictional arrangements with Japan set up by executive agreement under authority of the Security Treaty in 1951 and the Administrative Agreement considered with it, see the discussion of Girard v. Wilson in McLaughlin, supra note 54, at 759–60.
In the latter case it was added that "the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent."

Of the reservations mentioned only that with respect to power development of the waters of the Niagara River was genuinely improper, and there the impropriety did not affect ratification. Some of the others may be considered superfluous, but they were not quibbling, captious, or arbitrarily restrictive. To the extent that it plugged legal gaps or asserted independent policy judgments the Senate was discharging the function it was intended to perform. That it did so during this period in a manner not excessively or unreasonably obstructive is perhaps evident from the fact that all the reservations were accepted.

One explanation advanced for the considerable degree of harmony which has prevailed in the war and post-war period with respect not only to ratification of treaties but to approval by the Congress of important executive agreements and foreign policy legislation is "bipartisanship." That politics stop at the water's edge is certainly not a proposition of universal validity in American politics. The element of truth in it lies in the fact that a party alignment in the Congress which has been developed largely upon the basis of local campaign issues leaves open the possibility of a much greater concensus upon foreign policy issues.61 To develop this consensus fully requires leadership and effort, and some willingness on the one hand to relinquish exclusively party claims to credit for the programs developed and on the other to avoid arbitrary applications of party discipline in voting divisions. If new institutional apparatus is not essential in cultivating this collaboration, at least there must be a different use of existing machinery. The techniques most notable in recent years have been (1) free use of senators and other party leaders of both parties in negotiating international agreements;62 (2) inclusion in the Senate Committee on Foreign Relations of representative and influential

61. DAHL, CONGRESS AND FOREIGN POLICY 232 (1950) puts this well:
"For what bipartisanship in Congress reflects is the fact that a nation may be divided on domestic issues and at the same time may contain a national majority on foreign policy cutting athwart the interest-group alignments of domestic policy. The conflict of political parties is an awkward mechanism for taking this cross-interest situation into account. Bipartisanship is a means of overcoming the artificiality of party lines by setting to one side particular issues on which a substantial number of leaders and followers are in agreement."

62. Examples include the use of Vandenberg, Connally, Dulles, Bloom, Eaton, and Stassen in the San Francisco conference of 1945 which drafted the United Nations Charter, of White at Cairo, Elbert Thomas at Philadelphia, Wagner and Tobey at Bretton Woods, Austin at Chapultepec, Connally, Vandenberg, and Austin
party leaders, to enable it to act as a kind of foreign relations council; (3) occasional focusing of congressional action upon particular areas of foreign policy by the use of select committees, such as the Select Committee on Foreign Aid in the House of Representatives (Herter Committee); (4) better foreign policy coordination in the executive branch through the National Security Council and its Operations Coordinating Board, the assignment to this area of special assistants to the President (in the Truman administration of one assistant, Averell Harriman, as a foreign policy coordinator), and other liaison agencies; (5) careful preparation of background material and extensive consultations between officers of the Department of State and congressional leaders, (6) inclusion of the House of Representatives in consultations whenever implementation of a program will require the action of both houses. It is not suggested that these activities have become routine with respect to all foreign policy issues—far from it—but there has been deliberate effort to exploit these possibilities in handling major programs.

The tendency toward a very strong Senate Committee on Foreign Relations began during the war when Senators Glass, Byrnes, and Austin were persuaded to relinquish other important committee assignments in which they had long seniority to accept vacancies in the Foreign Relations Committee. For a time it included the majority and minority floor leaders, the majority whip, and the chairmen of the Committees on Foreign Relations, Finance, Banking and Currency, Military Affairs, Education and Labor, Inter-oceanic Canals, Appropriations, Audit and Control, Pensions, and Public Lands. Of course it has not been possible for it to continue such a position of strength through the postwar period, but it has become established as a blue-ribbon committee always including strong Senate leadership.

In the United Nations Charter, the Marshall Plan, and the North Atlantic Treaty can be seen the careful cultivation of bipartisan cooperation at the Inter-American Defense Conference at Rio de Janeiro, Bailey and Brewster at the Chicago International Civil Aviation Conference, Connally and Vandenberg at meetings of the Council of Foreign Ministers and the Paris Peace Conference for drafting peace treaties, Dulles for negotiation of the Treaty of Peace with Japan. This practice seems to have determined a point which remained in issue to Woodrow Wilson’s day. McKinley had used members of the Senate, even of the Committee on Foreign Relations, in the commission to negotiate a treaty of peace with Spain in 1898, but these appointments were resented by the Senate as a deliberate effort to influence the jury. This incident was probably one reason why Wilson did not appoint Senators to the delegation to the Paris Conference in 1919. Recent appointments have not aroused Senate opposition.

63. See the account of Senator Thomas, The Senate’s Role in Foreign Policy, reprinted from World Affairs Interpreter (1947) in 4 Padelford, Current Readings on International Relations 188 (1948).
Preliminary planning for the Charter had begun with conversations between State Department and congressional officials, then took form with the appointment in 1942 of an Advisory Committee on Post-war Foreign Policy, which included both executive and legislative personnel. By the Fulbright and Connally resolutions in 1943, both houses were committed in principle to participation in an international security organization. Nonpartisan consideration was assured by a declaration by Austin, Vandenberg, and other Republicans, and by the agreement of Hull with Dulles, as Dewey's delegate, to avoid the subject as a presidential campaign issue. A committee of eight was then appointed by the Senate Foreign Relations Committee at the request of Hull to confer with him regularly, and the House leaders later met with the Secretary of State. After the preliminary conference at Dumbarton Oaks the committee of eight and the House leaders again discussed important issues with the Secretary of State, and this collaboration was continued by the appointment of a strong congressional group to the delegation at the San Francisco conference. This careful and continuous collaboration was rewarded when the Senate consented to ratification of the Charter by a vote of 89 to 2.

In the background of the Marshall plan were useful accumulations of facts and impressions about European economic problems by the Colmer Committee, subcommittees of the House Committee on Foreign Affairs, and the Herter Committee, and about the impact of economic assistance upon the American economy by the Krug, Nourse, and Harriman committees in the executive branch. Speeches by Acheson and Marshall focused attention upon the need for a coordinated program of European economic assistance and led to formation of the Committee on European Economic Cooperation by European governments. Probably congressional convictions were sharpened by the serious deterioration in the position of France and Italy in the summer of 1947 which made special interim aid necessary. Through the summer extensive consultation went on between State Department officials and the foreign relations committees of Senate and House. A great deal of work was required to draw together the several executive departments and a number of congressional committees which became involved in the drafting and discussion of bills first for the interim aid and then for the Economic Cooperation Act of 1948. The Appropriations Committee as well as the Senate Foreign Relations and House Foreign Affairs Committee were heavily involved. Lewis

64. For a full account see Cheever & Haviland, American policy and the Separation of Powers 97-142 (1952). On the U.N. Charter see Postwar Foreign Policy Preparation 1939–1945 (Dept of State Publication No. 3580, 1949).
Douglas discharged an important liaison function in State Department contacts with them. Congressional emphasis stressed not only the economic problems but also administrative organization to conduct the program, and the “watchdog” committee provided by the act showed the desire for continued legislative-executive collaboration. If the administration was successful in persuading the Congress to embark upon a novel and important venture in foreign policy it is also true that the Congress contributed significantly to the form of the program.

The North Atlantic Treaty was also developed through careful preliminary consultation. In fact it affords a rare modern example of senatorial advice prior to negotiation, for Secretary of State Marshall and Under Secretary Lovett accepted Vandenberg’s view that so sharp a departure from traditional policy as a defensive alliance with European states had better be initiated by the Senate. The Vandenberg Resolution was accordingly drafted, reported with unanimous approval by the Committee on Foreign Relations, and adopted by the Senate. Thus the President was “advised of the sense of the Senate” that the United States should, among other things, associate itself with regional security arrangements for effective self-help and mutual aid, and should make clear its determination to exercise the right of individual or collective self-defense under article 51 of the United Nations Charter. In the drafting of the treaty there was an important exchange of views between the Department of State and the Senate Committee on Foreign Relations which produced the phrase in article 5 committing each signatory in the event of armed attack upon another signatory only to “take such action as it deems necessary.” Thus was forestalled any Senate objection based on the constitutional right of Congress to declare war which might have defeated a commitment to go to war. As the treaty was not only a departure from established policy but posed serious problems of possible military involvement and of relationship to the United Nations security system it was thought necessary to invite full public debate. For that reason the Foreign Relations Committee held public hearings. It even allowed Senators Donnell and Watkins, opponents of the treaty, to attend and examine witnesses.

These examples of concerted executive-legislative action suggest that when the importance of the issue demands a full effort the executive branch is not without means to enlist the support

66. CHEEVER & HAVILAND, op. cit. supra note 64, at 128.
of the Senate or of the whole Congress. Perhaps difficulties in the
past have been due not so much to the want of consultative appa-
ratu,s as to failure to appreciate the need for full employment of it.
Although there have been suggestions from time to time that a
permanent executive-legislative council on foreign affairs would
contribute to a regular bridging of the separation of powers gap,
experience suggests that this gap can be closed by ad hoc liaison
devices when there is a will to do so. The situation is not so des-
perate as to require a complete shift from treaties to executive
agreements, and revision of treaty-making procedure is less a mat-
ter of absolute necessity than convenience.

The Department of State has made a useful contribution to exec-
utive-legislative relations in the revision of its directive to its own
staff with respect to procedures in making treaties and executive
agreements.67 Incorpo,rated into the circular are the following
remarks of Mr. Dulles to the Senate Committee on the Judiciary
April 6, 1953:

It has long been recognized that difficulties exist in the determina-
tion as to which international agreements should be submitted to the Senate
as treaties, which ones should be submitted to both Houses of the Con-
gress, and which ones do not require any Congressional approval....
The Congress is entitled to know the considerations that enter into the
determinations as to which procedures are sought to be followed. To
that end, when there is any serious question of this nature and the
circumstances permit, the Executive Branch will consult with appropriate
Congressional leaders and Committees in determining the most suitable
way of handling international agreements as they arise.68

In elaborating this intent the directive provides (paragraph 2):
"Treaties are not to be used as a device for the purpose of effecting
internal social changes or to try to circumvent the constitutional
procedures established in relation to what are essentially matters
of domestic concern." It further orders (paragraph 3) that the
use of executive agreements shall be confined to agreements made
pursuant to a treaty, statute, or constitutional power of the Presi-
dent, or subject to congressional approval or implementation.69
In the event of serious doubt whether treaty or executive agree-
ment is the appropriate form, or whether a presidential or a con-
gressional-executive agreement should be used, the question must
be brought to the Secretary's attention by a memorandum routed
through the legal adviser and the Assistant Secretary for Con-
gressional Relations for clearance and comment (paragraph 5.2):

67. See Dep't of State Circular No. 175, Dec. 13, 1955, reprinted in 50 Am. J.
Int'l L. 784 (1956).
68. 28 DEP'T STATE BULL. 591, at 594-95 (1953).
"Thereafter, whenever circumstances permit, consultation shall be had with appropriate Congressional leaders and committees in determining the most suitable way of handling such international agreements, such consultation to be had by the office responsible for the negotiations with the assistance of the Assistant Secretary for Congressional Relations." A circumspect adherence to such procedures ought to go far toward assuring adequate executive-congressional consultation.

B. Expanded Use of Executive Agreements

These reflections lead into a consideration of the position occupied by executive agreements in postwar practice. The statistics in the appendix to this Article show that in the twenty-year period ending with 1957 the United States concluded 2687 executive agreements, only 203 treaties—a proportion of over thirteen to one. Yet in the decade of the nineteen-thirties the proportion had been less than two to one. Plischke’s tabulation for the period 1789–1939 is as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>Executive Agreements</th>
<th>Treaties</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789–1839</td>
<td>27</td>
<td>60</td>
<td>87</td>
</tr>
<tr>
<td>1839–1889</td>
<td>238</td>
<td>215</td>
<td>453</td>
</tr>
<tr>
<td>1889–1939</td>
<td>917</td>
<td>524</td>
<td>1441</td>
</tr>
<tr>
<td>Total</td>
<td>1182</td>
<td>799</td>
<td>1981</td>
</tr>
</tbody>
</table>

Thus it appears that the use of both treaties and executive agreements has accelerated, but not at the same rate. In the first fifty-year period the number of executive agreements was insignificant, and less than half the number of the treaties. During the second fifty years executive agreements exceeded treaties slightly in number. In the third half-century they made a sharp relative gain, but still totaled less than twice the number of the treaties. In the fifty-year period 1889–1939, the rate of treaty making was 10.48 per year, in the twenty-year period of the appendix, 10.15 per year, a slight decrease although in the light of previous trends a substantial increase could have been expected. In the fifty-year period the executive agreement rate was 18.34 per year, in the twenty-year period 134.35 per year, an increase of more than seven to one. If one were to plot curves showing rate of accelera-

tion in making treaties and executive agreements the projection of
the curves would suggest that perhaps 700 treaties could have
been expected in the twenty-year period rather than 203, whereas
the 2687 executive agreements would appear not much above
proper expectations.

What is the explanation of the executive agreement explosion
when the rate of treaty making has actually declined? It might
be argued that the rate of treaty making reached that absolute
limit of senatorial capacity which is possible without institutional
changes and therefore has leveled off. This is hardly convincing
in view of the steady growth of legislative output and the sharp in-
crease in measures authorizing, approving, or implementing execu-
tive agreements. Relative to these activities treaty making should
have run much faster than it has in order even to stand still. A
more plausible view is that the executive branch chooses to by-
pass the difficulties and delays in obtaining Senate consent to rati-
fication except in situations in which the treaty form is required
by tradition or political expediency. That this is occasionally true
seems likely. That it is but a small part of the truth will quickly
appear to anyone who will scan the titles of the postwar executive
agreements. He will discover that most of them are at the inter-
national administrative rather than the international legislative
level. Just as government agencies produce voluminous administra-
tive regulations in giving effect to statutes, so international admin-
istrative agreements are required to give effect to foreign policy
embodied in treaties, resolutions, and statutes. And volume is com-
pounded by the fact that if the policy is to be put into effect in
our relations with twenty or thirty countries it will be necessary
to conclude twenty or thirty executive agreements even though
nearly identical language is employed. For certain foreign assistance
programs based upon annual appropriations by the Congress it
will also be necessary continuously to revise such agreements.

Such blocks of administrative agreements, in numbers ranging
from a few to several hundred each, can be found in the postwar
period for the following topics: postal conventions within the
framework of the Universal Postal Union; 71 mutual aid settle-
ments terminating wartime aid to allies; agreements for disposal of sur-
plus property left in allied countries by military forces; reciprocal
trade agreements under the Trade Agreements Act of 1934 and its
extensions, 72 followed by multilateral agreements under the Gen-

T.I.A.S. No. 2800; see also 17 Stat. 283, 304 (1872) which gives authority to the
Postmaster General to ratify conventions directly.

eral Agreement on Tariffs and Trade,\textsuperscript{73} which also started a train of agreements embodying minor modifications and applications and protocols of supplementary concessions; agreements concerning military cemeteries; conventions stemming from the International Civil Aviation Agreement of 1944\textsuperscript{74} to regulate air transport services, air service facilities, certificates of airworthiness for imported aircraft, and providing civil aviation missions; emergency foreign relief programs under congressional authority; transport arrangements and relief from customs for relief supplies and packages; assistance agreements under the Foreign Aid Act of 1947;\textsuperscript{76} European recovery agreements under the Economic Cooperation Act of 1948;\textsuperscript{76} Point Four technical cooperation agreements under the Act for International Development of 1950;\textsuperscript{77} cooperative health, sanitation, and educational programs under the Institute of Inter-American Affairs;\textsuperscript{78} inter-American highway construction;\textsuperscript{79} military assistance agreements under the Defense Act of 1941; mutual defense assistance under the Mutual Defense Assistance Act of 1949;\textsuperscript{80} mutual security assurances required to modify the economic cooperation and technical assistance programs after enactment of the Mutual Security Act of 1951,\textsuperscript{81} with its emphasis upon military assistance; exchanges of patent rights and technical information for defense;\textsuperscript{82} agreements for leased military bases, air service facilities, radar and weather stations, including jurisdictional and administrative regulations; arrangements for military assistance advisory groups and military advisory missions; off-shore procurement agreements, with exemption from export licensing; agreements under the Atomic Energy Act of 1954 for cooperation in developing civil uses of atomic energy;\textsuperscript{83} guaranties of private investment under the Mutual Security Act of 1954;\textsuperscript{84} cooperative agriculture programs; disposal of surplus crops;\textsuperscript{65} establishment of U.S. educational foundations in other countries; the

\textsuperscript{74} Dec. 7, 1944, 61 Stat. 1180 (1947), T.I.A.S. No. 1591.
\textsuperscript{82} See 22 U.S.C. § 412 (1952) (several statutes, 1941 to 1947).
informational media guaranty program under the U.S. Information Educational Exchange Act of 1948; radio broadcasting agreements under the International Telecommunication Convention; arrangements for stations under the International Agreement on North Atlantic Ocean Weather Stations of 1949; extensions of time for meeting requirements of United States copyright laws; exchange of official publications. None of these many hundreds of agreements presents any question of by-passing the Congress; they are simply the exercise of the regulatory function in carrying out the great post-war foreign policies of economic, military, and technical assistance, and policies with respect to communications, transport, and reciprocal tariff reduction established with congressional assent by basic statutes or treaties or both.

There have been other executive agreements concluded on an ad hoc basis, which are less easily catalogued. Many have been required in the course of terminating World War II, prosecuting war criminals, and dealing with problems of military occupation especially at the termination of the occupation. The postwar defensive alliance system has required many agreements with

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90. See, e.g., London Agreement Establishing International Military Tribunal for Prosecution of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1586, E.A.S. No. 472; Charter of the Military Tribunal for the Far East, Jan. 18, 1946, T.I.A.S. No. 1589. See also Trial of War Criminals (Dep't of State Publication No. 2420 1945); Trial of Japanese War Criminals (Dep't of State Publication No. 2316 1946).
respect to bases and experimental or training facilities,\textsuperscript{92} jurisdiction of offenses by military personnel stationed abroad,\textsuperscript{93} and claims for damages caused by them.\textsuperscript{94} Declarations and agreements

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concerning collective security have been made. Many international administrative agencies have been created by executive agreement, the constitutions of others have been amended, some


have issued regulations binding member states, and arrangements concerning their headquarters and the privileges and immunities of their staffs have been made. Navigational improvements, regulation of vessels, facilitation of trade, construction of roads, scientific research, sanitary problems, migratory work-


ers,\textsuperscript{106} public loans,\textsuperscript{107} were dealt with in others. Occasionally agreements were required merely to interpret previous agreements.\textsuperscript{108} Others modified or terminated existing agreements,\textsuperscript{109} including the long standing convention with respect to the Cape Spartel Lighthouse;\textsuperscript{110} the even older Rush-Bagot Agreement escaped, not wholly unscathed, because of its symbolic value in relations between the United States and Canada.\textsuperscript{111}

How far are these many agreements an exercise of exclusive executive prerogative? The statistical answer provided by the appendix is that in the period 1938–1957 there were 2687 executive agreements of all types, that of these 310 were pursuant to treaties previously approved by the Senate, 1947 were authorized by statutes enacted by both houses of the Congress, 270 obtained subsequent approval by the Congress, leaving only 160, or 5.9 per cent


110. Protocol of March 31, 1958, T.I.A.S. No. 4029, terminating the international regime created by the Convention of May 31, 1865, and relinquishing administration to Morocco. On the significance of the original convention in the history of international organization see Sayre, Experiments in International Administration 47 (1918).

which seem not to have been authorized by or referred to the Congress. It is possible that this last figure is a little high, for the absence of any cross reference system makes it difficult to identify with complete assurance all congressional actions with respect to executive agreements. On the other hand there were some additional instruments in the nature of executive agreements, particularly during the years of World War II, which were not listed in the Executive Agreement Series. These were generally conference communiqués or declarations, or purely military agreements. Even so the percentage does not suggest a strong tendency toward independent action by the President. It is necessary also to consider the subject matter of those executive agreements which seem not to have been authorized or approved by the Congress, and for this purpose a list is provided at the end of the appendix. Many of them are minor administrative matters within an established framework of policy. The types which require further comment are chiefly military agreements and agreements respecting international organization or regulatory regimes.

As Commander-in-Chief of the armed forces of the United States, the President, of course, finds it necessary to enter into agreements with respect to strategy, tactics, logistics, and status of forces, a need vastly increased during a major war in which the military efforts of allies must be coordinated. The power to enter into executive agreements is here reinforced by the power of military command. In a legal sense this probably adds nothing since both must be exercised in conformity with legal limitations and the President's obligation to preserve, protect, and defend the Constitution. With respect to policy and procedure it is important, for the military responsibility of the President will properly dictate secrecy with respect to many wartime agreements and with respect to such problems as weapons development and joint staff planning even in time of peace. Proposals which may be made for limiting the use of the executive agreement power must take this point into account.

112. In this group are the communiqué of the Casablanca Conference, Jan. 14–24, 1943; the Joint Statement by Prime Minister Churchill and President Roosevelt, Aug. 24, 1943 (Quebec Conference); the communiqué and the declarations of the Moscow Conference, Nov. 1, 1943; the Statement by President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill, Dec. 1, 1943 (Cairo Conference); the Declarations of the Three Powers, Dec. 1, 1943 (Tehran Conference); the Protocol of Proceedings, and Proclamation Defining Terms for Japanese Surrender of the Berlin (Potsdam) Conference, July 17-Aug. 2, 1945. These are conveniently collected in A Decade of American Foreign Policy, Basic Documents, 1941–1949, S. Doc. No. 123, 81st Cong., 1st Sess. pt. 1 (1950). Certain significant military or naval dispositions which evidently rested upon consultation by the President with other governments, e.g., the United States decision to convoy merchant vessels of belligerents although we were still formally neutral, may not have rested on written agreements.
It is true that the President's exercise of plenary power in military agreements is a potential source of political embarrassment, for commitments may be made without consulting the Congress which constrain future foreign policy. Wars, including cold wars, can hardly be waged without clear declarations of objectives and plans for post-war measures to secure them. President Wilson's Fourteen Points were a force in terminating World War I and could not be ignored in drafting the treaties of peace. During World War II Secretary Hull at the Moscow Conference in 1943 and President Roosevelt at Cairo, Tehran, Yalta, and Potsdam, entered into understandings and in some cases specific agreements with respect to many postwar dispositions, including territorial questions, denazification and democratization, trial of war criminals, and international organization. These had direct military value in their effect on public opinion and in some cases as bargains with allies. President Eisenhower's conclusion of an armistice in Korea, which raised no question of consultation since it had been a campaign question, directly affected the situation in Vietnam and thus posed new foreign policy issues; his alignment of the United States with the Baghdad Pact powers may have much more than military significance.

It should be kept in mind that the problem is not one which is confined to the executive agreement power or primarily connected with it. It inheres in the nature of the executive power and its separation from the legislative power in our constitutional system and involves many types of executive action. In a system like that of the British Government which involves Cabinet solidarity and responsibility to the Parliament there is built into the institutional apparatus some assurance that executive commitments will not be irresponsibly made even though consultation is wholly within the Cabinet. In our system the President must weigh the advantages and disadvantages of consulting congressional leaders informally, a step which inevitably opens a risk of premature public disclosure. Nor would any sort of rule requiring reference of executive agreements or of certain categories of executive agreements to the Congress altogether curtail this executive discretion. In the example last mentioned, if the executive agreement concerning the Baghdad Pact could not be concluded without reference to the Congress the President might choose instead to make a unilateral declaration of his intention to use, in certain circumstances, the military forces under his command. Nor is it easy to state categories to be reserved for congressional-presidential agreements without sacrificing the possibility of flexible response to emergency situations.

Agreements with respect to international organizations present
a different sort of problem. There would be few who would argue for unlimited commitments by the United States to international agencies without legislative consideration and approval, or for commitments, however made, which would permit such agencies to expand their jurisdictions or functions without renewed consideration and approval in the same manner by the member states. Has recent practice been inconsistent with this principle? The basic constitutional instruments of the United Nations, the International Court of Justice, the Universal Postal Union, the International Telecommunications Union, the International Civil Aviation Organization, the World Meteorological Organization, and the Intergovernmental Maritime Consultative Organization, were treaties which the Senate consented to ratify. The Constitution of the International Labor Organization was included in the Treaty of Versailles as part XIII, but after the rejection of the treaty by the Senate participation in the ILO was authorized by a joint resolution approved June 19, 1934. In the case of the Court there was the further question of acceptance of compulsory jurisdiction under article 36(2) of the statute; advice and consent to the deposit of such a declaration was given by the Senate. The pattern for constitutional instruments of other specialized agencies has been adoption by a conference, with approval by deposit of an instrument of acceptance in accordance with constitutional processes of the state concerned. The United States has assumed membership in the Food and Agriculture Organization, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations Educational, Scientific, and Cultural Organization, the World Health Organization, the International Refugee Organization, and the Caribbean Commission by deposit of such instruments of acceptance by the President, in each case after authorization by joint resolution of the Congress.

The Constitution of the Intergovernmental Committee on European Migration was not submitted to the Congress but was a development from a provisional committee set up in 1951 upon the initiative of the United States; this action was taken under section 16 of the Displaced Persons Act of 1948, as amended, and sub-

113. 48 Stat. 1182 (1934).
substantial expenditures had been authorized in the Mutual Security Act of 1951 to encourage emigration of surplus manpower to areas where it could be utilized.\textsuperscript{118}

The Act of Chapultepec, adopted by the Mexico City Conference on Problems of Peace and War, March 8, 1945, was not submitted to the Congress, presumably because it was an interim arrangement pending conclusion of a regional security treaty, and rested upon the war powers of the President. It provided for consultation with other signatories as to sanctions which might be employed against an aggressor in accordance with constitutional processes. It would appear that the President's powers would extend to such consultation so that a simple executive agreement was appropriate. In a memorandum of April 1, 1946 to other American republics the United States indicated that its military assistance commitments under the act would terminate with the expiration of the War Powers Act.\textsuperscript{117}

This leaves only the agreements establishing the International Military Tribunals of Nuremberg and Tokyo, an appropriate exercise of the President's war powers; the participation of the United States in the Central Commission of the Rhine at a time when it was a military occupant of part of Germany; and the agreement creating the European Coal Organization, a temporary emergency agency.

Amending procedures and regulatory functions of international organizations are defined in their constitutional instruments. Do they expose member states to a possible increase of the powers of such agencies or of obligations to them? Amendments to the Charter of the United Nations and the Statute of the International Court of Justice can enter into force only when they have been adopted by a vote of two-thirds of the Assembly and ratified in accordance with their constitutional requirements by two-thirds of the members including all the permanent members of the Security Council.\textsuperscript{118} Thus the United States could exercise an absolute veto upon amendment. Nor have the agencies of the United Nations been given any power to enact legislation or regulations binding member states; they can request information, conduct studies or investigations, discuss, and make recommendations. Implementation of their recommendations is dependent upon the member States. In theory the Security Council has action powers in deciding to employ sanctions, but lacking any forces of its own has been reduced in practice to recommending contributions by member

\textsuperscript{116} 65 Stat. 373 (1951); 64 Stat. 228 (1950), 64 Stat. 202 (1950); see Warren, Europe's Problem of Excess Population, 26 DEP'T STATE BUL. 169 (1952).
\textsuperscript{117} See 15 DEP'T STATE BUL. 667 (1946).
\textsuperscript{118} See U. N. CHARTER art. 108; STAT. INT'L CT. JUST. art. 69.
The amending procedures in the constitutions of specialized agencies vary somewhat, but seem fully to protect the position of member States. The Universal Postal Union requires accession to the basic convention; hence unless amendments (proposed by a two-thirds majority of the Congress) are accepted the member must resign. Acceptance of seven accessory agreements, with their regulations and protocols, or amendments thereto, is optional. The usual pattern of other agencies requires adoption by a two-thirds vote of the plenary assembly whenever new obligations of member States are prescribed, followed by ratification by at least two-thirds of the members; in some organizations this brings the amendment into force as to all, in others only as to the ratifying States. In United States practice the instances of amendment noted in the postwar years have been approved by the Senate or by joint resolution except in the case of Postal Union revisions, which were ratified by the Postmaster General and approved by the President under long-standing statutory authority. Sanitary regulations of the World Health Organization were approved directly by the President, presumably because they were of technical character and of interest primarily to the Public Health Service and other operating agencies. In authorizing accession to the World Health Organization the Congress specifically reserved the right of withdrawal, since this was not covered in its constitution, and specified that the United States undertook no commitment to enact legislation on matters within the scope of the organization. These provisions hardly suggest undue laxity in surrendering powers to international organizations.

If there is little evidence of executive desire to conclude international engagements without congressional approval in the postwar years the perennial issue remains: should this approval be in

119. Convention on Universal Postal Union arts. 4, 13, 15, 23 (1947 rev.).
120. So as to the International Bank for Reconstruction and Development, Arts. of Agreement art. 17 (1944), and International Monetary Fund, Arts. of Agreement art. 8 (1944), which stipulate consent of three-fourths members having four-fifths of the voting power, and unanimous consent as to several provisions; see F.A.O. Const. art. 44; I.C.A.O. Convention art. 94, which permits specification by the assembly of a larger percentage of ratification; see I.L.O. Const. art 36, which specifies the two-thirds ratifying must include five of the eight members of the Governing Body representing the chief industrial states; see I.M.C.O. Convention art. 52; UNESCO Const. art. 13; WHO Const. art. 60. See Jenks, Some Constitutional Problems of International Organizations, 22 B.U. Int’l L. 11, 65-68 (1945).
121. International Bank, International Fund, I.L.O., I.M.C.O. (except as to states filing a declaration of non-acceptance), UNESCO, WHO. However the right of dissatisfied members to withdraw would remain.
122. F.A.O., as to which the statute authorizing accession also made this stipulation, I.C.A.O., I.R.O., W.M.O.
the form of Senate consent to a treaty or of congressional approval by statute? To a very great extent the answer was given by the Congress itself in approving statutes which authorized and required a major series of executive agreements at the operating level. The first major break in this direction came with the decision to use an executive agreement in establishing the United Nations Relief and Rehabilitation Administration in 1943. This decision was reached in discussions between Department of State officials and the Senate Committee on Foreign Relations and House Committee on Foreign Affairs, and in a conference between the President and the majority and minority leaders of both houses. Nevertheless there was dissatisfaction in the Senate, which led Vandenberg to request an investigation by the Committee on Foreign Relations "to determine whether the draft agreement was of the nature of a treaty, and should be submitted to the Senate for ratification." 124

A subcommittee was appointed to which Hull, Acheson, and Sayre again explained the views of the Department. After a sharp conflict with defenders of senatorial prerogative, including Senator Connally, the issue was resolved by what has been called the Sayre-Green formula, 125 a compromise in which the draft of the UNRRA agreement was submitted to the Committee on Foreign Relations (which made some revisions accepted by the Department) in return for Senate assent to the executive agreement procedure. Vandenberg reported favorably to the Senate upon these decisions, describing the compromise as satisfying the interest of the House of Representatives in a program requiring continuing legislative support and finding a "common ground" of executive-legislative agreement. 126 The UNRRA agreement was actually incorporated into the joint resolution and thus specifically approved by both houses.

No doubt Secretary Hull was moved to rely upon the executive agreement primarily by a desire to avoid isolationist obstruction of a series of important agreements shaping post-war international organization. But the strength of his position in bargaining with the Senate was the genuine need to assurance support by the House of Representatives in implementing United States participation in such programs. A major request for appropriations was implicit in the UNRRA agreement. Probably it would be too much to say

124. S. Res. 170, 78th Cong., 2d Sess., 90 Cong. Rec. 1737–63 (1944). See also an exchange of letters between Senator Bilbo and Acting Secretary Grew on the failure to submit to the Senate international aviation conventions pursuant to the Chicago convention in 12 DEP'T STATE BULL. 1101–03 (1945).
125. See CHEEVER & HAVILAND, op. cit. supra note 64, at 97–100; COLEGroVE, AMERICAN SENATE AND WORLD PEACE 28–30 (1944).
that the amicable solution of the incident established any clear pattern for future cases, but it at least brought the Senate to a grudging admission that approval by joint resolution would be an appropriate alternative in some cases.

The Department of State has also shown its interest in seeking common ground in the circular of December 13, 1955, already mentioned. There it directed its officers to use the executive agreement form:

only for agreements which fall into one or more of the following categories:

- 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.

In fact the review of executive agreements already made suggests that throughout the post-war years, as well as since 1955, there have been few if any which have not fallen within these limits. It may be assumed that the Department does not mean to request congressional authorization or approval for agreements in category "c," but does propose to do so for those in "b." It also indicates (para. 5.2) that any doubts will be resolved by conversations not only within the Department but also with congressional leaders and committees. Adherence to this procedure cannot but improve relationships.

One recent proposal is worth noting. As a consequence of the Bricker amendment debate Senator Ferguson introduced (for himself and Senator Knowland) a resolution requiring the Secretary of State to transmit to the Senate within sixty days the text of any international agreement other than a treaty concluded by the United States, unless disclosure would be prejudicial to national security, in which case it should be transmitted to the Committee on Foreign Relations under an appropriate injunction of secrecy to be removed only upon due notice from the President. The resolution was reported favorably by the Committee on Foreign Relations on August 7, 1954, but no action was taken by the Senate. Of course examination by the Senate Committee after the agreement had come into force would not give it the favorable position it held under the Sayre-Green formula, but would at least enable it to express its views vigorously and promptly. Considering the

127. DEPT OF STATE CIRCULAR NO. 175, DEC. 13, 1955, REPRINTED IN 50 AM. J. INT'L L. 785 PAR. 3.
extraordinary capacity of the Senate to browbeat the executive branch when it is minded to do so, this might be enough to assure continuous solicitude for Senate opinion even during negotiations. Of course most executive agreements enter into force at signing or soon after, so that such a provision would add to the Committee’s knowledge only in exceptional cases.

On June 13, 1956 Senator Bricker introduced a resolution to amend the *Standing Rules of the Senate* so as to require that committee reports recommending consent to ratification should indicate to what extent the treaty would supersede or modify national statutes. Such information certainly is appropriate for the Senate’s consideration and ought to be collected by the Committee on Foreign Relations in the course of its study of the treaty.

C. TREATIES AND DOMESTIC JURISDICTION.

A related consideration is the extent to which international agreements have been made which invade the area of purely domestic questions or impair domestic jurisdiction. This has been a point especially stressed by advocates of constitutional limitation. Senator Bricker, in introducing his amendment proposal in the 84th Congress, remarked:

The threat of treaty law has not abated. The treatymaking ambitions of the United Nations and its agencies continue to reflect a zeal to regulate the political, economic, and social rights and duties of people everywhere. Those who seek to make the United States a mendicant province in some U.N.-operated world government are determined to destroy the concept of national sovereignty.

The Constitution of the United States and its Bill of Rights cannot survive the loss of national sovereignty. Most world government plans call for a universal bill of rights along the lines proposed in the U.N. human-rights covenants. These proposed covenants, if adopted by the United States, would repeal the heart of the Bill of Rights, including the great first amendment freedoms of speech, press, religion, and assembly.

In a formal sense it can be said that the Charter of the United Nations specifically forbids intervention by it into the domestic jurisdiction of states except in the application of sanctions. This limitation, which was a modification and expansion of one in the League of Nations Covenant applicable to the Council’s action in disputes, was devised to take account of the broadening of the

132. U.N. Charter art. 2, para. 7 provides: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”
133. League of Nations Covenant art. 15, para. 8 provides: “If a dispute between the parties is claimed by one of them, and is found by the Council, to arise out
functions of the General Assembly and the Economic and Social Council. Although the possibility of interventions by EcoSoc occasioned more concern at San Francisco, the development of the Assembly's functions, especially in the security field, has since increased apprehension with respect to it. Secretary of State Stettinius remarked that the limitation would control the power of the Assembly under article 10 to make recommendations to member states. The same could be said of the more specific types of recommendation authorized in articles 11, 13, and 14, but article 10 was probably singled out because it had been considered by many a vehicle for enlargement of the Assembly's role. Although the functions of the Assembly are confined to discussion, review, coordination, and recommendation its capacity for "intervention" into matters of domestic jurisdiction might, in the absence of specific limitations, be greater than this fact would suggest. It has been suggested that there may be circumstances in which recommendations under the articles mentioned would have binding effect upon members under the Charter or could be given binding effect by the Security Council, or become binding by reason of prior commitments of members to implement them.

The functions of the United Nations expressed in article 55, to promote, and of EcoSoc, expressed in article 62, to initiate studies and make recommendations with respect to economic, social, cultural, educational, health, and human rights questions, present a special problem because these objects can hardly be accomplished without some intervention (if that term be used in a popular sense) into matters of domestic jurisdiction. Yet it was clearly

of a matter which by international law is solely within the jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

134. REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 44 (Dep't of State Publication No. 2349, 1945).
135. See Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 Buff. L. Int'l. 1 (1948). The possibilities of the last technique are apparent in the Assembly's recommendations for the disposition of the former Italian colonies, which became effective upon the basis of a prior agreement by the parties to the Italian Peace Treaty, and in the Uniting for Peace Resolution of 1950, whereby the Assembly sought to develop on this basis an alternative collective security system. Subsidiary organs created under article 22, ostensibly because "necessary for the performance of its functions" have seemed even less constrained by article 2(7) than the Assembly itself. Investigatory border commissions, the commission to supervise Korean elections, the Peace Observation Commission, mediators in Palestine and India-Pakistan, conciliation and truce commissions, all intended to aid the Assembly in its functions of discussion and recommendation, press rather seriously upon domestic jurisdiction.
136. This presents a major difficulty of interpretation. In the sense of international law "intervention" is an interference of "an imperative form; it must either be forcible or backed by the threat of force." Buzan, *Law of Nations* 308 (5th ed. 1955). Lauterpacht has argued for construction in that sense as applied to human rights, so that only "peremptory, dictatorial, interference" by the United Nations
the intention at the San Francisco Conference that the competency of EcoSoc, and the Assembly to deal with these problems should be subject to the limitation of article 2(7), for Mr. Dulles on behalf of the sponsoring powers explained that the broadening of that limitation into a general principle was required because the scope of the United Nations had been expanded "to include functions which would enable the Organization to eradicate the underlying causes of war as well as to deal with crises leading to war. Under the Economic and Social Council the Organization would deal with economic and social problems"; in pursuing these it must be confined to dealing with governments and not permitted to "penetrate directly into the domestic life and social economy of the member states." Thus EcoSoc and its subordinate agencies were expected to rely upon the voluntary cooperation of member states in supplying or permitting collection of data concerning economic and social conditions, and in implementing recommendations for the correction of these conditions. Not unnaturally EcoSoc has pushed pretty hard at the boundaries of this restriction in its investigations of such conditions as forced labor and failure to repatriate prisoners of war.

These points are pertinent to the present discussion in several ways. It appears that article 2(7) is not in itself likely to produce a clear boundary between domestic and international questions; it does not define but assumes a boundary. In the absence of criteria or a requirement of reference to a tribunal which might evolve criteria, this leaves the determination to political judgment. A comfortable latitude of interpretation has in fact prevailed, and where political obstacles have not seemed formidable the commendable objectives of the United Nations have gained support for measures which may or may not have been interventions into

would be barred; studies, discussion, and recommendations would not since "none of them subjects to coercive action, or a threat thereof, the unwilling determination of a State. They mould its attitude, but this is a matter different from compulsion." Lauterpacht, International Law and Human Rights 169 (1950). If however, the Charter is to be construed in accordance with the intent of the signatories, it is pretty clear that the technical sense of "intervention" was not intended. In that sense article 2(7) would be a tautology in view of the prohibition of threat or use of force in article 2(4) and in general international law. Furthermore an amendment presented by Dr. Evatt had been accepted in order to apply the limitation to "recommendations," under article 39, as distinguished from enforcement measures. His memorandum used the phrase "to intervene in that matter [of domestic jurisdiction] by making recommendations to the state threatened or attacked." 6 U.N.C.I.O. at 437. Goodrich & Hambro, Charter of the United Nations, 120 (2d ed. 1949), suggest as a reasonable interpretation that "while discussion does not amount to intervention, the creation of a commission of inquiry, the making of a recommendation of a procedural or substantive nature, or the taking of a binding decision constitutes intervention under the terms of this paragraph."

domestic jurisdiction. The United Nations has been able to follow a characteristic tendency of governmental agencies in expanding its functions to the limits allowed by a very liberal construction of powers.

How should this situation affect attitudes toward treaties and conventions sponsored by the United Nations? Senator Bricker's answer is that they are Trojan horses designed to admit the invader into our domestic concerns; he would interpose added constitutional barriers against the responsiveness of unwary senators to such attractions. An alternative view would credit the senators with sufficient discernment to detect domestic legislation in the guise of a treaty and the courts with a firm disposition to reject it as unconstitutional. A third reaction might well be a doubt whether such a problem has actually been presented. If it be admitted that the United Nations has not found article 2(7) a serious obstacle in performing its functions it may feel little need to extract additional grants of power to deal with domestic affairs from its member states. On this assumption those who lie awake worrying about the United Nations might be better advised to consider strengthening article 2(7) rather than the Constitution of the United States.

That there has not in fact been any serious effort by the United Nations to draft treaties which, if ratified, would invade domestic jurisdiction can be demonstrated by examining the texts of those which have been viewed with most alarm. These seem to be the Convention for the Prevention and Punishment of the Crime of Genocide, the draft Covenants on Human Rights, the Convention on the Political Rights of Women, and the Draft Statute for an International Criminal Court.

The Genocide Convention was drafted in a form which may merit some criticism. Genocide is defined in part (article II) as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group .... " Conspiracy, direct and public incitement, or attempt to commit genocide, and complicity in genocide are also punishable (article II). Such acts would also constitute homicides, assaults and batteries, or other crimes in domestic criminal codes where premeditation with respect to the particular acts without regard to the special object of group extermination would suffice. Although this would present

138. These are not Senator Bricker's words; the metaphor was used by Tucker, LIMITATIONS ON THE TREATY MAKING POWER 339 (1915).
no conflict where one act constituted two different crimes in different jurisdictions, it may cause practical difficulties of choice where the same jurisdiction is to deal with each offense. The inclusion of national, ethnical, racial or religious groups, omitting political and economic groups, may also be thought a weakness. "Mental harm" needs some definition. So do "conspiracy" and "complicity." The scope of a provision in article IX for reference to the International Court of Justice of disputes between signatories "relating to the interpretation, application or fulfillment of the present Convention, including the responsibility of a State for genocide or any of the other acts enumerated in Article III," is not perfectly clear; presumably it was not intended as an alternative method of making a state answerable for genocide against its own nationals.140

But on the question of infringing domestic jurisdiction the draft-

140. A good statement of some of the defects appears in Carlstrom, Should the United States Ratify the Genocide Convention? A.B.A. SECTION ON INT'L & COMP. L. 35 (1949). But see Turlington, The Genocide Convention Should Be Ratified, id. at 26-34. Reports critical of the convention were made to the A.B.A. by its Special Committee on Peace and Law Through United Nations. See 74 A.B.A. REP. 326 (1949); 79 A.B.A. REP. 268 (1954). After submission to the Senate the convention was referred to the Committee on Foreign Relations and by it to a subcommittee, which on May 28, 1950 recommended consent to ratification subject to the following understandings and declaration, S. Doc. No. 247, 81st Cong., 2d Sess. 28 (1950):

(1) that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals.

(2) that the United States Government understands and construes the crime of genocide, which it undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention, with the intent to destroy an entire national, ethnical, racial, or religious group within the territory of the United States, in such manner as to affect a substantial portion of the group concerned;

(3) that the United States Government understands and construes the words "mental harm" appearing in article II of this convention to mean permanent physical injury to mental faculties.

(4) that the United States Government understands and construes the words "complicity in genocide" appearing in article II of this convention to mean participation before and after the fact of aiding and abetting in the commission of the crime of genocide.

DECLARATION

In giving its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10, of the United States Constitution, and, consequently, the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged.

The first understanding had been proposed by the Department of State. The main committee redrafted the understandings as reservations because "misgivings continued about certain aspects of the convention," but took no action, nor has it done so since.
ing seems impeccable, for the convention is clearly non-self-executing and leaves jurisdictional arrangements to domestic legislation:

Article V. The contracting parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI. Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to such contracting parties as shall have accepted the jurisdiction of such tribunal.

At present there is no international penal tribunal, and even if one were created there would be no obligation to accept its jurisdiction. The treaty commitment, therefore, is merely to assign jurisdiction of genocide to whatever domestic court the legislative body may designate and to stipulate penalties by statute. The only international element is the definition of the crime. Very possibly the convention will prove to be an ineffectual device for the control of genocide because the worst offenders are generally the bigots and fanatics who sometimes obtain control of governments and therefore of the courts to which enforcement is relegated. But this very weakness is the evidence that no breach has been made in domestic jurisdiction.

The two draft International Covenants on Human Rights, one on civil and political rights, the other on economic, social and cultural rights, have been in preparation for a decade. Preliminary drafts completed in 1954 by the Commission on Human Rights have been under discussion by the Third Committee of the General Assembly through four sessions, but revision is far from complete. Any comment upon tendencies in the covenants toward impairment of domestic jurisdiction must therefore be provisional. The substantive rights listed are in considerable part rights already protected in the United States by national and state constitutions or by statutes. This in itself does not imply infringement of domestic jurisdiction unless techniques of international enforcement are contemplated. In the Draft Covenant on Civil and

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141. The only effort in the convention to reach this is article VIII, under which signatories may call upon an organ of the United Nations to take appropriate action for the prevention or suppression of genocide. Unless the genocide also endangered international peace such action could not go beyond recommendation.


143. Thus the Universal Declaration of Human Rights (U.N. Pub. Sales No.
Political Rights the undertaking of the signatory state is found in article 2:

1. Each State Party hereto undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each state undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant.

3. Each State Party hereto undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To develop the possibilities of judicial remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent authorities, political, administrative or judicial;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

These undertakings are certainly significant ones, but they are undertakings to exercise domestic jurisdiction in enforcement of the rights specified. No international jurisdiction is opened to individuals who complain of infringement of rights. Therefore the only possibility of conflict with United States jurisdiction would be in the event of specification in the covenant of rights inconsistent with those specified in our domestic law. This does not seem to be the case. The rights stated in the covenant are more inclusive than those in the first eight, the thirteenth, and the fifteenth amendments of the Constitution, but when the statutory and judicial elaboration of the due process and equal protection of the laws clauses is also taken into account the standards correspond pretty closely. Without entering into a detailed analysis, which would in itself require a long article, it can be stated with some confidence that the rights enumerated in the Covenant on Civil and Political Rights are not inconsistent with those protected in the United States, with the possible exception of a proposed "right of self-determination." This is difficult to define, and as a collective right seems hardly appropriate to an instrument concerned with the protection of individual rights. Its inclusion is being vigorously contested, and decision has been postponed.

58.1.4) adopted by the General Assembly on Dec. 10, 1948, presents no problem of domestic jurisdiction because proclaimed only "as a common standard of achievement" to the end that educational efforts may be directed toward securing universal and effective recognition and observance of the rights defined; no legal obligations are undertaken by the states or rights of intervention claimed by the U.N.
Actually, the national position seems to be fully protected by the words of article 5, identical in both covenants:

1. Nothing in this Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in this Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any Contracting State pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

This last paragraph seems also an effective answer to the assertion that the Covenant on Economic, Social, and Cultural Rights ought to be rejected because it does not recognize a right to acquire property. Of course such a right cannot be asserted if it is desired to have communist states ratify; i.e., the right is one outside the area of general consensus for which the covenants must have regard. But this omission in no way detracts from the freedom of laissez faire states to protect property rights under their domestic law.

One point which has been much discussed is the commitment to be undertaken by federal states in which civil liberties are partially a subject of state or provincial regulation and enforcement. A draft article which was considered but omitted would have provided that as to rights appropriate for federal regulation the obligations of federal states would be like those of unitary states, but that with respect to rights assigned or reserved by federal constitutions to state, provincial, or cantonal governments the federal governments undertook only to bring these to the attention of the local governments with a recommendation that they be implemented by local law or enforcement. This led

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144. This draft article can be found, with a critique, in a report of the A.B.A. Special Committee on Peace and Law Through United Nations, 74 A.B.A. Rev. 322 (1949).
145. See Phelan's account in 1 SHOTWELL, THE ORIGINS OF THE INTERNATIONAL
to the compromise provisions in articles 18 and 19, but was in fact a misrepresentation. The obstacles are not legal but political. The national government, acting for the United States as a state, can undertake an obligation which can be discharged only by state governments because of the constitutional division of legislative powers. Such an obligation would be binding in international law and would be constitutional unless the subject matter was not merely within the reserved powers but also purely domestic.

However, the assumption of an absolute obligation in such a case might be impolitic because the United States might be forced to default upon its international obligation if the states failed to give effect to it. This may be the situation with respect to the Covenants on Human Rights, for no self-executing principle which might make the covenants directly binding as law of the land upon state and local governments is stated; the obligation of the United States is only to “take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary.” It would seem to be necessary to do this at both levels of government unless sufficient machinery already exists, but the federal government has no way of compelling the state governments to act. If this is a serious policy objection, however, it is not because domestic jurisdiction has been invaded but precisely because it has not been—we are left with the usual difficulties inherent in the division of powers in the civil rights field.

LABOR ORGANIZATION ch. 5 (1934). Mr. Robinson, after consulting constitutional lawyers (he mentioned James Brown Scott) made these points, 2 id. at 210-11:

(1) The Senate has the constitutional power and duty to advise and consent to treaties. To allow a foreign body to make a treaty to bind the United States would be, in effect, a delegation of the treaty-making power to the extent of the provisions of the treaty.

(2) The Congress of the United States is the Legislative Body of the United States in such matters as have been delegated to it by the States of the Union. And it is generally understood that the Police Power, as such, is not among the powers granted to the Union, but among those reserved to the States. Legislation required to give effect to a treaty would need to be passed by the Congress as a whole, and it is for the Congress to determine, notwithstanding the terms of the treaty, whether it will or will not pass such legislation. Furthermore, the Congress of the United States cannot be bound in advance to pass such legislation, either affirmatively or negatively.

(3) In regard to the reserved powers, including therein the so-called Police Powers, the States retain the right of legislating for their citizens. Neither the executive nor the legislative branch of the Federal Government can give any assurance that any legislative action will be taken in any of the States.

(4) In ultimate resort the constitutionality of a treaty or of an act of Congress may be tested in the Supreme Court of the United States. The legislation passed by a State Legislature may be tested in the State Courts and in the Supreme Court of the United States. The legislation of Congress may be declared unconstitutional by the federal judiciary, and that of the States by the State judiciary or the federal judiciary.
The rights specified in the Covenant on Economic, Social and Cultural Rights certainly go much beyond those presently protected in the United States or anywhere else. Such goals as the right to work (article 6), to social security (article 9), to adequate food, clothing and housing (article 11), to an adequate standard of living conditions (article 12), to the highest attainable standard of health (article 13), to education (primary for all, secondary for most, higher on a basis of merit) (article 14), to take part in cultural life and enjoy the benefits of scientific progress and its applications (article 16), are not presently within the economic capacity of many states. But the justification of so bold an advance is that the only legal commitment of a signatory of this covenant will be to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant . . .” (article 2).

In neither covenant is international enforcement contemplated. For civil and political rights an international human rights committee would be created (articles 27–39), which could receive complaints by States of failure of other states to comply with the covenant (article 40). But the committee would be confined to fact-finding and tender of good offices in finding a solution (article 41–45, 48). In the event of failure resort might be had to the International Court of Justice (articles 46 and 47). For economic, social and cultural rights the only procedure would be periodic reporting upon progress made by signatories to EcoSoc with the possibility that the reports might lead to suggestions (part IV). These devices are not a very impressive invasion of domestic jurisdiction. States might well feel a little ashamed to fly from such a mouse.

The draft statute for an International Criminal Court,146 prepared by the United Nations Committee on International Criminal Jurisdiction in 1951, is still under discussion. However, the draft in present form pretty clearly does not infringe domestic jurisdiction. The purpose of the Court (article 1) would be to try persons accused of international crimes, but many governments feel that further elaboration of a body of international crimes ought to precede creation of such a court. There is probably little need for it at present.147 According to the Draft Statute, jurisdiction could be conferred upon the Court by States parties to the statute either

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147. J. L. Brierly, representing the United Kingdom, and Manley O. Hudson, representing the United States, both distinguished international lawyers, voted against the draft statute in the U.N. International Committee primarily on this ground. See debate on the merits of ratification between Parker and Finch, 39 A.B.A.J. 641 (1952).
by convention or by special agreements as to particular cases (article 26). No person could be tried by it unless jurisdiction had been conferred by the State or States of which he was a national and by the State or States in which the crime was alleged to have been committed (article 27). What is contemplated, therefore, is a wholly voluntary delegation of State jurisdiction to the International Criminal Court. As no compulsory jurisdiction is proposed the Court could hardly interfere with domestic jurisdiction, however open to objection such a plan may be upon other grounds.

The Convention on the Political Rights of Women148 adopted by the General Assembly and opened for ratification December 20, 1952, is an example of a lawmaking treaty, i.e., the signatories declare as a rule of law that women shall be entitled to vote, to be eligible for election to all publicly elected bodies, and to hold office and exercise public functions, on equal terms with men, without discrimination. No enforcement technique was stated, but questions of interpretation and application may be referred to the International Court of Justice. In no substantive sense could the rules stated interfere with our domestic law, since we already have the same rules in national law. Nor would it seem reasonable to object to law-making treaties as such if we wish to see the development of conventional international law. But it can certainly be argued that the area of regulation selected here is a domestic one for which an international agreement is inappropriate and (in the case of the United States) perhaps unconstitutional.149 However laudable the objective, this does seem to be one United Nations treaty which attempts to occupy a domestic field. The only ground perceived upon which it might be contended that political rights of women with respect to suffrage, candidacy, and office holding are an international issue would be a contention that their resentment of unequal status in many countries has produced a situation endangering international peace or stability. As far as the writer can discover there is no evidence to support such a conclusion. It seems doubtful that the purpose of the United Nations Charter to encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion," can in itself make a formerly domestic matter an international one, for the clauses of the Charter expressing this principle state goals toward which activity is to be directed; they are not a self-executing legal rule for states.150 Of course there

150. Id. at 749–51.
may be other areas of human rights which so immediately affect international relations as to justify treaties. Control of the slave trade, the white slave traffic, the rights of minorities and refugees, statelessness and multiple nationality, freedom of movement across state lines, tax discrimination against aliens, are examples.

The treaties drafted by the United Nations as a whole exhibit concern to avoid intrusions into domestic jurisdiction. That efforts of this sort to raise the standards of backward countries should be looked upon by advanced countries as dangerous to them is a curious phenomenon. No state has more to gain from such an improvement of social conditions throughout the world as would increase stability than has the United States. If these treaties are likely to prove ineffectual instruments they are at least not alarming, and this country is surely able to select the good and reject the questionable by use of existing constitutional processes.

IV. PROPOSALS FOR CONSTITUTIONAL AMENDMENT

From the preceding survey of United States treaties and executive agreements there emerge some conclusions which are relevant in considering whether there is need for amendment of the treaty clauses of the Constitution. (1) Although the Supreme Court has at times seemed to prefer the rule of judicial paucity\(^\text{151}\) to making any contribution to understanding of the treaty and executive agreement powers, it has, in the important case of \textit{Reid v. Covert},\(^\text{152}\) strengthened earlier declarations that both are subject to constitutional limitations; these seem to include express and implied prohibitions, and a requirement that they deal with international rather than purely domestic subjects. (2) The position in domestic law of executive agreements has not been fully defined by the courts, but the tendency has been to subordinate them to the elements of the supreme law of the land specified in the Constitution. (3) There is little evidence from recent practice of a desire to employ executive agreements simply to avoid the difficulty of obtaining Senate consent to treaties; however, there has been greatly increased use of executive agreements (a) to con-

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151. Note especially the failure of the Supreme Court to take advantage of its opportunities in \textit{Rice v. Sioux City Memorial Cemetery}, 348 U.S. 880 (1954), \textit{per curiam decision vacated, certiorari dismissed, 349 U.S. 70} (1955); see comment, McLaughlin, supra note 149, at 750–51, and in \textit{United States v. Guy W. Capps, Inc.}, 204 F.2d 655 (4th Cir. 1953), \textit{aff'd on other grounds, 348 U.S. 296} (1955). With due respect to Mr. Justice Frankfurter's judgment, it seemed formalistic in the \textit{Rice} case to dismiss the certiorari to review the restrictive covenant as having been improvidently granted merely because an Iowa statute had made future covenants of this sort illegal; the question was still of general interest for many other states and the Court does not sit for the sole benefit of the citizens of Iowa other than Mrs. Rice. See \textit{The Supreme Court, 1954 Term}, \textit{69 Harv. L. Rev.} 119, 124–26 (1955).

152. 354 U.S. 1 (1957).
clude administrative arrangements needed to give effect to major foreign affairs programs authorized by statute or treaty, (b) in pursuance of the military powers of the President in mutual defense programs, and (c) subject to approval by both houses by joint resolution when it seems desirable to have assurance of broad congressional support. (4) Although no exact definition of subject matter appropriate to treaties and executive agreements has been attempted, the Department of State has concluded that unless made pursuant to constitutional powers of the President executive agreements should be for implementation of treaties or statutes; i.e., treaties should define policy, executive agreements should develop administration to give effect to it. (5) The Department of State and the Congress have both shown willingness to consult as to the propriety of employing the treaty or executive agreement form, and such consultation is now standard operating procedure for the department in cases of doubt; however, no significant progress toward a regular institutional bridging of the separation of powers gap, by foreign affairs council or otherwise, has occurred. (6) The Senate has not been unduly dilatory, obstructive, or cautious in handling recent treaties; no really significant treaty has been defeated and all reservations have proved to be acceptable. (7) There is little evidence of a disposition upon the part of the United Nations or other international organizations to use treaties to impair domestic jurisdiction, although some confusion can be expected from the lack of clear definition of domestic jurisdiction.

Some comment will now be attempted upon recent proposals\(^\text{153}\) for amendment of the treaty power, not with the object of supplying a full critique of the details, but to consider how far they have been responsive to the problems, interpretations, and adjustments already discussed.

### A. Constitutionality of Treaties

There has been no disagreement whatever upon the principle that treaties should be subject to constitutional limitations. As already noted, even Mr. Justice Sutherland's theory of the inher-

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153. A digest of these proposals for the 69th through 79th Congresses can be found in Loewy, Proposed Amendments to the Constitution of the United States Introduced in Congress From the 69th Congress 2d Session, Through the 79th Congress, Dec. 6, 1926 to Jan. 3, 1947 (Senate Lib. 1947); for the 80th, 81st, and 82d Congresses see Brown, Proposed Amendments to the Constitution of the United States Introduced in Congress From the 80th Congress, Jan. 3, 1947, Through the 82d Congress to Jan. 3, 1953 (1953). See the comment of Borchard on an interesting House debate in May, 1945 on a resolution reported by the Judiciary Committee that "hereafter treaties shall be made by the President by and with the advice and consent of both Houses of Congress." 39 Am. J. Intern. L. 537 (1945). A substitute motion was adopted requiring a majority of the membership of both houses.
ent character of the treaty power was not advanced as exempting it from specific prohibitions of the Constitution or procedural limitations. The heated controversy in recent years over the "gap in the Constitution" arose from the opinion that the supremacy clause in qualifying treaties made "under the authority of the United States" as the law of the land imposed only a procedural and not a substantive requirement of constitutionality. This view was fortified by a misreading, or incomplete reading, of Mr. Justice Holmes's opinion in *Missouri v. Holland.* He did indeed say, "it is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." But to quote these words without quoting those immediately following—"We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way . . ."—is inexcusable. Mr. Justice Holmes's words, and the whole tenor of the opinion, come to this, that the supremacy clause may not state substantive constitutional limitations upon the treaty power, but these can be found elsewhere in the Constitution.

Those who agree with the conclusion developed earlier in this Article that treaties are subject to express and implied prohibitions of the Constitution and can be employed only for genuinely international as opposed to domestic questions, find it hard to suppress the suspicion that Senator Bricker's vigorous charge through the "gap in the Constitution" was intended to divert attention from other less attractive features of his proposed amendment. The principal difference of opinion on the constitutional point was whether the limitations on the treaty power were already so firmly established that an amendment restating them explicitly might be open to misconstruction. No doubt this difficulty could have been overcome. Had the Bricker group been willing to accept

154. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936): "[T]he Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise." Id. at 320: "[T]he 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 Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." See McLaughlin, *supra* note 149, at 753.


156. See McLaughlin, *supra* note 149, at 753–64.

157. The writer ventured to suggest the following form of amendment of the supremacy clause to the Judiciary Committee: "Nothing in Article VI, Section 2, of this Constitution shall be construed to give legal force or effect to treaties or other international instruments which are inconsistent with this Constitution." *Hearings on S. Res. 1 Before a Subcommittee of the Senate Committee on the Judi-
a simple provision that treaties which conflict with the Constitution are invalid, there is no doubt they could have had it. Instead, they chose to couple with this a change in the distribution of powers between national and state governments by making the exercise of the treaty power in all matters affecting the reserved powers of the states subject to implementing state legislation. This unworkable and reactionary proposal carried the inoffensive clause on constitutionality down with it.

The first form of amendment proposed by Senator Bricker contained three sections bearing upon constitutionality:

Section 1. No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof.

Section 2. No treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution in the Congress, the President, and in the Courts of the United States, respectively.

Section 3. No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by Act or joint resolution.

These provisions were open to the objection that enumeration of constitutional rights which could not be impaired by treaty might convey an implication that other clauses of the Constitution could be. In 1953 Senator Bricker wisely abandoned this form in favor of the simple, inclusive prohibition recommended to the Senate by

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158. In a statement of July 22, 1953 supporting the Knowland resolution, which had been offered as a substitute for the Bricker amendment, President Eisenhower said, in part:

"Its purpose is to assure that treaties entered into by the President and consented to by at least two-thirds of the Senate in behalf of the United States shall not override the Constitution. It provides that treaties and executive agreements shall not violate the Constitution, and that the courts may so declare; ... This resolution has my unqualified support. ... While I have opposed other amendments which would have had the effect of depriving the President of the capacity necessary to carry on negotiations with foreign governments, I am glad to support the Knowland amendment, for it confirms that this Presidential power cannot be used contrary to the Constitution."

29 DEP'T STATE BULL. 195 (1954). On Jan. 25, 1954 President Eisenhower wrote to Senate Majority Leader Knowland, opposing the Bricker Amendment as reported by the Judiciary Committee, but concluded: "I fully subscribe to the proposition that no treaty or international agreement can contravene the Constitution. I am aware of the feeling of many of our citizens that a treaty may override the Constitution. So that there can be no question on this point, I will gladly support an appropriate amendment that will make this clear for all time." 30 DEP'T STATE BULL. 195 (1954). These tenders were not acceptable to Senator Bricker.

the American Bar Association on February 26, 1952: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect..." It has been modified in subsequent proposals to include executive agreements as well as treaties and elaborated thus: "which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or effect." In reporting a part of the proposal favorably on March 27, 1956 the Judiciary Committee went back to substantially the form proposed by the American Bar Association. Nevertheless Senator Bricker contrived still another form in 1957:

Section 1. A provision of a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect. This section shall not apply to treaties made prior to the effective date of this Constitution.

The point had been made, in arguing against the assumption of a gap in the Constitution, that the reason for the words "under the authority of the United States" instead of "pursuant to this Constitution" was to maintain the position as law of the land of treaties concluded under the Articles of Confederation. Nevertheless, it hardly seems necessary at this late date to protect the position of the treaty of peace recognizing our independence by words such as those of the final sentence. Other variations are not especially significant. They were defeated although never seriously opposed because they were tied to other unacceptable proposals.

163. See McLaughlin, supra note 149, at 729–30.
164. Secretary Dulles did make the following argument in his statement to the Judiciary Committee on April 6, 1953:

"Section 1 of S.J. Res. 1 provides that no treaty shall abridge any right enumerated in the Constitution. The Constitution specifies the power of Congress to declare war. Does Section 1 of the proposed Constitutional amendment mean that the United States can never make a treaty which would outlaw war? Can we never agree, with other nations, to abridge the present unqualified right of Congress in relation to war? Surely this is no time for the United States to make itself unable to enter into treaties which would effectively ban the terrible spectre of war."

28 DEP'T STATE BULL. 593 (1953). Surely this is a singular construction of the right to declare war. Does Mr. Dulles suppose the Constitution means that Congress is entitled to the perpetual preservation of the institution of war in order that it may from time to time enjoy its right to declare one? A more conventional view of the power is that it means no more than that if war be declared, it must be done by the Congress. Mr. Dulles' argument also implies that it may be possible now to make treaties which are inconsistent with the Constitution. He took this posi-
B. ADVICE AND CONSENT

Hardly a session of the Congress has passed without the introduction in the House of Representatives of proposals to amend the Constitution by requiring participation of the House in consent to ratification. Some proposals are simply for approval by a majority in both houses, others stipulate a majority of the membership rather than of those present. The proposals are not regarded as a serious exercise, for it is well understood that a joint resolution, if passed by the House, would fail of a two-thirds majority in the Senate. Even less likely to succeed would be a change to approval of treaties by the House alone, although the suggestion has been made.

There has been no pressure in postwar years for a break in the Senate monopoly of treaties primarily because the alternative of an executive agreement approved by joint resolution has been acceptable to the Senate for adherence to international organizations, while much of our foreign affairs program of economic, military, and technical assistance, and of joint defense arrangements, has been carried out by executive agreements pursuant to statutes and treaties. Yet there are significant subjects for which the treaty is still considered the appropriate vehicle, notably conclusion of peace, defensive alliances, double taxation, consular rights, international control of commodities, fisheries, international claims, extradition, general lawmaking conventions, and friendship, commerce and navigation. Perhaps we cannot be certain that a president, if confronted with stubborn minority obstruction, would not attempt an alternative method even in these fields, but to date the traditional procedure has remained intact. The unrepresentative character of the Senate, with its heavy majority from the more thinly populated, agricultural states, has also remained intact. Consequently there is still the possibility of a recurrence of open conflict between the Senate and the President over consent to ratification. The major conflicts of the past were, after all, usually over subjects for which the treaty method is still being employed regularly. Therefore there is still reason to conclude that it would be preferable to move to the more representative method of approval by the whole Congress. If it must be conceded that there would

165. See H.J. Res. 8 (Gossett), 26 (Morrow), 44 (Kefauver), 50 (Mills), 80th Cong. 1st Sess. (1947); H.J. Res. 36 (Merrill), 141 (Mills), 81st Cong. 1st Sess. (1950); H.J. Res. 77 (Mills), 193 (Gossett), 282 (Burick), 236 (Stockman), 82d Cong. 2d Sess. (1952).

166. See McCall, Again the Senate, 126 ATLANTIC MONTHLY 395 (1920).
still be serious deficiencies from the standpoint of representation, at least there would be less opportunity for minority obstruction. The argument that a two-thirds vote in the Senate inspires confidence that the treaty is widely supported might be cogent as against a change to consent by a majority in the Senate alone. But a majority of both houses, especially of the membership of both houses, ought sufficiently to assure support. When legislative implementation and appropriations will be needed the participation of the House should bring much greater confidence. For what it is worth the experience of other states also strongly favors approval by the whole legislative body.167

C. Relationship to Domestic Law

Legislative approval is also related to the question of the circumstances in which treaties should become a part of the domestic law. Given the basic rule of the supremacy clause, there has been a practical reason for the distinction taken in this country between self-executing and non-self-executing treaties simply because treaties are not in the first instance approved by the whole Congress. The difficulty of predicting whether congressional implementation of the treaty by legislation and appropriations can be secured will lead a cautious president or secretary of state to prefer the non-self-executing form for agreements which require such implementation. This solves no problem of international obligation but does show executive deference for the legislative prerogatives of the House of Representatives.

This practical difficulty has often been avoided by the use of the executive agreement approved by joint resolution or made pursuant to statute. In other countries the problem hardly arises in this form because their rule does not permit treaties to become the law of the land without parliamentary approval; hence it is common practice either to require such approval as a condition of ratification or in the absence of such a requirement nevertheless to refer to the parliament all treaties which will involve any modification of domestic law.168

167. See Report of the Special Committee on Peace and Law through United Nations. 75 A.B.A. Rep. 283, 291 (1950), where it is stated that only Mexico, Liberia, Cuba, and the Philippines follow the United States practice of ratification with the advice and consent of the Senate only, whereas 24 states require that all treaties be approved by the whole parliamentary body and 28 require this when the treaties affect internal law or the rights of citizens, or require legislative implementation. 168. "The United States appears to be the only government in the world today where treaties become a part of the law of the land on concurrence of two thirds of the Senators present, without the approval of the whole national legislative body. It is true that in Mexico the Senate may, by a majority vote, approve a treaty, which then becomes the supreme law of the land, but the
Proposals for amendment have not faced this problem squarely. In 1951 the American Bar Association's Standing Committee on Peace and Law through United Nations reported for consideration and study an addition to the supremacy clause in part as follows:

and provided further that no treaty, although it deals with a proper subject of negotiation between the United States and another Nation or Nations, which abridges the rights and powers of the states or which treaty must, in the first instance, be submitted to Congress. In Argentina treaties are the supreme law of the nation, but they must be approved by the Congress. Moreover, these three are the only federal governments in which treaty law overrides internal state laws and constitutions in conflict therewith. In this respect these three governments are not in positions of mutuality with other contracting parties when questions of actual performance of treaty obligations arise."

Reports, supra note 167, at 290. This statement must be taken with some reserve as it applies to the Soviet Union or other communist states because it expresses the form rather than the substance. Under the Soviet Constitution of 1936 the Presidium of the Supreme Soviet ratifies and denounces treaties. Technically the Presidium is an agency of the Supreme Soviet and a law enacted by the latter on Aug. 19, 1938 "on the Procedure for Ratification and Denunciation of International Treaties" requires ratification by the Supreme Soviet of treaties of peace, mutual defense treaties, treaties of nonaggression, treaties requiring mutual ratification for their implementation. See 2d Sess. of the Sup. Soviet of the U.S.S.R., Verbatim Rep. 678 (1938). Actually, the relationship of the two organs is quite different. Aspaturian, Soviet Foreign Policy in MacRae, 5 in Foreign Policy in World Politics 177-78 (1958) puts it well:

"Juridically a creature of the Supreme Soviet, for which it [the Presidium] acts as legal agent, it is, in fact, its institutional superior and surrogate, since it is empowered with virtually the entire spectrum of authority granted to the Supreme Soviet during the long and frequent intervals between sessions of the Soviet legislature. Technically, all of its actions are subject to later confirmation by the Supreme Soviet, but, in practice, this is an empty ritual."

The system of party control and direction which pervades all government organs assures that a treaty ratified by the Presidium will in fact be the law of the land to the extent desired. In the case of the United Kingdom ratification is in a formal legal sense a purely executive act, but any modification of domestic law requires parliamentary action; hence the government must consider the questions whether the provisions of the treaty accord with the existing law of the land and whether any action proposed to be taken by the Crown to execute the treaty is authorized by the existing law of the land. If the answer to either of these questions is in the negative, the Crown must induce Parliament to legislate so as to make the necessary change in the law or to equip the Crown with the necessary power to execute the treaty. If Parliament declines to do so, the Crown will not ratify the treaty; if by imprudence the Crown has already ratified the treaty, the United Kingdom is bound by it (for the Crown is internationally omnicompetent in the matter of treaties) and the Crown must do its best to extricate the country from an embarrassing situation. Even the fact that the treaty has been ratified and is internationally binding upon the United Kingdom, does not enable a British court to give effect to it municipally if it should conflict with the law of the land. Nevertheless, a duty to make reparation for any resulting breach of an international obligation would arise."

undertakes to impose civil or criminal liability for acts of a citizen of
the United States or provides that legislation shall be enacted imposing
such a civil or criminal liability, or which affects rights of, or imposes
duties on, citizens of the United States or provides that legislation shall
be enacted affecting such a right or imposing such a duty, shall become
law in the United States unless, and then only to the extent that, Con-
gress shall implement it by legislation which it could have enacted un-
der its constitutional grant of legislative powers in the absence of such
treaty.  

There was here a confusion of two distinct ideas, one that
treaties affecting existing rights of states and citizens ought not
to become domestic law except by statute, the other that treaties
should not be put into effect at all if they affected subjects within
the reserved powers of the states. The second point was in no way
responsive to the legitimate problem of obtaining legislative ap-
proval for incorporation of treaties into domestic law. It was sim-
ply a conservative states-rights view that the scope of the treaty
power should be reduced to subjects upon which federal statutes
could be enacted under the delegated powers. Yet it was this
clause which was included in the form of constitutional amend-
ment recommended by the American Bar Association on February
26, 1952 to the Congress:  

“A treaty shall become effective as internal law in the United States only through legislation by Con-
gress which it could enact under its delegated powers in the
absence of such treaty.”

Before this recommendation Senator Bricker and others had in-
troduced Senate Joint Resolution 130,  

which was some re-

section 3 read: “No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by Act or joint resolution.” This
appeared also in a number of proposals for amendment presented
in the House of Representatives, although the form recommended
by the American Bar Association was adopted in others.  

By 1953 Senator Bricker had revised his proposal in conformity with the American Bar Association’s; as favorably reported by the Judiciary
Committee after hearings held February 18–April 11, 1953 it con-
tained the well-known “which clause”:  

“A treaty shall become

172. S.J. Res. 376 (Smith), 379 (Hebert), 390 (Auchincloss), 415 (Rankin), 444
    (Dolliver), 462 (Rankin), 82d Cong., 2d Sess. (1952).
174. S.J. Res. 1, 83d Cong., 1st Sess. (1953); Senate Judiciary Committee Report
effective as internal law in the United States only through legis-
lation which would be valid in the absence of treaty.” The same
limitation was applied in section 3 to executive agreements. Sub-
stantially the same form, although without the “which” and with
treaties and executive agreements covered in the same section, was
included in the revised proposal presented to the 83d and 84th
Congressess.\textsuperscript{175}

This unfortunate insistence upon confusing the problem of giv-
ing effect to treaties in domestic law with a chauvinistic view of the
scope of the treaty power has only served to postpone any rational
consideration of the main point. It was the deserved opposition to
the “which clause” which defeated the amendment proposal as a
whole. In the final revision of his proposal for the 85th Congress
Senator Bricker abandoned his insistence upon this clause as to
treaties, although retaining it as to executive agreements.\textsuperscript{176} With
respect to treaties he finally went back to an approach confined
to the question of how to give effect to treaties as domestic law:

A treaty or other international agreement shall have legislative effect
within the United States as a law thereof only through legislation, except
to the extent that the Senate shall provide affirmatively, in its resolution
advising and consenting to a treaty, that the treaty shall have legislative
effect.

No action was taken on this. The words “legislative effect” are
not felicitous in this context, but it must be conceded that if we
begin with the system of Senate consent to ratification we can
hardly avoid these alternatives: either (1) we allow the President
to decide, perhaps on insistence by the Senate, when to negotiate
a treaty in non-self-executing form, thus referring to the Congress
the question whether it shall be given effect as domestic law by
statute; or (2) we regard treaties as basically non-self-executing
except as we may permit some qualification of the rule, whether by
an exercise of Senate discretion or otherwise. But as long as the
Senate must consent to ratification it really has the power, as a con-
dition of assent, to determine whether the treaty shall be self-execut-
ing or not. The qualification in the proposal still leaves it with this
power.

A more constructive approach would be the participation of the
House in consent to ratification. If that were done the whole prob-
lem of self-executing and non-self-executing treaties would evap-
orate, for a legislative approval would have been obtained before
ratification.

\textsuperscript{175} S.J. Res. 181, 83d Cong., 2d Sess. (1954); S.J. Res. 1, 84th Cong., 1st Sess.
(1955). However, in reporting the resolution favorably on March 27, 1956,
the Judiciary Committee omitted this clause.

D. LIMITATIONS ACCORDING TO SUBJECT MATTER

An approach to constitutional amendment which has received little attention would be specification of the types of international agreement appropriate to different classes of subject matter. This has been attempted to a limited extent in other countries, almost always in distinguishing international agreements requiring legislative approval from those within the executive prerogative. A partial tabulation of those for which legislative approval is required shows a considerable variation reflecting the international position and interest of state, but also some areas of fairly wide agreement: 177

<table>
<thead>
<tr>
<th>Type of treaty</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requiring legislative implementation</td>
<td>Burma, Czechoslovakia, Finland, Greece,</td>
</tr>
<tr>
<td></td>
<td>Hungary, Korea, Norway, Thailand</td>
</tr>
<tr>
<td>Assumption of a financial burden</td>
<td>Belgium, Burma, Egypt, Eire, France, Italy,</td>
</tr>
<tr>
<td></td>
<td>Korea, Lebanon, Poland, Syria</td>
</tr>
<tr>
<td>Affecting rights or obligations of citizens</td>
<td>Burma, Egypt, France, Poland</td>
</tr>
<tr>
<td>Requiring modification of internal law</td>
<td>France, Italy, United Kingdom</td>
</tr>
<tr>
<td></td>
<td>(in practice)</td>
</tr>
<tr>
<td>Altering constitutional provisions</td>
<td>Czechoslovakia, Iceland</td>
</tr>
<tr>
<td>Changes of territory or boundaries</td>
<td>Czechoslovakia, Egypt, France, Iceland,</td>
</tr>
<tr>
<td></td>
<td>Italy, Poland, Thailand</td>
</tr>
<tr>
<td>Commerce, tariffs, navigation</td>
<td>Belgium, Burma, France, Greece, Korea,</td>
</tr>
<tr>
<td></td>
<td>Lebanon, Poland, Sweden, Syria</td>
</tr>
<tr>
<td>Alliances, mutual aid</td>
<td>Czechoslovakia, Egypt, Korea, Poland,</td>
</tr>
<tr>
<td></td>
<td>U.S.S.R.</td>
</tr>
<tr>
<td>Long or indefinite duration</td>
<td>Lebanon, Switzerland, Syria</td>
</tr>
</tbody>
</table>

The proposals for amendment mentioned in section IV (1) of this Article have suggested an absolute prohibition of agreements affecting rights of citizens protected by the Constitution, transfer-

177. The table is based upon information from Peaslee, Constitutions of Nations (2d ed. 1956) and the digest of treaty provisions in 75 A.B.A. Rep. 313 (1950). See U.N. Legislative Series, Law and Practices Concerning the Conclusion of Treaties, U.N. Doc. No. ST/LEG/SER. B/3 (1953). In addition to the examples in the table the following are specified as types requiring legislative approval: accession to international organizations (France, Korea); treaties of special importance (Norway, Sweden); arbitration or judicial settlement (Italy); economic treaties of general character (Czechoslovakia), political treaties (Czechoslovakia, Italy); foreign concession agreements or grants (Afghanistan, Greece); safety of the state (Syria); peace, nonaggression (Egypt, U.S.S.R.).
The Scope of the Treaty Power

ring constitutional powers of the government to international organizations, or abridging internal laws, but none seems to contemplate a classification of permissible agreements by subjects. Nor has there been any resolution of the old debate on the question whether executive agreements should be restricted to certain subjects. The existence of legal power to conclude them without restriction seems to be generally conceded, but in practice they have not been employed at all for a number of subjects and have been used for others only at the administrative level. The Department of State circular of December 13, 1955\(^{178}\) limited simple executive agreements to matters within the constitutional powers of the President, a subject-matter definition, but did not limit congressional-executive agreements in terms of subjects. This statement reflects pretty accurately our current practice.

It might be practicable to construct an amendment which defined categories in some such manner as the following:

1. International agreements wholly prohibited.
2. Treaties, requiring consent of the Senate.
3. Congressional-executive agreements, specifically approved by the Congress or pursuant to statutes or treaties.
4. Presidential agreements, on the sole authority of the President.

Those inconsistent with the Constitution.

Alliances, conclusion of peace, territorial changes, creation of policy-forming international organizations, lawmaking conventions, control of production of commodities, fisheries, reduction of double taxation, extradition.

Subjects other than those in categories 1, 2, and 4.

Subjects within the constitutional powers of the President; other administrative agreements pursuant to treaties, congressional-executive agreements, or statutes.

Such a scheme might give a sense of security against irresponsible action. Against it must be put the rigidity it imposes, the difficulty of accurate and comprehensive definition, and of distinguishing between policy agreements and administrative agreements affecting the same subjects. We have roughly this division now in our practice and perhaps ought to rely upon the wisdom of experience to produce constitutional custom without formal amendment.

E. Executive Agreements

The present modus vivendi in the use of congressional-executive agreements...

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agreements and the restraint ordinarily exercised in the use of purely presidential agreements have not been fortified by expressed legal limitations or by much judicial clarification of the domestic legal status of such agreements. The possibility of presidential irresponsibility must therefore be conceded, even though senatorial charges of irresponsibility are a matter of the pot calling the kettle black. The question is whether to leave the issue to the conflict of political forces, which at one time center on Senate obstruction of treaties, at another time on presidential abuse of the executive agreement power, or to attempt a more precise legal definition.

Amendments recently proposed have reflected senatorial alarm because of the diminishing role of treaties; as might be expected they attack only one side of the problem. Senator Bricker's first proposal subjected them to the same limitations to be applied to treaties, then added the following section:

Section 4. Executive agreements shall not be made in lieu of treaties. Executive agreements shall, if not sooner terminated, expire automatically one year after the end of the term of office for which the President making the agreement shall have been elected, but the Congress may, at the request of any President, extend for the duration of the term of such President the life of any such agreement made or extended during the next preceding Presidential term.

The President shall publish all executive agreements except that those which in his judgment require secrecy shall be submitted to appropriate committees of the Congress in lieu of publication.

The first paragraph of this section stated a principle which could hardly be given effect without a definition of the proper place of treaties. The second reflected the attitude which used to be held by some international lawyers that executive agreements are not government obligations but personal agreements of the President. This view has been generally abandoned, so that the application of the section would compel renewal or unilateral abrogation of international commitments. Whatever might have been said a half century ago of the feasibility of review and renewal of all executive agreements by a new administration, it would now add an impossible burden and seriously impede the execution of our foreign policy. There is no possibility of continuing economic, military, and technical assistance or mutual defense programs on the present scale without many hundreds of administrative agreements. Nor can we in-

180. Borchard, Shall the Executive Agreement Replace the Treaty?, 53 Yale L.J. 664 (1944) argues at 678: "executive agreements either bind a) only the administration that made them, as Theodore Roosevelt and others have thought, or b) are of uncertain duration. In the third place they may be terminated unilaterally by any future President at any time without incurring the charge of treaty violation. . . ."
spire confidence by using terminable agreements identified with a particular president. The practical route to continuously responsible action is to tie the agreements to statutes or treaties, as has been done. But Senator Bricker took no account of congressional-executive agreements; his preoccupation was with the presidential agreement. His third paragraph was a minor procedural safeguard of some utility.

The revised Bricker proposal reported June 4, 1953181 contained only a short paragraph on executive agreements: “Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.”

After the defeat of this resolution Senator Bricker made no effort to secure a special congressional power to regulate executive agreements but included them with treaties in his later proposals182 for conformity with the Constitution and non-self-executing character until given effect by legislation valid in the absence of the agreement. The idea of an unlimited congressional power to regulate executive agreements is unacceptable. It fails to take account even of the requirements of the special position of the President as Commander in Chief. Even if it be assumed that Congress would exercise such a power with discretion by continuing to allow a large latitude of presidential action, such an amendment would profoundly alter the basis of the separation of powers. Before committing so great a power to the legislative body it would seem reasonable to demand such a reformation of it as would assure representative character. Without this it is probable that the American people would prefer not to relocate a power essential to military direction and routine diplomatic relations.

Another sort of question is posed by the provision in Senator Bricker’s last version of the amendment.183 There he dealt separately with the domestic status of executive agreements as follows: “Section 3. An international agreement other than a treaty shall have legislative effect within the United States as law thereof only through legislation valid in the absence of such an international agreement.”

There is certainly reason to look askance at the present undefined status of executive agreements in domestic law. Unless the courts find it possible to deal with this comprehensively on the basis of the present meager references in the Constitution there is reason for a

constitutional amendment. But the Bricker proposal takes little account of the elements of the problem. Assuming that executive agreements, like treaties, must be consistent with the Constitution and confined to international issues, they are a valid mechanism of effecting foreign policy. To provide that in reserved power areas they could be given effect within the states only by state legislation would be an intolerable interference with the conduct of foreign affairs by the national government. The principle of *United States v. Belmont*184 and *United States v. Pink*185 that the foreign policy of the United States as declared in even a purely presidential agreement must displace contrary state and local policy, is surely essential to a consistent external policy. This cannot be achieved if the decision remains with individual states. On the other hand, to give effect to a presidential agreement inconsistent with a statute or treaty would be unreasonable in that it would allow the executive alone to overcome policy determined by the legislative and executive branches in concert and open the way for the conduct of foreign affairs by fiat. A reasonable solution might be to provide that executive agreements to the extent that they are consistent with the Constitution and with valid statutes and treaties, are law of the land.

F. Procedural Regulations

Proposals for modification by constitutional amendment of the procedures used in concluding treaties or executive agreements have been confined to minor points which could better have been dealt with by statute or Senate resolution.

Senator Knowland's proposed substitute for the Bricker amendment in 1953186 contained the following provision for a record vote on consent to ratification, which was also adopted by Senator Bricker in all his later revisions: “Section. 2. When the Senate consents to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.” The desirability of such a rule stems from the well known disposition of busy senators to absent themselves upon other business when no controversial measures are pending. If no one suggests the absence of a quorum business goes forward, however reduced the numbers. The *reductio ad absurdum* of this occurred on June 13, 1952 when two noncontroversial consular conventions and a protocol were approved. After a long speech by Senator Morse during which members drifted away, the conventions were called up about 6 P.M. When Senator Sparkman as tem-

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184. 301 U.S. 324 (1937).
185. 315 U.S. 203 (1942).
porary presiding officer called up the conventions, which he was himself reporting for the Committee on Foreign Relations, the only other member present was Senator Thye. The question of agreeing to the resolution consenting to ratification was put; Senator Thye remained silent and Senator Sparkman cast a voice vote in the affirmative. On advice of the Senate Parliamentarian he then ruled that two-thirds of the Senators present had concurred in the resolution.187

Whether controversial or not treaties are sufficiently important to deserve the attention of a quorum, the absence of which would of course be evident if a record vote were required. It does not follow that the clumsy and expensive procedure of constitutional amendment is needed to achieve this. A simple resolution amending the Standing Rules of the Senate can accomplish it. Such a resolution was proposed by Senator Lehman in 1953,188 but no formal change has yet been made. However, on July 20, 1953 Majority Leader Knowland announced a yea-nay vote would be the regular practice.189

CONCLUSION

Perhaps we have now reached a lull in the storm over amendment of the treaty power. On taking stock of the results it must be said that little contribution to intelligent resolution of the problems was made. The attempt to exclude treaties from the area of reserved powers was the central issue debated, and such a proposal hardly deserves serious consideration. The requirement of constitutionality is not really in doubt, and amendment to make it explicit was never a genuine issue; alone it would not have been opposed. The real problem of the relationship of treaties to domestic law arises from the fact that the Senate consents to the first but the whole Congress enacts the second. Clearly the solution to this is to have both approved in the same manner. This would avoid all difficulties of implementation and incorporation into the law of the land. To confuse this issue with a muddled notion of excluding treaties from the area of reserved powers was a performance discreditable to the Senate. On the question of executive agreements a valid problem was stated, but no amendment at all relevant to the issue was ever stated.

If we are today on firmer ground than in 1945 it is not because of the amenders, but because of the development of four rational practices: (1) continued use of treaties where tradition requires

them; (2) use of executive agreements in combination with either statute or treaty or joint resolution for programs requiring legislative action; (3) adequate consultation between the Department of State and the Congress with respect to the choice of method; (4) restraint in the use of presidential agreements so as to confine them to areas within the President's constitutional powers or to administrative implementation. We have not achieved the genuine institutional changes which might assure responsible action for the future, but we may hope that sound practice will eventually bring conviction and shape constitutional custom.

APPENDIX*

Presidential Exercise of Executive Agreement Powers

I. Treaties and Executive Agreements, 1778–1929

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Treaties</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1778–1789</td>
<td>16</td>
<td>53</td>
</tr>
<tr>
<td>1790–1799</td>
<td>7</td>
<td>50</td>
</tr>
<tr>
<td>1800–1809</td>
<td>7</td>
<td>78</td>
</tr>
<tr>
<td>1810–1819</td>
<td>10</td>
<td>74</td>
</tr>
<tr>
<td>1820–1829</td>
<td>21</td>
<td>139</td>
</tr>
<tr>
<td>1830–1839</td>
<td>28</td>
<td>214</td>
</tr>
<tr>
<td>1840–1849</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>1850–1859</td>
<td>55</td>
<td>968</td>
</tr>
</tbody>
</table>

II. Treaties and Executive Agreements, 1929–1937

<table>
<thead>
<tr>
<th>Year</th>
<th>Executive Agreements</th>
<th>Treaties</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930</td>
<td>6</td>
<td>26</td>
<td>32</td>
</tr>
<tr>
<td>1931</td>
<td>9</td>
<td>13</td>
<td>22</td>
</tr>
<tr>
<td>1932</td>
<td>12</td>
<td>15</td>
<td>27</td>
</tr>
<tr>
<td>1933</td>
<td>12</td>
<td>7</td>
<td>19</td>
</tr>
<tr>
<td>1934</td>
<td>17</td>
<td>14</td>
<td>31</td>
</tr>
<tr>
<td>1935</td>
<td>14</td>
<td>24</td>
<td>38</td>
</tr>
<tr>
<td>1936</td>
<td>15</td>
<td>9</td>
<td>24</td>
</tr>
<tr>
<td>1937</td>
<td>13</td>
<td>20</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Total 225</td>
</tr>
</tbody>
</table>

*This appendix was prepared by Gary J. Meyer, fourth-year student, University of Minnesota School of Law, former Member of the Board of Editors, *Minnesota Law Review*.

### III.
**TREATIES AND EXECUTIVE AGREEMENTS**
**1938–1957**

<table>
<thead>
<tr>
<th>Year</th>
<th><strong>EXECUTIVE AGREEMENTS</strong></th>
<th></th>
<th>Treaties</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Presidential</td>
<td>Congressional- Presidential</td>
<td>Authorized in Subsequently Approved</td>
</tr>
<tr>
<td></td>
<td>by Treaty</td>
<td>by Statute</td>
<td>by Treaty</td>
</tr>
<tr>
<td>1938</td>
<td>6 (30%)</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>1939</td>
<td>2 (8%)</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>1940</td>
<td>2 (8%)</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>1941</td>
<td>2 (6%)</td>
<td>5</td>
<td>23</td>
</tr>
<tr>
<td>1942</td>
<td>6 (7%)</td>
<td>9</td>
<td>58</td>
</tr>
<tr>
<td>1943</td>
<td>7 (8%)</td>
<td>5</td>
<td>47</td>
</tr>
<tr>
<td>1944</td>
<td>6 (10%)</td>
<td>5</td>
<td>25</td>
</tr>
<tr>
<td>1945</td>
<td>8 (10%)</td>
<td>6</td>
<td>33</td>
</tr>
<tr>
<td>1946</td>
<td>9 (10%)</td>
<td>20</td>
<td>26</td>
</tr>
<tr>
<td>1947</td>
<td>16 (12%)</td>
<td>37</td>
<td>69</td>
</tr>
<tr>
<td>1948</td>
<td>12 (6%)</td>
<td>12</td>
<td>99</td>
</tr>
<tr>
<td>1949</td>
<td>11 (6%)</td>
<td>14</td>
<td>83</td>
</tr>
<tr>
<td>1950</td>
<td>5 (4%)</td>
<td>22</td>
<td>100</td>
</tr>
<tr>
<td>1951</td>
<td>16 (7%)</td>
<td>21</td>
<td>186</td>
</tr>
<tr>
<td>1952</td>
<td>7 (3%)</td>
<td>18</td>
<td>248</td>
</tr>
<tr>
<td>1953</td>
<td>4 (3%)</td>
<td>21</td>
<td>130</td>
</tr>
<tr>
<td>1954</td>
<td>9 (5%)</td>
<td>31</td>
<td>147</td>
</tr>
<tr>
<td>1955</td>
<td>10 (3%)</td>
<td>15</td>
<td>270</td>
</tr>
<tr>
<td>1956</td>
<td>10 (4%)</td>
<td>26</td>
<td>190</td>
</tr>
<tr>
<td>1957</td>
<td>13 (6%)</td>
<td>26</td>
<td>172</td>
</tr>
<tr>
<td>TOTAL, 1938–1957</td>
<td>160 (5.9%)</td>
<td>310</td>
<td>1947</td>
</tr>
<tr>
<td>TOTAL Treaties and Executive Agreements Since 1778</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. Computed through use of T.S. Nos. 912–994 (1937–1945); E.A.S. Nos. 117–505 (1938–1946); T.I.A.S. Nos. 1501 to date (1945 to date); The *United States Code Annotated* was the primary source used to determine whether a particular executive agreement was authorized in advance or subsequently approved.

4. The following is an explanation of the method used in computing the figures in the columns under the "Executive Agreement" label:

   All executive agreements are dated according to the date of signing and not according to when they entered into force. Where there are two dates of signing (e.g., Dec. 23, 1948, and Jan. 2, 1949), the most recent date is used for classification by year. All treaties are dated by the date of proclamation by the President.

   Changes, extensions, amendments, etc., of previous agreements are classified as separate agreements, but a proclamation of a previously formed agreement is not classified as a separate agreement. Memoranda of agreements are classified as separate agreements, as are terminations of agreements.

   Where an agreement has been approved previously by both a treaty and a stat-
EXECUTIVE AGREEMENTS NOT AUTHORIZED OR APPROVED BY THE CONGRESS

Note: Numbers up to 1500 refer to the Executive Agreement Series, above 1500 to the Treaties and other International Acts Series. An asterisk indicates the agreement is typical of a number of others which are not listed or was itself renewed.

<table>
<thead>
<tr>
<th>No.</th>
<th>Signatories</th>
<th>Subject</th>
</tr>
</thead>
<tbody>
<tr>
<td>118</td>
<td>Canada</td>
<td>Admission to practice before patent offices (1937)</td>
</tr>
<tr>
<td>124</td>
<td>Bulgaria</td>
<td>Waiver of legalization on certificates of origin (not including health and sanitation certificates) (1938)</td>
</tr>
<tr>
<td>139*</td>
<td>Finland</td>
<td>Exchange of official publications (for South American countries covered by treaty) (1939)</td>
</tr>
<tr>
<td>145</td>
<td>United Kingdom</td>
<td>Joint administration of Canton and Enderbury Islands (1939)</td>
</tr>
<tr>
<td>157*</td>
<td>Canada</td>
<td>Visits in uniform by members of armed forces</td>
</tr>
</tbody>
</table>

...
THE SCOPE OF THE TREATY POWER

173 Multilateral Statistics of causes of death
174 Canada Exemptions from exchange control measures

(1942)
282 * United Kingdom Marine transportation and litigation
283 Haiti Exchange of lands in Haiti
291 * Canada Temporary raising of level of Lake St. Francis during low-water periods

(1943)
317 Canada, United Kingdom Industrial diamonds (reserve for war effort)
332 United Kingdom Apportioning of supplies of African asbestos
390 Canada Lease of White Pass and Yukon Railway

(1945)
472 Multilateral Prosecution and punishment of major war criminals of European Axis
474 Peru Cooperative fellowship program
495 Argentina Fuel and vegetable oil
497 Norway Relations between armed forces in Iceland
501 U.K., Yugoslavia Provisional administration of Venezia Giulia
505 U.S.S.R. Liberated POWs and civilians

(1946)
1508 * Multilateral European Coal Organization
1514 Norway Civil administration and jurisdiction in liberated Norwegian territory
1520 Multilateral Declaration regarding Germany
1543 American Republics Act of Chapultepec
1556 United Kingdom Use and Disposition of recaptured vessels
1569 * Czechoslovakia Commercial policy
1571 Multilateral U.S. admission to Commission of the Rhine
1575 * United Kingdom Economic fusion of American and British zones of occupation in Germany
1589 Multilateral International Military Tribunal for Far East (Tokyo)
1594 * Multilateral Reparation for Axis aggression
1600 Multilateral Zones of occupation in Austria
1657 * Multilateral Liquidation of German property in Sweden

(1947)
1585 Nepal Friendship and commerce
1672 * Belgium American dead in World War II
1683 * Multilateral Restitution of Monetary gold
1725 China U.S. armed forces in China
1752 Canada Reconversion of industry (from war to peace)
1851 Korea Initial property settlement
1878 France Recruitment of voluntary labor for France

(1949)
1889 Canada Joint Industrial Mobilization Commission
1915 Multilateral Germany: Removal of restrictions on trade, transportation, etc.
1921 Austria Occupation costs of U.S. forces
1972 Greece Training exercises: U.S. fleet in Mediterranean
2066 United Kingdom, France Merger of three western zones of Germany

(1950)
2109 France Coal exports from three western zones in Germany
8. This group does not include agreements for the establishment of Loran stations as authorized by the act of August 4, 1949, c. 393, § 1, 63 Stat. 500, as amended, 14 U.S.C. §81 (1952).
<table>
<thead>
<tr>
<th>Code</th>
<th>Location</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3096</td>
<td>Trinidad, Tobago</td>
<td>Use of certain lands for defense recreational purposes (1955)</td>
</tr>
<tr>
<td>3361</td>
<td>Philippine Islands</td>
<td>Education Administration of schools in naval reservation, Subic Bay</td>
</tr>
<tr>
<td>3368</td>
<td>Greece</td>
<td>Importing goods by American personnel in Greece</td>
</tr>
<tr>
<td>3425</td>
<td>Multilateral</td>
<td>Termination of the occupation regime in the Federal Republic of Germany</td>
</tr>
<tr>
<td>3427</td>
<td>Multilateral</td>
<td>Exercise of retained rights in West Germany</td>
</tr>
<tr>
<td>3499</td>
<td>Austria</td>
<td>Disposition of certain U.S. property in Austria</td>
</tr>
<tr>
<td>3549</td>
<td>Multilateral</td>
<td>Penal administration of West Germany</td>
</tr>
<tr>
<td>3613</td>
<td>West Germany</td>
<td>Transfer of German archives</td>
</tr>
<tr>
<td>3615</td>
<td>Multilateral</td>
<td>Arbitration tribunal and arbitral commission on property rights and interests in Germany</td>
</tr>
<tr>
<td>3623</td>
<td>Nicaragua</td>
<td>Rama Road</td>
</tr>
<tr>
<td>3646</td>
<td>Philippine Islands</td>
<td>Recruitment of Filipino labor by U.S. army</td>
</tr>
<tr>
<td>3790</td>
<td>Saudi Arabia</td>
<td>U.S. rights at Dhahran air field.</td>
</tr>
<tr>
<td>3815</td>
<td>Fed. Rep. of Germany</td>
<td>Disbandment of Civilian Service Organization in Germany</td>
</tr>
<tr>
<td>3886</td>
<td>Japan</td>
<td>Annulment and progressive reduction in Japanese expenditures</td>
</tr>
</tbody>
</table>