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# TREATY POWERS RESOLUTION

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## HEARINGS

BEFORE THE

### COMMITTEE ON FOREIGN RELATIONS

### UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

### S. Res. 486

RELATING TO THE TREATY POWERS OF THE SENATE

JULY 21 AND 28, 1976

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TREATY POWERS RESOLUTION

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(II)

## CONTENTS

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<b>Hearing days:</b>	
Wednesday, July 21, 1976.....	1
Wednesday, July 28, 1976.....	69
<b>Statements by:</b>	
Bestor, Prof. Arthur, University of Washington, Seattle, Wash.....	15
Falk, Prof. Richard A., Princeton University, Princeton, N.J.....	33
Hathaway, Hon. William D., U.S. Senator from the State of Maine.....	102
Leigh, Monroe, Legal Adviser, Department of State, accompanied by Samuel Goldberg, Deputy Assistant Secretary for Congressional Relations; and Arthur Rovine, Assistant Legal Adviser for Treaty Affairs .....	71
Miller, Prof. Arthur S., George Washington University School of Law, Washington, D.C.....	110
<b>Insertions for the record:</b>	
Prepared Opening Statement of Senator John Sparkman.....	1
Text of S. Res. 486.....	3
Senator Clark's floor statement on Senate Resolution 486—Submission of a Resolution Relating to the Treaty Powers of the Senate.....	9
Prepared Statement of Prof. Arthur Bestor.....	20
Prepared Statement of Prof. Richard Falk.....	46
Executive Agreements Which Should Have Been Treaties.....	97
Text of S. J. Res. 106, 93d Cong., 1st sess.....	103
Statement by Senator Hathaway from the Congressional Record, May 8, 1973.....	103
Letter to Senator Clark from Senator Hathaway, dated August 30, 1976 .....	104
Letter to Representative Thomas E. Morgan from Arthur S. Miller, Professor of Law, dated June 9, 1976.....	124



## TREATY POWERS RESOLUTION

WEDNESDAY, JULY 21, 1976

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*Washington, D.C.*

The committee met, pursuant to notice, at 10:05 a.m., in room 4221, Dirksen Senate Office Building, Hon. Dick Clark presiding.  
Present: Senators Sparkman (chairman), Clark, and Case.  
Senator CLARK. The committee will come to order.

### OPENING STATEMENT

The Foreign Relations Committee today begins hearings on Senate Resolution 486, a resolution to reaffirm the constitutional treaty power of the Senate by restricting the scope of executive agreements. The resolution expresses the sense of the Senate that international agreements involving significant political, military, or economic commitments to foreign countries properly constitute treaties which should be submitted to the Senate for its advice and consent. The resolution further expresses the sense of the Senate that, in determining whether an international agreement properly constitutes a treaty, the President should consult with the Senate Foreign Relations Committee.

The resolution goes on to affirm that in the case of any agreement which has not been submitted as a treaty, the Senate may nonetheless make a finding that such agreement should properly have been so submitted. Once the Senate designated an agreement as properly constituting a treaty, the Senate's own rules would be brought into play in such a way that a point of order could be brought against consideration of any legislation which would provide funds to execute the agreement in question, unless that agreement were subsequently submitted to the Senate as a treaty.

I am actually quoting from an opening statement by the chairman of this committee, Senator John Sparkman. The remainder of the statement will be made a part of the record at this point.

[Senator Sparkman's prepared opening statement follows:]

### PREPARED OPENING STATEMENT OF SENATOR JOHN SPARKMAN

The Foreign Relations Committee today begins hearings on S. Res. 486, a resolution to reaffirm the constitutional treaty power of the Senate by restricting the scope of executive agreements. The resolution expresses the sense of the Senate that international agreements involving significant political, military or economic commitments to foreign countries properly constitute treaties which should be submitted to the Senate for its advice and consent. The resolution further expresses the sense of the Senate that, in determining whether an international agreement properly constitutes a treaty, the President should consult

with the Senate Foreign Relations Committee. The resolution goes on to affirm that in the case of any agreement which has not been submitted as a treaty, the Senate may nonetheless make a finding that such agreement should properly have been so submitted. Once the Senate designated an agreement as properly constituting a treaty, the Senate's own rules would be brought into play in such a way that a point of order could be brought against consideration of any legislation which would provide funds to execute the agreement in question, unless that agreement were subsequently submitted to the Senate as a treaty.

The background of this legislation is the extended process, going back at least a decade, through which Congress has been gradually reasserting its constitutional authority in foreign policy. The new laws adopted for this purpose have all been associated—and to a large degree precipitated—by events preceding and surrounding them. For about two decades following World War II Congress was inclined to leave foreign policy largely in the hands of the executive. This attitude of relative passivity seems on the whole to have been induced by the national sense of urgency generated by the Korean War and by the long series of crises and confrontations which made up the "cold war."

The Vietnam War changed all that. As that conflict went on and its costs rose, members of the Senate and House began to reconsider their own proper role in the making of foreign policy, and more particularly in the checking of executive initiatives. The first legislative milestone in the altered atmosphere was the National Commitments Resolutions, first introduced in 1967 and enacted in 1969, which expressed broadly the sense of the Senate that no significant foreign commitment ought to be undertaken without affirmative action by both legislative and executive branches. In 1972 Congress adopted the Case Act requiring all executive agreements to be submitted to Congress for its information within sixty days of their coming into force. In 1973, after careful and thorough deliberations, Congress enacted, over the President's veto, a far-reaching War Powers Act, which reaffirms the constitutional war power of Congress and, in its key provision, requires the executive to terminate any unauthorized military action within 60—or under certain circumstances—90 days, unless within that period Congress authorizes the continued use of the armed forces. Some observers have noted a remaining constitutional gap in the area of treaties and executive agreements. The latter can serve as a means by which the executive makes significant foreign commitments without the consent or participation of either house of Congress. The legislation now before us is designed to close such a gap. Whether it is the most effective and appropriate means of doing so can best be determined by a process of close and careful scrutiny, which we initiate here today. The Committee welcomes the advice, suggestions, and criticisms of the distinguished witnesses who will testify in these hearings. It is our intention to examine this most important issue with care and deliberation, and with open minds as to our course of legislative action.

Our witnesses today are Professor Richard A. Falk of Princeton University, and Professor Arthur Bestor of the University of Washington. I would suggest that each witness present his prepared statement to the Committee before questioning begins, and that questions then be addressed by members of the Committee to either or both witnesses. We also invite each witness to feel free to comment on observations made by the other.

Before yielding the floor to Professors Falk and Bestor, I would like to invite Senator Clark of Iowa, who is the principal sponsor of S. Res. 486, to make such opening comments as he may wish.

Senator CLARK. I might as well put the resolution in too.  
 [Text of S. Res. 486 follows.]

94TH CONGRESS  
 2D SESSION

## S. RES. 486

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### IN THE SENATE OF THE UNITED STATES

JULY 1 (legislative day, JUNE 18), 1976

MR. CLARK (for himself, Mr. CHURCH, Mr. GRAVEL, Mr. KENNEDY, and Mr. MONDALE) submitted the following resolution; which was referred to the Committee on Foreign Relations and if and when reported the Committees on the Judiciary and Rules and Administration for not to exceed thirty days to consider matters which may be within their jurisdiction, jointly by unanimous consent

---

## RESOLUTION

Relating to the treaty powers of the Senate.

1     *Resolved*, That this resolution may be cited as the  
 2     “Treaty Powers Resolution”.

3                     PURPOSE, FINDINGS, AND DECLARATION

4     SEC. 2. (a) It is the purpose of this resolution to fulfill  
 5     the intent of the framers of the Constitution and to ensure,  
 6     through use of the legislative power of the Senate, that no  
 7     international agreement constituting a treaty will be imple-  
 8     mented by the Senate without its prior advice and consent  
 9     to ratification of that agreement.

10           (b) The Senate finds that—

1 (1) article II, section 2, clause 2 of the Constitu-  
2 tion, empowers the President "by and with the advice  
3 and consent of the Senate to make treaties, provided  
4 two-thirds of the Senators present concur";

5 (2) the requirement for Senate advice and consent  
6 to treaties has in recent years been circumvented by the  
7 use of "executive agreements"; and

8 (3) the Senate may, for its part, refuse to authorize  
9 and appropriate funds to implement those international  
10 agreements which, in its opinion, constitute treaties and  
11 to which the Senate has not given its advice and consent  
12 to ratification.

13 (c) It is the sense of the Senate that, under article 2,  
14 section 2, clause 2, of the Constitution, any international  
15 agreement which involves a significant political, military,  
16 or economic commitment to a foreign country constitutes a  
17 treaty and should be submitted to the Senate for its advice  
18 and consent.

19 ADVICE

20 SEC. 3. It is the sense of the Senate that, in determining  
21 whether an international agreement constitutes a treaty  
22 under section 2 (c) of this resolution, the President should,  
23 prior to and during the negotiation of such agreement, seek  
24 the advice of the Committee on Foreign Relations.

## CONSENT

1

2       SEC. 4. (a) (1) Where the Senate, by resolution, ex-  
3 presses its sense that any international agreement hereafter  
4 entered into which has not been submitted to the Senate  
5 for its advice and consent constitutes a treaty under section  
6 2 (c) of this resolution and should be so submitted.

7       (2) Any such resolution shall be privileged in the same  
8 manner and to the same extent as a concurrent resolution of  
9 the type described in section 5 (c) of the War Powers  
10 Resolution is privileged under section 7 (a) and (b) of  
11 that law.

12       (b) (1) It shall not be in order to consider any bill or  
13 joint resolution or any amendment thereto, or any report of  
14 a committee of conference, which authorizes or provides  
15 budget authority to implement any international agreement  
16 if the Senate has expressed its sense, pursuant to subsection  
17 (a) of this section, that such agreement constitutes a treaty  
18 under section 2 (c) of this resolution.

19       (2) This subsection shall not apply if the Senate has  
20 given its advice and consent to ratification of such agreement.

21       (c) Any (1) committee of the Senate which reports  
22 any bill or joint resolution, and (2) committee of conference  
23 which submits any conference report to the Senate, authoriz-  
24 ing or providing budget authority to implement any such

- 1 agreement, shall indicate in the committee report or joint
- 2 statement filed therewith, as the case may be, that budget
- 3 authority is authorized or provided in such bill, resolution,
- 4 or conference report.

Senator CLARK. Senator Sparkman expects to be here as soon as an earlier hearing, which he is chairing, is completed.

I would like, myself, to extend and express my gratitude that the Foreign Relations Committee is taking the time to hold 2 days of hearings on the Treaty Powers resolution. I am grateful because I know our summer schedule is cramped and that hearing time is at a premium. I am even more grateful because I think that consideration of this resolution will afford the committee and the Senate the opportunity to focus on a number of significant questions particularly relevant in our Bicentennial year.

#### CONGRESS' ATTEMPT TO RECLAIM CONSTITUTIONAL GROUND

Over the past several years Congress has been active in attempting to reclaim constitutional ground lost to the executive branch. In 1973, it took a major step toward recovering its share of the warmaking power by enacting the war powers resolution. In the next year, the Senate passed Senator Ervin's bill on executive agreements, which was not taken up by the House. In 1974 Congress also regained lost constitutional prerogatives in the area of budget formulation through enactment of the Congressional Budget and Impoundment Control Act. This year the Senate has established a select committee to oversee intelligence activities—another step which in my judgment was long overdue. Each of these initiatives has restored a measure of equilibrium to our constitutional scheme of separation of powers, a scheme which—through a long process of erosion, accretion, and occasional outright usurpation—had reached a dangerous level of imbalance.

But the proper equilibrium has not yet been fully restored, particularly in the area of foreign affairs. Anyone who doubts this need simply take note of the most recent pronouncements of the executive branch regarding the scope of its foreign affairs authority. Last May, the President vetoed the International Security Assistance and Arms Export Control Act as an "encroachment on the executive branch's constitutional authority"—in the face of constitutional provisions expressly granting to the Congress the power to regulate commerce with foreign nations and to dispose of governmental property, which certainly includes arms and implements of war. The administration objects to this very resolution, on which we begin hearings today, as a violation of "the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement," and as an unconstitutional "distortion of the legislative process"—in the face of express constitutional provisions granting

to the Congress the power to appropriate funds and to each House the power to set its own internal rules of procedure.

So the challenge has not passed. The patient has not been cured. Equilibrium has not been fully restored. The question is, will the Congress complete the task it has set out to accomplish?

#### WILL CONGRESS COMPLETE THE TASK?

Let's be candid. It's undoubtedly premature to speak with any certainty, but many of us in Congress believe—as the public opinion polls all suggest—that next January we will be dealing with a Democratic administration. Many of us hope—profoundly hope—that that administration will be more respectful of the constitutional prerogatives of the Congress than have been its recent predecessors. And many of us will be prepared to accord a new administration—as we have been and are prepared to accord the present one—the full degree of cooperation due an administration which heeds the constitutional responsibilities of the Congress, and which does not attempt to arrogate power to itself at congressional—and constitutional—expense. We are, in short, prepared to cooperate.

But in our eagerness to cooperate with a Democratic administration—if there is one—we cannot again fall prey to the subservience, acquiescence and unquestioning trust which has bloated the Presidency to imperial dimensions. Unpleasant though it may be, let us remind ourselves that the Presidency took on those dimensions largely through the eagerness of Democratic Congresses to cooperate with Democratic Presidents—or to “provide flexibility,” as the executive branch likes to call it. Congress, because it agreed with the substance of the Presidential proposals, too often shortcut constitutional procedures in approving those proposals and instituted instead a procedure of convenience. As a result, when the substance finally became disagreeable, the procedures once available as checks had become tarnished and atrophied. Procedure, it has been said, is the first outpost of the law, and those of us concerned about restoring constitutionally required procedures would do well to learn from past mistakes when pressures again develop to shortcut constitutional procedures. For the real test of principle will come when public emotions are generated, not on the side of the Congress by a Watergate or a Vietnam, but on the side of the President, who—as most of our history demonstrates—is normally the prime governmental receptacle of public affection. Then and only then—when there can be no possibility of political gain—will the true measure of our devotion to constitutional principle be revealed. Justice Holmes said that the principle of free thought means “not free thought for those who agree with us, but freedom for the thought that we hate.”

I think that a related principle is at issue here. I think that separation of powers means insistence on constitutional procedure for proposals we agree with, not simply for those we dislike.

#### EXECUTIVE AGREEMENTS AND TREATIES

All this may appear irrelevant to the short resolution which the committee begins to examine today, but I don't believe it is. One of

the most elementary procedures that can be established by any nation's constitution is the procedure by which that nation commits itself in an agreement with another nation. Not surprisingly, on that point the framers of our own Constitution were quite specific. They provided that the "President may, by and with the advice and consent of the Senate, make treaties, provided two-thirds of the Senators present concur."

It is fair to say that this requirement of Senate advice and consent has been circumvented in recent years by various administrations—Democratic and Republican—by calling agreements "executive agreements" when the subject matter of those agreements was sufficiently important to require their submission as treaties.

I have just been looking at a list of some recent executive agreements and treaties. I might quickly read them into the record at this point. These are considered treaties—and these we gave our advice and consent to—as follows: Regulation of shrimp fishing off the coast of Brazil; international regulations for preventing collisions at sea; the legal status of three uninhabited coral reefs in the Caribbean; agreement with Poland to avoid double taxation; revision of international radio regulations.

And let me hasten to add I think these should have been considered as treaties, but let us look at the executive agreements, which were not considered as treaties: base agreement with Spain, 1970; the base agreement with Portugal in Bahrein, 1972; SALT 1 agreement, economic commitments made to the Soviet Union, 1972—and so forth—and none of these were deemed to be of significance or to qualify as treaties.

I do not believe that the framers intended to allow the advice and consent requirement to be dispensed with by engaging in a semantic shell game. If an agreement is significant, it should be submitted as a treaty. The frequent refusal of the executive branch to do so, however, makes it appropriate for the Senate to offer a bit of encouragement.

The means to do so are constitutionally available. They are two: the power over the purse, which is shared with the House; and the power to determine our own rules of proceedings, which, as the Supreme Court said, is "absolute and beyond the challenge of any other body." Exercised together, they provide all the leverage necessary to bring about the submission, for Senate advice and consent, of all significant international agreements.

That is the encouragement offered by the Treaty Powers resolution—it causes a point of order to lie under the Senate rules against any measure providing funds to carry out any executive agreement which the Senate, by simple resolution, has said should be submitted as a treaty for its advice and consent. Mr. Chairman, the resolution has been introduced twice, in two slightly different forms, and I ask unanimous consent that my statements upon introducing it be entered in the record at the conclusion of my remarks.

#### ISSUE OF HOW CONSTITUTION IS AMENDED

Mr. Chairman, I will not take the time now to reiterate the thoughts I expressed in those two statements. There is one matter, however, which I would like to raise here because it concerns me very much. That is the issue of how our Constitution is amended—how the fundamental law of the land changes.

The Congress—and this committee—confronted this question frequently during the Vietnam war. Then, we were told by representatives of the executive branch that the Constitution didn't really mean what it says—that although it gives the Congress the power to declare war, it has in effect been amended by “practice”—that Presidential military excursions against Barbary pirates and Mexican bandits and myriad other international evildoers had established the precedent that the President may wage war without congressional approval.

We answered that argument with the War Powers resolution. Now, however, we hear a similar argument made about the treaty clause—that the Constitution may seem to require Senate advice and consent, but that it really doesn't—that it has been changed by territorial acquisitions and destroyer deals and various other executive agreements so that, today, major international agreements can be approved not simply by two-thirds of the Senate, but by majorities of each House, or by the President acting all by himself.

I am not a constitutional lawyer. I would be the first to admit that. But I am a citizen of the United States, and one with a particular admiration for that document. I am also a U.S. Senator, who has taken an oath to uphold that Constitution. I believe in a living Constitution. I believe that it has some “play at the joints,” so to speak. But I do not believe that it is so alive that it has devoured its own vital organs. And surely it contains no more crucial provisions than those regulating how our Nation goes to war or commits itself internationally.

I am happy to note that I am not alone in these views. In its report on the International Security Assistance and Arms Export Control Act—the bill the President vetoed—this committee said that it “does not believe that an unconstitutional practice, by mere repetition, becomes more constitutional.” The Supreme Court, in *Powell versus McCormack*, said the same: “That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.” Most relevant of all, perhaps, are the words of George Washington, who issued this warning regarding the “reciprocal checks” established by the Constitution:

To preserve them must be as necessary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Mr. Chairman, I apologize for taking so much time. Let me simply conclude by saying that I can think of no more fitting way to celebrate our Bicentennial than for the Congress to take a fresh look at the document that brought us here and to insure that the democratic procedures it establishes are followed as diligently today as those who designed them intended.

[Senator Clark's floor statement follows:]

[From the Congressional Record, July 2, 1976]

SENATE RESOLUTION 486—SUBMISSION OF A RESOLUTION RELATING TO THE TREATY POWERS OF THE SENATE

(Referred by unanimous consent, to the Committee on Foreign Relations; and, if and when reported by that committee, jointly for not to exceed 30 days to the Committee on the Judiciary and the Committee on Rules and Administration.)

Mr. CLARK (for himself, Mr. Church, Mr. Gravel, Mr. Kennedy, Mr. Mondale, and Mr. Eagleton) submitted the following resolution:

*"S. Res. 486*

*"Resolved, That this resolution may be cited as the 'Treaty Powers Resolution'.*

*"PURPOSE FINDINGS, AND DECLARATION*

*"SEC. 2. (a) It is the purpose of this resolution to fulfill the intent of the framers of the Constitution and to ensure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without is prior advice and consent to ratification of that agreement.*

*"(b) The Senate finds that—*

*"(1) article I, section 5, clause 2 of the Constitution empowers each House of the Congress to 'dates the Rules of its Proceedings';*

*"(2) article II, section 2, clause 2 of the Constitution, empowers the President 'by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur';*

*"(3) the requirement for Senate advice and consent to treaties has in recent years been circumvented by the use of 'executive agreements'; and*

*"(4) the Senate may, for its part, refuse to authorize and appropriate funds to implement those international agreements which, in its opinion, constitute treaties and to which the Senate has not given its advice and consent to ratification.*

*"(c) It is the sense of the Senate that, under article 2, section 2, clause 2 of the Constitution, any international agreement, which involves a significant political, military, or economic commitment to a foreign country constitutes a treaty and should be submitted to the Senate for its advice and consent.*

*"ADVICE*

*"SEC. 3. It is the sense of the Senate that, in determining whether an international agreement constitutes a treaty under section 2(c) of this resolution, the President should, prior to and during the negotiation of such agreement, seek the advice of the Committee on Foreign Relations.*

*"CONSENT*

*"SEC. 4. (a) (1) Where the Senate may, by resolution, express its sense and that any international agreement hereafter entered into which has not been submitted to the Senate for its advice and consent constitutes a treaty under section 2(c) of this resolution and should be so submitted.*

*"(2) Any such resolution shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5(c) of the War Powers Resolution is privileged under section 7 (a) and (b) of that law.*

*"(b) (1) It shall not be in order to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority to implement any international agreement if the Senate has expressed its sense, pursuant to subsection (a) of this section that such agreement constitutes a treaty under section 2(c) of this resolution.*

*"(2) This subsection shall not apply if the Senate has given it advice and consent to ratification of such agreement.*

*"(c) Any (1) committee of the Senate which reports any bill or joint resolution, and (2) committee of conference which submits any conference report to the Senate, authorizing or providing budget authority to implement any such agreement, shall so indicate in the committee report or joint statement filed therewith, as the case may be, that such budget authority is authorized or provided in such bill, resolution, or conference report."*

Mr. CLARK. President, on April 14, 1976, I submitted Senate Resolution 434, the treaty powers resolution. I am pleased to say that it has been cosponsored by four of my colleagues, Senators Church, Gravel, Kennedy, and Mondale.

At my request, the resolution was sent to the executive branch for comments, and a response was received recently from Monroe Leigh, legal adviser to the Department of State.

Nearly all of Mr. Leigh's opinion is based upon a misreading of the content and effect of the resolution. The resolution does not purport, as Mr. Leigh suggests, to give the Senate the power to "make" treaties or to "convert" executive agreements into treaties. It is a simple Senate resolution. As such it obviously cannot have the force of law. All it can legally do is to state the sense of the Senate and establish internal Senate procedures which bind no one but the Senate. And that is all it does.

If as a result of those internal Senate procedures the executive branch chooses to conduct its affairs differently, it nonetheless makes that choice freely, without legal compulsion. If the executive branch elects, as a result of those procedures, to submit as treaties certain executive agreements which it would not otherwise have submitted, that is legally its own choice. The consequences of that choice will admittedly be serious—that is the purpose of the resolution—but the decision remains, legally, that of the executive branch. The resolution states clearly that its purpose is to insure "that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement." Nothing in the resolution—and nothing I said upon introducing it and nothing said by any of the Senators who have cosponsored it—would suggest that it has any external legal effect or that it would require as a matter of law that those agreements be submitted as treaties. And, certainly, nothing therein suggests any intent to "undo" existing executive agreements or to redesignate them, legally, as treaties.

Its fundamental policy impact notwithstanding, the resolution is legally simply a parliamentary carrot-and-stick procedure. If the executive branch submits as treaties agreements which in the opinion of the Senate ought to be so submitted, then the Senate will join with the House in funding them. If the executive branch does not submit those agreements as treaties, then the Senate will not join the House in funding them. All the resolution does is to establish a new Senate procedure to implement its judgment internally.

The proposed procedure is simple. The resolution would cause a point of order to lie against the consideration of any measure which authorizes or appropriates funds to carry out any international agreement if the Senate has, by simple resolution, said that it believes that agreement should be submitted as a treaty for advice and consent. The simple resolution stating that opinion will, of course, have no legal effect whatsoever. It will simply serve as a trigger for the subsequent point of order.

Mr. President, I believe Senate Resolution 434 is clear on this point. For the purpose of eliminating even the slightest ambiguity, however, I am reintroducing the treaty powers resolution today with several slight modifications. They make clear—if anyone could ever genuinely have doubted it—that provisions in a single Senate resolution regarding Senate "findings" and the provision regarding the Senate "declaration" have only internal, sense-of-the-Senate effect.

I trust that these revisions will allow the discussions to focus on the two constitutional objections raised by the Department which are pertinent. They are:

First. Refusal to fund a valid executive agreement would, in the words of Ambassador Robert J. McCloskey's cover letter to Chairman Sparkman, violate "the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement."

Second. The Senate has no constitutional power to establish this rule of internal procedure.

Mr. President, I believe it is fair to say that these two contentions, taken together, represent one of the broadest assertions of executive power that has yet been made by any administration on the treaty powers issue.

The first claim is patently unsound—that the Congress, even if it disagrees with an executive agreement or considers that agreement beyond the President's constitutional authority, must nonetheless provide the funds to implement it. To whom does the power over the purse belong, the President or the Congress? The Congress is not even required, constitutionally, to provide funds to carry out treaties which have received the advice and consent of the Senate—let alone executive agreements which no one but the President may desire.

Mr. President, the Department of State has told the Senate that it lacks the constitutional power to adopt a certain rule of internal procedure. Because of the far-reaching ramifications of that position I asked the Office of the Legislative Counsel of the Senate for its opinion. They concluded that—

"Section 4(b) of S. Res. 434 is clearly constitutional as an exercise of the rule-making power granted the Senate under Article I, section 5, clause 2 of the Constitution."

I have, in addition, written to the President asking whether these two propositions represent the true position of his administration. I ask unanimous consent to have printed in the Record the portion of the State Department legal adviser's opinion dealing with the Senate's rulemaking power.

There being no objection, the material was ordered to be printed in the Record, as follows:

*"Senate's Rulemaking Power"*

"The question then arises whether such designations are constitutionally sufficient to permit a single Senator to block funding legislation. An authorization or appropriations bill is legislation, and the requirements of Article I, section 7 of the Constitution for its passage must accordingly be met. For the Senate so to permit one Senator to block a particular and important type of legislation would, in our submission, be a serious distortion of the legislative process and of the constitutional requirements for passage of legislation. Ordinarily the Department of State would not venture to present a position on the internal rules of procedure of the Senate. We nevertheless feel obligated to oppose a proposal which would so impair the constitutional process under Article I, section 7, with such potentially damaging effect on the capacity of the United States to conclude international agreements.

"Senator Clark, in presenting S. Res. 434 to the Senate on April 14, said that the resolution was 'patterned, in fact, after the House germaneness rule.' (Cong. Rec., Apr. 14, 1976, p. S. 5746.) However, it does not appear that there is a relationship between the germaneness rule and the point of order procedure suggested in S. Res. 434. It is one thing to permit a point of order to block an amendment because it is not germane to the subject under consideration (see House Rule XVI, para. 7). It is quite another matter to permit a point of order to block legislation to fund an international agreement authorized by law and legally binding under international law, simply because one House has passed a resolution giving that agreement another designation.

"The germaneness rule follows naturally from the legislative process prescribed in Article I, section 7 of the Constitution. But a Senate or even a concurrent resolution cannot constitutionally overcome the President's legal authorization by a statute, a treaty, or the Constitution, to conclude an executive agreement. Where the President is legally empowered to conclude an international agreement, it would be a most serious distortion of the constitutional framework to permit one Senator to block funding legislation on the basis of a Senate resolution which cannot legally supersede the law authorizing the agreement.

"A point of order would lie, of course, where an attempt is made to appropriate funds for an item for which there is no legal authorization. But where an executive agreement is authorized by law, that authorization will subsist and cannot be nullified by a Senate resolution or a concurrent resolution. No matter what designation the Senate attaches to the agreement, the legal authorization for that agreement remains valid and in force.

"Nor, it is submitted, can the Senate alone constitutionally impose a rule requiring that legally authorized executive agreements receive a further two-thirds approval by the Senate before such agreements are implemented. Special majorities are imposed by the Constitution, and not by Senate resolution. In fact, in its most fundamental sense S. Res. 434 is an attempt by resolution to create a unanimous Senate approval rule for money bills that would fund 'significant' international agreements. But like all other bills, funding measures are adopted by a majority, and it requires an amendment to the Constitution to make it otherwise.

"We do not believe that either the Senate or the House would wish to establish a precedent under which statutory authorizations or mandates may be so overridden or amended. The alteration of the legislative process involved in proposed S. Res. 434 is extremely serious, and is one which, in our view, would substantially upset that process as set forth in the Constitution."

The opinion of the Senate legislative counsel is as follows:

*Memorandum for Senator Clark*

"This memorandum is in response to your letter to Mr. Littell requesting the opinion of this Office as to the constitutionality of section 4(b) of S. Res. 434 (94th Congress, 2d session) and the comments thereon by Monroe Leigh, Legal Adviser, Department of State.

"The Constitution provides that 'Each House may determine the Rules of its Proceedings. . . .' Article I, section 5, clause 2. This broad grant of authority is limited only by the specific exceptions set forth in section 5: the requirements respecting a quorum (clause 1), keeping and publishing a journal (clause 3), recording certain votes (clause 3), and adjournment (clause 4). No other exception is provided by the Constitution.

"The Supreme Court has, accordingly, construed the rule-making power liberally. In *United States v. Ballin*, 144 U.S. 1 (1892), the Court upheld the validity of a rule relating to quorums, stating that 'the advantages or disadvantages' and 'the wisdom or folly' of the rule did not 'present any matters for judicial consideration.' It continued:

" . . . With the courts the question is only one of power. The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.' *Id.* at 5.

Applying these standards to section 4(b) of S. Res. 434, it is clear that the rule established, which causes a point of order to lie against the consideration of a measure providing funds to carry out certain executive agreements, does not 'ignore constitutional restraints or violates fundamental rights.' The Constitution provides that no moneys can be drawn from the Treasury except pursuant to appropriations made by law (article I, section 9, clause 7), and it does not place any restraints on the power of Congress to refuse to appropriate funds, nor does it contain any restraint against the adoption of rules which might facilitate such a refusal. It is also clear that a 'reasonable relation' exists between the method established by section 4(b) and the result which is sought to be achieved. The result sought is apparently that set forth in section 2(a) of the Resolution, namely, 'to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented by the Senate without its prior advice and consent to ratification of that agreement.' The method established for achieving that result is to allow a point of order to be made against the consideration of any measure which provides funds to carry out an executive agreement which the Senate (as indicated by simple resolution) believes should be submitted as a treaty. This method, it appears, could accomplish the result sought.

"Under the language of article I, section 5, clause 2 of the Constitution, therefore, and under the construction given that provision by the Supreme Court, the rule proposed to be established seems clearly constitutional.

"Turning to the comments of Mr. Leigh, we note that he objects to the adoption of this rule on the grounds that it would "permit one Senator to block a particular and important type of legislation" and thus "be a serious distortion of the legislative process and of the Constitutional requirements for the passage of legislation." Such a rule, he believes, would "impair the Constitutional process under article I, section 7. . . ."

"Simply summarized, article I, section 7 requires that revenue bills originate in the House; establishes the veto power and a procedure for overriding a veto; and requires that measures having the force and effect of law be presented for Presidential signature. Article I, section 7 thus contains no provision relevant

to the adoption of the proposed rule, nor has any court ever construed the provisions of article I, section 7 as prohibiting the adoption of or invalidating a procedural rule of the Senate or the House of Representatives.

"The proposed rule would not "permit one Senator to block" legislation. At least two, and possibly three, majority votes of the Senate would be required in order to block such legislation. First, a majority vote would be required to adopt S. Res. 434, which establishes the rule giving rise to points of order. Second, a majority vote would be required to adopt the simple resolution of the Senate giving rise to a point of order with respect to legislation implementing a particular executive agreement. Third if a point of order is made, under the procedural rules of the Senate, the Presiding Officer must first rule on the point of order. Any Senator may appeal the ruling of the Presiding Officer and the Senate by majority vote either sustain or overrules that ruling. In effect the Senate by majority vote has the power to determine whether a point of order lies.

"Both the Senate and the House of Representatives have numerous procedural rules relating to the consideration of bills, resolutions, and amendments under which points of order can be made. *See, e.g.*, Rule XVI of the Standing Rules of the Senate; sections 303, 311, 401, and 402 of the Congressional Budget Act of 1974.

"It is therefore the conclusion of this Officer that section 4(b) of S. Res. 434 is clearly constitutional as an exercise of the rule-making power granted the Senate under article I, section 5, clause 2 of the Constitution.

Respectfully submitted,

MICHAEL J. GLENNON,  
*Assistant Counsel.*

JUNE 25, 1976.

Mr. CLARK. Mr. President, I ask unanimous consent that this resolution be referred to the Committee on Foreign Relations and, if and when reported by that committee, it be referred jointly to the Judiciary Committee and the Rules and Administration Committee for not to exceed 30 days for these committees to consider matters therein which may be within their jurisdiction.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Senator CLARK. Now, Senator Case is here and, to my knowledge, has been more active in this area of treaty powers and executive agreements than anyone I know of. So anything, Senator Case, that you wish to say—

#### STATEMENT OF SENATOR CASE

Senator CASE. Thank you, Mr. Chairman. Gentlemen, it is nice to have you with us, especially my colleague and fellow New Jersian, without disparage, of course, to any other State.

I have been interested for a long time in this question and I expect I shall be to the end of my days, certainly to the end of my period of activity and involvement in political activities. I'm not sure that even by the time that interest ceases, I shall have found the answers.

I used to think that this question could be answered rather quickly and easily, and I made several suggestions somewhat in the mode to the suggestions the Senator from Iowa has made. I am very glad to have his initiative, because we need to deal with this matter. We need to explore it, we need to work at it and we need to keep it constantly before the minds of the people of the country as well as the executive branch of the Government.

It may be that we shall find that happy solution in a single process, which we might institute here; it may be that we shall not. But in any event this exploration of the question, this examination into it, is a most useful exercise. We ought and I am confident that we shall continue to do this as long as even you, Senator Clark, are active in

the political realm, to say nothing of the shorter period which undoubtedly will be my lot.

Thank you, Mr. Chairman. I don't want to say anything more now. Senator CLARK. Thank you very much.

#### WITNESSES

Our witnesses today are Richard A. Falk of Princeton University and Arthur Bestor of the University of Washington. I would suggest that each witness present his prepared statement to the committee before questioning begins and that questions then be addressed by members of the committee to the witnesses. We would certainly invite each of the witnesses to comment on the other witness' points or positions or observations.

We are going to start with Professor Bestor of the University of Washington, and then Professor Falk.

#### STATEMENT OF PROF. ARTHUR BESTOR, UNIVERSITY OF WASHINGTON, SEATTLE, WASH.

Mr. BESTOR. It is a high honor to be invited to testify in this place. The Senate Committee on Foreign Relations plays a vital role in the American constitutional system, because it investigates on behalf of the Senate the momentous questions that the Senate has a unique power to act upon. The power to give advice and consent on treaties is the power to approve or disapprove commitments that may represent vital contributions by the American people to world peace and may entail heavy sacrifices on their part.

The power of the Senate in this matter is one of the crucial checks embodied in the American constitutional system of checks and balances. The purpose of the measure before us, the Treaty Powers resolution (S. Res. 486) is, in its own words, "to fulfill the intent of the framers of the Constitution."

Now, intent is a historical question, and it is as a historian, not a lawyer, that I wish to speak.

#### INTENT OF FRAMERS: TEXT AND CONVENTION STATEMENTS

To determine the intent of the framers, four types of contemporaneous sources are relevant: (1) the text of the Constitution itself; (2) the statements made in the Philadelphia Convention of 1787 where it was drafted; (3) the explanations offered by advocates of the Constitution while ratification was being considered by the public and voted on in the State conventions; and (4) the practices of the Government during its early period, while those who were intimately associated with the making of the Constitution were still active in its affairs.

The Constitution itself contains two provisions, and two only, dealing with the making of international agreements. One is the clause stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur" (Art. II, sec. 2, cl. 2). The other is the clause permitting an individual state, with the consent of Congress (i.e., both Houses and the President), to make an agreement or com-

compact with a foreign power (Art. I, sec. 10, cl. 3). Both provisions, be it noted, require the positive concurrence of one or both parts of the legislative branch.

One of the British precedents with which the Constitutional Convention had to reckon was the legal fiction (for it was far from being a hard political fact) that (in Blackstone's words) it was "the king's prerogative to make treaties, leagues, and alliances," and that his was also was "the sole prerogative of making war and peace." ("Commentaries on the Laws of England," I, 257). Whether these powers should be confided to the executive branch in the Constitution they were drafting was an issue that came before the framers of the Constitution at the end of the first week of the Philadelphia Convention. Four of the leading members addressed the question, and they unanimously rejected the idea of following British precedents and theories in this matter. Typical was the speech of James Wilson, of Pennsylvania, later a Justice of the Supreme Court. Wilson said that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war and peace."

The first draft of the Constitution that had the actual format of a constitution (as distinguished from a mere collection of resolutions) was reported on the 6th of August 1787, 6 weeks before the Convention completed its work, and it contained the first specific provision respecting the making of treaties. This draft vested in the Senate, and the Senate alone, the entire power of making treaties and appointing ambassadors. In subsequent discussion, James Madison suggested "that the President should be an agent in Treaties," and this idea was silently accepted. A new wording (proposed by a committee) was adopted on the 4th of September, less than 2 weeks before the end of the Convention. This began with the long-since-familiar phrases: "The President by and with the advice and Consent of the Senate, shall have power to make Treaties. . . ." Thereafter no change of substance was made.

The rephrasing adopted on the 4th of September can be made to appear as a thoroughgoing alteration of the constitutional scheme that had previously been under consideration, reviving the British conception of treaty-making as an executive prerogative and relegating the Senate to a subordinate position. This interpretation becomes untenable, however, when one notes the 18th-century constitutional significance of the phrase "advice and consent." It is taken directly from the enacting clause of English statutes—a legal formula in use to this day: "Be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords . . . and Commons in this present Parliament assembled, and by the authority of the same. . ." This does not mean, and never in modern times has meant, that the King could make a law in any other sense than that of giving final effect to a measure that had been deliberated upon, shaped, and finally passed by the legislature. The phrase "advice and consent" was shorthand for the legislative process in its entirety. The Constitution, in other words, gives the President the power to "make" a treaty, in the same way that the British King is empowered to "enact" a statute—namely, by finally approving and promulgating a measure that embodies the results of legislative deliberation.

INTENT OF FRAMERS: PUBLIC ARGUMENTS DURING RATIFICATION  
PROCESS

The people of the United States were led to accept, and their State conventions to ratify, the Constitution on the basis not of the speeches made in the Philadelphia gathering (for the full record was not published until 1840), but of the arguments publicly made by advocates of the new frame of government during the period of ratification in late 1787 and 1788. Of particular significance were the Federalist papers, whose three authors were James Madison, Alexander Hamilton, and John Jay. The first two were members of the Convention, the last had been Secretary for Foreign Affairs to the old Congress. All three agreed that legislative participation in the making of international agreements was imperative and was guaranteed by the Constitution.

It will suffice here to quote the 75th number of the Federalist, in which Hamilton began by saying that "the power of making treaties . . . will be found to partake more of the legislative than of the executive character." He went on to say—and I quote his warning verbatim—that "it would be utterly unsafe and improper to entrust that power [of making treaties] to an elective magistrate of 4 years duration. . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States."

Hamilton's opinion was that "the qualities . . . indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them."

It was on this understanding of the document that the American people were induced to adopt and to cherish the Constitution of the United States.

INTENT OF FRAMERS: EARLY PRACTICES OF GOVERNMENT

The practices of government during the early years under the Constitution are consistent with the view that the intent of the framers was to insure legislative participation in the making of international agreements, either directly in the case of significant ones, or indirectly by specific delegations of power in the case of subordinate and routine arrangements. By extremely strained interpretations, the executive branch today seeks to show that certain agreements of the latter type furnish precedents for far-reaching international agreements made by the President on his sole authority, without either Senate consent or prior congressional authorization. A brief examination of three of the most frequently adduced examples will show the fallacy of such arguments.

In 1792 Congress enacted a comprehensive statute dealing with the postal system. Its 30 sections prescribed postal operations in de-

tail. Among other things it empowered the Postmaster General to make contracts for the domestic transportation of the mails. Then, near the very end, the statute authorized him to make arrangements with postmasters in foreign countries "for the reciprocal receipt and delivery of letters and packets, through the post offices." This statute seems to me a perfectly legitimate use of the power of Congress "to make all laws which shall be necessary and proper for carrying into execution the . . . Powers vested . . . in the Government of the United States, or in any Department or officer thereof." (Art. I, sec. 8, cl. 18.) The power "to establish post offices" was one of the enumerated powers (*ibid.*, cl. 7), hence the making of arrangements respecting foreign mail, like the making of arrangements with domestic contractors, was a routine function that Congress could quite properly delegate by statute to an executive officer. There is absolutely no precedent here for the exercise by the President of a power to make international agreements without either Senate consent or prior congressional authorization.

Another episode often cited to prove the existence of an alleged executive prerogative to make executive agreements without legislative authorization occurred in 1799. A formally ratified commercial treaty with the Netherlands had been in existence since 1782. Shortly after the outbreak of the European war against the French Revolution in 1793, an American vessel was captured by a Dutch privateer, and her cargo condemned on the ground that the ship's papers were not in proper form according to the terms of the treaty. The State Department argued the case in behalf of the American owner, and in 1799 reached a settlement by which 20,000 florins were paid to and accepted by the claimant. This ended the matter. The negotiations were not conducted by virtue of some independent executive prerogative in foreign affairs. They represented nothing more than the carrying out of the executive's responsibility to "take Care that the Laws be faithfully executed"—the laws in this case being the terms of a treaty that had already received legislative sanction through the process of ratification.

#### INTENT OF FRAMERS—RUSH-BAGOT AGREEMENT

It is necessary, finally, to discuss the Rush-Bagot agreement of 1817-18 providing for what proved to be the permanent naval demilitarization of the Great Lakes. The significance of this agreement from the point of view of the treaty clause of the Constitution has been so often distorted by quotations torn from their context, that I have undertaken in my prepared statement, Mr. Chairman, to set forth the main features of the negotiation as they appear in the documentary record. Here let me offer a brief narrative.

In 1814, in the earliest negotiations to end the War of 1812, Britain first demanded the establishment of an Indian buffer state south of the Great Lakes, wherein neither party should be allowed to obtain land cessions from the Indians. When this demand was refused, Britain fell back on a demand that the United States agree not to maintain armed vessels on the Great Lakes or fortifications on their shores, while permitting British forces to remain there for the defense of Canada. This one-sided demand was naturally rejected and peace was made without stipulations as to forces along the border.

Once peace was made, however, the pressure for demobilization was so great in the United States that Congress in a statute of February 27, 1815, empowered the President to dismantle and sell the Great Lakes fleet "as he may judge most conducive to the public interest." The wide discretion allowed him certainly included, by implication, the power to seek an agreement with Britain for a commensurate reduction of forces. The power to reduce the American forces having already been delegated by Congress, President Madison was prepared to promise an immediate implementation of any "provisional reciprocal arrangement" that might be made, pending some more formal agreement. In April 1816, John Quincy Adams in London made a verbal agreement with the British foreign minister to halt further construction, though not to reduce armaments, and in August Secretary of State Monroe made the same kind of agreement *ad interim*, this time in writing.

Negotiations for an actual reduction of naval forces were not concluded until after Monroe became President, but such reductions were agreed to by an exchange of notes between Acting Secretary of State Richard Rush and the British Minister in Washington, Charles Bagot, dated the 28th and 29th of April 1817.

Now this agreement can properly be said to have derived its authority from the act of Congress of February 27, 1815. It can be described as an executive agreement authorized by prior congressional action. Bagot, being well aware of the treaty clause of the American Constitution, had misgivings about the long-term binding force of an agreement made by the Executive alone. Accordingly on January 14, 1818, he approached John Quincy Adams, now Monroe's Secretary of State, asking whether the President intended to communicate to Congress the notes that had been exchanged but that had not been made public. Bagot considered the agreement, he told Adams, to be "a sort of treaty," and he knew, of course, that a treaty could only be made "by and with the consent of the Senate." Adams carried the message to Monroe, whose first reply was that he "did not think it necessary that they [the notes] should be communicated." Twelve weeks later, however, Monroe changed his mind, and submitted the documents to the Senate, but raised the question "whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate." The Senate promptly answered his question by giving its consent on April 16, 1818, in the form prescribed for treaties. Monroe's doubts were those of a man who had voted against the adoption of the Constitution in the Virginia Ratifying Convention of 1788. The Senate, in contrast, contained one survivor from among the authentic framers, Rufus King.

The Rush-Bagot agreement exemplifies not the alleged independent power of the Executive to commit the Nation by an international agreement made on his sole authority, but instead certain very different principles. In the first place, it validates a constitutional principle to the effect that the President, in the course of carrying out a previously enacted statute, can enter into an international agreement that will facilitate and render more safe the execution of a mandate from Congress. In the second place, it confirms the constitutional prin-

ciple that for such an agreement to be converted from a mere agreement by the Executive to use his powers in a certain way, and to become instead a commitment of the American people, it would have been recast as a treaty, approved in the manner that the Constitution directs for an engagement that is to be part of the supreme law of the land.

In the third place and finally, the Rush-Bagot agreement establishes the constitutional principle that it rests with the Senate to decide whether an international agreement must take the form of a treaty. This, of course, is one of the principles incorporated in the Treaty Powers resolution (S. Res. 486). In my opinion, Mr. Chairman, the resolution correctly interprets the intent of the Constitution.

#### POWER OF THE PURSE AND POINT OF ORDER

To enforce its right to make the decision, the Senate is on perfectly sound constitutional ground in employing the power of the purse—the traditional means by which the legislature checks usurpations of power by the Executive. By adopting a rule to make this check effective by allowing a point of order to be raised seems to me entirely constitutional also, in view of the unqualified grant to each House of the power to “determine the Rules of its Proceedings” (Art. I, sec. 5, cl. 2).

Thank you, Mr. Chairman.

[Professor Bestor's prepared statement follows:]

#### PREPARED STATEMENT OF PROFESSOR ARTHUR BESTOR

##### JOINT RESPONSIBILITY IN THE MAKING OF INTERNATIONAL AGREEMENTS: THE INTENT OF THE FRAMERS

The Treaty Powers Resolution that is before this Committee has as its announced purpose “to fulfill the intent of the framers of the Constitution.”<sup>1</sup> The question whether the procedure that is proposed for dealing with international agreements does in fact fulfill the intent of the framers is obviously a crucial question, on which the constitutionality of the measure ultimately hinges. By definition, the question of the intent of the framers is an historical question. And it is as an historian that I shall attempt to answer it.

At issue, of course, is the constitutional status of international agreements made by the President on his own authority, without seeking the advice of the Senate or submitting the agreement to it for its consent, a favorable two-thirds vote being required—that is to say, without adhering to the procedure prescribed by the Constitution in the case of treaties.

The issue can be broken down into a series of specific questions about the constitutional intent of the framers. First, did the framers intend the treaty clause<sup>2</sup> to apply to every international agreement made by the authority of the United States? Second, if the framers did recognize that other kinds of international agreements might legitimately be employed, did they envisage any that would be made without some kind of congressional participation? Third, did they intend that such other international agreements (if permitted) should have the same range of subject-matter and the same high status as treaties? Fourth, did the framers intend that the President should have the sole power to decide whether a given international agreement should take the form of a treaty or whether it might be made in some alternative form which would not require the advice and consent of the Senate? Fifth, if the framers believed that the Senate had a right to participate in deciding whether a given agreement should take the form of a treaty or not, did they envisage the use of the power

<sup>1</sup> U.S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936); U.S. v. Belmont, 301 U.S. 324

<sup>2</sup> U.S. Constitution, Art. II, sec. 2, cl. 2.

of the purse to enforce the Senate's claim to this right? Sixth and finally, did the framers intend that the Senate (as well as the House) should have power to determine for itself its rules of procedure, adopting such as seemed to it necessary to prevent the erosion of its constitutionally-granted authority?

The most important evidence for the intent of the framers consists, of course, in the actual provisions of the written Constitution itself. Since the document creates a government of delegated and enumerated powers, the presumption must always be that the powers and procedures explicitly set forth in the Constitution are the powers that the framers intended to grant and the procedures they intended to prescribe. It is obviously fallacious (and even intellectually dishonest) to argue that the silence of the Constitution has the effect of authorizing additional powers to be exercised and alternative procedures to be followed. The unmistakable intent of the framers was that powers not granted in the document and procedures not authorized were withheld, or, in the language of the Tenth Amendment, "reserved."

Certain gaps have to be filled, it is true, for, as Chief Justice John Marshall pointed out in *M'Culloch v. Maryland*, a constitution that attempted to detail all the subdivisions of its great powers would have the "prolixity of a legal code" and "could scarcely be embraced by the human mind." In any discussion of the legitimacy of a governmental procedure, one must of course be mindful of the cautionary words of the great Chief Justice. "To have prescribed the means by which government should, in all future time, execute its powers," he wrote, ". . . would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."<sup>3</sup>

Flexibility is obviously essential in interpreting a constitution which, in Marshall's words "is intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Flexibility of interpretation, however, is always perilous, because nothing is easier than to interpret safeguards away. Marshall himself, in the opinion just quoted, indicated at least three basic tests that must be applied when powers or procedures are inferred from the Constitution rather than based upon explicitly stated provisions contained within it. In the first place, the interpretation must "depend on a fair construction of the whole instrument,"<sup>4</sup> that is to say, not upon single clauses torn from their context. In the second place, the interpretation must be consistent not only with the letter but also with the spirit of the Constitution.<sup>5</sup> And in the third place, there must be no losing sight of the principle "that the powers of the government are limited, and that its limits are not to be transcended."<sup>6</sup>

One final point must be made about these pronouncements of Marshall's. The case of *M'Culloch v. Maryland* involved the distribution of power between the states and the federal government. Marshall was not arguing that the *executive* was free to adopt whatever means he might consider "necessary and proper" for carrying out his responsibilities. The phrase "necessary and proper" occurs in the article of the Constitution dealing with *legislative* power.<sup>7</sup> It is the culminating grant of authority to *Congress*. Marshall was expounding this particular clause, and in passage after passage of his opinion he made it plain that he was insisting on adequate scope and discretion for *legislative* action and for *legislative* choice of means. The most famous sentence in *M'Culloch v. Maryland* is crystal clear in this respect, provided it is read together with the sentence immediately preceding it.

"But we think," wrote Marshall, "the sound construction of the constitution must allow to the *national legislature* that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable *that body* to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>8</sup>

<sup>3</sup> *M'Culloch v. Maryland* 4 Wheaton 316, at 407, 415 (1819).

<sup>4</sup> *Ibid.*, at 406.

<sup>5</sup> *Ibid.*, at 421.

<sup>6</sup> *Ibid.*

<sup>7</sup> U.S. Constitution, Art. I, sec. 8, cl. 18.

<sup>8</sup> *M'Culloch v. Maryland*, 4 Wheaton 316, at 421 (emphasis supplied).

The "necessary and proper" clause is worth quoting in full, "Congress shall have power," it provides, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>9</sup> Discretion in the choice of means belongs therefore to the legislature. The inclusion of the phrase "carrying into Execution" is significant, for these particular words are commonly used in defining the essential nature of executive power. What the clause means, on its very face, is that it is up to Congress to choose, and to specify by law, the means that may be "necessary and proper" for any officer (including the President) to employ "for carrying into Execution" the powers vested in him by the Constitution. If the means are explicitly prescribed by the Constitution, it would obviously be unconstitutional for Congress to alter them. But if certain means (that is procedures) not specified in the Constitution are felt to be "necessary and proper," then they are to be authorized by statute, not conferred by the officer on himself.

Before considering the alternative procedures which, under the "necessary and proper" clause, Congress might authorize for the making of international agreements, we should examine the procedures actually set forth in the Constitution itself. There are two. One provides for the making of treaties proper. The President, it says, "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."<sup>10</sup> The other provision is one that permits an individual state to enter into an "Agreement" or a "Compact" with "a foreign Power," provided Congress gives its consent.<sup>11</sup> Since an individual state is categorically prohibited from entering into a "Treaty," an "Alliance," or a "Confederation,"<sup>12</sup> the permitted kind of agreement was clearly intended to be of lesser scope and importance. The common characteristic shared by both of the constitutionally-sanctioned types of international agreement is the requirement of some kind of legislative approval—either the consent of the Senate by a two-thirds vote in the case of treaties, or the consent of both houses in the case of state compacts. No valid argument for an international agreement made by the executive alone can possibly be based on the two provisions of the Constitution dealing explicitly with the making of agreements with foreign powers.

The only other references to treaties in the Constitution have to do with their legal effect. The so-called Supremacy Clause defines the "supreme Law of the Land" as comprising three elements, the third of which is "all Treaties made, or which shall be made, under the Authority of the United States."<sup>13</sup> The article on the judiciary gives the federal courts jurisdiction over cases arising under treaties.<sup>14</sup> In view of the fact that treaties are required (by Article II, section 2, clause 2) to be made by and with the consent of the Senate, a state compact with a foreign power qualifies as part of the supreme law only because the congressional statute approving it is one of "the Laws of the United States . . . made in Pursuance" of the Constitution.<sup>15</sup> Despite the holdings of the Supreme Court in the cases of *Curtiss-Wright*, *Belmont*, and *Pink*,<sup>16</sup> there is no evidence in the Constitution or in statements by the framers that the latter intended for international agreements to become part of the supreme law of the land except when made in accordance with the clause on the making of treaties or else when given legal standing by virtue of the consent of Congress as a whole.

The requirement of legislative participation in the making of valid international agreements is clear enough in the text of the Constitution. The requirement becomes even clearer if the Constitution is read in the light of statements made during the constitution-making period by those responsible for its drafting, or for winning public support for it, or for first putting it into operation.

#### THE TREATY-MAKING POWER IN THE FEDERAL CONVENTION OF 1787

The Articles of Confederation, drafted in 1776-77 and finally ratified in 1781, gave the federal government almost as complete a monopoly of the war power

<sup>9</sup> U.S. Constitution, Art. I, sec. 8, cl. 18.

<sup>10</sup> Art. II, sec. 2, cl. 2.

<sup>11</sup> Art. I, sec. 10, cl. 3.

<sup>12</sup> *Ibid.*, cl. 1.

<sup>13</sup> Art. VI, cl. 2.

<sup>14</sup> Art. III, sec. 2, cl. 1.

<sup>15</sup> Art. VI, cl. 2.

<sup>16</sup> *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *U.S. v. Belmont*, 301 U.S. 324 (1937); *U.S. v. Pink*, 315 U.S. 203 (1942).

and the treaty power as did the later Constitution. The Articles, however, vested all federal powers in Congress, regardless of whether they might be classified as legislative, executive, or judicial. Even before the Constitutional Convention got under way in Philadelphia on the 25th of May 1787, there was general agreement that three separate branches should be created. One of the problems of the Convention, accordingly, was to sort out from the undifferentiated conglomerate of powers vested in the old Congress those particular powers that might be considered executive in nature, and then to assign them to their appropriate place in the new scheme.

Exactly a week after the Convention started its work, the question arose whether the powers of war and peace should be included among the executive powers to be taken out of legislative and placed in executive hands. Blackstone in his *Commentaries on the Laws of England* has unhesitatingly affirmed that it was "the king's prerogative to make treaties, leagues, and alliances with foreign states and princes," and that "the king has also the sole prerogative of making war and peace."<sup>17</sup> Since Blackstone elsewhere described the powers of the king as "the executive part of government,"<sup>18</sup> it could be argued that the making of treaties and the making of war were powers belonging necessarily to the executive branch.

When, however, the question was first raised in the Philadelphia Convention on the 1st of June 1787, four of the leading delegates spoke out at once to repudiate the idea that the powers of war and peace belonged in executive hands. James Wilson of Pennsylvania (later a justice of the Supreme Court) said that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace."<sup>19</sup> James Madison of Virginia agreed with Wilson's definition, saying that the phrase "executive powers" did not, in and of itself, "include the Rights of war & peace."<sup>20</sup> John Rutledge of South Carolina (another future justice of the Supreme Court) said that "he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."<sup>21</sup> His fellow delegate from South Carolina, Charles Pinckney (who would later serve as U.S. minister to Spain) expressed alarm at the possibility that executive powers "might extend to peace & war," because this "would render the Executive a Monarchy, of the worst kind, to wit an elective one."<sup>22</sup> No delegate spoke to opposite effect. As a result the Convention voted to strike out a proposed resolution which, though vague, might have been construed as vesting the powers of war and peace in the executive.<sup>23</sup>

During the two months that followed, the Convention adopted no resolution whatever placing in executive hands any power connected with foreign affairs, not even the power to command the armed forces. The whole group of questions relating to foreign affairs received careful and comprehensive attention for the first time in the deliberations of a so-called Committee of Detail, which reported a draft Constitution on the 6th of August 1787,<sup>24</sup> ten and a half weeks after the Convention began and only six weeks before it adjourned.

In this draft—the first that had the format of an actual constitution—the treaty power was vested exclusively in the Senate, with no mention of any sort of participation by the President. The wording was straightforward and unambiguous: "The Senate of the United States shall have power to make treaties, and to appoint Ambassadors. . . ."<sup>25</sup> The only diplomatic role assigned to the President for exercise on his own authority was that of receiving (but not appointing) ambassadors.<sup>26</sup> According to the assurances given to the American public by Alexander Hamilton in *The Federalist* in 1788, this particular power was intended to be largely ceremonial—"more a matter of dignity than of

<sup>17</sup> William Blackstone, *Commentaries on the Laws of England*, vol. I (4th ed., Oxford, 1770), p. 257.

<sup>18</sup> *Ibid.*, p. 250.

<sup>19</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols., revised ed., New Haven, 1966), vol. I, pp. 65-66 (Madison's notes).

<sup>20</sup> *Ibid.*, p. 70 (Rufus King's notes).

<sup>21</sup> *Ibid.*, p. 65 (Madison's notes).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, p. 67. The clause struck out would merely have allowed the executive "to execute such other powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature." *Ibid.*, p. 64 (Journal).

<sup>24</sup> *Ibid.*, vol. II, pp. 177-189.

<sup>25</sup> *Ibid.*, p. 183 (Art. IX, sec. 1).

<sup>26</sup> *Ibid.*, p. 185 (Art. X, sec. 2).

authority" and thus "without consequence in the administration of the government."<sup>27</sup>

When the Convention, later in the month, took up the committee's proposal to vest the treaty power in the Senate alone, James Madison suggested that it would be "proper that the President should be as agent in Treaties."<sup>28</sup> Though there was no debate on the suggestion, it seems to have been silently accepted thereafter by the members of the Convention, who were more concerned about other matters, such as the exclusion of the House of Representatives from a part in treaty-making, and the possible impact of treaties upon sectional economic interests. The most significant fact, in many ways, is that no one proposed for the President a more exalted role than that of being the "agent" of the Senate in treaty matters. This term, in fact, described exactly the relationship that had existed between the old Congress and its Secretary for Foreign Affairs. And in 1788 in *The Federalist*, Hamilton employed the same word, speaking of "the executive as the most fit agent" in foreign negotiations, while insisting on the necessity of "the participation of the whole or a part of the legislative body in the office of making" treaties.<sup>29</sup>

The treaty clause was given its final phrasing by a Committee on Postponed Parts which, on the 4th of September 1787 reported on various items of unfinished business. This Committee proposed, and the Convention adopted without significant change, the wording that has become familiar: "The President by and with the advice and Consent of the Senate, shall have power to make Treaties; and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors. . . ."<sup>30</sup> The requirement of a two-thirds vote was also included, and, after some rearrangement, the clause became Article II, section 2, clause 2, of the finished Constitution, which was submitted to the states only two weeks later.

It is possible, of course, to argue that the Convention was reversing at a single stroke and at almost the last minute, the long-held and frequently-asserted position of its leading members, and was therefore transferring from legislative (and specifically from senatorial) hands to the President plenary authority in the realm of foreign affairs, subject only the power of the Senate to veto a completed treaty, if submitted to it under that specific label.

Such an interpretation will not hold water, however, if due attention is paid to the real significance of the phrase "advice and consent"; that is to say, to the meaning the phrase had possessed in English and colonial constitutional documents for upwards of a century prior to the American Revolution. Among many examples of usage, the most significant is the appearance of the phrase in the enacting clause of English statutes—a usage that has remained unchanged from the latter part of the seventeenth century to the present. The formula was, and is, as follows: "Be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the Authority of the same . . ."<sup>31</sup> The King is thus said to "enact" laws, just as the President is said to "make" treaties. But the phrase "advice and consent" signifies that the King can do so only at the conclusion of, and only as the result of, a prescribed process involving initiative by the legislature, deliberation by the legislature, revision by the legislature, and final passage by the legislature. The phrase "advice and consent" was therefore synonymous with the legislative process in all its fullness, and the framers used it in this long-familiar sense. The treaty clause, understood in contemporaneous terms, vested in the Senate a right which that body (I must respectfully but regretfully say) has allowed to wither away—namely, the right to prior consultation and continuing collaboration with the President in the making of international agreements and therefore in the shaping of fundamental foreign policies.

#### PUBLIC EXPLANATIONS OF THE CONSTITUTION BY PROPONENTS AT THE TIME OF RATIFICATION

The debates in the Constitutional Convention were secret, and not until half a century later did most of the statements made on the floor become publicly

<sup>27</sup> *The Federalist*, No. 69 (14 March 1788). Edition of Jacob E. Cooke (Middletown, Conn., 1961), p. 468.

<sup>28</sup> Farrand, *Records*, vol. II, p. 392.

<sup>29</sup> *The Federalist*, No. 75 (26 March 1788). Cooke ed., p. 505.

<sup>30</sup> Farrand, *Records*, vol. II, pp. 498-499.

<sup>31</sup> An Act against the Importation of Gunpowder. 1 Jac. 2, c. 8 (1685), emphasis supplied. The formula remains unchanged at this day.

known through the publication of Madison's notes. In 1788, when most of the state ratifying conventions took action, the information available to the members, and to the public who elected them, consisted of the Constitution itself and the flood of pamphlets and newspaper commentaries in which proponents—many of whom had been members of the Convention—interpreted its provisions.

Unless we are to accuse these contemporary proponents of the Constitution of deliberate fraud, then we must take at face value their interpretations of the meaning of the various features of the document. It strikes me as scandalous to suggest that they were saying one thing while secretly intending something quite different. In particular, when members of the Convention explained to the public the governmental procedures that the Constitution prescribed, without mentioning any permissible alternatives, then we must presume that they intended these procedures to be followed and not by-passed. Moreover, even if we posit the unthinkable hypothesis that the framers lied to the public about their real intentions, the fact remains that the American people, through their elected representatives, adopted the Constitution on the basis of the interpretations publicly given by those involved in its drafting.

By general agreement, the most significant of the contemporaneous explanations of how the Constitution was intended to work was the series of papers entitled *The Federalist*. In no less than eighty-five numbers the three authors covered every aspect of the proposed constitutional system. And the authors themselves formed a knowledgeable and balanced group. Two had been members of the Convention: James Madison from the southern state of Virginia, Alexander Hamilton from the northern state of New York. Madison has been called, with good reason, the "father" of the Constitution, whereas Hamilton had been dissatisfied in the Convention with its failure to go as far as he wished toward centralization. The third author, John Jay (future Chief Justice of the United States), although not a member of the Convention, had acquired, as Secretary for Foreign Affairs to the old Congress, an experience in the handling of foreign policy that was probably unmatched, unless by Franklin (who was too old to take an active part in the discussion of ratification) or John Adams or Thomas Jefferson (both of whom were in diplomatic posts abroad while the Constitutional Convention was meeting).

The most elaborate discussion of the treaty power was by Hamilton. Five years later, in the "Pacifcus" letters of 1793, he would take a position in favor of executive primacy in foreign affairs, which was almost the opposite of that which he set forth in the *Federalist*, a fact that Madison pointed out by quoting verbatim Hamilton's earlier words.<sup>22</sup> Whatever Hamilton's later views may have become, we are interested here in the interpretation of the Constitution that he offered in 1788 for the purpose of persuading the public to adopt it. And at that time he expounded the treaty clause in terms that echoed those spoken at the Convention.

In the Convention, as we have seen, James Wilson insisted that "the Prerogatives of the British Monarch"—particularly the prerogative of war and peace, should not be the "guide in defining the Executive powers."<sup>23</sup> Hamilton in the 69th number of *The Federalist* was at pains to show that in the matter of treaties "there is no comparison between the intended power of the President, and the actual power of the British sovereign. The one can perform alone, what the other can only do with the concurrence of a branch of the Legislature."<sup>24</sup> Wilson had gone on to say that he considered the powers of war and peace to be essentially legislative in nature. Hamilton in the 75th *Federalist* expressed much the same view, saying that "the power of making treaties . . . will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them."<sup>25</sup>

Hamilton then went on to say: "The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities . . . indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead

<sup>22</sup> See Hamilton, "Pacifcus," No. 1 (29 June 1793), in his *Papers*, ed. by H. C. Syrett, vol. 15 (New York, 1969), pp. 33-43; and Madison, "Letters of Helvidius" (August-September 1793), in his *Writings*, ed. by Gaillard Hunt, vol. 6 (New York, 1906), pp. 138-188.

<sup>23</sup> See above, at note 19.

<sup>24</sup> *Federalist*, No. 69 (14 March 1788). Cooke ed., pp. 467-468.

<sup>25</sup> *Ibid.*, No. 75 (26 March 1788). Cooke ed., p. 504.

strongly for the participation of the legislative body in the office of making them."<sup>36</sup>

Hamilton repeatedly used such phrases as "the union of the executive with the senate, in the article of treaties," their "joint possession," or "joint agency," or "concurrent authority."<sup>37</sup> Furthermore he voiced a stern and specific warning against confiding to the President alone not simply the treaty power but an all-encompassing control over foreign relations generally. This significant passage, from the 75th *Federalist*, deserves quotation at some length:

"However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern *its intercourse with the rest of the world* to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States."<sup>38</sup>

Hamilton did not believe that the power should be entrusted to the Senate alone, but he uttered no such dire warning against doing so. Instead he pointed out that to have done so "would have been to relinquish the benefits of the constitutional agency of the president, in the conduct of foreign negotiations," and would have tended to lessen "the safety of the society."

Hamilton's conclusion, accordingly, was "that the joint possession of the power in question by the president and senate would afford a greater prospect of security, than the separate possession of it by either of them."<sup>39</sup>

With this conclusion his two associates in the writing of *The Federalist* fully agreed. Madison in the 38th number contrasted the situation under the Articles of Confederation, where Congress alone made treaties, with the situation under the proposed Constitution, which "empowers the Senate with the concurrence of the Executive to make treaties which are to be the laws of the land."<sup>40</sup> He it was who, in the Convention, suggested that the President might well be an "agent" in the negotiation of treaties, and in this sentence, it is worth noting, he still put the Senate foremost.

John Jay, in the 64th *Federalist*, likewise emphasized the importance of requiring concurrence between the executive and the Senate in the making of treaties. He spoke always in the plural of the *men* with whom "the power of making treaties may safely be lodged." The respective contributions of the Senate and the President were carefully delineated. Jay argued that the participation of the Senate would give to the process of treaty-making "every advantage which can be derived from talents, information, integrity, and deliberate investigations," whereas the President would contribute the necessary elements of "secrecy and dispatch."<sup>41</sup>

Treaties are mentioned in at least fifteen of the eighty-five numbers of *The Federalist*.<sup>42</sup> In none of them can I discover the slightest hint that some other kind of binding international agreement could constitutionally be made by the President without the authorization or approval either of one or of both houses of Congress.

#### PRACTICES DURING THE EARLIEST PERIOD UNDER THE CONSTITUTION

The way in which the earliest Congresses and the earliest administrations under the Constitution interpreted their respective powers is obviously important in ascertaining the intent of the framers. Two presidents—Washington and Madison—had been members of the Convention, as had various early cabinet officers and a substantial number of members of both houses of the first few Congresses. One must, of course, discriminate. The second and third presidents, John Adams and Jefferson, were abroad at the time of the Convention, and took no part in the ratification campaign that followed. And it is absurd to characterize the fifth president, James Monroe, as one of the framers of the Constitution (as is sometimes done), for not only was he not a delegate to the Philadelphia Convention, but in the Virginia ratifying convention he voted *against* the adoption of the Constitution.<sup>43</sup> After putting aside the faulty claims that are sometimes made, however, it remains true that the early actions of the legislative and executive

<sup>36</sup> *Ibid.*, p. 505.

<sup>37</sup> *Ibid.*, pp. 504, 506, and No. 66, pp. 450, 447, respectively.

branches were taken by men with a far more direct, vivid, and personal sense of what the framers of the Constitution intended than any later generation of public men could be expected to possess.

It is in order, therefore, to examine carefully the international agreements which, during this period, were made in some other form than that of full-fledged treaties. The existence of such agreements is often cited—especially in legal memoranda from the executive branch—as evidence that the framers intended to bestow upon the President a power to make international executive agreements on his own authority, without authorization from or approval by any legislative body. As will be shown in the following account of the three agreements most frequently referred to, none of them constituted an agreement of this particular kind. All involved some kind of legislative authorization or participation. One must remember that the point at issue is not whether the framers of the Constitution envisaged certain kinds of international agreements other than treaties. Of course they did, as Article I, section 10, clause 3, clearly shows. The point at issue is whether they envisaged any form of valid international agreement that could constitutionally be made without legislative authorization or participation or validation.

Now for the evidence.

On the 20th of February 1792 a postal statute was enacted. Its thirty sections prescribed in great detail the rates of postage, the responsibilities of masters of ships carrying mail into and out from American ports, and the like. Moreover it authorized the postmaster general to make contracts for transporting mail within the country. Finally, in the 26th section, fees were set on mail to foreign countries, and a delegation of power was then made in the following words: "And the Postmaster General may make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices."<sup>44</sup> Obviously Congress and President Washington (who signed the measure) believed that it was constitutional, under the "necessary and proper" clause, for Congress to authorize an executive officer to make certain routine agreements with foreign officials (as with domestic contractors) in order to carry out various details of a comprehensive statutory program. Such a carefully circumscribed delegation of contract-making authority would seem clearly to be within the intent of the Constitution. Agreements of this kind, however, provide no support whatever for an executive claim of power to make international agreements without congressional approval.

A second agreement reached in the decade of the 1790's illustrates a slightly different principle. In 1782 the United States had ratified a commercial treaty with the Netherlands, which contained elaborate provisions respecting contraband, neutrality, ships' documentation ("sea-letters" as the treaty described them), and the like. On the 1st of February 1793, at a climactic point in the French Revolution, war broke out between France and a coalition of powers including the Netherlands. An alliance existed between the United States and France, and until Washington's Proclamation of Neutrality of 23 April 1793 the situation under the Dutch treaty was confused. Furthermore news travelled slowly, and in July an American vessel carrying a French-owned cargo was captured by a Dutch privateer. The prize court released the ship, but on the technicality that the "sea-letters" were not in order it awarded the cargo to the captor. Negotiations by the United States in behalf of the ship-owner resulted in 1799 in a compromise agreement by the Dutch to settle the claim for twenty thousand florins. This was accepted by the United States in an exchange of notes.<sup>45</sup> The issue arose under the terms of a fully ratified treaty, one small individual claim was involved, and the acceptance of the compromise closed the case. The fact that the procedure met with no objection indicates that contem-

<sup>42</sup> *Ibid.*, No. 75; Cooke ed., pp. 505-506 (emphasis supplied).

<sup>43</sup> *Ibid.* (emphasis supplied).

<sup>44</sup> *Ibid.*, No. 38 (12 Jan. 1788). Cooke ed., p. 247.

<sup>45</sup> *Ibid.*, No. 64 (5 March 1788). Cooke ed., pp. 433, 436.

<sup>46</sup> *I.e.*, Nos. 3, 15, 22, 38, 42, 43, 44, 53, 64, 66, 69, 75, 77, 80, and 83. Many of these deal with other aspects than the power of making treaties.

<sup>47</sup> Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. III (2nd ed., Philadelphia, 1861), pp. 654, 655.

<sup>48</sup> An Act to Establish the Post-Office and Post Roads within the United States (20 Feb. 1792), 2nd Cong., 1st sess., c. 7; 1 Statutes at Large 232, at 239.

<sup>49</sup> See Wallace McClure, *International Executive Agreements: Democratic Procedure under the Constitution of the United States* (New York, 1941), pp. 43-44, for a brief factual account.

poraries considered it perfectly constitutional for Congress (or the Senate) to leave it to the executive to carry out the provisions of an already-ratified treaty, and to make, if necessary, such subordinate international agreements as might be needed in order to take care that the treaty was faithfully executed. What else is this but a definition of executive responsibility? It would have been absurd to embody the settlement of a single claim in a new formal treaty, but not as absurd as to assert that a case of this sort furnishes a precedent for the exercise of a totally independent and unlimited executive power to make major international agreements in disregard of the treaty clause of the Constitution.

Latest in time of the agreements that are usually cited in discussions of the President's authority to make international agreements is the Rush-Bagot Arrangement of 1817-1818 with Great Britain, providing for the limitation of naval armaments on the Great Lakes. To understand the constitutional implications of the episode, a straightforward narrative is more useful than a set of quotations torn from their context.

The military situation along the Canadian boundary had been a matter of serious concern to both Britain and the United States ever since the Treaty of Peace of 1783, followed as it was by a long delay in the surrender of British military posts in the northwest. When in 1814 negotiations began for ending the War of 1812, Britain's first demand was that an Indian buffer state should be created south of the Lakes, with a pledge that no land cessions from the Indians would thereafter be obtained by either party. Failing such a treaty provision, Britain hinted that it might ask for a surrender of the southern shores of the Lakes, to remove the threat of an attack on Canada. Instead, the British negotiators made what they described as the "moderate demand" that the United States should keep no armed naval force on the Lakes and should erect no fortifications on their shores, but that Britain should be allowed to do both.<sup>46</sup> The American commissioners, as might be expected, refused, and the Treaty of Ghent, which ended the war, contained no stipulation on this, as well as on a great many other disputed points.

Nevertheless, on the 27th of February 1815, ten days after the ratification of the peace treaty, an act of Congress authorized the President, "as he may judge most conducive to the public interest," to lay up or sell "all the armed vessels" on the Lakes.<sup>47</sup> Obviously it would be the better part of discretion (and discretion was granted the President) to secure an agreement with Great Britain before carrying through such a drastic demilitarization of a dangerous frontier. Though the act of Congress did not explicitly delegate to the President a power to make an international agreement in the course of carrying out the statute, any agreement actually made could certainly be defended as the exercise of a power implicitly authorized by Congressional statute.

On the 29th of August 1815, John Quincy Adams, the American minister in London, informed the Secretary of State, James Monroe, that British newspapers were carrying reports of cabinet decisions to augment that country's naval forces on the Great Lakes.<sup>48</sup> In response, on the 16th of November, Monroe wrote Adams that the President, James Madison, authorized him to propose a limitation of naval armaments by both sides.<sup>49</sup>

The initial British reaction was unfavorable, and the Secretary of Foreign Affairs, Viscount Castlereagh, again argued that unilateral disarmament by the United States was called for, since the latter possessed the advantage of "proximity."<sup>50</sup> Adams countered this by assuring Castlereagh "that no act of offensive hostility against any foreign nation can be authorized by the Executive of the United States without the sanction of a previous act of Congress, in whom alone is vested by the Constitution the power of declaring war."<sup>51</sup> (In itself, this statement is worth noting as an interpretation of constitutional war powers by the man who would become the sixth President.)

Finally, in April 1816, Castlereagh indicated to Adams that Great Britain was prepared to agree to a limitation of armaments by both parties. The two states-

<sup>46</sup> American commissioners (J. Q. Adams *et al.*) to Secretary of State (Monroe), Ghent, 19 Aug. 1814. *American State Papers*, Class I, *Foreign Relations*, vol. III (Washington 1832), pp. 708-709. (This volume cited hereafter simply as *Amer. State Papers*.)

<sup>47</sup> An act to repeal certain acts concerning the flotilla service. 13th Cong., 3d sess., c. 62 (27 Feb. 1815); 3 Statutes at Large 217.

<sup>48</sup> *War Vessels on the Great Lakes*: Report of the Secretary of State, 7 Dec. 1892; in 52d Cong., 2d sess., Sen. Exec. Doc. 9; reprinted in 56th Cong., 1st sess., House Doc. 471, p. 5. (Cited hereafter, from the House reprint, as *War Vessels*.)

<sup>49</sup> Monroe to Adams, 16 Nov. 1815, *War Vessels*, p. 5.

men agreed verbally "that no new or additional force should be commenced upon the lakes on either side for the present," and Adams informed his home government that "all the effects of a positive engagement" were understood "as existing from this time."<sup>52</sup> Adams, however, did not consider his instructions sufficient to authorize him to make a final binding agreement. Further negotiations were accordingly transferred to Washington, where the British Minister, Charles Bagot, handled the subsequent negotiations.

Formal negotiations between Bagot and Secretary of State Monroe began with a communication from the former on the 26th of July 1816.<sup>53</sup> Monroe replied on the 2nd of August, proposing that the forces on both sides should be reduced to four vessels apiece, one on Lake Ontario, two on the Upper Lakes, and one on Lake Champlain. None was to be larger than a hundred tons, each was to be armed with only a single eighteen-pound cannon, and their only assigned duties were to be to enforce the revenue laws. Monroe indicated that President Madison was anxious "that the arrangement should be made and executed with the least delay possible." Accordingly Monroe inquired whether Bagot's instructions permitted him to accede to a permanent agreement, and if not, whether he had "power to make, *ad interim*, any provisional reciprocal arrangement, having the same objects in view."<sup>54</sup>

Bagot replied, four days later, that he would have to consult his government about a final, permanent agreement, but he offered to agree to an immediate suspension of further naval construction on the Lakes.<sup>55</sup> On the 12th of August 1816, Monroe accepted this provisional arrangement, but with a significant difference. The United States, he was prepared to agree, would suspend further augmentation of its naval force, but only to such an extent as would give it the same limits as the British force. The provisional agreement, however, would not be made until Great Britain provided information on its present force in the Great Lakes.<sup>56</sup> The next day Bagot confirmed his assurance that "all further augmentation . . . will be suspended," and promised to obtain an exact statement of British naval forces on the Lakes.<sup>57</sup> This was forthcoming on the 4th of November 1816,<sup>58</sup> and Monroe reciprocated on the 7th with an account of American forces and an assurance that orders were being given (as they immediately were) to prevent any augmentation "beyond the limit of the British naval force on those waters."<sup>59</sup>

Here matters rested until after the inauguration of Monroe as President of the United States in succession to Madison, the appointment of Richard Rush as Acting Secretary of State, and the recall of John Quincy Adams from London to become Secretary of State.<sup>60</sup> With the departure of Madison from the Presidency, it is appropriate to consider his constitutional views as reflected in this episode, for it is sometimes asserted that Madison believed that the final agreement on the permanent disarmament of the Great Lakes would not have to be

<sup>52</sup> Adams to Monroe, 8 Feb. 1816. *Ibid.*, pp. 5-6. On the unfavorable British response see also Adams' letters of 31 Jan. and 30 March 1816. *Ibid.*, pp. 4, 7-8.

<sup>53</sup> Adams to Castlereagh, 21 March 1816. *Ibid.*, p. 7.

<sup>54</sup> Adams to Monroe, 15 April 1816. *Ibid.*, p. 8.

<sup>55</sup> Bagot to Monroe, 26 July 1816. *Ibid.*, p. 9. This was the earliest of the communications published at the time. It formed part of the documentary record transmitted to the Senate by President Monroe on 6 April 1818. *Amer. State Papers*, p. 203. It is also the first one printed in Hunter Miller, ed., *Treaties and Other International Acts*, vol. II (Washington, 1931), pp. 645-654, at 649. On 8 July 1816 Monroe informed Adams that Bagot had received instructions from his government on the matter. *War Vessels*, p. 9.

<sup>56</sup> Monroe to Bagot, 2 Aug. 1816. *Amer. State Papers*, p. 203; Miller, *Treaties*, p. 650; *War Vessels*, pp. 9-10.

<sup>57</sup> Bagot to Monroe, 6 Aug. 1816. *Amer. State Papers*, pp. 203-204; Miller, *Treaties*, p. 651; *War Vessels*, pp. 10-11.

<sup>58</sup> Monroe to Bagot, 12 Aug. 1816, *Amer. State Papers*, p. 204; Miller, *Treaties*, p. 651; *War Vessels*, p. 11.

<sup>59</sup> Bagot to Monroe, 13 Aug. 1816. *Amer. State Papers*, p. 204; Miller, *Treaties*, pp. 651-652; *War Vessels*, pp. 11-12.

<sup>60</sup> Bagot to Monroe, 4 Nov. 1816; with enclosure, 1 Sept. 1816. *Amer. State Papers*, pp. 204-205; Miller, *Treaties*, pp. 652-653; *War Vessels*, p. 12.

<sup>61</sup> Monroe to Bagot, 7 Nov. 1816; with enclosure. Miller, *Treaties*, p. 653 (the only one of the sources that prints the enclosure in full).

<sup>62</sup> Monroe, inaugurated on 4 March 1817. Immediately invited John Quincy Adams to be Secretary of State, but the latter (still in England) could not take up his duties until 22 Sept. 1817. In the meantime Richard Rush (who had been Attorney General under Madison) served as Acting Secretary of State, after which he became minister to Great Britain.

submitted to the Senate for approval.<sup>61</sup> There is no historical evidence to support such a view. Madison had left office before the negotiations reached the final stage, when a decision about form would have to be reached. He had, of course, been willing to make a provisional agreement, which was certainly defensible on the basis of the act of Congress of the 27th of February 1815. In his letter of the 2nd of August 1816, Monroe said that if Bagot possessed the authority to make an agreement, his instructions from Madison were "to give it immediate effect, either by convention, the interchange of notes, or in any form which may be thought best adapted to the ends proposed."<sup>62</sup> In itself this statement did not imply that eventual approval by the Senate would be unnecessary, should the arrangement prove to be more than a temporary one.

An agreement was finally put into final form by an exchange of notes, one from Bagot dated the 28th of April 1817, and one from Rush as Acting Secretary of State the next day.<sup>63</sup> Orders were promptly issued to the naval officers on both sides,<sup>64</sup> and then the whole matter was pushed aside. When John Quincy Adams took up his duties as Secretary of State, he was distressed by this laxness of the Monroe Administration, complaining in his diary after Monroe's annual message of December 1817, that "It has been usual heretofore with the message at the opening of the session of Congress to send a collection of documents with it relating to the principal subjects mentioned in it. This was not done at the present session, and some inconvenience has resulted from the omission."<sup>65</sup>

In Bagot's mind, this failure to publish the text of the agreement created misgivings as to its status, and he approached Adams, now Secretary of State, asking whether some final steps ought not to be taken. Adams made the following entry in his diary for the 14th of January 1818:

"Met and spoke to Mr. Bagot this morning on my way to the President's. He asked me if it was the intention of the President to communicate to Congress the letters which had passed between the Secretary of State and him (Bagot) containing the arrangement concerning armaments on the Lakes, which he said was a sort of treaty. I spoke of it to the President, who did not think it necessary that they should be communicated."<sup>66</sup>

Adams gave no indication either of approval or disapproval of Monroe's response. Twelve weeks later, on the 6th of April 1818, Monroe changed his mind and did submit the documents to the Senate.<sup>67</sup> Though it would seem probable that his Secretary of State advised him to do so, there is actually no evidence on the matter. By the same token, there is no evidence that Adams ever agreed that submission was unnecessary.

In laying the Rush-Bagot correspondence before the Senate, Monroe wrote: "I submit it to the consideration of the Senate, whether this is such an arrangement as the Executive is competent to enter into, by the powers vested in it by the Constitution, or is such an one as requires the advice and consent of the Senate."<sup>68</sup> Monroe did not indicate the particular constitutional clauses that he believed might give to the executive a power to make an agreement of this kind on his sole authority, nor did he cite any precedents or statements supporting such a view. It is fantastic to argue that Monroe's doubts (seemingly shared by no one else) constitute "persuasive evidence of the intentions of the framers of the Constitution" to the effect that "not even all important agreements were required to be submitted to the Senate."<sup>69</sup> This argument becomes doubly fantastic when one remembers that Monroe (here classified with the framers) was not a member of the Convention which drafted the Constitution and that he voted against it in the Virginia ratifying convention.

In any case, the Senate promptly decided the matter, giving short shrift to Monroe's doubts. A week after the President submitted the documents, the Senate

<sup>61</sup> See the memorandum of 5 Feb. 1976 from Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, Department of State, transmitted to Senator John J. Sparkman as a reply to a memorandum from the Senate Office of Legislative Counsel. *Congressional Record*, 17 Feb. 1976, pp. S1687-S1692, at S1688-S1689.

<sup>62</sup> *Amer. State Papers*, p. 203; Miller, *Treaties*, p. 650; *War Vessels*, p. 10.

<sup>63</sup> Miller, *Treaties*, pp. 645-647; *Amer. State Papers*, pp. 205-206; *War Vessels*, pp. 13-14.

<sup>64</sup> *Amer. State Papers*, pp. 206-207; *War Vessels*, p. 14.

<sup>65</sup> John Quincy Adams, *Memoirs*, ed. C. F. Adams, vol. IV (Philadelphia, 1875), p. 42. Madison did at least mention the agreement in his message on 2 Dec. 1817. *Amer. State Papers*, p. 129, paragraph 2.

<sup>66</sup> J. Q. Adams, *Memoirs*, vol. IV, pp. 41-42.

<sup>67</sup> Senate, *Executive Journal*, vol. III (Washington, 1829), pp. 131-132 (6 April 1818).

<sup>68</sup> *Ibid.*

<sup>69</sup> Rovine, memorandum of 5 Feb. 1976 (as cited in note 61 above), p. S1689, col. 1.

Committee on Foreign Relations reported a resolution in the form ordinarily employed for treaties, and on the 16th of April 1818, the Senate resolved (with two-thirds of the members present concurring) "to approve of and consent to the arrangement" and to "recommend that the same be carried into effect by the President."<sup>70</sup> On the 28th of April 1818, President Monroe publicly proclaimed that the "arrangement," with every one of its stipulations, "has been duly entered into, concluded, and confirmed, and is of full force and effect."<sup>71</sup> He did not refer to it as a treaty, but he did cite Senate approval in one of the "whereases." Wallace McClure, author of the standard work on *International Executive Agreements* and himself an officer of the State Department, declared unequivocally that the agreement was, by the Senate action, "converted into a treaty."<sup>72</sup> Though historians generally agree, a recent State Department memorandum remarks slightly that "this view has not been accepted."<sup>73</sup> By whom and for what reasons the view has been rejected is not stated, but one can make a guess.

The decision of the Senate in the matter of the Rush-Bagot Agreement exemplifies quite clearly the distinction intended by the framers of the Constitution between a treaty and a short-run agreement designed to deal promptly but temporarily with an immediate problem.

Properly speaking, an executive agreement is an agreement by the executive as to the way he will use his executive powers in a present situation. It may create an obligation for which the people whom he represents may find themselves liable, but it cannot be regarded as a solemn national commitment entered into by them. To a certain extent it may bind the successor in office of the particular executive who makes it, but essentially its duration is temporary. To convert it into a national commitment by which the people bind themselves and thereby all their agents, present and future, it must be made with their participation by their legislative representatives. This, I submit, is what the constitutional word "treaty" was intended to signify.

#### CONCLUSION

The one clear precedent that can be derived from the events surrounding the Rush-Bagot Agreement is that the Senate has a right to decide whether an international agreement ought properly to be a treaty and must therefore be dealt with as such. This, of course, is a central principle of Senate Resolution 486, which is before this Committee. In my judgment, section 4(a)(1), which authorizes a "sense of the Senate" resolution announcing that a particular international agreement constitutes a treaty and should be submitted as such, is supported by the Rush-Bagot precedent, and is a legitimate means of fulfilling the intent of the framers that international commitments should be made only with legislative participation. The provision is supported by reason as well. The requirement of advice and consent is one of the checks that the Constitution provides against executive usurpation. It would be utterly unreasonable to allow the executive to decide for himself whether and when the check may be by-passed. It would be like allowing the prosecutor to waive the constitutional rights of a defendant.

The ultimate check with which, from time immemorial, legislatures in the Anglo-American tradition have been endowed, is the power of the purse. To harness this to the enforcement of the Senate's right to give or refuse advice and consent, as section 4(b)(1) does, seems to me undeniably constitutional.

The proposed Senate rule by which appropriations could be blocked on a point of order if designed to carry out an agreement that the Senate has indicated it will not implement unless put in the form of a treaty, seems to me likewise constitutional, in view of the unqualified grant to each House of the right to "determine the Rules of its Proceedings."<sup>74</sup>

In conclusion, may I say, with all due respect, that Congress seems to me to play into the hands of the executive by allowing discussions of these matters to proceed solely on the basis of the concept of the "separation of powers." An equally vital principle of the Constitutional system is the concept of "checks

<sup>70</sup> Senate, *Executive Journal*, vol. III, p. 134.

<sup>71</sup> *Amer. State Papers*, p. 207.

<sup>72</sup> Wallace McClure, *International Executive Agreements* (New York, 1941), p. 49.

<sup>73</sup> Rovine, memorandum of 5 Feb. 1976 (as cited in note 61 above), p. S1688, col. 3, footnote.

<sup>74</sup> U.S. Constitution, Art. I, Sec. 5, cl. 2.

and balances." Neither phrase appears in the document itself, but both occur side by side in virtually every discussion of the Constitution from the time of its formation to the present. Though often treated as synonyms, the two are in fact competing concepts. So far as the relationship of the judiciary to the political branches is concerned, the concept of separation of powers is, and ought to be, absolutely controlling. But in the relationship between the legislative and the executive branches, the concept of checks and balances was in reality given primacy by the framers. The power of the President to veto an act passed by both Houses of Congress is an intrusion of executive power into the legislative realm, as the writers in *The Federalist* frankly conceded. But any argument to the effect that a presidential veto is unconstitutional because it is in violation of the principle of separation of powers would be laughed out of court. The fact that the veto is authorized by the Constitution is a sufficient answer to any contention based on a vague and abstract theory. The right of the Senate to refuse consent to an international agreement that it considers to be a treaty is a limitation on executive discretion and thus in a sense an intrusion upon executive power. It is a sufficient answer to the charge that it violates the principle of separation of powers to say that it is a right explicitly granted in the Constitution.

It would be desirable, in my opinion, for Congress to invoke, deliberately and consistently, the doctrine of checks and balances as an offset to the invocation by the executive branch of the doctrine of the separation of powers. It might prove helpful for the Subcommittee on Separation of Powers of the Senate Judiciary Committee to be re-named the Subcommittee on Constitutional Checks and Balances. There is as much constitutional warrant for the one term as for the other. The essential point is to make clear to the American public that recent measures adopted or proposed by the Senate and the House are not unconstitutional usurpations of executive power. Quite the reverse. Measures like the one under discussion today are attempts to make effective the checks that the framers intended the two Houses to exercise. The ultimate purpose of all such checks is to prevent any branch of government (in this case the executive branch) from destroying the balances of the Constitution by absorbing to itself the powers that the framers deliberately distributed among the several branches—as in particular they were careful to distribute and balance and check the most portentous powers of all, those of war and peace.

#### BIOGRAPHY OF ARTHUR BESTOR

*Current positions:* Professor of History, University of Washington, Seattle (since 1962); President, Pacific Coast Branch, American Historical Association (1975-76).

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*Publications* (partial list):

Books in the Field of History: *Backwoods Utopias* (1950); 2d enlarged ed., 1970); *Education and Reform at New Harmony* (1948; reprinted 1973); *Three Presidents and Their Books* (with D. C. Mearns and Jonathan Daniels, 1955); *Problems in American History* (with R. W. Leopold and others, 1952; 4th ed., 1972); *The American Territorial System* (with J. P. Bloom and others, 1973).  
 Books on Public Educational Issues: *Educational Wastelands* (1953); *The Restoration of Learning* (1955).

Historical Articles: "Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined," 5 *Seton Hall Law Review* 527-665 (Spring 1974); "Impeachment (review of R. Berger)," 49 *Washington Law Review* 255-285 (1973); "The American Civil War as a Constitutional Crisis," 69 *American Historical Review* 327-352 (Jan. 1964); "State Sovereignty and Slavery," 54 *Journal of the Illinois State Historical Society* 117-180 (summer 1961).

Also articles and reviews in: *Journal of the History of Ideas*, *American Scholar*, *Journal of Southern History*, *William and Mary Quarterly*, *Scientific Monthly*, *Daedalus*, *Harvard Educational Review*, *New Republic*, and others.

#### STATEMENT OF PROF. RICHARD A. FALK, PRINCETON UNIVERSITY, PRINCETON, N.J.

MR. FALK. Thank you, Mr. Chairman. It is a great privilege for me to have this opportunity to present my views on the questions before this committee. And I would, with the chairman's permission, depart from my prepared statement, to a considerable extent, at least, in trying to make a more effective introduction for the purpose of questions and discussion. But I would like to have my prepared statement introduced into the record.

SENATOR CLARK. Both statements will be put in the record.

MR. FALK. Let me say at the outset that I think it is very important, as Senator Case emphasized in his remarks, that this committee persist in its efforts to rehabilitate a proper constitutional balance between the legislative and executive branches with respect to foreign affairs. And I think that the issues, that were raised to public prominence initially by the controversies arising out of the Vietnam period, reveal structural imbalances of a very fundamental sort, which will require, as both Senator Case and Senator Clark indicated, a very persistent and persevering effort, which—it is not clear—which will be successful.

#### WHAT RELEVANT CONSTITUTION DEPENDS ON

In my opinion the fundamental context of Senate Resolution 486, Mr. Chairman, is really a question of how relevant the Constitution can be made in relation to a very fundamental failure over the years to maintain the intention of the framers with respect to both separation of powers, and checks and balances in foreign affairs.

I believe the prospect for restoring the constitutional conception in foreign affairs is dependent on a much higher degree of executive cooperation, than has so far been present. It is important to note that almost any independent assessment of the constitutional experience with respect to separation of powers and checks and balances, Mr. Chairman, would agree that this imbalance has developed. And yet at every step of the way the executive branch has struggled to maintain every aspect of its inflated control over foreign affairs. Such bureaucratic loyalism is incompatible with the whole notion of a living Con-

stitution and a resilient Constitution, which really depends upon a cooperative appreciation of a given situation among the branches of government. In a constitutional tug-of-war the results of reform efforts are likely to be disappointing to all parties.

And it is not only a matter of executive opposition to these congressional initiatives. It is also a failure of executive practice, Mr. Chairman, to comply with even the modest reform measures that have taken the form of legislative enactments in recent years. One is led to conclude that the executive branch has refused to accept formal legislative action, Mr. Chairman, as a sufficient mandate for changing its patterns of practice, which have given rise to these legislative efforts.

And therefore it seems to me that the whole prospect of a resilient Constitution in this area is crucially dependent on congressional insistence upon request for enactments they have already made. And therefore I think one has to view, as somewhat discouraging, the failure of Congress itself to take seriously, for instance, the War Powers Act in the context of the *Mayaguez* incident May 12, 1975; in that setting a popular Presidential initiative provided an ideal instance where Congress could have acted without much difficulty of a practical sort, as if they really meant the consultative provisions of the War Powers Act. But instead they acquiesced, it seems to me, in a very perfunctory reporting to Congress of steps that were already undertaken and they more or less confirmed the compatibility of that Presidential procedure in *Mayaguez* with the War Powers Act, even though on the face of it, to me at least, it is very fundamentally inconsistent with the spirit of that legislation.

And the same failure pertains to one of Senator Case's important legislative contributions, namely, the requirement that secret executive agreements be transmitted to the Senate Foreign Relations Committee and the House Foreign Affairs Committee. I think that the failure of Congress to object, in a significant way, to the failure by the President to transmit the Nixon-Thieu understandings—which established a commitment by the United States to reintervene in the Vietnam War—illustrates acquiescence in executive behavior violative of legislative enactment.

And so, I think it is very important in this process—this process of trying to rehabilitate the constitutional arrangement—that Congress itself be constantly encouraged to take its own actions very seriously, particularly when tested in these kinds of circumstances.

The third aspect of the resilience of the Constitution, which seems important to deal with as directly as possible, is the inconsistency between the obvious intent of the constitutional arrangement, as I think has been very definitively articulated by Professor Bestor and which I fully agree with, and the constitutional practice that has emerged, not only in the post-World War II period but really over the entire course of American history.

It is helpful to recognize that for a very long period of time two conditions prevailed that reinforced this process of erosion of the original constitutional arrangement—

The CHAIRMAN. Would you mind if I asked you a question at this point?

Mr. FALK. Please, sir.

## CONSTITUTIONALITY OF WAR POWERS RESOLUTION

The CHAIRMAN. Before we get too far away from the War Powers Act, I have one question. One of the principal movers of that act was John Sherman Cooper. I believe there were about three or four who actually sponsored the act, and Senator Cooper was one of the leaders. He told me later that he had serious doubts as to the constitutionality of the War Powers Act. He felt it imposed upon executive powers and he was not certain that we had the right to do it. What would be your comment on that?

Mr. FALK. Well, of course, that is a complex and difficult question, Senator Sparkman, and long, learned articles have been written on both sides of the constitutional issues emanating from the War Powers Act. My own judgment is that the act is a fully constitutional attempt to restore the role of Congress war declaring power and, if anything, is an insufficient execution of such intent: That is, it does not go far enough, it seems to me, in rehabilitating the original intention, which was not to allow the President by his independent authority, Senator, to commit the Nation to war. I think that is the essence of what vesting the war declaring power in Congress sought to accomplish. And I think the War Powers resolution is a kind of compromise between restoring that war declaring authority, and recognizing the desirability, or at least the alleged desirability, of entrusting the executive branch with a lot of war initiating discretion.

My own view is that that war initiating discretion remains far too unrestricted in the War Powers Act: The act never refers, for instance, to the United Nations Charter or to the commitments of international law, which should, it seems to me, constrain the war initiating competence of the President. Because the Charter, for instance, is a treaty—a validly ratified treaty—that should provide part of the framework within which the President acts. I would have liked to have seen those constraints confirmed within the context of the War Powers Act.

So, my direct answer to your question is that the War Powers Act is certainly constitutional and, if anything, needs to be supplemented by stronger legislation.

Senator CASE. Would the Senator yield?

The CHAIRMAN. Yes.

Senator CASE. To permit this comment?

The CHAIRMAN. Yes.

## CONSTITUTIONAL OBJECTIONS TO WAR POWERS ACT

Senator CASE. As I recall, Senator Cooper later expressed concerns in regard to this act, which were also Senator Humphrey's and others, were that it gave the President authority beyond the authority granted in the Constitution and it was apparently a kind of dangerous invitation to the President to take initiatives which would inevitably lead the country into a position from which we could not extricate ourselves without a war.

I should only add, as regards myself, I supported it as an effort to deal with a very difficult question, but I still recognize the validity of these questions and the rightness of the concerns.

The CHAIRMAN. As I understand it, the Constitution imposes on the Congress the task of making war, of declaring war, of taking the Nation into war, of appropriating money for war. But the War Powers Act indirectly recognized the right of the President to start war without asking Congress to declare war. It seems to me that it may be that that was the basis of Senator Cooper's thoughts; that is, that it was relegating a plainly stated part of the Constitution to the exercise of the President's discretion.

I believe it had another feature, about which there may be some question, and that is requiring the President to consult with Congress on the actions taken. There has always been a question in my mind as to whether or not we could require the President to consult with Congress. It seems to me we can ask him to discuss these things with Congress, but I am not sure we can require him to consult with the Congress before action. I would like to hear your comments on those things.

Mr. FALK. Well, I think that difficult issues are raised here by the effort to strike a compromise between the purity of the constitutional principles and the practicalities of operating in a contemporary world. I think that is what the underlying tension here is; it is between those constitutional principles and a kind of consensus as to what practical imperatives require. And something like a consultation provision is an attempt to deal reasonably in the middle ground between imposing what may seem to be an overly rigid set of constraints on executive authority, and acquiescing in the complete executive usurpation of the congressional role. And that is why, because one is trying to strike that balance between principle and practicality, the resilience of the Constitution really does presuppose that the executive branch will also accept in good faith reasonable efforts to strike a balance in the middle.

As for the other part of your question, Senator Sparkman, it seems to be an instance where some Senators were concerned—and I think properly concerned because the war power is such an ultimate power—with an operative abridgement of congressional role in the format of a legislative enactment that was designed to rehabilitate it. And so you have the irony of two sets of constitutional objections: those that came from the most ardent congressional advocates of rehabilitation of the congressional role with respect to the war declaring power, and those in the executive branch who objected to any attempt at bridling Presidential discretion and flexibility. What emerged was a rather confusing constitutional discussion because these two kinds of objections were not generally distinguished in a clear way.

And I think ideally there is room here for a more adequate definition of the congressional role with regard to the war initiating and war sustaining procedures. Also present here is the contemporary problem of avoiding declarations of war so as to make the conflict more readily susceptible to a negotiated solution. It may be important to search for new modes to enable congressional participation to be harmonious from a constitutional perspective without being an irritant in foreign affairs.

I know Professor Bestor also would like to comment on these issues.

## COUNTERBALANCE FOR RECENT DELEGATIONS OF POWER TO EXECUTIVE

Mr. BESTOR. I should like to comment on the final point made by Professor Falk—namely, that recent delegations of vast powers to the executive (a development unforeseen by the framers) require a counterbalance in the form of strengthening the constitutional checks upon executive power, perhaps in ways likewise unforeseen by the framers.

It is obvious that the problems of Government are far more complex than in 1787, and that situations constantly arise that must be met far more quickly than in the days of slow communications and leisurely responses. As a consequence we have accepted very generally the delegation of permissive and discretionary powers to the executive that go far beyond anything contemplated by the framers. One of their fundamental principles, that of check and balances, is, however, still as essential today as it was then, if we are to enjoy a free society.

The unprecedented transfers or delegations of power to the executive branch represent innovations upon the original constitutional system. If we are to accept them—as we have—then we must be prepared to accept innovations that will restore or preserve the balance which the framers considered imperative. The procedures embodied in the War Powers Resolution of 1973 (87 Stat. 555), in the proposed Treaty Powers resolution now before us (S. Res. 486), and in certain similar measures pending in the House of Representatives, do involve certain innovations. Unless they can be shown to contravene specific provisions of the Constitution, the constitutionality of such innovative procedures must be judged by the same criteria that we apply to the innovative procedure of delegating power to the President. The latter is justified by the argument that prompt executive action may be necessary to safeguard the constitutional system itself against suddenly emerging dangers. Innovative checks upon unilateral executive action are equally defensible on the ground that they are necessary to safeguard the constitutional system against the slower but more insidious dangers of executive usurpation.

The concentration of power in the hands of one branch of Government is, of course, the danger against which the doctrine of the separation of powers is intended to guard us. If the power to make treaties is a power shared by the President and the Senate (as it is), then the bypassing of the Senate by the President in the matter is a direct violation of the principle of the separation of powers. A different argument is often advanced by the executive branch, which maintains that any interference by Congress with the conduct of foreign affairs by the President breaches some supposed wall of separation between legislative and executive authority. This interpretation misses the real thrust of the doctrine of the separation of powers. A separation of powers, said Madison in the 47th number of the *Federalist*, does not mean that the different departments of government "ought to have no partial agency in, or no controul over the acts of each other." In fact, he continued in the next

number, "unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation that the maxim requires as essential to a free government, can never in practice be duly maintained." Usurpation of power by one branch was the crucial matter. "It will not be denied," said Madison, "that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."

Because of the ambiguity of the term "Separation of Powers" (which is often erroneously invoked to deny the power of one branch to effectively check the encroachments of another), the constitutional intentions of the framers are far better understood if examined in terms of the concept of Checks and Balances. Neither phrase appears in the Constitution itself, but both figured in most contemporaneous discussions of it. Though used side by side, the two concepts are not in fact synonymous. The power of the President to veto an act of Congress is an obvious illustration of the principle of Checks and Balances. It can be reconciled with the doctrine of the Separation of Powers only if Madison's definition of the latter is accepted, for the veto means that one branch is exercising a "partial agency in" and a "controul over" the acts of the other. It means (to quote another of Madison's phrases) that the two departments are "connected and blended" so as to give each "a constitutional controul" over the other. In the treaty clause the Executive and the Senate are "connected and blended" in exactly the same way. To attempt to bypass the Senate in the making of international agreements is as flagrantly unconstitutional as would be an attempt to bypass the President in the enactment of a law. Yet the efforts of the two Houses to prevent a usurpation of their powers by means like those embodied in the Treaty Powers Resolution are always countered by the executive branch with an invocation of the doctrine of the Separation of Powers, employing a definition of the latter which is totally at variance with the one contained in the writings of the framers.

The constitutional position of Congress in the matter of foreign relations would be far better understood by the American public if discussions were conducted in terms of the clear and easily grasped idea of Checks and Balances rather than in the vague and highly ambiguous idea of a Separation of Powers. Congress plays into the hands of the executive branch by allowing the latter always to discuss foreign relations in terms of a concept of the Separation of Powers that excludes the legislative branch from active involvement, while discussing domestic affairs in terms of a concept of Checks and Balances that automatically sanctions the Presidential veto.

As a first step in making the issues clear to the American public, it might be helpful if the Subcommittee on Separation of Powers of the Senate Judiciary Committee were to be renamed the Subcommittee on Constitutional Checks and Balances.

#### EXTENT OF POPULAR SUPPORT FOR CONGRESSIONAL ASSERTIONS

Senator CASE. Could I throw in a question here? I don't mean necessarily to have it answered or discussed at this moment if it is not convenient to either of you, but a factor which is not, I think,

generally introduced in theoretical or academic discussions of these questions is, namely, to what extent the country will support assertions by Congress or its committees—in this case the Foreign Relations Committee—and how far will the Congress itself support us if we object to certain actions and how far is it desirable in particular circumstances to insist upon the prerogatives that are established in the Constitution or seem to be?

This whole question of making a Government work and a Constitution work has to take into account popular support and popular feeling, to a degree which I think is sometimes put aside by people in discussions of what ought to be. This is really the basic test.

Take the *Mayaguez* situation and others. I don't think there is much doubt that there was a great outraged feeling on the part of the American public. The *Mayaguez* incident came at a time when nerves were raw and feelings were in such a state that it was impossible not to assert the authority of the United States. Questions as to the way it was done and its wisdom and whether the facts justified particular actions are not quite the point. The fact is that it was felt we could not take this kind of thing any more and it was a good idea for us to let the world know this fact, even at the cost of some rough handling of individuals and of people.

This popular feeling always enters into this whole question. I wanted to throw that out for your comments, because sometimes in insisting upon too nice or too precise or too rigid a set of rights and the enforcement of them, you can destroy the right itself. That is a part of the whole operation of government, isn't it?

Mr. FALK. I think your point is very well taken, Senator Case. I did use the two examples, which I gave, as ones that I thought were relatively painless from the point of view of public acceptability. In the *Mayaguez* context, whether rightly or wrongly is not here the question, there is no doubt that Congress supported the Presidential initiative. It was merely a matter of whether the executive branch was going to use military force in a way that evaded the consultative procedure. There was nothing in the context of the situation, Senator, that was inconsistent with recourse to the consultative mechanism envisioned by statute. There could have been a truncated form of consultation if time was of the essence. But what seemed evident to me was a more or less deliberate reassertion of unilateral presidential prerogatives directly in conflict with the whole notion of striking a balance between practicality and principles, which I think the consultative arrangement tried to accomplish.

Senator CASE. I don't disagree with you at all, but you are always going to have the executive taking advantage of a situation in order to do that. Who knows what is right? There were some protests made. But I don't think there would have been any attention paid if much had been made of the lack of consultation.

Would it not perhaps be a little better to pretend that there had been consultation, than to make a point of it in that circumstance?

Mr. BESTOR. I agree with the Senator on the importance of public opinion in these matters. One can, I think, criticize Congress for not always having made clear to the public exactly what it is trying to accomplish when it defends its right to a decisionmaking role in foreign affairs. Too often the public feels that what is at stake is simply the

special prerogative of some legislative body. It is important to make clear that what is at stake is the public interest in making sure that decisions for war and for peace are made not by one man but on the basis of a meeting of minds among the diverse representatives of the people.

If this can be made clear, Congress would more frequently capture the imagination and support of public opinion—not, perhaps, in the dramatic situations that the President can so easily exploit, but in the long run, when the future course of the Nation in world affairs, and the costs and sacrifices involved, are being considered.

#### CONGRESS' POWER TO REQUIRE PRESIDENT TO CONSULT

The Senator has wondered whether Congress really has power to require the President to consult. Constitutionally speaking, I am sure that it does, if it has the will to require it. The treaty clause, with its provision for "advice and consent," seems to me to empower the Senate to insist that the President seek its advice, directly, and continuously.

One great historical mistake, as I see it, was made by the Senate in its earliest years, when it rebuffed President Washington as he tried to establish a procedure for face-to-face consultation between the President and the Senate about future treaty negotiations. Instead of meeting with him, in the character of a privy council or a council of state, as the framers seem to me to have intended, the Senate refused to discuss the issues with the President directly, and insisted that it must meet apart from him to make its decisions, which it would then communicate to him. The Senate thus forfeited a role that it might have played—and that I believe the framers intended it to play—of regularly discussing with the President in person the long-range problems of foreign policy, advising him on immediate moves to be made, and drafting (or at least approving) the instructions to be issued to American envoys abroad.

Though I have no hope that this kind of continuous, face-to-face consultation can be revived and restored in my lifetime, I do hope that deliberate moves will begin to be made in this direction. In particular I hope that men interested in foreign affairs will begin to recognize that the words "advice" and "consent" are two words, and that they do not mean the same thing. "Advice" is something given while decisions are still to be made. "Consent" is something given after decisions have been reached and have been carried to some kind of conclusion that must be accepted or rejected.

Senator CLARK. Professor Falk, do you want to continue your testimony?

#### INCONSISTENT CONSTITUTIONAL TRADITION

Mr. FALK. Yes. Thank you. Professor Bestor's comment just now really is a very excellent illustration of the basic point that I was trying to make earlier; namely, that the departure from the constitutional arrangement envisioned by the framers is not just a matter of recent practice, but was initiated almost immediately after the Constitution was adopted and that, therefore, one does have this unfortunate reality of a long, accepted constitutional tradition that seems clearly inconsistent with the structure of the Constitution as initially envisioned.

This reality is part of the reason it is so difficult to restore a constitutional balance without, Mr. Chairman, a strong measure of executive cooperation in the process. Such a difficulty is accentuated because the constitutional provisions, those provisions dealing with foreign affairs, are scanty and indefinite to begin with.

As a consequence there is a great deal of room for discretionary interpretation of what is intended in the Constitution. And, indeed, patterns of interpretation have evolved in a way that seems to violate the most fundamental aspects of constitutional principle. What I have been trying to suggest in these general remarks, Mr. Chairman, is that we are really confronted by a very fundamental question as to whether the Constitution is adequate in the area of foreign affairs, as now formulated and interpreted. And it seems to me that these series of legislative attempts at rectifying the imbalance provide a test of adequacy. If these efforts fail to reshape patterns of a practice that have emerged particularly in recent decades then that would suggest to me a real failure of the Constitution as formulated and interpreted to serve the best interests of the American people, as well as the needs of the United States and the world, in relation to the critical subject-matter of foreign policy.

Obviously a very fundamental issue is at stake. And although one hesitates to use the word "crisis," because crisis has been so misused, it does seem to me that, looking back on what has happened over this period, not only with respect to the war power and the treaty power, but in relation to the whole underlying conception of separation of powers and checks and balances, it does seem it is a situation of structural crisis. And it remains to be seen whether these moderate attempts of Congress will be sufficient to resolve this crisis.

#### IMPORTANCE OF EMPHASIZING CONTINUING IMPLEMENTATION OF CONGRESSIONAL INITIATIVES

And in that regard, I would respectfully suggest to Senator Case that I think that a high price is paid by pretending that the executive—well, not pretending for "pretending" is too strong a word—but by acting as if the executive is complying with these moderate legislative attempts at restoring the balance, Senator, when indeed there is noncompliance. Such acquiescence signals, it seems to me, to the public and to the President that the constitutional constraint is not terribly serious; that it is really rhetorical in large part; and that when the rhetoric is tested in any kind of crucible, any crucible that includes some practical pressure, then the practicalities overwhelm the principles.

I think this is the wrong kind of message, particularly at this time, to convey to the public and to the President. So I do feel that energy should be devoted to assure compliance with these congressional initiatives once enacted.

Let me turn now briefly to Senate Resolution 484, which I think deals in a very intelligent way with one of the areas of imbalance, namely, the circumvention of the treaty power by reliance on executive agreements that don't necessitate any kind of congressional participation whatsoever.

RATIONALE OF SENATE RESOLUTION 484

Now, again, the difficulty here is that the Constitution is not self-evident as to the appropriate scope of independent executive authority to making agreements. I think there is no question—and this underlies the whole rationale of Senate Resolution 484—that the original constitutional intention was to require reliance on treaties to form significant national commitments. Otherwise, it would have made no sense to think, as the framers clearly did think, that the notion of separation of powers was being applied in the context of national commitments.

But what has evolved over time and has not been consistently challenged, it seems to me, is the degree to which executive agreements dealing with significant commitments, Mr. Chairman, can nevertheless be made and regarded as valid. My own view is that the situation is at the present time an area of constitutional indeterminacy; it is not clearly unconstitutional for the President to seek to make significant national commitments by relying on executive agreements. It is not clearly unconstitutional because of the failure of the original constitutional intentions to be implemented over such a long intervening period. It is undesirable that such intentions haven't been realized and it is also undesirable that the executive branch does not want to have them realized in the present setting and continues to resist efforts, like the one embodied in this resolution, that I think would reasonably restore the original constitutional conception.

There are three sets of questions posed by Senate Resolution 484: Is it legally sound? Is it wise, as a matter of practical policy? Will it be effective in operation?

LEGAL SOUNDNESS AND WISDOM OF S. RES. 484

As far as being legally sound is concerned, it seems to me there is no substantial grounds for objection to this resolution. Of course, congressional rulemaking has to be carried on in conformity to the Constitution, but this resolution seems clearly in conformity with the Constitution. And even if it incorporates a view of the treaty power, of the exclusivity of the treaty power that is different from the view that the executive branch holds, it seems to me that no substantial objection can be against an internal Senate rule with regard to the scope of the treaty power.

WISDOM OF RESOLUTION

The wisdom of this kind of Senate resolution seems to me in general to be very great because it does help to restore balance and it helps to convey to the President a sense that adverse consequences of a practical sort could result from his failure to adhere to this procedure. So in that sense it is an important step beyond the national commitments resolution, because it does tie the Senate's interpretation of the treaty power to further action in support of its view, thereby providing a sanction of sorts.

CLASSIFYING ALL SIGNIFICANT COMMITMENTS AS TREATIES QUESTIONED

By taking the further step in Senate Resolution 484 the Senate expresses the seriousness of its intention. My only concern involves the

drafting of the resolution in its present form. In this respect, I feel that this language may be too rigid, Mr. Chairman, to the extent that it automatically classifies all significant international commitments as "treaties."

I think that in certain situations—and I tried to illustrate this possibility in my prepared statement—such as an armistice agreement that includes a reconstruction aid provision, it would probably be undesirable for the reasons, or partly for the reasons, which Senator Case alluded to earlier; namely, it would be totally unacceptable to the public to prolong a war in order to go fully through the treaty process, Mr. Chairman, in order to get advice and consent in the standard constitutional form.

Therefore, I think that it would be important to say that Congress "may classify significant international commitments as treaties," rather than that it "must" classify them.

I think that the practicality—I mean, the acceptability within the Senate itself in a situation of pressure, which is hard to anticipate, would make this a much more workable way of trying to accomplish the basic purpose which is that in all situations—where there is not a case of national urgency—to insist upon the treaty power as the sole basis for significant national commitments.

I think the resolution would be an immense step forward, which one should not imperil by taking a dogmatic position on this issue of constitutional principle; namely, that every such commitment must be viewed as a treaty. In light of the long period of prior inconsistent practice, it would be particularly hard to persuade the public or the executive that it was unreasonable of the President to ignore such a rigid insistence that every agreement regardless of circumstances must be handled via the treaty route.

Senator CASE. Mr. Chairman, may I interrupt at this point? There is a very, very specific significance to a change such as you suggest—namely, of the word "shall" to "may"—in that you get involved in the whole operation of the Senate as a body. If you say "shall," then the Senate has to act. If you say "may," then the Senate can avoid action and all the dilatory techniques available to prevent action may be brought into play by a minority of Senators who may be merely responding to downtown pressure.

We have dealt with the matter by provisions for the automatic right of an individual Senator to bring a matter before a committee and to have it decided or to bring it before the Chamber and have it decided in that particular period.

I don't disagree that the change is a good idea. I think it is right. But I do know, as an individual member who finds himself sometimes in the minority or even in the majority and who is frustrated by the minority, that we have to do something about that very specific matter. I say that because you can hold up action in this body until hell freezes over, and certainly long enough until an emergency has rendered any question with which you might be dealing academic.

Mr. FALK. Senator, I am grateful for your comments on this. I would suggest that my purpose can be accomplished by saying "shall unless." So in other words the automatic operation would generally take precedence and it would require an active initiative to create an exception that would remove a significant national commitment from the treaty category.

Senator CASE. That is an interesting suggestion.

Mr. FALK. In other words, it would have an automatic—

Senator CASE. Is that a substantive change from the way it stands now?

Mr. FALK. As I understand it, the resolution, as it stands now, states that any significant national commitment would automatically be treated, and should be treated, as a treaty, regardless of circumstances.

#### DECIDING WHICH COMMITMENTS SHOULD BE TREATIES

Senator CASE. I don't have the exact language of this particular act in front of me, but one suggestion I contemplated, and I think I may have proposed it at one time or another, is that it is up to the Senate in every case to decide whether an international agreement is so significant as to require treatment as a treaty, which is in substance what you may be suggesting now?

Mr. FALK. No; with all due respect, Senator, it is not, because some of the very significant commitments—such as an armistice agreement—then one would still not want to apply—

Senator CASE. But who would decide?

Mr. FALK. Well, my last suggestion was that it should be regarded as a treaty unless a specific initiative, within the Senate, declassifies it as such.

Senator CLARK. The way the legislation is drawn, there are at least two or three occasions, it seems to me, upon which the Congress could agree not to consider something as a treaty. The first requirement under the resolution is for the executive to meet with the Foreign Relation Committee to consult with them and to try to determine whether or not a commitment is of significance and does qualify as a treaty. At that point clearly the committee could decide that it is not of significance. Admittedly there is some conflict as to what "significance" might mean.

Second, it still would not have the effect of holding the Administration to sending it up as a treaty unless there were a Senate resolution passed by a majority of the members of the Senate who so designated it as being significant enough to be sent up as a treaty.

But it seems to me that in the case you cite, if I understood Professor Bestor's point earlier, that this resolution would not prevent the administration from going ahead and negotiating and, in fact, signing a peace treaty with reconstruction clauses in it. It would simply require that after the negotiations are completed, if in the opinion of the Senate the agreement were significant, that it be sent up as a treaty. But you could not deny the executive branch the power to negotiate such an agreement.

Mr. FALK. Senator Clark, it seems to me there are two difficulties that I see with that view. One is that all the flexibility in the resolution, Senator, depends on manipulating the word, "significant."

Senator CLARK. I think that may be the case.

Mr. FALK. And you would have to manipulate it in certain situations, Senator, in such a way as it would appear to be violating the character of the commitment. For instance, no one would contend that the Vietnam peace agreements were insignificant and yet, in order to get the flexibility that you say correctly is here, you would have to so regard them.

Such an approach creates the impression that one does not really mean what one is saying.

Senator CLARK. Yes; I see the problem you raise.

Mr. FALK. And the other point is that if you defer recourse to the treaty route until the postagreement stage it may introduce an uncertainty into international negotiations.

If we use the Vietnam agreements as an example, Senator, it seems evident that it may not have been satisfactory to the Vietnamese negotiators to be told that this is an agreement but it is going to have to be approved formally by the Senate as a treaty. In that kind of a negotiating situation the other side may well say that they will wait then until they know it is a firm commitment, especially if distrust exists.

And given the experience they have had with—

Senator CASE. It is a question of having your cake and eating it, too. Is that what you are saying?

Mr. FALK. Yes; it is hard. I know there is no ideal solution to this.

Senator CLARK. Can the President make peace by himself?

Mr. FALK. Yes.

Senator CLARK. Professor Bestor?

Mr. BESTOR. I have agreed with almost everything that Professor Falk has said this morning, but I do view this last point differently. According to section 4. (a) (1) of the Treaty Powers resolution, the proposed rule and the point of order based upon it do not become applicable until and unless the Senate, by resolution, expresses its sense that the particular international agreement in question should be submitted as a treaty. If a majority of the Senate was willing, because of some overriding circumstance, to waive its right to give advice and consent in treaty form and instead to accept a particular agreement made in some other form, then it could simply vote down the resolution. Moreover, a compromise would seem to be possible—namely a resolution that would accept and implement the agreement on a temporary basis, but would announce that before it could be considered a permanent commitment, the agreement would have to be submitted as a treaty. This, it seems to me, would take care of the kind of situation that Professor Falk has described.

I should hate to see the proposed resolution weakened by writing into it distinctions that might give rise to dilatory proceedings.

#### EFFECTIVENESS OF RESOLUTION IN PRACTICE

Mr. FALK. Let me just conclude by making a couple of remarks about whether this kind of resolution is likely to work in practice. I think that, as I suggested earlier in a different context, that it will only work if there is a real active commitment within the Senate to take seriously the legislative mandate that is implicit here. And I think that the climate of opinion really has to be conveyed to the public so that they understand that important issues are at stake beyond those that seem to be present when a popular and strong President acts in violation of the spirit of the Constitution.

And second, I think that this kind of resolution, as with the whole series of legislation attempts, really does depend on making the executive branch more of a partner and less of an opponent in the struggle

to rehabilitate the constitutional arrangement. And in that respect, referring to your remarks at the very outset about the possibility of a different administration in office, it would be a very good thing to get an advance significant commitment—to make a bad pun on “significant commitment?”—from a prospective aspirant to the Presidency, I think, of his appreciation of the degree to which imbalance has occurred in the area of foreign relations and also some assurance that he would support the kind of congressional initiatives that have been attempted in recent years and depart from the practice of fighting them every step of the way.

[Professor Falk's prepared statement follows:]

PREPARED STATEMENT OF PROF. RICHARD FALK, PRINCETON UNIVERSITY

The general temptation to invoke the words of Thomas Jefferson is already great in this Bicentennial year, but in the setting of these hearings it is virtually irresistible. And for good reason. Not only did Jefferson so graciously embody in his sensibility the noblest sentiments associated with the founding of this republic, but he more than any of the founders had a keen sense of the tendency of republics to degenerate into despotism. These distant forebodings of Jefferson seem almost uncanny in their pertinence to the present situation of governance in America.

In essence, Jefferson warned that only the people could be trusted over time to preserve a constitutional framework built around notions of liberty and public happiness and that the people could also serve as guardians if they were kept adequately informed. Jefferson expressed this conviction in many forms, but it is a consistent gold thread that runs through the whole fabric of his long and varied life. Shortly after leaving the presidency Jefferson said it this way: “The people of every country are the only safe guardians of their own rights, and are the only instruments which can be used for their destruction. And certainly they would never consent to be so used were they not deceived.” [Letter to John Wyche, May 19, 1809] Another earlier formulation to the same effect is even more insistent: “The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.” [Letter to Col. Edward Carrington, Jan. 16, 1787].

It was obvious from the outset of American institutional history that the Congress would serve to represent the people in relation to foreign policy. Thus to guard against Executive abuse effectively meant to underwrite Congressional capacity by way of declaring war, appropriating money, defining crimes against the law of nations, and giving advice and consent to proposed treaties. For Congress to perform as the watchdog of the people it must be fully informed, and indeed the citizenry, too, needs reliable information if it is to assess properly the vigilance of its elected officials, therefore, a vigorous Congressional role in the area of foreign relations is integral to the constitutional scheme.

The situation of America has, of course, altered dramatically in the course of time, but the issues of public policy have persisted since Jefferson, if anything they have sharpened. In the setting of foreign relations the Constitution seeks to strike a rough and imprecise balance between effectiveness and separation of powers. For most of American history, a policy of geopolitical detachment prevailed and enjoyed overwhelming support, as did both the principled departures from such detachment (e.g. Monroe Doctrine; Open Door Policy) and the exceptional departures occasioned by American entry into both world wars. This consensus as to policy, while not invariable, was present during the early phases of the Cold War, enduring even the strains of the Korean War. This consensus disappeared in the course of controversies produced during the Vietnam War, and in its place, there emerged an awareness of structural strains that had gone virtually unnoticed so long as the policy directives seemed generally acceptable. Even before the constitutional significance of the Vietnam experience was dramatized by Watergate there arose in Congress a long overdue, but fundamentally sound, effort to redress the balance between legislative and executive roles with respect to foreign policy, especially in relation to significant national commitments that endanger war or threaten to drain taxpayer revenues.

One further dimension of the overall situation needs to be mentioned. When the Constitution was drafted foreign policy was simple and its conduct was largely a matter of national discretion. Even war was not likely to break upon the country with sudden surprise or devastating effect. Indeed, the prohibition of standing armies underscored the idea that the normal condition of the society was expected to be one of 'peace,' with the eventuality of war being an occasion of national emergency. Now, however, we live in a setting of permanent pre-war mobilization, of globe-girdling entangling alliances, of American forces abroad and foreign bases, and of imminent nuclear menace. We live also in a world that has experienced world wars twice in the memory of the living, as well as a seemingly endless series of local wars whose gory happenings are increasingly globalized by media coverage. In such a setting it is not surprising that statesmen and their publics have sought to erect institutions, establish procedures, and agree upon legal rules to restrain the behavior of states. What is surprising is the feebleness of the effort and the slowness of our appreciation that a peaceful and just world order serves our national needs much more than does the sovereignty-oriented geopolitics of the past. Part of what is at stake in the effort to gain information and to secure public participation in the foreign policy issues of the day is the underlying effort to strengthen the rule of law in the affairs of states. Secrecy, deception, executive self-determination of national well-being are partly a byproduct of highly centralized bureaucratic control over foreign policy that rests upon discretion and culminates in secret illegal foreign ventures. Only under a mandate to engage in "covert operations" would the government, for instance, dare initiate and implement plans to assassinate foreign heads of state.

The weakness of international law as an effective system of restraint places great stress upon the control of state behavior at the national level, especially for principal states. Therefore, efforts to regulate foreign policy serve not only the cause of constitutionalism, but also provide some assurance that the United States will behave with prudence and responsibility in the world of sovereign states.

These considerations, then, underlie the inquiry of these hearings into the legality and wisdom of S. Res. 486. This proposed resolution poses no serious constitutional questions of any consequence. Surely, there is nothing in the Constitution that confers upon the President authority to circumvent the treaty power by forming commitments through the medium of executive agreements. Similarly, it should be acknowledged that no constitutional guidelines exist as to what are the outer limits of the executive agreement power, whether executive agreements and treaties are mutually exclusive or overlapping categories, whether Congress can insist that a particular international agreement constitutes a treaty. Neither judicial pronouncement, nor scholarly opinion, provide additional clarification. The issues are left by the Constitution itself and by the practice that has grown up under it in an indeterminate condition. Such a situation is suggestive of the need for Congressional assertiveness to offset Executive activism. Since the Constitution provides no guidelines that establish Executive/Congressional boundaries and since the play of forces no longer produces a satisfactory situation, it is necessary for Congress to define its own position by legislative action.

It is, I believe, against this background of concern that Congress has acted. The national Commitments Resolution of 1969 did no more than to reaffirm by resolution the original constitutional intent to include Congress in the commitment-forming process for non-routine subject-matter and could be read as a warning to the President. The Case Act of 1972 requires the President to transmit all non-treaty agreements to Congress and sets up a procedure for limited transmittal of secret agreements. The War Powers Act of 1973 sought to assure that Congress would retain some rights to stop undeclared wars, that is, wars that had been initiated by presidential action, but without a declaration. Several steps remain to be taken to complete the process of setting ground rules for a more definite Congressional role in foreign relations needed to give substance to separation of powers.

S. Res. 486 is one of these steps. In one respect S. Res. 486 develops further the position taken in the National Commitments Resolution of 1969. In effect, S. Res. 486 establishes for the Senate a role in identifying and resisting departures from the policy enunciated in the 1969 Resolution. It is true that the two resolutions, although complementary in intention, do not quite mesh—the 1969 Resolution defines "commitments" rather narrowly, but Congressional participation broadly (i.e. by treaty, statute, or concurrent resolution) whereas

S. Res. 486 defines commitments broadly in Section 3(b), and regards all such commitments as requiring a single mode of Congressional participation, namely, via the treaty route. As such, it confines the Congressional role to the Senate and imposes a requirement of  $\frac{2}{3}$  consent which may be considerably more difficult to obtain than the simple majorities required for a statute or concurrent resolution. Such a procedure may lead to some disagreement or misunderstanding between houses of Congress as to whether the Constitution can and should be construed to require a treaty basis for all significant national commitments.

Another issue raised here is whether under all circumstances it would be helpful to subject significant national commitments to this requirement. Suppose an armistice agreement contains a controversial provision on reconstruction aid for a foreign country. Surely such a provision is a "significant—economic commitment to a foreign country," but is it desirable to insist that it is valid as a commitment only if submitted to the Senate for its advice and consent. Such a procedure may delay or imperil altogether delicate war-terminating negotiations. The effect of S. Res. 486 might be either to induce the President to follow the treaty route or to lead a foreign government to insist that undertakings in an agreement are not credible unless adopted in the form of a treaty. Also by requiring that only the treaty method is acceptable to the Senate for significant commitments, there is some loss of flexibility because the joint resolution option is declared to be an unsatisfactory method to secure legislative participation. Such a scheme may also be too rigid as to mode of Congressional participation—for instance, it may be more helpful to obtain a joint resolution on reconstruction aid because it is the House that would have to appropriate the money.

These concerns of mine, and they are no more than that, suggest the possible advisability of adding a provision to S. Res. 486 that allows for greater flexibility. For instance, it might be helpful to revise the language of Section 2(c) by substituting "may be regarded as" for "constitutes" in line 16, and adding "then" between "should" and "be" in line 17. Appropriate changes would also have to be made in the language in Section 3 and 4.

It might also be helpful to add a provision that recognized that when a significant commitment under clause (c) exists, but is not deemed a treaty, then it should either obtain Congressional approval by joint resolution or that the normal expectations of Congressional participation are suspended because of a finding of urgency.

In effect, the search here is for an adequate way to fulfill the Congressional role without establishing expectations that are unlikely to withstand the test of experience. Congress is correct to convey its intentions to the Executive because recent developments have demonstrated that neither trust nor consensus exists as to the propriety or wisdom of significant commitments made to foreign governments and that recent Executive practice to circumvent Congressional resistance should be discouraged. At the same time, to be successful, the discouragement must not become an absolute of its own with no appreciation of the need for flexibility or the likelihood of shifting Congressional priorities, especially if, as is quite likely, a bipartisan consensus in foreign policy reemerges. With modest changes S. Res. 486 could provide a valuable additional legislative step toward establishing an effective accommodation of Executive and Congressional roles in the setting of significant commitments to foreign governments. Such a step would have the salutary effect of bringing the treaty process to bear in several contexts where it has been habitually circumvented in recent decades—for example, foreign base agreements. This process may inhibit some commitments, reshape others, and certainly produce a more informed public understanding of significant international commitments. As such it would move the constitutional arrangement in a Jeffersonian direction, as well as strengthen the disposition of Congress and the nation generally to regard national commitments so undertaken as genuinely binding on the nation as a whole.

Mr. BESTOR. I would agree completely with this suggestion.

#### ACADEMIC COMMUNITY'S ATTITUDE TOWARD CONGRESSIONAL EFFORTS

Senator CASE. That is a fascinating thing. What is your assessment of the academic community's attitude on these questions at the moment?

Mr. FALK. Well, the academic community, one of its glories is its diversity and—

Senator CASE. I don't mean in every instance, but generally.

Mr. FALK. I think there is overwhelming support for the congressional efforts that have been made since the national commitments resolution. I think, if anything, there is an increasing level of support because Watergate, coming after Vietnam, accentuated the structural character of the constitutional situation; that it was not just a matter of one administration and one set of policies that turned out badly, but rather it was really a slow accretion of power by the executive branch, which is accentuated because of the Executive's tendency to initiate most foreign policy.

Therefore, unless the legislative role is taken seriously, it is likely to be faced with situations difficult to influence. At such a stage the only thing that Congress can do in that situation is to react. So I think there is an overwhelming support for trying to rehabilitate some significant degree of balance even if it sacrifices some degree of efficiency and Presidential flexibility. Even at that cost, my impression is that a great deal of thoughtful support exists at the present time to bolster the congressional role.

#### EBB AND FLOW OF EXECUTIVE'S AND CONGRESS' POWERS

Mr. BESTOR. In one of the Federalist papers, John Jay alluded to Shakespeare's line about a "tide in the affairs of men." The framers were well aware of the ebb and flow in the respective powers of the legislative and executive branches. At that particular moment in time, most of the members of the Convention felt that the tide was flowing too strongly toward the popular branch. The Articles of Confederation, which they were seeking to improve, had had only a legislative branch. And in most States the first constitutions gave the Governor little authority. It is therefore easy to find in the records of the Convention and in commentaries like the *Federalist*, a good many warnings against allowing the legislative branch to encroach upon the executive.

It must not be supposed, however, that the framers thought that the danger would always come from this direction. Eighteenth-century writings were apt to describe in cyclical terms the dangers that would arise, sometimes from monarchical (or executive) usurpations, at other times from aristocratic usurpations, at still other times from the usurpations of popular or democratic assemblies. The framers hoped to guard against dangers of all three kinds by devising a system of checks and balances. They were as careful to check executive power as to check legislative power. In the field of foreign affairs, for example, they made the President Commander in Chief but vested in Congress the power to declare war, and they gave the President power to make treaties but only by and with the advice and consent of the Senate.

In the actions and reactions of American history since the Revolution, one can observe this ebb and flow of power as between the two branches, and a corresponding ebb and flow in public opinion about the allocation of power. At the onset of the Revolution, executive power,

in the person of George III and the colonial Governors, was under attack. At the time of the Constitutional Convention it was the weakness of executive power that struck many as dangerous. Skipping over many decades, one can say that the election of Andrew Jackson reflected a public demand for vigorous executive leadership. In a sense attention shifted back to Congress and especially the Senate in the mid-19th-century debates. But the inability of Congress to solve the problems connected with slavery, meant that executive power came to the fore again with Lincoln, only to shift back to Congress after Lincoln's assassination and the accession of Andrew Johnson. Then, by the beginning of the 20th century, public opinion became convinced that vested interests exercised too vast a control over Congress, and the bold executive ventures of Theodore Roosevelt in both domestic and foreign policy captured the popular imagination.

In the present century, issues of foreign policy have become so important that one can trace the same kind of ebb and flow of power and of opinion in this realm by itself. Theodore Roosevelt's presidential initiatives in Panama, in the Caribbean, and in world affairs generally, carried the power of the Presidency in foreign relations to new heights. And during this period there began to be general acceptance of the idea that the Constitution intended to vest in the President both primacy in foreign affairs and an exclusive authority over many aspects of it. By and large, this view was the dominant one in academic circles down to the time of the Vietnam war. Though Wilson was defeated in his attempt to bring the United States into the League of Nations, academic opinion tended to regard the failure of the United States to ratify the League Covenant as a mistake, to look upon the Senate as obstructionist, and therefore to support even quite extreme executive claims to primacy in foreign affairs. Franklin D. Roosevelt's policies that led us into World War II, and Truman's intervention in Korea produced only a small amount of dissent in academic circles.

The turning point was the Vietnam war. There was no doubt in anyone's mind that it was the executive branch which was responsible for taking us into the conflict and for constantly escalating it. Clearly neither Congress nor the people were fully and truthfully informed. And whereas in the past it could be claimed that the President, as representative of the people as a whole, could and would respond more sensitively to the public opinion of the Nation than a Congress in which local and sectional interests played so large a role, the obvious fact was that successive administrations were unwilling to listen to mounting criticism of the war.

The result is that the country—and perhaps especially the academic community—is looking to Congress to reassert its authority, hoping that through measures like the one before us, it will restore to the constitutional system the balance that the framers intended.

#### CHANGE IN ACADEMIC PERCEPTION SINCE BRICKER AMENDMENT

Mr. FALK. Let me just add a footnote to what Professor Bestor has just said, with which observation I agree. That is, the academic community during the Bricker amendment controversy, I think, was all on the side of the executive position, that is, that the Bricker amendment would greatly hamper the flexibility the Executive needed to deal

successfully with the complexities of American participation in the world. That was a period where there was a basically bipartisan consensus on the principal foreign policy issues of the day and a feeling that Senator Bricker was really spearheading a kind of regressive obstructionism premised on his anxiety about Presidential efforts to tie the country to human rights commitments.

As I said earlier, I think since the time of the Bricker amendment controversy there has been a complete 180-degree change of academic and scholarly perception with respect to these issues and there now is, as I suggested and as Professor Bestor has suggested, a wide recognition of the need for rectifying the imbalances in favor of the legislature.

Senator CASE. These are fascinating questions and, of course, there is a great parallel between mood and attitude as to substance. And the popular attitude toward the general view of the balance between the Executive and the Congress is important.

When you think of the existing attitude that President Kennedy expressed in regard to involvement, for instance, then how differently such a speech as his inaugural speech would be received today if it were indeed made, that has something to do or has a great deal to do with this question.

#### EFFECT OF DEMOCRATIC PRESIDENT ON CONGRESSIONAL EFFORTS

I wonder if you would have anything to say as to—I guess I am asking you to now be a prophet rather than an advisor—whether we are going to have a different situation if we have a President Carter in office in the next 4 or 8 years. Would it be different than if we had a President Ford for another 4 years? I will not attempt to name a successor after that.

How is our Democratic Congress going to act? Are people like Senator Clark going to act differently if they have a President Carter to deal with?

Senator CLARK. Yes, Senator, I raised that question in my opening statement as a matter of fact.

Senator CASE. Some of us have gotten old in the saddle and we pretty much go our own way. I think I am one of those. But these young fellows are going to be very susceptible to a young, attractive President of their own party and feel that the party has a responsibility to stick together and the like.

Is there anything you would like to comment on as to the workability of our machinery in light of those circumstances?

Mr. FALK. Well, I think that it is difficult to assess how a future President will act because his actions will be shaped by intervening developments. But I think there is an inevitable tendency of whoever occupies the Presidency, Senator, because of the complexity of the world and because of the degree to which there is a practical requirement that foreign policy be initiated quickly and at the Presidential level to press for more authority in foreign affairs.

When the memory of Vietnam and the memory of Watergate have faded, then the Congress, if they like what is happening—and again, I use the *Mayaguez* situation—and that was a small-scale operation—and if Congress likes what is happening, I would be rather pessimistic

about a Democratic Congress, Mr. Chairman, challenging popular foreign policy initiatives by a Democratic President. And therefore it is desirable at this time, when there is support for rectifying the imbalances, to encourage all efforts to make the congressional role as unambiguous and automatic as possible.

I mean past experience is a good argument for trying to create clear procedures that will persist in the face of all but overwhelming pressure.

Senator CASE. That would give a minority in Congress an opportunity to express adequately opposition to a policy?

Mr. FALK. Yes.

#### INCOMPATIBILITY OF PARTY SYSTEM AND BALANCE OF POWERS

Senator CASE. There is this basic problem we have of the incompatibility of perhaps the party system and the balance of powers. We don't go nearly as far as the parliamentary system with respect to party responsibility and party-sticking-together. But parties were not supposed to exist at the time this Constitution was written with its checks and balances and the balance of powers concept.

Senator CLARK. It seems to me that everybody is saying, for instance, that with a Democratic President and a strong Democratic Congress, you might have a greater opportunity for cooperation. Of course, without cooperation from the Executive, whatever legislation was passed would still be very difficult to implement. At the same time and on the other hand there is also a greater danger in that you have two-thirds of one party in power and the President of the same party in power. Therefore, it seems to me, there is a tremendous temptation to look the other way when that President wants certain actions. Is that what you are saying?

Senator CASE. Do you remember that hilarious column by Russell Baker 2 months ago in which the congregation were assembled and the leader called upon them all to say amen?

Senator CLARK. Yes.

Senator CASE. And they all said, "amen."

[Laughter.]

Senator CASE. Sorry, go ahead.

Mr. BESTOR. It seems to me to be a problem and a very real one. And one suggestion I would make is that emphasis ought to be placed on the procedural side of things. A President ought to be informed by the members of his own party that it is of the utmost importance that the kinds of decisions that he wishes to make should be the product of advice from the Senate and consultation with both Houses, to a far greater extent than in the past. They might well point out the moral of Lyndon Johnson's presidency. Even with a majority in Congress, and a majority that supported him, his unwillingness to consult the Senate and to be open with Congress on Vietnam brought him down.

#### HELPFULNESS OF INCREASING HILL STAFF

Senator CASE. You know, there is a structural point here also, and that is the question of staff. The attitude of the President's staff has always been much worse than that of the President himself. We have

begun in recent years to develop on the Hill something of a balanced staff organization comparable to that downtown. I think as that increases, it may be a helpful factor.

Mr. FALK. I would strongly support that because I think one of the things that led to the long period of congressional acquiescence and executive encroachments was a feeling on the part of Congress of being overwhelmed by Presidential staffs, the way in which principal issues were presented and just the feeling that there was no kind of staff basis in Congress to challenge executive discretion in many of these areas.

So I think that adequate staffing on the legislative side is a critical dimension of this.

#### WHO DETERMINES WHAT CONSTITUTES A TREATY?

Senator CLARK. I wonder if I might ask two or three questions of each of you about this specific resolution, because I would like to have your comments on the record. One of the basic questions obviously is who is going to determine what constitutes a treaty. We have had letters back from the executive branch and other sources and articles which argue that the Constitution permits the President to choose the form of international agreement he prefers, that the President has unlimited discretion to conclude any international agreement as an executive agreement.

This has been a rather consistent position. We have had testimony and letters on it.

It seems to me that that interpretation leaves empty the Constitution's requirement that the Senate consent to treaties unless that treaty clause is construed rather non-sensically to intend that the Senate consider agreements only when the President, at his pleasure, chooses to submit them. Isn't it unreasonable to suppose that the framers placed such a nonsensical provision in the Constitution? Isn't it more reasonable to conclude that some class of agreements must be submitted as treaties?

Mr. BESTOR. I would like to respond to that. The provision for advice and consent is a check on the President. It seems to me utterly unthinkable that it should be within the option of the President to do away with the check. The idea is as ridiculous as would be the claim of a public prosecutor that he had authority to waive the constitutional rights of a defendant.

Mr. FALK. This is a difficult question, Senator Clark, because on the one side there exists the long experience and tradition of the President choosing whatever instrumentality he wishes to form agreements; and Congress more or less acquiescing in the exercise of that discretion and never challenging it in any kind of significant or sustained way until very recently.

And on the other side you have the clear role of the Senate with regard to the treaty power, Senator, being integral to the separation of powers to foreign affairs, particularly with respect to national commitments.

So what seems to me to be present here is a situation where the discretion of the President has to be interpreted as being compatible with the underlying intention of the treaty power. Therefore, it is true that

in certain circumstances, Presidents would be free to choose other methods of reaching international agreements, but I think the treaty power was intended to provide balance specifically in relation to "significant national commitments." And therefore, I think the way I would respond is to say, yes, there is that kind of Presidential discretion, but it has to be interpreted in light of the treaty power, which requires that it be exercised only with respect to nonsignificant national commitments—with the single exception, as I mentioned earlier, of those emergencies where one needs an agreement quickly, despite the fact that it is significant, and therefore suspends normal recourse to the treaty process.

Senator CLARK. As I understand what you are saying, with this exception, gentlemen, you would say that certainly some agreements, in accordance with the Constitution, must be sent to the Senate for advice and consent. There must be some classification of agreements.

Mr. FALK. Yes; but that does not resolve the question as to who decides which category a particular agreement falls into. And there is no authoritative basis for answering that. It is unresolved. One has to recognize that it is indeterminate. I mean, there have been no judicial pronouncements that are definitive, it seems to me, on this. Clearly you can find judicial support for a fair measure of discretion to enter valid executive agreements.

I think the issue would very likely be decided somewhat differently if brought before a court in a present setting than it was in the past. I think one may need further development of criteria of identifying what is significant and, you know, what kinds of agreements have to be regarded as treaties.

Senator CLARK. But you do agree that if some agreements must be sent as treaties, that certainly the significant ones ought to be sent as treaties?

Mr. FALK. Yes; with the exception I mentioned earlier.

Senator CASE. Your exception really is in cases where the President thinks he ought to act and he would go ahead and act and take his chances on whether the country would support him, correct? Isn't that what you are really saying?

I mean, I believe this myself. Look at President Lincoln in dealing with habeus corpus and other matters later decided by the court as quite illegal. Yet he was never seriously challenged except by the individuals involved, and only in a few cases.

I was a little in sympathy with President Nixon's statement a couple of months ago. I did not hear it exactly but it was quoted in the papers. He said something like, "Sometimes a person has to break the law." That is not an irresponsible statement if you consider it fairly and in a serious context. I think sometimes it is a true statement of what the situation really is.

I would be glad to have your comments on this question: Isn't it better to have it in that fashion and leave the matter in that posture rather than to set up a specific method of having the State, for example, determine whether a specific agreement has to be sent up as a treaty, which is one structural process that would be required to be followed in all cases?

Mr. BESTOR. In this matter, Senator, I would be willing to trust the consciences of the Members. I cannot believe that a majority of the

Senate would adopt a resolution that would destroy the basis of a truce and thus prolong a state of war. Even though the agreement might meet the definition of a national commitment, any Member can decide not to vote for a resolution that would have disastrous results. Logic and consistency can be bought at too high a price. Instead of subscribing to the idea that "Sometimes a person has to break the law," I would prefer to say that those who pass judgment on an action (whether as jurymen voting on guilt or Senators deciding whether to condemn an irregularly arrived-at international agreement) have a responsibility of looking at the situation as a whole.

#### DETERMINING WHAT CONSTITUTES A TREATY

Senator CASE. I don't know. On touchy questions like the Spanish question or the Greek-Turkish question, for instance, and in questions that involve domestic politics in serious ways or questions of compensation or amnesty or other things which might be involved in an agreement ending a war, I shy away from the ultimate step Dick Clark has taken, namely, that we should hold to ourselves in all cases the right to declare that an agreement must be brought before us as a treaty. I don't think I would go that far.

Senator CLARK. In giving the Senate authority to make that determination?

Senator CASE. I used to say they should because I could think of nobody else who could do it. I think I asked you who should do it and you said that nobody should?

Mr. FALK. That nobody should have the authority to classify what is a treaty?

That is not my position. I agree with the effort to say that significant national commitments should be regarded as treaties.

Senator CASE. I accept that proposition.

Mr. FALK. And the President cannot arbitrarily evade the implication of that determination by exercising discretion. Now the difficulty, it seems to me, is to find some mechanism by which to challenge effectively the discretion, the abuses of Presidential discretion by entering into executive agreements in order to make controversial national commitments. And the foreign bases are good examples of that.

Senator CLARK. But ultimately doesn't that have to rest either with the executive or the legislative? I mean either no one has the power to decide that or one or the other has the power to decide that. Rather clearly, it seems to me, it has to be the latter: One has to put trust in the decision of the majority of the Members of the Senate voting on a Senate resolution, which may be wrong particularly in the cases you cite, or one must say that can be best decided by one man or one woman, namely, the President of the United States.

You cannot have it any other way, can you?

Mr. FALK. Well, I would agree with you if it has to be either the President or the Senate, then I would prefer to take the risk of having it be the Senate.

Senator CLARK. Could it be a third force?

Mr. FALK. Well, there is another possibility and that would be to say the President, as is traditional, would have discretion in the first instance, but that that discretion could be challenged in some formal way.

Senator CLARK. Isn't that precisely what the resolution does?

Mr. FALK. Yes; and as I tried to suggest, my only difficulty with the present formulation is that it forces the flexibility in application to come exclusively through manipulating the word "significant". And I think that is undesirable because it could create a misimpression about the seriousness of the procedures that are being adopted.

Senator CASE. You wouldn't have to have the word at all. You could leave it to the Senate to decide whether it should pass on a treaty or pass on an agreement, couldn't you?

Mr. FALK. Well, I think that one of the purposes of Senator Clark's initiative, as I understand it, is to reaffirm the correct notion that the treaty power was intended to cover all significant national commitments and that it is important to make that explicit in order to communicate to the President and to the public what one wants to accomplish.

If you make the provision too vague, then it seems to me to have no impact at all on discretion in those very instances where the President would be tempted to avoid confronting a challenge in the Senate if he allowed the agreement to be regarded as a treaty.

#### FOREIGN POWERS' DESIRE FOR PRIOR SENATE APPROVAL

Senator CASE. What about your very important point about the reluctance of foreign ministers of other countries to accept any agreement made by the President with their governments without getting the Senate on the line ahead of time?

Mr. FALK. Well, I think in general, Senator Case, that it is in the interest of foreign governments to have commitments made by the American President, Senator Case, confirmed by the Senate through the treaty process because it is a commitment that is much more likely to be respected. And the commitment to grant Vietnam reconstruction aid is a good example of a commitment that I think under no circumstances would have been implemented by the Congress. And I think to the extent one wanted another government to rely on the credibility of what the United States was proposing, it was unfortunate to promise something that there was no prospect of it being implemented.

And I think the treaty process would have made that much clearer.

Mr. BESTOR. It seems to me, Senator, that it is important that the power of the President not be misrepresented to the foreign power. The Constitution clearly provides that treaties must be approved by the Senate. Now if the President insists that he has a right to bypass the treaty provision, I think other powers ought to be on notice that this may not be the case.

Furthermore, it seems to me we are not distinguishing between the kind of subordinate or temporary executive agreement that is made on the basis of a previous statute authorizing the President to act. For example, a declaration of war automatically makes the President the Commander in Chief of the military forces. This being so, an executive agreement with allies on military matters in time of war, or an executive agreement for an armistice to terminate hostilities,

are measures deriving their authority from the congressional act declaring war. But the validity of such agreements is limited by the duration of the state of war and its immediate aftermath. When, however, an armistice agreement goes beyond a cease fire between opposing forces and a redeployment of forces to prevent a violation, and purports to deal with the future pattern of international relations in an indefinite way, then the agreement exceeds the authority of a military commander.

To make such a long-term agreement belongs to the authority within the constitutional system that is empowered to commit the Nation permanently. And this is the President and Senate jointly. It is important to differentiate the power of a Commander in Chief when conducting and terminating a war, from an alleged peacetime power of the Executive to make all sorts of arrangements anywhere in the world at any time.

Senator CASE. I don't want anyone to think that because I am engaging in discussions with you gentlemen and my colleagues that I am against this effort because I am not. I think we here in the Congress and particularly in the Senate have been put in a position by the executive branch's assertion of absolute discretion—and this is now a very flat position of the executive branch and is taken by its legal officers and its Secretaries—that they downtown have the absolute right to decide whether or not something should be submitted to us for consideration, and that they can make any arrangement at their discretion and it will be binding on the American people. So we have been put in a position where efforts along these lines are necessary.

There is even a question as to whether or not the power of appropriations cannot be committed. Of course you cannot force Congress to pass an act appropriating money, but you can create an obligation, which is very strong indeed.

#### NECESSITY OF EXPRESSION OF COOPERATION FROM EXECUTIVE AND PRESIDENTIAL ASPIRANTS

We don't think we can possibly accept the situation that now exists with respect to this assertion by the Executive. That makes most important, however, your point that we have to have in some fashion an expression by the Executive and by aspirants for the Presidency, for example, as to their attitude toward this question of cooperation with the Congress in making these agreements rather than continuing the assertion of absolute authority without any check.

Senator CLARK. In fact, that is a very apt description. I was looking at the administration's position. Senator Sparkman received a letter from Mr. McCloskey as a cover letter transmitting the Secretary of State's position and legal opinion on the Treaty Powers resolution in which they say: "No constitutional requirement for passage of a money bill designed to implement a properly authorized and legally binding agreement."

In other words, we do not even have the authority to refuse to authorize or fund these executive agreements after they are made. That is a very, very strong position.

Senator CASE. It goes the whole way and we cannot avoid challenging it. And I heartily support that effort.

#### HOUSE'S INCREASING INSISTENCE ON RIGHT OF PARTICIPATION

The only other thing I think is terribly important, and you both have spoken of it, is this matter of working out a process which does not exclude or antagonize the House.

If Congress is indeed to reestablish its position, we cannot, I think, be successful without taking that into account. I personally welcome and I think we have to recognize the House's increasing insistence on its right of participation. We had an example recently on the question of how we are going to handle the Spanish bases question; whether a treaty should be regarded as an authorization for the payment the treaty contemplates. We have been working on that in cooperation, I must say in this instance, with the State Department. I hope we can work it out.

We must, I think, keep the House's sensibilities and its proper role actively in mind in our actions because as much as we may regard ourselves as a rather elite institution, particularly members of this committee, and properly so, that isn't the universal opinion on the Hill.

The CHAIRMAN. You referred to the little mixup we had with the Spanish bases treaty. We did work that out.

Senator CASE. That is right. And I think in a good fashion and with the cooperation of the executive branch. Perhaps it was with a gun at their heads but nevertheless it was worked out.

Senator CLARK. That not only provided in the treaty for a separate authorization but appropriation on an annual basis.

The CHAIRMAN. And we passed separate legislation authorizing that appropriation.

#### FORMULA WORKED OUT FOR SPANISH BASES TREATY

Senator CASE. Would you like to make any comment on that particular formula that was worked out? I was wondering if you had any comment bearing on that method of wisdom in connection with this whole question? I would be glad to have it. And if you would like to reserve any comment until you have had a chance to look at it further, I would be awfully glad, and I am sure the committee would be glad, to add that to the record.

Mr. BESTOR. I would like to comment briefly in very general terms, without discussing recent developments in the handling of the question of U.S. bases in Spain, into which I would need to look further.

It seems to me that greater and more specific recognition ought to be given in Senate documents of all kinds to the constitutional role of the House in matters affecting foreign relations—particularly its indisputable right to participate in the enactment of money bills. Committee reports, bills, and resolutions should go out of their way to include references of the sort, and I think the formula for giving advice and consent to treaties might well include the phrase "reserving to the House of Representatives its constitutional authority to partici-

pate in the enactment of any financial or other measure that may be necessary to implement the present agreement." This, it seems to me, would do a great deal to lessen rivalry between the two houses—a rivalry with which the public has little sympathy, and which stands in the way of concerted resistance to executive usurpations of power in the realm of foreign affairs.

#### TIME LIMITATIONS ON DELEGATIONS OF EMERGENCY POWER SUGGESTED

May I make a related point? Congress, it seems to me, ought to develop a consistent and stringently restrictive policy with respect to the delegation of discretionary power to the President, especially the delegation of emergency power. Every such grant should be for a definite, clearly specified period of time, so that positive legislation would be necessary to extend it. The constitutional authority of Congress has been eroded by grants to the President of powers that may well have been needed to meet a particular situation but that were not limited to that situation, and thus have remained permanently on the statute book, capable of being invoked by the executive branch for purposes never originally intended. Because the repeal of a statute requires an act of Congress that the President may veto, these improvident grants are difficult to rescind.

Setting a time limit was the procedure used from the end of the 17th century in English mutiny acts (see 1 William and Mary, chapter 5, 1689) to prevent the King's power as commander in chief from being used to subvert parliamentary government. It is the device being used more frequently in various of the States, in the so-called "sunset" statutes, to insure periodic review of governmental agencies.

Borrowing from the treaty powers resolution that is before us, I should like to see each House adopt a procedural rule making it out of order to consider any bill granting discretionary or emergency powers to the President unless a specific time limit is set by the bill. So far as possible, earlier statutes should be revised so as to include similar provisions.

Senator CASE. There is something of that machinery involved in this matter of the exercise of the Committee on Legislation, which has done a very good job I think.

#### CONGRESSIONAL POWER TO DENY FUNDING FOR EXECUTIVE AGREEMENTS

Senator CLARK. Do either of you have any doubts that the Congressional power over the purse gives the Congress full authority to deny funding for any executive agreement that it may choose?

Mr. BESTOR. The matter was settled in 1796 in connection with the Jay Treaty, and, in the opinion of virtually all constitutional authorities, settled definitively. When an appropriation bill to carry out the treaty was introduced in 1796, the argument was made that the legislative branch was bound to enact it without further ado. This view was rejected, the appropriation measure was debated and passed in the ordinary way, and the House of Representatives adopted a resolution proposed by Madison—often called the "father" of the Constitution—which declared "that when a treaty stipulates regulations on

any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution \* \* \* on \* \* \* laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or in expediency of carrying such treaty into effect."

Recent attempts by the executive branch to revive the arguments that were definitively rejected in 1796 exhibit, it seems to me, a reckless disregard of constitutional precedents and of the intentions of the framers.

Mr. FALK. The only thing that I would add would be that I agree with what Professor Bestor said in that there is the possibility that if a President entered an executive agreement with a foreign government, that in an international sense an obligation of the United States would be validly created. And one, therefore, would have a situation where Congress was under no obligation, no real obligation; but a failure to appropriate would mean that the United States was thereby placed in violation of a valid international legal commitment.

Senator CLARK. So that if Congress failed to fulfill the funding for the two Nixon commitments, you are saying we could stand in contradiction of international law?

Mr. FALK. Yes; that happened to be a special case in that the commitment to Thieu was itself a violation of the overt agreement that the United States had negotiated in Paris and was dubious on its own, Senator, from the point of view of international law. But as far as the relationship between Saigon and Washington was concerned, it did seem to me to create a valid commitment.

Senator CASE. Could I express my appreciation, Mr. Chairman, and to both of you so much for your contribution here? I have not only enjoyed it but I hope we have profited by it. I hope this will be a continuing cooperation so long as we are all around. I do have to go, Mr. Chairman.

Gentlemen, I am sorry I cannot stay until the conclusion of this morning's business but I must go. However, one thing did occur to me here. Professor Bestor's biography, which is a most interesting statement, shows he was born in 1908 and graduated from Yale in 1920. That makes him, I think, probably the greatest prodigy we have seen for a long time.

Mr. BESTOR. Although I don't like to give up that honor, Senator, there must be a misprint. I was graduated in 1930.

Senator CASE. Thank you.

#### EACH HOUSE'S POWER TO SET INTERNAL RULES OF PROCEDURES

Senator CLARK. Under the Constitution, article I, section 5, clause 2, each House is given the power "to determine the rules of its proceedings." Isn't it therefore up to each House to decide what procedure it will follow in deciding whether to fund a given executive agreement?

Mr. FALK. I think I can answer that very briefly by saying just yes. You know, one can say ritualistically "provided they are in conformity with the Constitution." Perhaps issues would arise if the Senate created rules that somehow violate the Constitution. But that is not arguably relevant in this context.

Mr. BESTOR. I would agree with that.

Senator CLARK. Professor Bestor, what do you believe was the intent of the framers regarding the scope or the power of each House of the Congress to set its own internal rules of procedure?

Mr. BESTOR. I think that article I, section 5, clause 2, means exactly what it says: "Each House may determine the Rules of its Proceedings." Parliament had always determined its own rules of procedure and had resisted any attempt on the part of others to prescribe rules for it. The framers gave Congress the privileges that Parliament had found necessary to protect its independence of outside control.

I see no reason to read into the clause anything other than the requirement applicable to all clauses, that it shall not be exercised in such a way as to violate the Constitution. This does not mean, of course, that a given rule cannot be in violation of some *ex parte* interpretation that an interested group may choose to put upon the Constitution.

Senator CLARK. Isn't it well within the scope of that power to establish a point of order of procedures where it is thought necessary?

Mr. BESTOR. Yes.

Mr. FALK. Yes.

#### CONSTITUTIONALITY OF POINT OF ORDER PROCEDURE

Senator CLARK. You would not view the point of order procedure as an unconstitutional attempt to replace a majority rule with a unanimous-consent rule, would you?

Let me state it another way. That may not be clear. It is part of the contention of the administration in responding to this particular resolution that we are somehow replacing a majority rule with a unanimous-consent rule unconstitutionally by establishing such a point of order requirement in our Senate resolution.

Mr. BESTOR. The argument of the executive branch seems to me, Senator, to be without foundation. Majority rule is fully provided for by the Treaty Powers resolution. According to section 4(a)(1), a majority of the Senate must vote that a given agreement should be in the form of a treaty. Assuming that the Senate has previously adopted (likewise by majority vote) the rule incorporated in the Treaty Powers resolution, then the principle of majority rule is in no sense violated by giving any individual Member the right to challenge, by point of order, any move that violates the rules already established by the majority.

Senator CLARK. Of course, if the majority of the Members of the Senate feel that the point of order should not stand, they can overrule the point of order by a simple majority as well?

Mr. BESTOR. Yes.

#### IS ANYTHING IN RESOLUTION UNCONSTITUTIONAL?

Senator CLARK. What I am really asking is, I think, do either of you believe there is anything in this resolution which is unconstitutional?

Mr. BESTOR. I find nothing at all.

Mr. FALK. Nor do I.

CONSTITUTIONAL CONVENTION'S REJECTION OF HOUSE ROLE CONCERNING  
TREATIES

Senator CLARK. It is my understanding that the Constitutional Convention considered and rejected giving the House of Representatives a role with the Senate in the advice and consent process. Is that your interpretation or not?

Mr. BESTOR. Yes; that is quite correct. A brief historical account is perhaps desirable. With the permission of the committee I should like to furnish for the published record a more complete narrative than the answer I am about to give without the benefit of having the necessary sources at hand.

Under the Articles of Confederation treaties were made by the only organ of Government there was; namely, Congress, in which each State had an equal vote. For any important decision, including the making of treaties, the vote of nine States was required—that is, at least two-thirds of all the States in the Union. Now the power of the Senate under the Constitution represents an arrangement with certain striking similarities to the old one. Each State has equal representations, and a two-thirds vote is required, though only a two-thirds vote of the Senators actually present. These resemblances are not accidental, though the end result was achieved in a roundabout fashion.

At the outset of the convention the delegates who urged a bicameral legislature envisaged the upper Chamber as a small body of elder statesmen, capable of acting with secrecy, holding office for long-terms, and thereby elevated above partisan and local (i.e., State) pressures and prejudices. That they should be primarily responsible for handling the country's relations with other nations followed from these characteristics.

The so-called Great Compromise, whereby the Senate was to represent the States equally and the House was to be apportioned on the basis of population, altered in subtle ways the position of the Senate. Though long terms still made it a more stable body than the House, the nationalistic predisposition it was expected to have was replaced by direct and powerful ties with the separate States. (Until 1913, it must be remembered, the Constitution provided for Senators to be chosen by the State legislatures.)

When on the 6th of August 1787, the first actual draft of the Constitution was laid before the Convention by its so-called committee of detail, the Senate was given the exclusive power to make treaties, and no two-thirds rule was imposed. The assumption probably continued to be that the Senate, in treaty matters, would act as a body of nationally minded elder statesmen, who would rise above State rivalries.

Once the treaty clause came up for debate, however, the interests of the different classes of States came to the fore. A basic reason was that treaties of commerce, rather than treaties of alliance or treaties of peace, were uppermost in most delegates' minds. A year previously, the differing interests of the Southern and Northern States had produced one of the gravest crises under the Confederation. The subject was a proposed treaty with Spain, which would have obtained certain commercial advantages that were of interest to the Northern States, but would have given up any claim of the United States for free naviga-

tion of the Mississippi through the Spanish territory lying on both sides of its lower course. The nine-States rule of the Confederation allowed the Southern States (which had a strong interest in the "western waters") to block the latter surrender. In the tradeoffs that occurred in the latter part of the Convention, a two-thirds rule for navigation acts (which the South favored and the North opposed) was given up in return for a two-thirds rule on treaties (which the South considered of equal or greater value for the protection of its economic interests).

This was the context in which the question of giving the House of Representatives a role in treaty-making came up. Because of the preoccupation with the economic impact of treaties on State and sectional economic interests, the focus of the discussion was upon the kind of majority that should be required for Senate approval. Comparatively little attention was consequently given to the longrun implications of excluding the popularly elected House from participation in treaty-making.

On the 16th of August, it is true, George Mason of Virginia expressed misgivings about the excessive power of the Senate, which "by means of a treaty might alienate territory &c. without legislative sanction." On the 23rd, Governor Morris of Pennsylvania said he was reluctant to place the power of making treaties in the Senate, but was willing to do so provided that (in the words of the motion he made) "no Treaty shall be binding on the United States which is not ratified by a Law"—that is to say, by an enactment requiring House approval. Though he was supported by his Pennsylvania colleague James Wilson and by John Dickinson of Delaware, speeches in opposition were made by Madison, by Nathaniel Gorham of Massachusetts, and by William Samuel Johnson of Connecticut. The principal objection was to the awkwardness of an arrangement whereby (in Johnson's words) "the acts of a Minister with plenipotentiary powers from one Body, should depend for ratification on another Body."

When Governor Morris' motion was put to a vote, eight States opposed it, only Morris' own State of Pennsylvania voting yes. (One State, North Carolina, was evenly divided.) Madison next proposed a compromise, which would have allowed the President and Senate "to make Treaties eventual and of Alliance for limited terms," but "requiring the concurrence of the whole Legislature in other Treaties." Nothing came of the proposal, and in later discussions of the treaty clause the main issue was the two-thirds requirement.

As this narrative suggests, the importance of obtaining the full consent of the governed to national commitments by involving both Houses in the treaty-making process was never seriously considered at the time. Today, I believe, involvement by the House in such matters is vitally important if the American people are to have confidence in the soundness and responsibility of our foreign policy. Therefore I have already urged that committees of the House be invited to participate along with Senate committees in the consideration of issues of foreign policy, leaving to the Senate itself (as the Constitution specifically and inescapably provides) the final vote on consent to a treaty.

PREFERABILITY OF SENATE ALONE APPROVING SIGNIFICANT INTERNATIONAL AGREEMENTS

Senator CLARK. Further on that point, given the expressed intent of the framers on the subject, isn't it preferable that the Senate alone—and this really deals with Senator Case's question—rather than the House and the Senate, approve significant international agreements?

Mr. FALK. I would say if one were starting fresh with the constitutional experience of the United States, that the answer would probably be yes—given the way the Constitution was drafted. But I do think Senator Case has a point, Senator, that the practical realities of trying to deal with the disequilibrium that has emerged in the constitutional system between Congress and the President will be greatly upset if an internal dispute or conflict arises between the House and the Senate. And given this prospect it might be desirable to have some means of securing a role for the House and for the concurrent resolution procedure in certain circumstances where, for instance, the appropriations' power of the House is peculiarly pertinent to the significant national commitment that is at stake.

Senator CLARK. Wouldn't it always be?

Mr. FALK. No, I don't think so. I mean, I think that one could distinguish between the sense in which it might always be, Senator, and a commitment that, on its face, dealt with a matter of appropriations.

Senator CLARK. Yes, Professor Bestor?

Mr. BESTOR. I completely agree that dissension between the Senate and the House on these matters would be disastrous. Indeed I think that the trick of "divide and rule" has already been used effectively by the executive to negate the power of Congress.

I suggest that a very serious effort ought to be made by both Houses to conciliate each other's views. A good example is the bill now pending in the House for congressional review of international executive agreements (H.R. 4438), which specifically excludes treaties from its operation.

My hope would be for negotiations between the two chambers looking to the adoption by the House of a resolution complementing the Treaty Powers resolution by saying, in effect, that when the Senate has, by resolution, determined that a particular agreement must take the form of a treaty, the House will likewise refuse to consider an appropriations bill or other supportive legislation until and unless the agreement has been ratified as a treaty.

In return for this, it seems to me, the Senate ought to agree that it will consult the House before ratifying any treaty that can be expected to require fiscal or other supportive legislation, and to incorporate as reservations whatever the House deems necessary to protect its legislative prerogatives.

On a permanent basis, I would like to see devised a procedure by which the House Committee on International Relations and the Senate Committee on Foreign Relations would sit together on a frequent and regular basis as a joint committee, to consider fundamental issues of foreign policy, virtually all of which involve questions on which the House as well as the Senate must eventually act.

Congress must present a united front if it is to induce the Executive to take seriously its obligation to seek advice as well as consent from

the Senate and its corresponding obligation (less specific in the Constitution, perhaps, but nevertheless clear) to keep the House fully informed of developments on which it will be called upon to act.

#### HOUSE PARTICIPATION IN RELATION TO NATIONAL COMMITMENTS

Senator CLARK. What do you think of the suggestion that there ought to be some area here where the Senate could retain its constitutional rights in terms of giving advice and consent on significant agreements, on treaties, on one hand; and the House being able to work with the Senate in terms of nonsignificant agreements—I guess in terms of joint resolutions? Does that make sense to you?

Mr. FALK. Yes; I think that it is an attractive way of compromising the various considerations that are at stake here and I think that the notion of setting up a joint committee on commitments in general, Senator—where it would also be possible to have some kind of consultative informal process to allow House participation even in relation to significant national commitments—well, I think it would not encroach upon the treaty power but it would, it seems to me, allow the House a mechanism for having their views taken into systematic account in the course of the hearings carried on around “significant national commitments.”

#### HANDLING OF SIGNIFICANT AGREEMENTS

Senator CLARK. Do you both agree that significant agreements ought to be handled via the treaty route rather than joint resolution?

Mr. BESTOR. Rather than executive agreement.

Senator CLARK. Oh, rather than executive agreement? In other words, followed by joint resolutions on authorizations and funding.

Mr. BESTOR. In this instance the Constitution seems to me completely clear in its requirement that treaties be made with the advice and consent of the Senate. Accordingly, I think it would be dangerous, however desirable the end result might be, to depart from that clear and established understanding.

Furthermore, the distinction that ought to be made between a treaty and an executive agreement is that a treaty represents a long, continuing, and important international commitment; whereas an executive agreement is an appropriate way of making subordinate and temporary arrangements. These latter can be authorized by acts of Congress, both Houses participating, but I don't see how one can escape the specific requirement of the Constitution that it is the final responsibility of the Senate, through advice and consent, to give its approval to a treaty.

Mr. FALK. I don't fully agree with Professor Bestor on that point. It is the first time I have not really agreed with him in the course of this long morning. But I don't feel the Constitution, in light of the practice that has emerged, is crystal clear on what agreements have to be regarded as a treaty. And I think it would be difficult in my judgment to sustain the case that in some instances “significant commitments” of a particular kind could not be made through the executive agreement procedure. I think it is undesirable that such practice has been established, but I think it is hard to argue at this stage that the

Constitution is absolutely unambiguous on this point. And I could see some sense in saying that executive agreements, approved by concurrent resolutions, for commitments that emphasized a prospect of appropriations, Senator, might have merit as a reasonable feature for soliciting congressional participation in conformity with the Constitution.

The problem of reasserting a congressional role is complicated by the reality that the mixture of the Constitution and the practice just is not crystal clear on relative competence of the President and the Senate.

Senator CLARK. In other words, you are saying in effect that executive agreements do have some standing in light of historical developments and that they may be as valid as the treaty power itself?

Mr. FALK. Well, you cannot read out of existence, Senator, executive agreements by just looking at the language of the Constitution because there is too much intervening authoritative practice, which is inconsistent with that clear reading.

#### EFFECT OF PATTERN OF CONSTITUTIONAL VIOLATIONS CONCERNING EXECUTIVE AGREEMENTS

Senator CLARK. But Sam Ervin used to say something like, "A violation of the Constitution does not constitute an amendment to the Constitution." What is your reaction to that?

Mr. FALK. Well, that is a nice epigram. Undoubtedly it is rhetorically useful. But a violation that is repeated as a pattern over a long period of time and has been virtually unchallenged and acquiesced in does seem to me to create the grounds for saying it is reasonable for the President to believe that he has this authority under the Constitution. And until the Supreme Court declares that he does not, there is no basis for asserting unambiguously that it is unconstitutional behavior.

Senator CLARK. You say he has the right to believe that he is acting under the Constitution?

Mr. FALK. That is reasonable, in light of these intervening developments, to regard the executive agreement powers as a very wide power.

Senator CLARK. You mean constitutionally?

Mr. FALK. It is reasonable to believe that. I happen to think that it is an unfortunate interpretation of the Constitution, but what I am trying to do is to draw a distinction between how the Constitution is most appropriate understood, Senator, and what the range of reasonable disagreement would be. And what I am suggesting is that, short of some kind of Supreme Court resolution of this uncertainty, it is very difficult to dogmatically assert, Senator, what the Constitution allows and what it does not allow. And that applies, of course, to the executive claims as much as to the constitutional claims.

Senator CLARK. Not being a constitutional authority nor a lawyer—

Mr. FALK. You have two advantages, then.

Senator CLARK. But it seems to me by your use of the term "constitutional authority" one might argue he has the authority, but since there is nothing in the Constitution itself to in any way authorize that,

it seems to me that that legal authority, whatever it might be, is not constitutional. It might be something extra-constitutional or acquired through the years.

Mr. FALK. Well, I'm not sure whether it is a point of semantics or a substantive point, Senator. All I am doing is to say that it is reasonable for a President to believe that he has the constitutional authority.

#### ISSUES OF CONSTITUTIONALITY OF EXECUTIVE AGREEMENTS

Mr. BESTOR. My testimony, Senator, had to do with the intent of the framers. Their intent seems to me quite unambiguous. I see no constitutional basis for the claim of the President to authority for making an international agreement unless through the treaty procedure, or unless by authority of a previous act of Congress, or unless the agreement in question involves matters of detail under a previously ratified treaty. Some latitude may be allowable when an agreement needs to be put into immediate effect. Under such circumstances, validation by the Senate or by Congress as a whole can legitimately be made later, if the agreement is submitted for appropriate approval without delay. The validation by Congress of Lincoln's suspension of habeas corpus in the secession emergency is a case in point.

To sum up my position: So long as there is congressional approval; either in the form of advice and consent by the Senate or in the form of an act passed by both Houses, then an executive agreement would seem to me to be authorized by either the treaty clause or the "necessary and proper" clause, and therefore to be constitutional.

The real issue is the constitutionality of executive agreements made by the President without any kind of legislative approval. I find nothing in the Constitution to support the claim that a power to make such agreements has been granted, directly or by implication, to the President. And I agree with Senator Ervin that a violation of the Constitution cannot become a constitutional principle merely by acquiescence over a period of time—not in the American system, at least.

The problem can be clarified, I believe, by recognizing that a large number of executive agreements are constitutionally valid according to the principles I have just enunciated. The misgivings of the public, and (I take it) of this committee arise from executive agreements that are made by the President without any sort of approval from Congress. The executive branch itself admits that these are relatively few in number. In a recent memorandum to this committee, the Legal Adviser of the State Department (Mr. Monroe Leigh) reports that "about 86 percent of executive agreements are authorized by statute." These, therefore, are not at issue. It is the remaining 14 percent that raise constitutional questions, and perhaps only the "approximately 2 to 3 percent" that Mr. Leigh says "are authorized solely by the Constitution"—according to his interpretation of the Constitution. (Congressional Record, November 14, 1975, p. S 20103).

If the number is as few as 2 or 3 percent, then it is hard to see why the conduct of American foreign relations would be hampered by submitting these agreements as treaties and obeying the constitutional mandate with respect to treaties. Nor would so small a number clog the machinery of the Senate. Obviously the unwillingness to submit these agreements as treaties is that the Administration does not wish

them to be debated in the Senate. And this is the very reason why they ought to be debated there, and why the Senate should insist—in the interests of the Nation itself—that they be put into treaty form and dealt with by constitutionally mandated procedures. The very fact that the State Department considers it important to keep these agreements from becoming subject to constitutional procedures is a signal that they contain commitments of a kind that the Senate, as watchdog of the public interest in international relations, would not be likely to approve. I don't think the framers of the Constitution intended that watchdogs should be tied up and muzzled.

Senator CLARK. Thank you.

TAKING INTO ACCOUNT PATTERNS OF PRACTICE  
IN CONSTRUING CONSTITUTION

Mr. FALK. May I make one small point? I think the difference between us on this point—and it is a very fundamental point—is that I am suggesting that substantive practice does bear on the proper interpretation of the Constitution. And although I agree with the view of what the framers intended—and it is the view that underlies this resolution—I think that general theories of construction, of how you construe a legal document like a Constitution, would also take into account patterns of practice that have been acquiesced in by the relevant branches of government over a period of time.

Mr. BESTOR. This argument, Mr. Chairman, if applied to the question of racial segregation, would mean acquiescence in the provision of "separate but equal" facilities for different races throughout the period from 1896, when the Supreme Court in *Plessy v. Ferguson* held that "separate but equal" satisfied the requirement of the 14th amendment for "equal protection of the laws," until 1954, when the Supreme Court in *Brown v. Board of Education* held that segregated education was unconstitutional, despite the patterns of practice that had been followed for decades by every level of government.

Against the patterns of practice that have been followed in the making of foreign policy, I would set not only the intent of the framers in 1787, but the experience of recent years—particularly the Vietnam disaster, into which we were led by the belief that presidential leadership, with minimal consultation of Congress, was the path of national safety. Under the circumstances I suggest that the proper constitutional course is like that which the Supreme Court pursued in 1954; namely, to seek out the fundamental meaning and purpose of constitutional mandates.

Mr. FALK. I would only add to that that I think until the Supreme Court acted in 1954, it would have been reasonable to view the Constitution as endorsing separate but equal standards and that it does require—and would require in the present context—an authoritative opinion by the Supreme Court to resolve this question in a definitive way.

Senator CLARK. I am sorry to say I have only 3½ minutes to vote on final passage of the Watergate reform bill. We have been very, very privileged to hear your testimony today. I think it has been extremely helpful and we are pleased that you came and spent the whole morning. Thank you very much. The hearings are adjourned.

[Whereupon, at 12:30 p.m., the committee recessed subject to the call of the Chair.]

## TREATY POWERS RESOLUTION

WEDNESDAY, JULY 28, 1976

UNITED STATES SENATE,  
COMMITTEE ON FOREIGN RELATIONS,  
*Washington, D.C.*

The committee met, pursuant to notice, at 10:08 a.m., in room 4221, Dirksen Senate Office Building, the Hon. Dick Clark, presiding.

Present: Senators Sparkman (chairman), Clark (presiding), Case and Javits.

Senator CLARK. The hearing will come to order.

Senator SPARKMAN. I'd like to make a brief opening statement, Mr. Chairman, before we start.

### OPENING STATEMENT OF SENATOR SPARKMAN

The Foreign Relations Committee today continues its examination of the treaty powers of the Senate.

In recent years both Houses of Congress have shown increasing concern over their role and responsibility in the making and oversight of international agreements. The House International Relations Committee is currently considering proposed legislation which would authorize Congress by concurrent resolution of both Houses to disallow executive agreements within 60 days of their transmittal to Congress.

The Senate Foreign Relations Committee has initiated hearings on a resolution, Senate Resolution 486, which would have the effect of requiring the Executive to submit agreements which constitute significant national commitments in the form of treaties, subject to the advice and consent of the Senate by two-thirds vote.

Although no clear consensus has yet emerged as to the most appropriate and responsible means of dealing with this issue, there seems to be a general consensus that some form of action is needed in the area of treaties and executive agreements.

The common purpose of the various proposals now under consideration is to enable Congress to discharge more effectively its constitutional responsibilities in the making and oversight of significant foreign commitments.

The first witness today will be Mr. Monroe Leigh, Legal Adviser to the Department of State, who will present the views of the executive branch in this most important field of executive-legislative relations.

Following Mr. Leigh's testimony and questioning by the committee, we will hear the views of Prof. Arthur Miller of the George Washington University National Law Center.

Before Mr. Leigh proceeds with his prepared statement, I want to say that I have invited Senator Clark of Iowa, who has taken important initiatives and has really been the leader in this field and who is the author of the proposed resolution, to take charge of the hearing, since he is the one who has been most directly connected and concerned with this subject.

One other thing I want to state is this.

Under a rule of the Senate, ordinary committee meetings cannot be held unless the subject matter is urgent. I have obtained permission from the Senate to hold hearings on some matters that fell within that category—for instance, the hearings yesterday on three pending commodity agreements were held under that permission. Another type of hearing permissible under even this stringent Senate rule is a hearing which falls in the category of oversight. This hearing is being held under that exemption. It will not be our purpose to consider legislative action, but to deal with the factual situation relating to treaty-making powers. This is not a legislative session; it is an oversight session.

I am very glad that Senator Clark has started this work of looking into treaty-making powers and other things related thereto.

I will now ask Senator Clark to take charge.

SENATOR CLARK. Thank you very much, Mr. Chairman, both for your comments and your cooperation in agreeing to have these hearings before the full committee.

I did want to mention that Senator Hathaway is going to be coming in at some point during the hearing with a statement. Whenever he arrives, we will take a break and hear his statement, if that is agreeable to you, Mr. Leigh.

MR. LEIGH. Of course.

#### SENATE AND HOUSE ROLES IN MAKING NATIONAL COMMITMENTS

SENATOR CLARK. I join with Senator Sparkman and my colleagues in welcoming Mr. Leigh and Professor Miller here today to provide further information and to answer questions on how the two Houses of Congress together with the executive branch can cooperate and work together in framing our Nation's foreign policy. I say work together because quite aside from the Senate's exclusive role in providing advice and consent to treaties, in my judgment the House of Representatives has a very profound role and responsibility in this whole process.

There can be no doubt whatsoever about the legitimacy, indeed the constitutional necessity, of the House role in funding international commitments, including treaties, which may be authorized for ratification by the Senate.

Therefore I am convinced that the House should be just as interested as the Senate in guaranteeing that the Congress not permit the executive to usurp the legitimate congressional role in making U.S. national commitments.

#### OBJECTIVE IN RAISING QUESTIONS

Similarly, I say working together with the executive branch because I am firmly persuaded that there can be no sound nor effective

American foreign policy without the closest of cooperation between the Congress and the Executive.

So, our objective, and that I think of my colleagues, in raising questions about the proper constitutional role is only to establish how the system of checks and balances really should operate in the particular area of international agreements. We are trying to interpret more precisely provisions of the Constitution which may, through the years, have been misused.

I think the more accurately the respective responsibilities are defined and the more closely we consult with each other, the less friction and misunderstanding will exist between these two branches of Government, and as a consequence, the more effective our policy can become.

Senator Hathaway not having yet arrived, I think we should at this point go ahead and hear Mr. Monroe Leigh, the Legal Adviser to the State Department.

You may proceed in any way you deem appropriate.

**STATEMENT OF MONROE LEIGH, LEGAL ADVISER, DEPARTMENT OF STATE, ACCOMPANIED BY SAMUEL GOLDBERG, DEPUTY ASSISTANT SECRETARY FOR CONGRESSIONAL RELATIONS; AND ARTHUR ROVINE, ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS**

Mr. LEIGH. Thank you very much, Senator Clark, Senator Sparkman. I will be happy to suspend whenever Senator Hathaway arrives, if you would just so indicate.

Senator CLARK. Fine.

Mr. LEIGH. I would just like to introduce before I begin Mr. Sam Goldberg on my right, who is the Deputy Assistant Secretary of State for Congressional Relations, and on my left is the Assistant Legal Adviser to the Department of State for Treaty Affairs, Mr. Arthur Rovine.

Senator SPARKMAN. Mr. Chairman, before we start, I think the record should show that Senator Case has been here, but had to go over to the Senate floor. We hope he will be back.

Senator CLARK. Good.

Mr. LEIGH. Mr. Chairman, I am very grateful for this opportunity to appear before the committee to consider with you Senate Resolution 486, the "Treaty Powers Resolution."

Senate Resolution 486 would permit the Senate to express its opinion that particular executive agreements should, in its opinion, be considered as treaties; and once that opinion has been expressed, unless the Senate has in the meantime approved the treaty by a two-thirds majority, a point of order procedure would become applicable permitting any one Senator to block consideration of the funding of any such designated agreement.

**STATE DEPARTMENT OBJECTION TO SENATE RESOLUTION 486**

As you know, Mr. Chairman, the Department of State believes that this resolution, even though it would purport to do no more than estab-

lish an internal rule of procedure for the Senate, would raise difficult legal and policy questions if adopted.

Our objections to the proposed resolution focus on three problem areas.

Let me say as an interpolation, Mr. Chairman, that we have not been quite sure which is the final version of Senate Resolution 486. There is a slight variation between the—

Senator CLARK. The final version, of course, is the one which was submitted last.

Mr. LEIGH. Well, we do not know that from the dates. There is a slight difference between the one which appeared at the time you made your statement introducing it on the floor, and the printed version which has been circulated.

But, unless some special—

Senator CLARK. You say there is a slight difference between the printed version and the last one put in the Congressional Record?

Mr. LEIGH. Yes; there is a slight difference.

Senator CLARK. As far as I am concerned the official resolution would be the one that was submitted in the Congressional Record on the last occasion.

Mr. LEIGH. Well, let me proceed. If this becomes important to you—I just wanted to make that point.

Senator CLARK. Fine.

Mr. LEIGH. First, Mr. Chairman, the resolution if adopted would seriously diminish the role of the House of Representatives in authorizing or approving many international agreements. The resolution would claim for the Senate the power to treat an executive agreement as a treaty, irrespective of prior participation of both Houses in authorizing or approving the agreement.

Second, the resolution, if adopted, would interfere with the President's role as the Nation's negotiator of international agreements with other countries. Implicit in this role is his making an assessment of what type of instrument would best serve in a particular case.

Third, Mr. Chairman, the resolution, if adopted, would raise questions with respect to the requirements concerning adoption of legislation.

Let me now discuss each of these problem areas in further detail.

#### INTERFERENCE WITH HOUSE'S PROPER ROLE

In our judgment the proposed Senate Resolution 486 would, if adopted, constitute a very significant interference with the proper role of the House of Representatives. The House, of course, has a role in the authorization and funding of the vast majority of executive agreements.

Under Senate Resolution 486, however, the Senate could deprive the House of that role whenever it so wished simply by expressing its opinion on the matter.

If, for example, a statute authorizes the President to conclude an executive agreement, and the President in good faith concludes an agreement pursuant to that statute, in our view it would frustrate the

statutory purpose to permit the Senate to redesignate the agreement as a treaty. Most particularly, the role of the House in the statutory process would be greatly diminished, if not eliminated altogether.

Senator CLARK. Mr. Leigh, I do not want to constantly interrupt because I have a series of questions here I want to ask, but I do want to be sure I understand your position.

You are saying here, then, under this section "Role of the House of Representatives" in effect that the House may cut out entirely, or to quote the second sentence on page 2, under "Role of the House of Representatives," you say, "The House, of course, has a role in the authorization and funding"—for purposes of my question I will emphasize "funding"—"of the vast majority of executive agreements." But, under Senate Resolution 486, the Senate could deprive the House of that role whenever it so wished simply by expressing its opinion on the matter." Again, at the end of the page you say that the House's role would be not only diminished, but possibly eliminated altogether.

How could the Senate by passing a resolution deny the House of Representatives its power of funding?

Mr. LEIGH. What you are doing is setting up a different pattern. I want to give specific examples of what I mean. It is different with respect to different types of executive agreements. That is what I was going to come to next.

Senator CLARK. I know what you are coming to next; I have read that.

My question deals with the specific question: If the Senate followed this procedure of a simple resolution in which it expressed its view that an international agreement ought to be sent up as a treaty, and held under the point of order to that, how would that deny the House of Representatives its initiating power to fund treaties? That is what you are saying here?

Mr. LEIGH. That is the next section of my statement, if I may move on to it.

Senator CLARK. On funding? Are you going to deal with the funding question?

Mr. LEIGH. I will deal with all questions I hope, if I may get to them.

Senator CLARK. So that I understand what you are saying—it seems to me you are saying very specifically here—I am only referring to the funding question now, to the power of the House of Representatives under the Constitution to initiate appropriations measures. I just don't see—

Mr. LEIGH. Well, may I give this example, Senator?

If the House participates with the President and the Senate in the passing of legislation which contemplates the negotiation by the President of certain international agreements as executive agreements on condition that those agreements be brought back to both Houses and put on the table for 60 days, and if thereafter the President does those things pursuant to the statutory authority, then that becomes the supreme law of the land.

Senator CLARK. Yes.

Mr. LEIGH. What this resolution permits the Senate to do is to alter the expectations of the House of Representatives. That expecta-

tion is that when the funding question arises under the resolution, it will be a matter for majority vote by both Houses. What this resolution does is to permit the Senate, if it is valid, to designate an agreement of the sort I have just described as one that should have been a treaty, and after that, insofar as one House, namely the Senate is concerned, it will require a unanimous vote of the Senate in order to be approved. That is a change—

#### REQUIREMENT FOR UNANIMOUS VOTE OF SENATE DENIED

Senator CLARK. A unanimous vote of the Senate?

Mr. LEIGH. It will require a unanimous vote for the funding, unless in the meantime the Senate has given its advice and consent to a treaty.

Senator CLARK. Why would it require a unanimous vote?

Mr. LEIGH. Because it permits one Senator to object.

Senator CLARK. But certainly you know that a point of order can be overruled by a simple majority of the Senate or the House at any point.

Mr. LEIGH. Yes; that can certainly be done.

But if that is the case, why do you need to have this resolution at all?

Senator CLARK. That is another issue.

Mr. LEIGH. But that is the very heart of this question.

Senator CLARK. I do not want you to operate on the assumption that there are any unanimous votes required by this resolution, which was your phrase, of the U.S. Senate.

Mr. LEIGH. This is my belief as to what this does, so long as the step has not been taken of overruling the presiding officer's ruling.

Senator CLARK. But that is done constantly and regularly, as you know.

Mr. LEIGH. If that is done constantly and regularly, then presumably the same majority would be available to defeat the funding if the Senate did not really wish to do it.

Senator CLARK. That might very well be. But I do not want a misconception placed into the record that if this passes, it would require a unanimous vote of the Senate in order to fund.

#### RESOLUTION'S EFFECT ON HOUSE'S POWER TO INITIATE APPROPRIATIONS MEASURE

I think I understand your answer. You are not saying in this statement that this resolution would in any way impede the constitutional requirement or would in any way affect the constitutional requirement or the House's power to initiate appropriations measures.

That was really my question. I think I may not have been stating it right.

Mr. LEIGH. Well, you know, Senator, I do not want to be over-technical about this, but the constitutional provision about the House prerogative in initiating applies to revenue measures as far as the Constitution textually is concerned.

Now, I have known for years that it has been the practice on the Hill to say that appropriations should also originate in the House.

Senator CLARK. I think they always have.

Mr. LEIGH. Nearly always they have, but I do not believe it is a constitutional requirement.

Senator CLARK. But my question—

Mr. LEIGH. Surely they can initiate, but if it is hung up in the Senate by the kind of point of order procedure which is contemplated here, then there has been introduced an element of inflexibility in the process which was not anticipated at the time the empowering statute was passed.

Senator CLARK. I understand your argument there.

I wanted to be sure that there was no misunderstanding about the idea that if this body, for example, as we have just done, passed the Spanish Treaty, that somehow the fact that the U.S. Senate had ratified the treaty thereby bound the House of Representatives to fund it. Obviously they initiate the funding of it, and should they decide for any reason not to fund it, obviously it would not be funded.

Mr. LEIGH. Quite true.

There is one thing, Senator Clark you understand my answer depends on the fact that I am talking about the kind of executive agreement which has had a prior House authorization as well as a Senate authority. The funding comes in at a later stage, of course.

Senator CLARK. Would you continue.

Oh, Senator Sparkman, go ahead.

Senator SPARKMAN. I am always interested in this point of discussion because it has been the source of a great deal of discussion and argument over the years. I can remember when it actually developed into a "first discussion" between the two chairmen of committees.

The Constitution provides that all revenue measures must originate in the House of Representatives. It does not say that appropriations or funding must originate there. I do not know whether I would say always or not, but for a long time, during the time I have been here, the House has insisted that provision carried with it the right to initiate appropriations. I do not suppose that question will ever be settled to the satisfaction of everybody. It is generally followed. So far as I know, though, the Senate has never agreed, except tacitly, that that was a requirement. I suppose we run into the same difficulty here that we have many times in the past in ordinary funding.

Mr. LEIGH. Well, like so many things in this Constitution based on separation of powers, you can never get an exact answer on every question, and so you have to have a measure of good will on both sides.

I would like to continue if I may, Mr. Chairman.

#### INTERFERENCE WITH HOUSE'S ROLE

I was going to say that it could not have been the intention of the House when assisting in the passage of a statute authorizing executive agreements to have such an agreement transformed into a treaty. This is important, Mr. Chairman, since approximately 86 percent of all executive agreements are authorized by a statute.

Further, if the House had a particular point of view as to how existing statutory authority for particular agreements should henceforth be shaped, but the Senate wished to assume total control of the matter itself, it could do so simply by designating such agreements

as treaties. This could be done for individual agreements or entire classes of agreements concluded pursuant to statutory authority. The role of the House in this particular phase of the process would vanish. It is doubtful, at the least, that the constitutional framework can be stretched to this degree.

#### CONTRAVENTION OF EXISTING STATUTES

In addition, Mr. Chairman, many existing statutes, such as the Trade Act, the Atomic Energy Act, the Arms Control and Disarmament Act, and others, require that executive agreements concluded thereunder be submitted to both Houses for approval, or the possibility of disapproval.

Senate Resolution 486 would contravene those statutes by once again removing the House from that role. For example, the Senate could simply call a trade agreement a treaty and the House role in the approval of the agreement or disapproval of it would immediately vanish.

The question is whether the Constitution intended that the system should work in this way. Did the Senate and the House intend such a system when it subjected such agreements to the approval of both Houses?

I believe the proper answer to both questions is no. I do not believe that either the Senate or the House would wish to establish a precedent under which statutory authorizations or mandates might so easily be overridden or amended. Senate Resolution 486 would, if adopted, constitute a very serious alteration of the normal legislative process, and, in our view, it would substantially upset that process as set forth in the Constitution.

Proponents of this resolution have argued that once the Senate has already agreed in a statute that an agreement must be submitted to both Houses for approval, it would be exceedingly unlikely that the Senate would then turn around and call the agreement a treaty. Nevertheless, Senator Clark argued when presenting the first draft of this resolution, "the possibility of such a reversal should not be precluded altogether, for a situation may always arise in which the President exceeds his statutory authority. This resolution provides the means of proceeding in that event."

Indeed, the stated purpose of the resolution, as set forth in section 2(a), is "to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented" by the Senate without its prior approval. It is not, I would note, limited to funding measures.

But, who is to determine whether the President has exceeded his authority under the statute? Apparently the Senate alone would make that determination. We thus are in a situation in which the Senate and the House together have authorized the President to conclude an agreement, the President concludes such an agreement, and the question is raised whether the President has exceeded his statutory authority, and thereafter the Senate alone under this resolution, without any concurrence from the House, makes a determination which has profound consequences on the prospects for implementing legislation.

Senator CLARK. Again, a point of clarification.

At the bottom of the page, I think you have added something here saying it is not limited to funding. You say, "Indeed, the stated purpose of the resolution, as set forth in section 2(a), is 'to insure, through use of the legislative power of the Senate, that no international agreement constituting a treaty will be implemented' by the Senate without its prior approval." Of course, funding is a legislative power.

Mr. LEIGH. That is quite true. But here you are talking about a specific approval, evidently, because the purpose of this legislation is to designate those agreements which the Senate thinks should have a two-thirds majority approval. My only point is a narrow one, that there is a slight variance between the stated purpose of the resolution and the actual operative language of the resolution.

Senator CLARK. I think the stated purpose is the use of the legislative power of the Senate, which I believe to be exclusively a funding power in this case. I do not see that the resolution gives us any legislative authority other than that. All it does is say we are going to express our judgment, a majority of the Senate, by simple resolution as to whether something is a treaty. It does not make it a treaty. We simply say that if it is our judgment that it is significant enough to be a treaty, we therefore are not going to provide funds for it. That is the only thing the resolution does.

Mr. LEIGH. All I was saying is that the intent apparently is to prevent any such designated agreement from being treated in the ordinary way, and to subject it to a different kind of procedure, and a more difficult kind of procedure in terms of the prospects for securing implementing legislation.

Senator CLARK. Please go ahead.

#### INVASION OF RIGHTS OF JUDICIAL BRANCH

Mr. LEIGH. I should like to add, Mr. Chairman, that the question whether the President has exceeded his statutory authority is one for determination by the courts, and not by the legislature. In that sense, the proposed Senate Resolution 486 is also an invasion of the rights of the judicial branch.

Senator CLARK. Mr. Leigh, again I cannot accept that sentence without a comment.

I do not see for a moment that if the Senate decides not to provide funds that this is an invasion of the judicial process. After all, if in the judgment of this body, or the House of Representatives, the President, let us say, has exceeded his statutory authority in sending troops into Cambodia, and they decide based on that that they are not going to provide for funds, is that an invasion of the judicial branch's authority?

Mr. LEIGH. It depends on what the total situation is, Mr. Chairman.

#### CONGRESS' RIGHT TO REFUSE FUNDING FOR TREATY

I perceive that one of the reasons we are having these differences is because we start from different premises. I do not accept the proposition that the Senate has a right to refuse funding for a validly made treaty, to take the easiest example.

Senator CLARK. I see.

Mr. LEIGH. Now, it is frequently said that the Senate has a right to refuse funding. Now, mind you, I realize that this is not agreed, that it is controversial. But my position is that the Senate has the power to refuse the funding for whatever reasons seem appropriate to it—

Senator CLARK. But not the right?

Mr. LEIGH [continuing]. But if it has previously approved a treaty which provides for the payment of funds, as for example in the Panama Treaty, payment to Panama, I do not believe the Senate has a right, in the legal sense, to refuse. It is a question really of the conscience of each Member of the Senate as to how he votes. But nevertheless, as a strict matter, I do not think he has a right not to support the treaty obligations.

Senator CLARK. How about the House of Representatives? Do they have the legal right not to fund a treaty the Senate passed?

Mr. LEIGH. I think their position is no different in that respect.

Senator CLARK. You are stating the administration's position on this point?

Mr. LEIGH. Well, I don't want to say that because we haven't really discussed this within the administration. It is my personal opinion as a lawyer within the administration.

Senator CLARK. Your personal opinion.

Mr. LEIGH. But this was a matter of difference between Jefferson and Hamilton, as a matter of fact, and it has never really been resolved, and possibly never will be resolved.

Senator CLARK. It is your judgment that once advice and consent of the Senate is given to a treaty, that the House of Representatives has no legal alternative but to provide the funds?

Mr. LEIGH. Well, in whatever way you use "legal," the question would be whether they had a right—

Senator CLARK. A legal right.

Mr. LEIGH [continuing]. A legal right. I agree that they have the constitutional power in the way it is arranged. But it is a matter of conscience for the individual Members of the House as to how they decide to vote on—

Senator CLARK. But isn't that a rather different thing, the matter of conscience as distinguished from the legal right?

Mr. LEIGH. Senator, this is an old question in contract law as well. If you remember, Justice Holmes disagreed with a lot of other people about whether if you have made a contract you have a right to breach it.

Senator CLARK. Of course, they did not make the contract.

Mr. LEIGH. But the Constitution makes it terribly clear that the treaty is the supreme law of the land in the same sense that any enactment of statute is.

#### INVASION OF JUDICIAL BRANCH'S RIGHTS QUESTIONED

Senator CLARK. So we can get on with your statement, my only point was that it seems to me that you are pushing the point a little too far in your statement when you say in a sense that Senate Resolution 486 is also an "invasion of the rights of the judicial branch."

Mr. LEIGH. "An invasion of the rights—"

Senator CLARK. All Senate Resolution 486 could possibly do is provide that no funds could be used to implement the treaty. It does not seem to me that to refuse to provide funds because we believe a statute has been exceeded is an invasion of the judicial branch. I do not see how denying funds is an interpretation of the law or is an invasion of the judicial branch.

Mr. LEIGH. Well, perhaps I should go on.

Senator CLARK. Yes.

#### HOUSE REACTION TO SENATE RESOLUTION 486

Mr. LEIGH. It is true that the House is not entirely without recourse, but the possibilities in this context are hardly encouraging. Indeed, the most likely House reaction to Senate Resolution 486 is one of imitation. If the Senate can designate executive agreements as treaties and thereby trigger a point of order procedure for funding, what is to prevent the House from designating agreements by some characterization which would also trigger a rule permitting one House Member to block the funding of that particular agreement?

Senator CLARK. Of course, doesn't that ignore the fact that 51 percent of the House of Representatives can overrule any point of order?

Mr. LEIGH. Well, that is the point you previously made, but nevertheless it substantially increases the difficulties of securing implementing legislation. It seems to me that fairly read, that is the purpose of this resolution.

Senator CLARK. For one Member to block all action?

Mr. LEIGH. Until such time as the Senate has treated that particular designated agreement as a treaty.

Senator CLARK. I think you are absolutely right if you ignore the fact that 51 percent can overrule a point of order.

Well, go ahead.

While, as I said earlier, the vast majority of executive agreements are authorized by statute or treaty, there are some agreements that are concluded solely under the President's independent constitutional authority. The Congress may not constitutionally redesignate—I am using that word again—such agreements as treaties.

I would like at this point to submit for the record a detailed memorandum on this subject that I sent to Senator Abourezk last year at his request.

Senator CLARK. That will be made a part of the record at this point.

Mr. LEIGH. Thank you, Mr. Chairman.

It sets forth the nature, scope, and illustrative examples of agreements authorized solely by the Constitution.

[As of the date of publication, the information referred to had not been supplied.]

Mr. LEIGH. It may of course be argued that the House has no role in the treaty process. But the House could rely upon the same arguments we have heard in support of Senate Resolution 486.

The House could argue that its designation was not legally binding on anyone, that it was just a simple expression of opinion by the House, and that surely the House is entitled to express its opinion. Once the

opinion is expressed, unless the House approved of the treaty, now given some other characterization, by two-thirds, then any single House Member could block the funding for the treaty. Thus the House would have a role over treaties not intended by the Constitution, and all on the basis of a simple expression of opinion and a procedure suggested to them by the Senate. The House procedure might simply require that the House first express its opinion that the treaty was very important and should have the assent of both Houses. Then, unless the House approved the treaty by two-thirds, the point of order procedure would apply.

Mr. Chairman, in my view, this is playing games with the Constitution; such a House procedure would be equally objectionable as Senate Resolution 486, since it would interfere with the proper role of the Senate.

Senator CLARK. What do you mean there, Mr. Leigh, by the "proper role of the Senate?" What would that be?

Mr. LEIGH. Well, I think in that case you would have the House insisting on a two-thirds vote for the approval of certain international agreements, and the Constitution clearly provides that that is the Senate's role.

House action of this kind also raises a great likelihood of conflict between the two Houses and substantial confusion in the process of international agreement making. Suppose, for example, that the administration concludes an important new agreement on military bases. The Senate argues that unless the agreement is submitted as a treaty, the Senate will designate it a treaty and apply its new point of order procedure. The House argues that unless the agreement is submitted as an executive agreement subject to joint approval, the House point of order procedure will apply.

Mr. Chairman, this is not a rational procedure conducive to the effective conduct of U.S. foreign policy or the effective functioning of the Government. It is all too likely to produce an impasse.

Senator CLARK. I could not agree with you more about that. But it seems to me that the Senate proposed action under Senate Resolution 434 is an attempt for the Senate to take action in accordance with the treaty clause of the Constitution. Obviously that is the intent of the resolution.

No such intent would be implied by the House's action. Obviously this resolution is an attempt to implement the treaty clause.

Mr. LEIGH. I understand that.

Senator CLARK. The House obviously has no such basis for taking that kind of action.

Mr. LEIGH. Nevertheless, the House could use the same technique. That is the only point that I wish to make at this stage in my statement, Mr. Chairman.

Senator CLARK. Fine.

#### INTERFERENCE WITH ACCEPTED ROLE OF PRESIDENT

Mr. LEIGH. Mr. Chairman, we believe the proposed resolution would also interfere with the accepted role of the President in the process of international agreement making.

First, and most generally, as we noted in our memorandum on Senate Resolution 434, the proposed resolution assumes that the Constitution authorizes the Senate to make designations of particular agreements as treaties. Yet, the Constitution provides in article II, section 2, that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

The power, by and with the concurrence of the Senate, to "make" treaties is specifically granted to the President, and is not given to the Senate. The proposed resolution, however, would appear to give to the Senate at least some part of that power. In our view, this can be accomplished only by means of a constitutional amendment, and not by legislation or a sense of the Senate resolution.

#### DESIGNATION OF AGREEMENTS AS TREATIES

Senator CLARK. Again, Mr. Leigh, but very briefly, certainly this resolution is not an attempt to amend the Constitution. At no point does it presume that the Senate designates particular agreements as treaties, to use your exact language. You say, "First, and most generally, as we noted in our memorandum \* \* \* the proposed resolution assumes that the Constitution authorizes the Senate to make designations of particular agreements as treaties."

Let me say, as the author, that there is nothing in that resolution that for one moment suggests the Senate has the power to designate agreements as treaties. It simply says that it has the power by simple resolution to express its judgment that an international agreement is significant enough to be considered as a treaty. It does not designate any treaties. If the President decides not to send an agreement up as a treaty, certainly there is nothing in this resolution that thereby makes it a treaty. There is nothing in the resolution that would require that it be sent as a treaty. It simply says we may not provide funds. It is our judgment that it is a treaty, and therefore we are not going to provide funds to implement it. It simply exercises under our rules the right to withhold funds.

I do not want for a moment anyone to think that somehow the Senate is setting itself up as designating international agreement as treaties.

Mr. LEIGH. May I make this point, Mr. Chairman?

I concede that this version of the resolution is better in this respect than the earlier one. Nevertheless, there is still language in this resolution which speaks of "constitutes a treaty."

Now, you can amend it, and in such a way further amend it, as to remove that particular objection that I am speaking of.

Senator CLARK. Maybe you are right. Can you cite that for me in the resolution?

It seems to me that the whole sense of the resolution is simply providing a method whereby the Senate could, first consult with the President, or that this Foreign Relations Committee could consult with the Executive; second, that we could simply express our opinion by resolution; and third, that if a majority of the Members wanted to hold to the point of order, that we would not provide the funds. That is all it really does.

Mr. LEIGH. Well, the word "constituting" appears in the first section, section 2(a); it appears again, Senator, in 2(c); it appears again in 4(a); and in various other places.

Now, I understand the points you are making, and this kind of language can easily be changed, and yet we would still have our fundamental disagreement in that respect.

Senator CLARK. It is all based on the consent. The consent refers to the sense of the Senate resolution.

Mr. LEIGH. Yes; I understand.

But, this is one of those cases where what the Senate does internally has other effects, I think.

Senator CLARK. I agree with that; it has other effects. I just do not want the implication left that somehow the Senate is going to designate an international agreement as a treaty.

Mr. LEIGH. This point is a little bit like the antitrust laws. It used to be said, of course, that antitrust laws do not apply to anything outside the United States. It is a territorial proposition. And yet, in the *Alcoa* case, in the 1940's, Judge Hand said well, if what a company does outside the United States has effects inside the United States, then it is something we have to take account of. That is the position of the executive branch in speaking on this resolution. Even though you conform it strictly to the philosophy of having only an effect within the Senate, it nevertheless has consequences outside the Senate. Well, I will go on.

Senator CLARK. Please.

#### RESOLUTION'S EFFECT ON PRESIDENT'S TREATYMAKING POWERS

Mr. LEIGH. It may be recalled that the Constitutional Convention in Philadelphia did consider whether the power to "make" treaties should be vested in the Senate, rather than in the President. This idea was rejected.

Farrand points out that "The committee had recommended that the power of appointment and the making of treaties be taken from the Senate and vested in the President 'by and with the advice and consent of the Senate.' With surprising unanimity and surprisingly little debate, these important changes were agreed to."

Professor Louis Henkin of Columbia states that the Founding Fathers were "eager to abandon treaty-making by Congress which, under the Articles of Confederation, appointed negotiators, wrote their instructions, followed their progress, approved or rejected their product. \* \* \* And so, the Constitution gave the power to make treaties to the President, but only with the advice and consent of two-thirds of the Senators present."

The proposed resolution would, if adopted and implemented, constitute a step back toward the abandoned system of treaty-making of the Articles of Confederation. It is true that the Senate designation of an agreement as a treaty, followed by Senate approval, would leave the President free to ratify the treaty or not, as he wished; at the same time it would claim for the Senate an aspect of treaty-making which our constitutional structure does not contemplate.

CONSTITUTIONAL QUESTIONS RAISED IN RESPECT TO EXECUTIVE  
AGREEMENTS

In our view, Mr. Chairman, the proposed resolution also raises constitutional questions in respect to executive agreements concluded solely upon the authority of the Constitution.

While, as I said earlier, the vast majority of executive agreements are authorized by statute or treaty, there are some agreements that are concluded solely under the President's independent constitutional authority. The Congress may not constitutionally redesignate—I am using that word again—such agreements as treaties.

I would like at this point to submit for the record a detailed memorandum on this subject that I sent to Senator Abourezk last year at his request.

Senator CLARK. That will be made a part of the record at this point.

Mr. LEIGH. Thank you, Mr. Chairman.

It sets forth the nature, scope, and illustrative examples of agreements authorized solely by the Constitution.

[As of the date of publication, the information referred to had not been supplied.]

Mr. LEIGH. One of the clearest examples, to take but one illustration, is a cease-fire or armistice agreement which, of course, must be timed precisely to the hour and minute. Such agreements may be of profound significance to the Nation, but there is no constitutionally appropriate method pursuant to which the Senate may designate them as treaties.

INTERFERENCE WITH ACCEPTED NEGOTIATING POWERS OF PRESIDENT

Further, Mr. Chairman, we believe the proposed resolution would also interfere with the accepted negotiating powers of the President. As we noted in our earlier memorandum on Senate Resolution 434, the question whether a legally authorized international agreement should be a treaty or an executive agreement is one of great difficulty, and there are no hard and fast legal rules distinguishing the two forms.

We note that whenever the President is legally authorized to conclude an international agreement, whether his authorization is derived from a statute, or a treaty, or the Constitution, he has to make a choice between treaty or executive agreement. There are necessarily many legal and political variables he must take into account in making that choice.

RIGHT TO CHOOSE FORM OF INTERNATIONAL AGREEMENT

Senator CLARK. Again, a question to make sure that I understand the State Department's position.

You say twice that he has to make the choice. "We note that whenever the President is legally authorized to conclude an international agreement, whether his authorization is derived from a statute, a treaty, or the Constitution, he has to make a choice between treaty or executive agreement." Or again, "There are necessarily many legal and political variables he must take into account in making that choice." It rather

clearly, from the State Department's point of view, is up to the President exclusively and solely to make the choice between treaties and executive agreements; or, to put it in another way, it is your position that it is the President's sole discretion or choice to determine whether an international agreement falls into the category of a treaty or an executive agreement.

Mr. LEIGH. Let me put it a little less drastically than that, Senator.

The President necessarily has to negotiate, and therefore he has to be the initiator of the form of the agreement. So, in that sense the President clearly has to make his own decision as to how he wants to start out.

If he starts out on the treaty route and brings to the Senate a treaty, the Senate can certainly reject it; and here I would say it has a right in the legal sense to reject it.

Senator CLARK. But it has only the right to reject, and not to choose the form.

Mr. LEIGH. That's right.

I think that the Senate can reject it and say we would rather have you come back with some other form, even.

Senator CLARK. But only as a matter of advice that we would rather have it sent back in another form.

Mr. LEIGH. They can reject it and issue a report saying that if it were submitted in a form so that the House could participate, and it was done by joint resolution, I think they could do that.

Senator CLARK. But you feel that it is the President's choice to decide?

Mr. LEIGH. Certainly initially it is his choice.

Senator CLARK. Then, presumably he has the choice to decide that all international agreements may be sent as executive agreements, if he chooses.

Mr. LEIGH. I do not believe his choice ranges as far as that question indicates. I think questions like cession of territory would necessarily have to be done by treaty.

Senator CLARK. Why so?

Mr. LEIGH. Are you thinking of doing it by joint resolution as an alternative?

Senator CLARK. I don't know, but it seems to me that if you leave it to one person, the President of the United States, to make the sole choice—he could choose to send every agreement as an executive agreement.

Mr. LEIGH. I don't believe that, sir. I don't believe that.

Senator CLARK. Who will make the choice if the President does not?

Or, are you saying he has no choice but to send it as a treaty?

Mr. LEIGH. That would be my view, yes.

Now I had not taken into account the possibility of sending it for adoption as a joint resolution. But that would produce a result which was the supreme law of the land, and I really do not have a firm position on that.

Senator CLARK. But there is no question that what all of us could agree upon as being a very significant international agreement could simply be sent as an executive agreement if the President so chooses. It is his choice.

Mr. LEIGH. I do not think that the President can make any kind of executive agreement in the world that he wants to and send it up to Congress under the Case Act and say now the United States is bound by this. He has got to find specific authority for the various components of that agreement in order to be able to implement it.

Now you know from our Sinai discussions that there are any number of variables. Some things are a matter of commitment subject to the appropriation of funds by Congress. Other things may be done pursuant to a prior grant of the legislative authorization to implement some particular phase of the agreement.

I do not think I go as far as saying there is no kind of international agreement that the President cannot do by means of an executive agreement if he chooses to do it.

Senator CLARK. Then it is not really his choice, is it? That choice has been made by some other factor.

Mr. LEIGH. He initially has to decide what he wants the form to be; there is no question about that.

Senator CLARK. We will come back to that I think later.

Please go ahead.

Mr. LEIGH. I had just read this sentence about the choice depending upon political variables. I would like to go on with that.

Senator CLARK. Yes, please.

#### INTERFERENCE WITH PRESIDENT'S ACCEPTED NEGOTIATING POWERS

Mr. LEIGH. The President, as the negotiator for the Nation, must consider all the variables, including political considerations which necessarily involve larger issues of our relationship with the foreign nation involved. What degree of formality to give an agreement, for example, touches directly on foreign policy questions that form part of the negotiating process. To permit the Senate to designate what shall be a treaty is to remove these political issues from the exclusive province of the executive branch and to give them to a House of Congress not immediately involved in the negotiating process.

Congressional experts have agreed in general with this view.

Senator Sam Ervin's Subcommittee on Separation of Powers of the Senate Judiciary Committee, after lengthy hearings in 1972 on this subject, wrote the following:

American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreement. First in order of importance is the treaty, an international bilateral or multilateral compact that requires consent by a two-thirds vote of the Senate prior to ratification \* \* \*. Next is the congressional-executive agreement, entered into pursuant to statute or to a preexisting treaty. Finally, there is the "pure" or "true" executive agreement, negotiated by the Executive entirely on his authority as a constituent department of the government.

"It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialog." [Congressional Oversight of Executive Agreements, Committee Print, 93d Cong., 1st sess. p. 6.]

Senator CLARK. Let me stop you at that point, Mr. Leigh, to say that I do not think the resolution is in contradiction to the Ervin point at all because we do not question that the President, to quote directly

here, has the "power to choose the instrument of international dialog." We simply say that the Senate also has the right to express a judgment and to withhold money after having expressed that judgment. Certainly the President has the power to send up the instrument he feels is appropriate. We would not feel that is any way contradictory.

Mr. LEIGH. I understand your position on it, Senator, but let me say this is again an example of the Senate taking an action, let's say an expression of the sense of the Senate that this constitutes a treaty and should have been submitted as a treaty—

Senator CLARK. Should be submitted.

Mr. LEIGH. Yes. It then, you see, has an effect outside the Senate and outside the country, and to the extent that it impairs the confidence of our treaty or our agreement partners abroad in this respect, it influences and affects the President's conduct of foreign policy.

Senator CLARK. Certainly. I do not think there is any question about that.

Mr. LEIGH. This is why I say that it trenches upon the President's power to negotiate and conduct foreign policy.

Senator CLARK. It is interesting that it was Senator Ervin who said that obviously violations of the Constitution do not constitute amendments to the Constitution in regard to the practice of using executive agreements as instruments of international agreement to the exclusion of treaties.

Go ahead. I am sorry to interrupt you so much.

#### RIGHT TO CHOOSE BETWEEN TREATY AND EXECUTIVE AGREEMENT

Mr. LEIGH. It has been stated in these hearings that the executive branch has claimed a totally unfettered right to choose between treaty and executive agreement. Mr. Chairman, we have never claimed that right. Our position, as set forth in the memorandum previously submitted to this committee, is that where an agreement is properly authorized by law, whether by statute, treaty, or the Constitution, then the President must make a choice between treaty or executive agreement.

Senator CLARK. I do not quite understand that. Let's read it together:

Where an agreement is properly authorized by law, whether by statute, treaty, or the Constitution, then the President must make a choice between treaty or executive agreement.

How could he make a choice if it is already provided by law?

Mr. LEIGH. There are many authorizations in treaties, for example. But I do not think that because an executive agreement is contemplated under the terms of, say, the Japanese Security Treaty, that the President is precluded, if he should so decide from bringing that agreement back as a treaty rather than as an executive agreement.

Senator CLARK. Even though it had been authorized as an executive agreement?

Mr. LEIGH. That's right.

Senator CLARK. I see.

Mr. LEIGH. I think he has that choice.

Senator CLARK. I see.

Mr. LEIGH. We said that even where an agreement is authorized by law, the President's choice is not completely unfettered since he is expected to adhere to the customs and practices which have developed since the conclusion of the first executive agreements in the early years of the Republic.

We noted that there is in our constitutional practice a presumption that agreements of exceptional national importance will be treaties, although long years of practice have shown that many vitally important agreements were not treaties. Nevertheless, if there is no prior authority for an agreement, or if the agreement is of particular significance, then normally treaties are required.

Senator CLARK. Now what does that mean, "required?" By law?

Mr. LEIGH. Well, you probably know that there never has been a court case holding that an international agreement not made as a treaty was invalid because it had not been made as a treaty.

Now, when I say "required," I mean required by the practice, the sense of fitness, appropriateness, consultations with the Senate, that sort of thing.

Senator CLARK. But not by the Constitution?

Mr. LEIGH. No; I don't think so.

Senator CLARK. No international agreement is required to be sent as a treaty, regardless of how significant it may be?

Mr. LEIGH. Well, we previously discussed this in connection with the cession of territory, and so on, and I gave you my opinion that I thought that cessions of territory would have to be handled as treaties.

Senator CLARK. So, constitutionally certain international agreements are required?

Mr. LEIGH. I think some are. I admit that this is a matter of judgment; and the fact that there has never been a court decision on that indicates that it was a matter of judgment.

Mr. CLARK. It would not seem that the treaty clause would mean much if nothing was required, would it? So, why have it?

Mr. LEIGH. I agree with that. In fact, that is fundamental in my judgment.

Senator CLARK. Yes.

I promise to let you finish your statement.

Mr. LEIGH. I will try to go through it swiftly.

Nevertheless, if there is no prior authority for an agreement, or if the agreement is of particular significance, then normally treaties are required—I repeated that sentence. Subject matters within the competence of the States of the Union, and where an agreement will affect State law, normally requires treaties, even though the Supreme Court has twice held that executive agreements may override inconsistent State law.

May I add here, Mr. Chairman, that the wording of section 2(c) of Senate Resolution 486, in which the Senate would present its opinion that any agreement involving a "significant political military, or economic commitment to a foreign country constitutes a treaty," is not consistent with many statutes authorizing important agreements, such as the Trade Act, the Atomic Energy Act, and the Arms Control and Disarmament Act, among others.

In addition, section 2(c) of Senate Resolution 486 would appear to be inconsistent with the 1969 National Commitments Resolution, which contemplates national commitments of the United States by means of a treaty, statute, or concurrent resolution of both Houses of Congress. The 1969 resolution is perfectly clear that a treaty is not required for a national commitment.

In any event, we believe that Senator Ervin's Separation of Powers Subcommittee summed it up best in its statement that the Executive has the "power to choose the instrument of international dialogue." Within the limits I have specified, I believe that statement is correct.

I come now, Mr. Chairman, to funding.

#### CONGRESSIONAL POWER OF THE PURSE UNCHALLENGED

Before presenting our views on this matter, I wish to emphasize that we are certainly not challenging the Senate's power to refuse funding for international agreements. The Senate and the House each have the power to withhold funds from any international agreement, and obviously our remarks should not be taken as casting any doubt whatsoever on the Congressional power of the purse.

Our objections to Senate Resolution 486, and to Senate Resolution 434 before that, are based only on the particular method chosen to exercise the power of the purse, and not the power itself. The normal method for refusing funds is to refuse to pass the required authorization or appropriation measure. If a majority of either House does not approve of the requisite authorization or appropriation bill, that is the end of the matter—there is no funding.

#### PROPOSED PROCEDURE FOR FUNDING

But the normal majority rule does not apply under Senate Resolution 486, and that is one of the basic problems. Under Senate Resolution 486, if the Senate gives its nonbinding opinion that an agreement should be a treaty, and if the Senate does not approve the agreement by two-thirds, then the point of order procedure applies, and any one Senator can block the funding measure. It was argued that this point of order procedure is subject to three majorities—a majority to pass the original resolution; a majority to give its opinion that the agreement is a treaty; and a possible majority to uphold the point of order procedure.

But if the proposed procedure for funding is really subject to majority rule, why have this unusual resolution at all? Why not continue with the normal and constitutionally mandated procedure under which all legislation, including funding measures, are subject to the normal majority procedure? The entire purpose of a point of order procedure is to permit fewer than a majority, even one Senator, to block a proceeding. It is quite misleading, in our view, to give the impression that Senate Resolution 486 is simply one more application of the normal majority rule.

Senator CLARK. Then it is your contention that any one member of the Senate could block funding if this resolution were passed? That is the State Department's view?

Mr. LEIGH. Yes. That is our contention.

That can be changed presumably by overriding the ruling of the presiding officer of the Senate.

Senator CLARK. But you do not feel that is a very significant factor?

Mr. LEIGH. I do not get much reassurance out of that frankly, Senator.

The resolution has been described as resting on the rulemaking power of the Senate. Unquestionably the two Houses of Congress have the right and power to establish their own internal rules of procedure. But I believe we are all agreed that internal rules of the Senate and House must be consistent with the Constitution. The Supreme Court has said that each House "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." [*United States v. Ballin*, 144 U.S. 1 (1892).]

There are other cases as well as the Ballin Case that hold that internal rules of the Senate and House must be consistent with the Constitution. [See, for example, *Proell v. McCormack*, 395 U.S. 486 (1969).]

I believe we are also agreed that the Constitution requires that legislation—all legislation, including funding measures—receive a simple majority for approval. While the Constitution does not explicitly state that voting is by a simple majority, it implies as much in article I, section 3, which provides that the "Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." Jefferson's manual states that "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, et cetera, where not otherwise expressly provided." [At p. 246.]

The Constitution does, of course, provide for special majorities, as the two-thirds rule for approval of treaties in the Senate, and the necessity for a two-thirds override of a President's veto. But the normal constitutional requirement is for a decision by a simple majority—not two-thirds, and certainly not 100 percent. Thus it would be clear to all, I believe, that a simple Senate rule requiring that funding legislation be approved by all Senators would be unconstitutional.

What is the difference between such a rule and the rule proposed in Senate Resolution 486?

The only difference is that in Senate Resolution 486 the Senate must first give its opinion that an executive agreement is or should be a treaty, and then, unless the Senate approves the agreement now called a treaty by two-thirds, the point of order procedure applies and any Senator can block the funding for this agreement.

In brief, a 100-percent rule is established on the basis of the Senate's opinion, which is not binding on anyone, that a particular executive agreement should have been a treaty.

In my view, Mr. Chairman, the Senate cannot change the constitutional rule of a simple majority into a rule requiring 100 percent simply on the basis of a nonbinding Senate opinion.

## SUMMARY OF LEGAL AND POLICY PROBLEMS

In summary, Mr. Chairman, we believe that the proposed resolution raises legal and policy questions because (1) the resolution would permit an unacceptable interference with the role of the House of Representatives; (2) the resolution would interfere with the President's position as negotiator for the Nation; and (3) the rule of procedure it would establish appears to be inconsistent with the requirements for the adoption of legislation.

## OTHER PROBLEMS WITH PROPOSED RESOLUTION

Mr. Chairman, there are other problems as well with the proposed resolution. Since it leaves any executive agreement upon which it may operate in full force and effect, it leaves standing obligations of the United States under international law. Yet if the funding is cut off, the obligation cannot be performed, and the United States is in the position of having to violate its international legal obligations on the basis of a sense of the Senate resolution.

In 1900 the Supreme Court of the United States, in the *Paquete Habana* case (195 U.S. 677), said that "international law is part of our law."

Mr. Chairman, it is difficult enough for the Government when a duly passed statute places the United States in violation of its international legal obligations. To be put in that position on the basis of a sense of the Senate resolution would appear to be unjustified even in domestic law and detrimental to the conduct of U.S. foreign policy.

There are other serious domestic law difficulties and ambiguities with the proposed Senate Resolution 486. For example, there is the obvious question of time limits. For example, how much time does the Senate have in which to give its opinion that an executive agreement should have been treated as a treaty? Suppose that the executive agreement in question is funded through the normal process once or twice, or perhaps even more often. Does the Senate nevertheless still have the right to designate it as a treaty for purposes of the next round of funding?

There is also the question whether the resolution is aimed only at legally binding commitments. Could Senate Resolution 486 be applied to any international exchange that engaged the United States in some kind of political or moral undertaking without being in fact an international agreement?

The Senate might decide first that a particular arrangement was in fact and in law an agreement, and then designate it as a treaty. Such action by the Senate would create confusion in the minds of the foreign recipients of such political and moral undertakings and could indicate a degree of commitment beyond that intended by the President or his representatives. In truth, such an action in that context by the Senate comes perilously close to usurping the President's constitutional prerogative in the conduct of foreign policy and in negotiation.

We also noted in our memorandum on Senate Resolution 434 the problem of classified agreements. The small number of such agreements concluded by the United States each year are reported to the committee and to the House International Relations Committee pur-

suant to the Case-Zablocki Act, which provides for their continued classification.

Yet under Senate Resolution 486, a classified agreement could in effect be declassified through the simple expedient of a Senate opinion that the agreement is a treaty. The United States does not have classified treaties, and the resolution would apparently give to the Congress and remove from the President the right to declassify international agreements to which the United States is a party. At the least, until the United States is prepared to adopt classified treaties as an acceptable form of international agreement, Senate Resolution 486 would not accord with the Case Act.

#### EFFECTIVE AND CONTINUING CONSULTATION RECOMMENDED

Mr. Chairman, as noted in our memorandum on Senate Resolution 434, we continue to believe that effective and continuing consultation between the two branches is more likely to achieve the goals we share than the drastic approach represented by this proposed resolution. There are admitted difficulties with consultation. With whom, how often, on what issues—are complicated questions. But consultation on agreements of significance is already required by the Department of State's circular 175 procedure. Perhaps we should be engaged in the development of further mutually agreed details on how that consultation should work. It can be done. Certainly the consultations with respect to the recently concluded treaty on defense cooperation with Spain indicates that this process may be carried out to the mutual satisfaction of both branches.

#### OTHER APPROACHES TO MATTER

There are other approaches on this matter that should be explored. For example, we might examine the possibility of having the several Assistant Secretaries of State provide the relevant committees with regular and detailed briefings on developments in their areas of responsibility. These briefings could certainly include reporting in advance on any contemplated international agreements of significance, and could lead to consultations whether particular agreements should be in treaty form. This idea was originally recommended by Secretary of State Rogers in 1971, and repeated by the Legal Adviser at later dates.

Thank you very much Mr. Chairman and Senator Sparkman for your patience in listening to my statement. I appreciate the chance to take part in these hearings. I will be happy to attempt to answer further questions.

Senator CLARK. Thank you very much, Mr. Leigh. It is a very direct and I think forthright statement. Obviously I disagree with a good many of its conclusions, but I think it certainly deals very directly with the resolution and what you believe to be its weaknesses.

#### IMPLIED CONGRESSIONAL IRRESPONSIBILITY

I must say it seems to me that your statement does have a strong sense of the Congress, or perhaps the Senate in particular, being, or

potentially being a most irresponsible body, that if given the slightest opportunity the Senate might well void valid armistices; that they might well, given the opportunity, generally operate in the disinterest of their own country. I am not quite sure that that is the case.

Even though one might be able to show legally that under certain circumstances the Senate could take this action or that, could countermand a valid armistice, let's say, I doubt that the Congress would act that irresponsibly. Indeed, if they did, I do not suppose it would make much difference anyway because our system of government obviously would not work without some kind of faith, understanding, and cooperation between the executive and the legislative branches. I mean both sides. It cannot just be the executive either. It does not seem to me that the system could work. You use the example of the House taking a similar action to the one we take and thereby reaching a complete impasse in government. I think that indeed would be the conclusion if we both acted in that way. That example implies an enormous irresponsibility on the part of the House of Representatives or on the part of the Senate.

I will give you a chance to comment on that.

Mr. LEIGH. Well, I agree with so much of it, Senator, regarding cooperation. I have always been fond of a statement attributed to former Senator and later Secretary of State Cordell Hull. He said that there are some things which constitute too much power for a good man to want, or for a bad man to have.

Now we are in a situation where we have to think of the possibilities as to how particular powers will be exercised. So, when we come up here to comment on proposed legislation which would create a pattern and procedure of this sort, we have to assume that among the hundred men in the Senate there may be some at some time who will irresponsibly insist upon exercising a negative; and we even have to assume that there may be occasions when there will not be a majority to override that point of order objection. That is the heart of our position.

Senator CLARK. Where there would not be a majority? Why would the majority be so irresponsible as to not override it? I can't imagine it would be.

Mr. LEIGH. I don't know.

But if you are prepared to abide the result of majority determination, you do not need this resolution at all. This resolution is a means of getting a leg up so that it would be harder for a majority to carry through a funding bill.

Senator CLARK. We will go into that.

#### CAN PRESIDENT DOWNGRADE TREATY TO EXECUTIVE AGREEMENT?

One question I had with regard to another answer, where you will recall it was not clear to me, was what you meant by passing a statute authorizing a treaty or an executive agreement and then giving the President a choice. You said, I think properly, that in fact even though statutory authority had been granted to enter an executive agreement or a treaty, that on occasion the President may decide, let us say, that an executive agreement should be sent up as a treaty.

I was curious about the reverse of that. Is it your belief that the President has the power to take a treaty which has been advised and consented to, if that is the right phrase, and downgrade it to an executive agreement?

Mr. LEIGH. I do not think the President can downgrade it, if that is the proper way to describe it.

Senator CLARK. If he has the power to choose the instrument to the extent of using executive agreements, why could he not use it to revise a treaty?

Mr. LEIGH. You remember I emphasized that because he has the right to initiate discussions he may initially choose the form. But I would go beyond that answer and say now that if the Senate had adopted a particular international agreement as a treaty, the President does not have power to change it into something else, nor do I understand why he would want to.

#### COULD PRESIDENT AMEND TREATY BY EXECUTIVE AGREEMENT?

Senator CLARK. Could he, though, amend the treaty by executive agreement?

Mr. LEIGH. That is one of those questions for which you have to come to the specifics of the particular arrangement. I think there are quite a number of treaties which contemplate that certain adjustments can be made in the treaty structure by means of simple agreement afterwards. I would have to do some research to give examples of that.

Senator CLARK. But if it does not do that, if there is no specific proposal, then does the President have the power or the legal right to change the nature of a treaty, in effect make it an executive agreement?

Mr. LEIGH. Let me consult with Mr. Rovine a moment, please.

Senator CLARK. Fine.

Mr. LEIGH. I thought Mr. Rovine and I were in disagreement about my intended answer to that question. We are not. We both agree it could not be done by executive agreement.

#### CASE OF KURILE ISLANDS

Senator CLARK. But was not that in fact done in the return of the Kurile Islands and the other islands in that area to Japan in the wake of the peace treaty?

Mr. LEIGH. This was not American territory which was ceded by executive agreement, was it?

Senator CLARK. No.

Mr. LEIGH. You are talking about Japanese or Korean territory?

Senator CLARK. We are talking about the case of the Kurile Islands. It's Japanese.

Mr. LEIGH. Well, the U.S. Government never had them; we were not party to any treaty relating to them. We will have to look at that instance. I am not familiar with the details.

Senator CLARK. I am advised that the territory had been put at U.S. disposal by the Japanese.

Mr. LEIGH. Oh, as a matter of occupation, right.

Senator CLARK. Yes.

Mr. LEIGH. After their surrender.

Senator CLARK. By treaty.

Mr. LEIGH. Well, what was the date of the executive agreement?

Senator CLARK. I don't know.

Mr. LEIGH. It must have been about 1948?

Senator CLARK. We are not sure.

Mr. LEIGH. I believe the peace treaty with Japan came long after this executive agreement. I have some vague recollection of it. We will look into that.

Senator SPARKMAN. It was 1951—September 8.

Mr. LEIGH. That was the date of the Japanese peace treaty. You were probably present for the signing.

Senator SPARKMAN. I was one of the signers.

Mr. LEIGH. One of the signers.

#### IS CONGRESS REQUIRED TO FUND EXECUTIVE AGREEMENTS?

Senator CLARK. Mr. Leigh, I have a cover letter from Ambassador McCloskey to Chairman Sparkman transmitting your original memorandum on the Treaty Powers Resolution, to which you referred on several occasions in your testimony. In it Mr. McCloskey refers to "the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement."

This is really the issue that we talked a little about earlier, but so that we are clear on it, do you believe that the Congress is constitutionally required to provide funds for all valid executive agreements?

It seems to me that is what Mr. McCloskey's letter says.

Mr. LEIGH. Might I ask Mr. Rovine to respond to this question?

Senator CLARK. Yes.

For the record I want to be sure you understand that this is a Department of State communication to Chairman Sparkman signed by Robert McCloskey. It says, "if the intended interpretation is that the executive agreement and its legal authorization would remain in full force and effect, the Senate's designation of the agreement as a 'treaty' would not be sufficient to permit a change in the constitutional requirements for passage of a money bill designed to implement a properly authorized and legally binding agreement."

Mr. ROVINE. I think there might be a misreading of that paragraph, Senator. It was designed only to say what we said in our statement, namely that there are requirements for the passage of legislation, and that funding bills or money bills are no different in that the requirements are the same; and that simply designating an agreement as a treaty is not sufficient to change the requirements for the passage of any legislation, including funding measures.

Senator CLARK. But that is not what it says, is it?

Mr. ROVINE. That is what it's intended to say.

Senator CLARK. But you and I are in agreement that that isn't what it says?

Mr. ROVINE. I think it does say that.

Mr. LEIGH. Senator, could I make the point that this was the fourth alternative interpretation of the original resolution, which is not one that is now maintained. So, it seems to me that whatever comment we made on that fourth interpretation—

Senator CLARK. I do not think there has been anything changed in the second resolution that would in any way affect that comment, do you?

Mr. LEIGH. I thought you were reading from paragraph 4(d).

Senator CLARK. I am reading from 4(b).

Mr. LEIGH. I see.

Senator CLARK. Let me be sure I understand your current position. Congress has the full power to withhold funding from any international agreement. Is that correct?

Mr. LEIGH. Yes; we agree.

Senator CLARK. That is what you said on page 13.

Mr. LEIGH. Right, Senator.

Senator CLARK. So the President does not have the authority, obviously, to promise a foreign country that Congress will provide funds for a particular international agreement. The President has the power to negotiate, but Congress has the power over the purse. Isn't that correct?

Mr. LEIGH. That is true in the circumstances I believe you have in mind. But the Congress may have given a prior authorization to the President to make an agreement promising to spend money, and in that case—well, I guess Congress could reverse itself and we would be in a constitutional stalemate.

Senator CLARK. Without that kind of provision, it is quite clear that Congress could withhold the funds and the President would not have the power to make such a promise and thereby bind the Congress.

Mr. LEIGH. That is right, sir.

#### RESOLUTION'S INTERFERENCE WITH PRESIDENT'S NEGOTIATING AUTHORITY QUESTIONED

Senator CLARK. Then I am not sure how this resolution interferes with the President's negotiating authority, as you say, since its effect is to cut off funds, and you agree that the Congress has the full constitutional right to do that.

Mr. LEIGH. But one of the examples I gave, Senator, was the case where Congress had already given a prior authorization to make an agreement which provided that he could commit the Nation with respect to funds.

We have situations like contract authorizations and I do not believe that it is appropriate for the Senate by mere resolution to alter the pattern which was anticipated at the time the Congress acting through both Houses and with the President's participation in approving it, authorized the President to make a particular kind of agreement. In certain cases this resolution would drastically alter the expectations both of the President and, as I said earlier, I believe also of the House of Representatives.

## SCOPE OF PRESIDENT'S NEGOTIATING POWER

Senator CLARK. On this particular subject of the President's negotiating power, we had a very illuminating presentation by several witnesses last week on the intent of the framers in this regard. Professor Bestor in particular talked about it, as did others as well.

Professor Bestor pointed out that it was Madison who believed that it was "proper that the President should be an agent in treaties." Hamilton used the same word in the Federalist Papers—"agent"—when he said the Executive was "the most fit agent in foreign negotiations."

Doesn't your view on the scope of the President's negotiating powers go a bit beyond Madison's or Hamilton's views?

Mr. LEIGH. Well, I think that use of the word "agent" in that context is a little bit antique, frankly.

Senator CLARK. What is your interpretation of what was meant by "agent"?

Mr. LEIGH. I think Madison intended, as evidenced by the totality of his expressions on this subject, including particularly his acceptance of the pattern in the text of the Constitution, that the President be the principal voice of the United States when it spoke internationally. I think that is what he meant. I do not think he meant agent of the Congress.

Senator CLARK. By agent you say he meant the principal voice.

## INCREASED USE OF EXECUTIVE AGREEMENTS

Are you satisfied with executive branch practice over the last few decades in the area of executive agreements? Do you think their increased use is something Congress ought to be concerned about? Or does this seem to you to be a perfectly logical, worthwhile, and valid trend, one that you would subscribe to?

Mr. LEIGH. Well, I happen to think, as I testified at my confirmation hearings, that the executive should use treaties more often than it has in the recent past.

Nevertheless I think, Senator Clark, that we have to allow that with the increase in communications around the world, the increase in the subjects that have to be adjusted among nations, and in particular the increase in the number of nations that exercise sovereignty in the international arena, it is inevitable that there is an enormous increase.

Senator CLARK. Increase in what?

Mr. LEIGH. In all kinds of agreements. Many of these are not really of great significance. For that reason I think it is understandable that there has been a tremendous increase in the number of executive agreements.

Senator CLARK. Why would there not also be a significant increase in treaties, then?

There has only been a very slight increase I think.

Mr. LEIGH. Well, perhaps you have some figures. Mr. Rovine and I do not have any.

Senator CLARK. I think there is a very slight increase in the number of treaties.

Mr. LEIGH. We need to look at the ratio of treaties to executive agreements 20 years ago as against today. We do not have those figures.

Senator CLARK. But in any case your answer is that looking over a long period of history it does concern you somewhat that more major international agreements are not sent to the Senate as treaties.

Mr. LEIGH. That's true, sir, and I so testified at my confirmation hearings.

#### EXECUTIVE AGREEMENTS WHICH SHOULD HAVE BEEN TREATIES

Senator CLARK. Let's talk about these a little more specifically. Is there any executive agreement entered into over the last decade or two which you think should have been sent up for some form of congressional approval that has not been?

Mr. LEIGH. Well, I don't know that I can answer that without giving considerable thought to it. I would prefer, Senator, if I may, to supply something for the record afterwards on that.

Senator CLARK. All right.

[The information referred to follows:]

#### EXECUTIVE AGREEMENTS WHICH SHOULD HAVE BEEN TREATIES

[Supplied by Department of State]

Upon further consideration, I do not wish to cast doubt upon the validity of any executive agreement by characterizing it as an agreement that should have been submitted to the Senate as a treaty, or to the Congress as a whole for approval by both Houses. From a legal perspective, I can think of no executive agreement entered into by the United States in recent years that was not authorized by statute, treaty, or the Constitution. As a political matter, I believe that little purpose would be served at this point by specifying particular agreements that might as a matter of political rather than legal interest, have been submitted as treaties, or as executive agreements subject to joint approval.

Professor Henkin has written that "no one can say with certainty" when Senate approval of a particular agreement is required. (*Foreign Affairs and the Constitution*, 1972, p. 427.) I have noted before that the issue of treaty or executive agreement is one of great difficulty, and that there are no hard and fast legal rules to assist in deciding what falls within the treaty structure, and what may be done as an executive agreement. Professor Arthur Sutherland of the Harvard Law School summarized the problem in the following terms:

"Two things are certain: they [executive agreements] have been used from the earliest days of the independence of the United States; and thoughtful men have during all that time been unable to supply what the Constitution lacks—a clear distinction between what is appropriate matter for executive agreement, and what should be handled by treaty with Senatorial concurrence. . . . We are as puzzled as President Monroe was in 1818. If we knew what was essentially treaty-like, we could define executive agreements by exclusion; but it is no more possible in our day than in his to define one unknown in terms of another." (65 *Harv. L. Rev.* 1324 (1952))

I believe that Professors Henkin and Sutherland were correct. Under the circumstances, I feel that no useful purpose would be served by an attempt to specify particular executive agreements that should or might better have been submitted to the Senate as treaties, or to Congress for approval by both Houses.

Senator CLARK. At this point you cannot think of a single executive agreement that you feel should have been sent up to the Senate for ratification in the last 20 years, or in the postwar period?

Mr. LEIGH. Well, when you say should, are you speaking more on the legal side, or more on the political side?

Senator CLARK. Either.

Mr. LEIGH. I don't want, you see, to come along now in answer to your question and characterize in a public hearing a particular executive agreement which the President still regards as binding and in force as one which should have been sent as a treaty without giving very careful consideration to it. In fact, this is a point I made earlier. I think that when the Senate, even though acting or intending to act only in its internal sense, takes something which, in the President's view, is merely an executive commitment or a declaration of political intent, either of which would fit, by the way, the definition in the resolution, and says this should have come as a treaty, that gives an emphasis to it which the President had not intended. It is a matter of some concern, I think.

Senator SPARKMAN. May I interrupt here?

Senator CLARK. Of course.

#### HANDLING OF SPANISH BASES AGREEMENT

Senator SPARKMAN. You may recall that some time ago Senator Fulbright was quite insistent that the Spanish bases agreement should be handled as a treaty rather than as an executive agreement, and that at the last renewal it was submitted as a treaty for the first time.

Mr. LEIGH. I'd like to comment on that. That is quite true, Senator Sparkman.

Originally my understanding was that Mr. Dulles came up to the Congress and consulted on how the Spanish arrangement should be formalized. He came back with the impression that the leaders of the Senate preferred that it be treated as an executive agreement rather than as a treaty. So that pattern was followed for successive years, for a great many years.

In the case of this latest renewal I was one of those within the State Department who recommended strongly that it be treated as a treaty because I thought it had that solemnity.

Senator SPARKMAN. I was not privy to those discussions you referred to with Secretary Dulles, and Senator Fulbright was not chairman at that time. He later became chairman. But even before he became chairman I remember he was quite insistent that that agreement ought to be a treaty rather than an executive agreement.

#### EXECUTIVE AGREEMENTS BEYOND PRESIDENT'S AUTHORITY

Senator CLARK. Let's look at the question in the abstract for a moment. As you point out, it is difficult for you to comment on specific agreements which are in effect and say these perhaps should have been sent up as treaties.

If we look at agreements which you would argue are authorized by the Constitution, those that fall within the President's inherent constitutional authority—which I think is your phrase—the question really is, how wide is that authority. I think we would agree that the President cannot enter into executive agreements that violate express constitutional guarantees, let's say, such as the first amendment. Beyond these, are there any executive agreements which lie clearly beyond the President's constitutional authority, agreements which should be authorized somehow by the Congress?

Mr. LEIGH. Well, Senator, I have frequently advised in my work within the executive branch, both in this period with the State Department and earlier with the Defense Department, that particular proposed agreements could not be made as executive agreements without either converting them into treaty form or making whatever undertakings were included in such agreements subject to congressional authorization. Also I have advised that certain proposed negotiations be deferred until the necessary implementing authority had been obtained from the Congress.

So, there is a whole category of executive agreements which I would say the President did not have the power to make without some sort of statutory, or treaty, or constitutional basis.

Senator CLARK. You do not take the position, do you, that the President, as a matter of law, can enter into any agreement he wishes as an executive agreement? You are saying no, he does not have that right. He isn't the sole decider then?

Mr. LEIGH. It depends on what he puts in it. The Senate could reject a treaty. The President could negotiate the next day, as far as power is concerned, the same terms in an executive agreement, and provide that the agreement would come back for a joint resolution approval of Congress. I think that is a possibility. So I have difficulty in answering your question yes or no in the form in which you pose it.

Senator CLARK. I guess I am really trying to get your judgment on whether the President may, in fact, as a matter of law enter into any agreement he wants simply as an executive agreement as distinguished from a treaty.

Mr. LEIGH. If he qualifies it enough, he probably can do that, Senator, but it would be so qualified that in certain cases it would not be worth anything to the other party.

Senator CLARK. Qualified in what way?

Mr. LEIGH. By saying this is subject to congressional approval, or I promise you \$5 million subject to congressional appropriation of funds subsequently. That's an executive agreement.

Senator CLARK. Suppose there were no money involved. How could he do it then?

Mr. LEIGH. You know, it is hard to answer this in the abstract. You have to tell me frankly what the subject matter of the agreement would be.

Suppose it is an armistice arrangement.

#### INTERNATIONAL AGREEMENTS OUTSIDE PRESIDENT'S CONSTITUTIONAL AUTHORITY

Senator CLARK. Let's approach it from another way.

Would there be an example of an international agreement which you believe would be outside of the President's constitutional authority?

Mr. LEIGH. I can think of many, sir.

Senator CLARK. That is my question.

Mr. LEIGH. A President promises \$5 million to a foreign country when he has no statutory authorization and no money appropriated for it. That is outside his power.

Senator CLARK. Can you think of any non-money examples?

Mr. LEIGH. Non-money ones?

Senator CLARK. Yes. Non-money examples.

Mr. LEIGH. Neither Mr. Rovine nor I on the spur of the moment can think of any example which does not involve money or resources of some sort, and you asked us to give examples other than those.

Senator CLARK. In other words, so far as you can think of examples, or within the law, he can send almost anything up as an executive agreement, as long as it does not commit Congress to send money, which they clearly can turn down.

Mr. LEIGH. Well again, there are constitutional restraints on him—we don't mean to leave those out as I answer that question.

Senator CLARK. Yes; constitutional restraints, such as the first amendment which we have already discussed. Obviously that would be a restriction.

Mr. LEIGH. Well, suppose the President makes an agreement to send the Senate of the United States to attend an international meeting. I cannot conceive that that is constitutional or legal, and that is an example of an executive agreement; but no President in his right mind would do any such thing.

Senator CLARK. I guess what we are trying to get at is whether in fact a President of the United States, from a practical point of view, has unlimited authority.

Mr. LEIGH. I say again I do not think his authority is unlimited.

Senator CLARK. How about an agreement to establish bases or a promise to defend a country?

Mr. LEIGH. May we separate those two?

Senator CLARK. Yes.

Mr. LEIGH. With respect to base agreements we have the classic opinion of Attorney General Robert Jackson. If the arrangement were such that it gave the United States the right to use bases, such as the base in Bermuda, but entailed no obligations, and this was the basis of Jackson's opinion, I don't believe that the President would be transgressing his authority were he to make such an agreement.

Suppose the agreement simply recited that the United States had the right to use so many acres in Bermuda. The President informed the Congress under the Case Act that this was the agreement he had made, that he was not going to send anybody there to occupy that space, and that the United States would have this agreement with the British Government—

Senator CLARK. Let's complicate that a little and say there are, as there almost always are, other commitments on our part.

Mr. LEIGH. Then you have to analyze what the other commitments are. If it is a commitment to defend the territory, my sense of propriety tells me that that should be done by means of a treaty. On the other hand, you and I both can conceive of situations in which the President would be required to act on extremely short notice, and if it was a matter of the safety of the Nation he might very well act on his own authority as Commander in Chief.

#### LIMITS OF PRESIDENT'S POWER TO MAKE AGREEMENTS

Senator CLARK. You say it would be your judgment that he ought not to make such an agreement in a regular case, but that there is noth-

ing in law that requires him to get the consent of the Senate to defend another nation?

Mr. LEIGH. But suppose—let me give this example which I have used before—the President has information that an armada of bomber planes is headed across the Atlantic, either headed for Canada or the United States. I think in that emergency situation the President could, as Commander in Chief, conclude agreements with the Canadians entailing military obligations and conceivably an agreement not to make a separate peace or something of that sort, such as Churchill proposed to the French. I think it would be extremely unwise to adopt any kind of provision, not that that is involved here, which would undertake to circumscribe the President's freedom.

Senator CLARK. Your answer is that he should and does have the power to do that.

Mr. LEIGH. Oh, yes.

Senator CLARK. He can make executive agreements to defend other nations without Senate consent.

Mr. LEIGH. If, as in the example I gave, the security of the United States was directly threatened.

Senator CLARK. But if it is not, then he would not have that power?

Mr. LEIGH. Well you are doing now what I dislike doing, trying to explore every nook and cranny of the subject matter. It is understandable in one sense, Senator, and I agree that you should try to find certitude about this. Yet the genius of our system, I submit, has been that you do not push constitutional propositions to the ultimate limit. If each branch pushed its power to the ultimate limit, it would produce a stalemate.

Senator CLARK. I agree. But I am not sure that to say that, if our national security is not involved, or not directly involved, and we make an agreement with another country to defend them, I am not sure as to whether that ought to be sent as a treaty or not is pushing it to an extreme example.

Mr. LEIGH. But you introduced a new condition, or at least if you introduced it earlier I missed it, that our national security is not involved. If you say that our national security is not involved, then I would certainly doubt that the President could commit himself to defend another country by means of an executive agreement.

It is always a difficult question to determine whether or not national security is involved.

Senator CLARK. Yes; indeed.

Do you consider the United States obligated, for example, to defend Israel if its existence were threatened?

Mr. LEIGH. I personally do not.

Senator CLARK. Under any treaty?

Mr. LEIGH. The nearest thing to that is the resolution which Congress passed in the Eisenhower administration, which is still on the books, I believe.

Senator CLARK. If I may interrupt, Mr. Leigh, Senator Hathaway is here and I think prepared to testify.

We will move him up here to the table as well and then we will come back to you for some further questions. Then we will hear from Professor Miller.

STATEMENT OF HON. WILLIAM D. HATHAWAY, A U.S. SENATOR  
FROM THE STATE OF MAINE

Senator HATHAWAY. Thank you very much, Mr. Chairman, for taking me out of order.

I do not have a prepared statement, Mr. Chairman. I was going through the bills that are scheduled for hearing this week and I came across Senate Resolution 486 in which I have been interested for some time. I dug out a file that I had when I was in the House of Representatives that pertains to part of this resolution, which I would like the committee to consider.

ONLY SENATE RATIFICATION OF MILITARY COMMITMENT TREATIES  
QUESTIONED

Some time ago—well, I do not recall the date of my testimony to the House—yes, June 9, 1970, in testifying in regard to the War Powers Act I pointed out to the committee there, as I am pointing out to this committee here, this was before the Subcommittee on National Security Policy on Scientific Development of the House Committee on Foreign Affairs, that treaties entered into by the United States with other countries or organizations which would commit the United States or make a military commitment on behalf of the United States seem to me to be in violation of the War Powers clause of the Constitution in that such treaties are ratified only by the Senate and not by the House of Representatives.

Now I had introduced at that time an amendment to the Constitution to accomplish this purpose, and I believe a copy of that resolution is here. As a matter of fact, I reintroduced the resolution to the Senate back in May of 1973, and I was wondering first whether or not such a provision might be incorporated into Senate Resolution 486 so as to avoid the tedium attendant upon a constitutional amendment; and secondly, of course, whether or not the committee would agree with me that such an amendment to the resolution would be in order or would be agreeable to the committee.

It just seems to me that treaties which make this military commitment really are in violation of the Constitution. Even if it can be argued that they are not, certainly the framers of the Constitution intended that both Houses of Congress have something to say with respect to all military commitments made on behalf of the Nation. I am concerned that we are bypassing that provision of the Constitution by having only the Senate ratify those treaties which entail a military commitment if certain events happen.

That is about the sum and substance of my recommendation, Mr. Chairman. I would be glad to elaborate on that, if you would wish; or, knowing you are pressed for time, I could simply leave here with you a copy of the resolution to which I have referred, as well as a statement made in the Congressional Record at the time that I introduced it.

Senator CLARK. Fine.

Why don't we take that information and look at it. It will give the members of the committee who are not present, as well as the staff, a chance to consider your recommendation.

Senator HATHAWAY. Fine.  
 Thank you very much, Mr. Chairman.  
 Senator CLARK. Thank you, Senator.  
 [The information referred to follows:]

[S.J. Res. 106, 93d Cong., 1st sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States to require the advice and consent of both Houses of Congress before any treaty or agreement providing for the commitment of United States armed forces to a foreign nation may be made

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution;*

“ARTICLE—

“The President may not without the advice and consent of both Houses of Congress make any treaty or agreement of any kind with one or more foreign nations or with any international organization if such treaty or agreement would bind the United States to commit or to provide to such country or organization for any reason any armed force of the United States.”

[From the Congressional Record, May 8, 1973]

By Mr. HATHAWAY:

S.J. Res. 106. Joint resolution proposing an amendment to the Constitution of the United States to require the advice and consent of both Houses of Congress before any treaty or agreement providing for the commitment of U.S. Armed Forces to a foreign nation may be made. Referred to the Committee on the Judiciary.

Mr. HATHAWAY. Mr. President, I am today introducing a joint resolution proposing a constitutional amendment to require the advice and consent of both Houses of Congress before any treaty or agreement involving the commitment of U.S. Armed Forces in a foreign nation may be made.

Under the Constitution, the treaty ratification function is given to the Senate alone. But the same Constitution requires action by both Houses of Congress in declaring war. In contemporary circumstances where there is no declaration of war, decisions of war, peace, and the deployment of our troops are often made on the basis of treaty arrangements. I believe the House of Representatives should play a role in approving these treaties.

Since 1945, the United States has entered into numerous multinational treaties. One of these, the Southeast Asian Treaty Pact, was the justification for our involvement in the Vietnam war, a war that cost us dearly in lives and dollars; 46,000 Americans lost their lives in that war, and nearly \$137 billion in tax dollars was spent.

Approval of the SEATO pact by the Senate was interpreted as permitting the dispatch of our Armed Forces to Indochina to implement the security treaty. It eventually was interpreted as authorizing acts of war. I seriously doubt that action by the Senate alone in these cases meets the general intention of the framers respecting congressional involvement in war decisions.

The possibility of giving the Senate alone the power to declare war was specifically considered and rejected at the constitutional convention. This would indicate a deliberate intent to include the House of Representatives, with its popular representation, in the war-making decision. Today when wars are waged sans declarations, on the basis of treaty commitments, both Houses of Congress should have a say in approving or disapproving treaties which call for American military involvement.

Both Houses of Congress must be allowed to serve as a strong source of examination and advice on the basic philosophy and direction of U.S. foreign policy, particularly as regards the commitment of our military forces to action in foreign lands.

Mr. President, I ask unanimous consent that the resolution be printed in the RECORD at this point.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

## S.J. RES. 106

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:*

## "ARTICLE —

"The President may not without the advice and consent of both Houses of Congress make any treaty or agreement of any kind with one or more foreign nations or with any international organization if such treaty or agreement would bind the United States to commit or to provide to such country or organization for any reason any armed force of the United States."

Senator HATHAWAY. I would be happy to draft something and submit it to the committee in the very near future to encompass the idea that I have spelled out briefly today.

Senator CLARK. I think that would be very helpful.

Senator HATHAWAY. Thank you very much.

[The information referred to follows:]

U.S. SENATE,  
Washington, D.C., August 30, 1976.

HON. DICK CLARK,  
Foreign Relations Committee, U.S. Senate,  
Washington, D.C.

DEAR DICK: At your hearing on July 28 on S. Res. 486, I promised to draft and send you a proposal by which to remedy the treaty and war powers conflict which I outlined in my testimony at that time.

I enclose such proposal herein, and its rationale follows.

(a) It is constitutionally impermissible, under the War Powers clause, to interpret treaties as committing our armed forces to some conflict without obtaining the required Congressional declaration of war.

(b) As a result of your correspondence with the Department of State, it can be said with near certainty that the Administration agrees with this reading of the War Powers clause. (Spanish Base Treaty hearings, March, 1976, pp. 33-34.)

(c) And this reading appears to be further upheld by the language of § 8 (a) (2) of the War Power Resolution.

(d) However, the clear and consistent meaning of § 8 (a) (2) is threatened by the exception contained in § 8 (d) (1), where it states that the War Powers Resolution shall not "alter . . . the provisions of existing treaties." This gives rise to what is, in my view, the very unfortunate suggestion that existing treaties in some cases do enable the deployment of our forces pursuant to a treaty and not to a declaration of war.

(e) Because of the ambiguity within the War Powers Resolution and because it is impossible to be certain that future administration will consistently interpret treaties in the present manner, it is necessary to take remedial action so as to remove such ambiguity and uncertainty before it should be called into question in a time when real forces make the question more than academic.

Accordingly, my amendment strikes the words in § 8 (d) (1) of the War Powers Resolution which created the ambiguity described above. I hope that in this simple manner we may achieve a salubrious clarification in the War Powers Resolution which is obviously a most important declaration of Congress's continued intention to guard jealously the instruments of war which, by the Constitution, it is empowered to wield.

Sincerely,

WILLIAM D. HATHAWAY,  
U.S. Senator.

[S. —, 94th Cong., 2d sess.]

A BILL To amend the War Powers Resolution to make clear that such Resolution prohibits the inference, from any treaty, of authority to introduce the United States Armed Forces into hostilities

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 8 (d) (1) of the War Powers Resolution is amended by striking out the comma and the words "or the provisions of existing treaties".

Senator CLARK. This committee will take a very brief recess at this point, perhaps 3 or 4 minutes.

[A brief recess was taken.]

Senator CLARK. The hearing will please come to order.  
Let's go ahead.

#### AGREEMENTS OF EXCEPTIONAL NATIONAL IMPORTANCE

Mr. Leigh, you comment that:

We noted that there is in our constitutional practice a presumption that agreements of exceptional national importance will be treaties, although long years of practice have shown that many vitally important agreements were not treaties.

Can I conclude from that that the President is required constitutionally to send to the Senate for its consent all significant international agreements? Is that what "constitutional" means?

Mr. LEIGH. No.

Senator CLARK. It's not?

Could you explain why not?

Mr. LEIGH. Because there may be a prior treaty authorization to enter into an executive agreement, or prior statutory authorization, which supports the President's exercise of his undoubted power to negotiate by providing the necessary legislative authority to implement the particular undertakings in the executive agreement.

Senator CLARK. But if it had not been previously ordered by statute, significant agreements must be sent up for the consent of the Senate. Must they not?

Mr. LEIGH. I would not say that if it is a question of, say, an armistice agreement, Senator. That is a very important agreement; and yet I do not think that the Constitution requires that it be submitted as a treaty.

#### WHAT AGREEMENTS MUST BE TREATIES UNDER THE CONSTITUTION?

Senator CLARK. I am reading here from your statement, under "Role of the President," where you are quoting the constitutional provision; specifically article II, section 2, that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." If significant international agreements need not be sent up as treaties, what in the world must be?

Mr. LEIGH. Well there are some things which are confided to the independent powers of the President. For example, if the President

wants to make an agreement with Canada regarding reciprocal pardons for prisoners in American jails and Canadian jails, that is within his independent constitutional power, separately specified in the Constitution.

Senator CLARK. Yes.

Mr. LEIGH. I do not consider that that is the kind of agreement which has to be sent to the Senate.

Senator CLARK. My question is the reverse of that.

If you read the constitutional provision, then certainly something must be sent up as a treaty; otherwise the framers of the Constitution had nothing in mind here. You are in agreement with that, I know.

Mr. LEIGH. Surely; something must be sent.

Senator CLARK. The question is what.

Mr. LEIGH. You are asking me to specify and I have given an example.

Senator CLARK. Even in a general way. I don't necessarily mean a specific example. What must be sent up?

Mr. LEIGH. The usual defense agreements customarily have been sent as treaties.

Senator CLARK. But you are saying "customarily." I am saying "required by law" to be sent.

Mr. LEIGH. Here again, Senator, you are pressing to define the absolute limits of the Presidential power and the congressional power.

Senator CLARK. I really do not mean to be. I am trying to establish some broad categories, even, of what must be sent up in fulfillment of the constitutional provision. I am trying to think what is required to be sent.

Mr. LEIGH. But someone has to make complicated determinations in each case. If you would give me an example of a particular agreement and ask me whether that should go as a treaty, perhaps I could come closer to being responsive. But it is very difficult for me to answer in the abstract.

Senator CLARK. It seems to me that it ought to be possible to say that there are certain kinds, certain categories, certain classes of international agreements that fit article II, section 2, paragraph 2 of the Constitution.

Mr. LEIGH. We did our best in the memorandum which we are submitting for the record to explain the criteria which we think should be followed. But I think I can find a half dozen treatise writers in international law and constitutional law who say that the precise limits cannot be clearly set forth.

Senator CLARK. But you would agree that there are certain limits?

Mr. LEIGH. There are some things which I think should be sent as treaties, and I have given a few examples of those.

#### CONSULTATION WITH COMMITTEE UNDER CIRCULAR 175 PROCEDURE

Senator CLARK. I was interested in the part of your statement, where you go into the question of consultation with the Congress, which I think is a very important area of your testimony.

You say, "Consultation on agreements of significance is already required by the Department of State's circular 175 procedure."

When was the Foreign Relations Committee consulted under that requirement on the secret Sinai agreement with Israel?

Mr. LEIGH. Well, I would have to say, Senator, that I was not party to such consultation. I would have to go and find out within the Department what actually happened. I was called upon to go out and join the party in the Middle East and came back and played a role when we got back here. But I would have to go back and ask people about the consultations.

Senator CLARK. You have Sam Goldberg to your right and maybe he can contradict, but as one member of the Foreign Relations Committee, I can assure you we were not informed at any point until after the fact.

When was the Foreign Relations Committee consulted on the Nixon-Thieu letters, where President Ford promised to respond with full force in the event South Vietnam was in danger.

Mr. LEIGH. Let me just correct—it wasn't President Ford.

Senator CLARK. Did I say Ford? I meant Nixon.

Mr. LEIGH. I think it is important to clear that up.

Senator CLARK. Of course. Good point.

Mr. LEIGH. Second, the executive branch, as you may not know, takes the position that it does not consider those international agreements. What you have is a series of letters, and the totality does not amount to an international agreement.

Senator CLARK. They are not considered by the administration to have been any agreement?

Mr. LEIGH. And they were not reported under the Case Act for that reason.

These were statements of Presidential intention peculiar to President Nixon and not binding on the U.S. Government in the international agreement sense.

#### CONSTITUTIONALITY OF POINT OF ORDER PROCEDURE

Senator CLARK. I would like to talk to you a little bit about the argument you made in your position on the point of order procedure and whether or not that is constitutional.

Is it your position that the point of order procedure is unconstitutional?

Mr. LEIGH. I have deliberately in my statement avoided saying that and I do not wish to say it now.

Senator CLARK. But do you think it may be?

Mr. LEIGH. It may be.

I have said it raised questions and I think it is very close. It might even depend on the way in which it was carried out. Suppose the Senate changed its rules and said to override a ruling of the Chair on a point of order you would need a three-quarters majority of the Senate.

Senator CLARK. Would that make it unconstitutional in your judgment?

Mr. LEIGH. That would take it closer to the line I would say.

Senator CLARK. I presume you would have the same constitutional objection to the Budget Act, the House germaneness rule, and all of the provisions of the Standing Rules of the Senate which allow points of

order to be made. It would not just apply to this one. It would apply equally to all others, would it not?

Mr. LEIGH. No.

The difference about this is that you have singled out a particular subject matter here. This is not a rule which would generally apply to all kinds of resolutions, rather you have singled out international agreements.

Senator CLARK. The Budget Act applies to certain specific point of order stands against a very specific kind of provision, anything that provides budget authority.

Would it be your feeling that that would possibly be unconstitutional as well?

Mr. LEIGH. I would have to say I am not familiar with the details of the Budget Act.

Senator CLARK. Certainly it involves as much of a 100 percent rule as you are making a case against here. In other words, if a point of order is seen as requiring 100 percent approval, then certainly that would be the case under the Budget Act, under the House germaneness rule, and all provisions of the Standing Rules of the Senate which allow points of order to be made.

Mr. LEIGH. Well, even if there could be a test of the constitutionality of such a provision, and I have not been able to conceive how you would arrange such a test, my fundamental point is that this introduces into the procedure a new kind of mechanism which is going to make it far more difficult for certain kinds of implementing legislation to be adopted, and that is bound to have consequences outside the Senate.

Senator CLARK. You might say that all of the other witnesses who have testified to the question of constitutionality. I have specifically asked them about that.

Mr. LEIGH. And I have seen at least two letters from professors of law who have said it was unconstitutional.

Senator CLARK. The point of order procedure?

Mr. LEIGH. That is right.

Senator CLARK. Do you mind telling us who those are?

Mr. LEIGH. I had in mind Professor MacDougal of Yale Law School, and Professor Restow of Yale Law School.

#### QUESTION OF WHETHER POINT OF ORDER CONSTITUTES 100 PERCENT MAJORITY

Senator CLARK. I want to make it very clear for the record that majority rule is not abolished. As you said quite rightly in your testimony, it is our contention that three majority votes are still required—the vote by which the resolution is adopted; the vote on the simple resolution on a given agreement; and the vote appealing the ruling of the Chair. That is constantly done.

I was on the Senate floor a week ago when Senator Mansfield was ruled out of order. It was a ruling, in fact, as to whether a point of order should stand; 51 percent said it should not, and it did not.

It seems to me you made rather light of that alternative for the Senate.

Mr. LEIGH. But the case comes out most strongly when a President acts in good faith pursuant to a prior legislative authorization which contemplates a particular procedure, and complies with that procedure in every respect. Nevertheless, the Senate may decide, despite the prior legislation authorizing the particular procedure and the particular terms of the agreement, that this should have been a treaty, and once that decision is made, a lot of things flow from it. This comes, I think, very close to repealing the statute already on the books pursuant to which the President acted in making the international agreement.

Senator CLARK. But that is a very different point than I am making. I understand your point. I think it is a point well worth considering. I think it is one of the strongest points you make in your testimony. But I do not see the relevance of that to what we are discussing here.

Mr. LEIGH. When the Senate and the House agree on a particular procedure and the President complies with that procedure; it surely is not assumed that in securing funds to implement and carry out such an agreement it is going to be subjected to this kind of point of order arrangement.

Senator CLARK. That is still not the question I am raising.

The question is whether a point of order constitutes a 100-percent majority. That is the only question we are addressing at the moment.

In fact, what we are addressing is whether the third point means anything, whether a vote appealing a ruling of the Chair means anything. It seems to me that if one were to accept your conclusion that any one Member of the Senate could block any funding measure, that it requires a 100-percent majority, then you have a very strong point. That is the only point I am addressing at the moment—as to why in the world 51 percent of the Senate could not at any point overrule a ruling of the Chair. The Chair, after all, is giving a ruling—that is all—and it is subject clearly to being overruled by a majority of the Senate. How can that be interpreted to be a 100-percent majority?

Mr. LEIGH. We assume that if the Senate makes a rule, it intends to abide by it. You are telling me that you are going to overrule it regularly. If that is the case, you might as well not have this resolution at all and just rely on the usual majority voting rules.

Senator CLARK. That is a far cry from saying it is a 100-percent majority.

Mr. LEIGH. We assume that when the Senate adopts a rule, it intends to abide by it.

Senator CLARK. But there is such a thing as an interpretation of a rule.

Mr. LEIGH. This is not an interpretation; this is actually the overturning of a rule.

Senator CLARK. Whenever you get a ruling from the Chair and it is put to the floor, and someone challenges that ruling, then I would say it is based on the Senate's interpretation of that ruling.

Mr. LEIGH. Perhaps, Senator, I have gone too far. This is an internal matter for the Senate. I have tried to emphasize the consequences which it will have outside the Senate, and I have expressed my concern as a representative of the executive branch as to what this would mean in practical terms. But I cannot really presume to go any further. When

the Senate adopts a rule of this sort, we assume it is going to be applied consistently.

Senator CLARK. I think, as you say about executive agreements, it is not just a question of what is in the Constitution. It is a question of practice and practice is pretty clear on this item as well. If a majority of the Members of the Senate feel that is not the interpretation they wish to place on it, obviously they have voted and do regularly vote the other way. To conclude that any one member of the Senate can at any time block all funding under a resolution of this kind would be an exaggeration of this point, to say the least.

You have been a very tolerant witness and we have kept you here for two and a half hours. We appreciate very much your taking the amount of time you have. Thank you, all three of you.

Mr. LEIGH. Thank you, Mr. Chairman.

Senator CLARK. We are going to hear now from Professor Miller. He is at the George Washington Law School here in Washington.

I think you have a prepared statement, do you not?

**STATEMENT OF PROF. ARTHUR S. MILLER, GEORGE WASHINGTON  
UNIVERSITY SCHOOL OF LAW, WASHINGTON, D.C.**

Mr. MILLER. Yes, sir.

Senator, I would like to read it if I may. It is fairly brief.

Senator CLARK. Yes.

Mr. MILLER. And if I may, I would like to interpolate a few sentences from time to time on ideas which have occurred to me since I originally wrote this.

Senator CLARK. Good.

Mr. MILLER. It is a pleasure to be with you today, Senator. I think this is a very important matter which the committee is concerned about.

The resolution, as you know, seeks to involve the Senate deeply into the international agreement-making process of the U.S. Government.

I believe there are two basic questions involved here: first, the constitutionality of the resolution; and the second, whether it is wise.

For reasons which I set forth below I answer both questions in the affirmative.

This statement sets forth what seems to me to be the important considerations of law and policy involved in the ultimate question of whether the Senate should approve this resolution. I will also make some reference to the House bill, H.R. 4438, which, as you know, is an attempt by the House to deal with the same basic underlying problem.

Senator CLARK. Yes.

**CONCEPTION OF SENATE AS PRESIDENTIAL COUNCIL**

Mr. MILLER. In many respects, Senator, your resolution seeks to restore the status quo ante—what appears to be the original intention of those who wrote the Constitution: that the Senate has a role beyond that of merely consenting to the ratification of treaties.

You will recall, I am sure, that President George Washington, the man who presided at the Constitutional Convention of 1787 and thus surely can be assumed to have known what was intended by the

framers, appeared at the door of the Senate on August 22, 1789, asking for advice and consent to some propositions concerning a proposed treaty with southern Indians.

The Senate refused to act at once and said they were going to send it to a committee. Washington stalked off. The Senate did act a few days later. Since that time no President has ever personally consulted with the Senate in its collective capacity, as distinguished from individual Senators.

No doubt there is much informal consultation between the Executive and the Senate—and the House for that matter—but the lesson of Washington's appearance in 1789, as Professor Corwin said in 1957, is that "the conception of the Senate as a Presidential council in the diplomatic field broke down the first time it was put to the test."

It should be noted that as late as 1908, Woodrow Wilson, in his classic book "Constitutional Government" said that the Senate should advise the President both as to appointments and treaties "in the spirit of an executive council associated with him upon terms of confidential cooperation."

Wilson further asserted that it was more than the President's privilege to do this, to deal with the Senate in that manner, but his best policy and plain duty. He said this, and I quote:

If he have character, modesty, devotion, and insight as well as force, he can bring the contending elements of the system together into a great and efficient body of common counsel.

That, however, was Wilson as scholar and as historian. We are all aware of how in 1919 he was unable to carry the Senate in the treaty which established the League of Nations. This calls to mind a statement I read recently appearing in a book entitled "The State of the Presidency," written by Thomas Cronin, of an anonymous aide of President Kennedy who, in 1970, said this:

Everyone believes in democracy until he gets to the White House, and then you begin to believe in dictatorship, because it's so hard to get things done. Every time you turn around, people resist you and even resist their own job.

Wilson did suggest, however, in his book "Constitutional Government" the forgotten side of separation of powers, and that is cooperation.

I believe it is highly necessary, it is indispensable that the built-in constitutional conflicts of separate governmental institutions sharing power do not work against the best interests of the Nation. Congress and the President must cooperate. The American people deserve no less.

This does not mean that Congress need be a rubberstamp to whatever the Executive wishes to do. Quite the contrary. What it does mean is that the Members of Congress and the officials in the executive branch share a similar duty to further the public's interests.

Professor Bickel, testifying a few years ago on a resolution before this committee, said this:

Congress has too long tolerated, indeed cooperated in a diminution of its role in the conduct of foreign affairs and in the decision of questions of war and peace, a diminution that approaches the vanishing point in my judgment.

Professor Bickel said that the balance of power between Congress and the President ought to be redressed in this respect. It is up to Congress to do the redressing.

## APPROVAL OF SENATE RESOLUTION 486 WITH RESERVATIONS RECOMMENDED

I consider that Senate Resolution 486 is an attempt to institutionalize that type of cooperation the American people are entitled to in the important area of international relations. With the reservations which I note below, I recommend that your resolution, Senator, be approved.

You will recall also that the late Justice Jackson in the *steel seizure* case in 1952 said this, and again I quote:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable Government. It enjoins upon the branches separateness but interdependence, autonomy but reciprocity.

## THE CONSTITUTIONAL DIMENSION

Now I should like to discuss the constitutional dimension. I believe—I heard Mr. Leigh's statement and I read his memo and Mr. McCloskey's letter sent previously to this committee—that basically I am in almost total disagreement with him, certainly on the law part of what he has said. I cannot conceive of any constitutional lawyer taking the position that a constitutional amendment is required in these matters. Indeed, he quoted Professors Rostow and MacDougal of the Yale Law School. I believe the committee ought to realize that that is Eugene Rostow, who was Under Secretary of State at one time, and who would be inclined, I believe, to take the State Department's position. He is a friend of mine, as is Myres MacDougal, who has consistently throughout his career—since he wrote the leading article on treaties and executive agreements as interchangeable, in his mind, instruments of foreign policy in the middle 1940's—taken the executive branch position against the Congress.

He did it in many cases on the Vietnam war, on the *Sabbatino* case, and on other matters. It is in the public record. They are friends of mine, but I think they are dead wrong. I do not know of any constitutional lawyer who would agree with them.

In analyzing this resolution, as I say, I did have the benefit of reading Mr. Leigh's memorandum and letter. I think the memorandum and letter are a disingenuous response to the committee's and the Congress very real concern about a number of international agreements. It is wrong in theory and wrong in principle. I would like to say in what follows why I have come to that conclusion.

First, the Constitution is quite clear in its express terms that treaty-making is a shared power between the Senate and the Executive. Ratification is an executive act, not an action of the Senate, and must be preceded by a two-thirds vote of approval by the Senate. So far as ratification taking place, I might add as a matter of interest that this came up a few years ago, with respect to a treaty which had been negotiated with Japan on Okinawa. The Senate did approve ratification of that treaty and subsequently a statement appeared in the press that President Nixon at that time might not ratify the treaty for reasons of foreign policy.

So, the point that I make here, and my emphasis, is that of course it is the President's power to make treaties, if you take the merely technical point that making treaties is a technical act of ratification.

Of course it is. He does not have to follow the Senate's approval. He can still refuse to put a treaty into effect, even if the Senate has approved it. Whether or not a treaty is made, then, is wholly dependent upon the President.

Second, there is no constitutional warrant in express terms for international agreements other than treaties, but executive agreements have been routinely employed since the beginnings of the Republic. It is too late in the day, in my judgment, to argue that they should not be used. But surely it accords with the intentions of those who drafted the Constitution that important or significant agreements with other nations should receive congressional, or at least senatorial, scrutiny.

All too often in recent years the State Department practice has been precisely the contrary: treaties are employed for the relatively insignificant, and executive agreements have been used for major commitments. Let me give you an example of that, Senator.

Prior to the United States-Spain treaty of this year, for example, Spanish bases were the subject of executive agreements. The same thing is true of the 50-destroyer deal with Great Britain in 1940, where we traded 50 destroyers for leases on bases in the Western Hemisphere.

Furthermore, there can be no question about the validity of Congress delegating to the President power to enter into executive agreements, as for example, in the Reciprocal Trade Act of 1934. In fact, as Mr. Leigh said in his testimony, most executive agreements are concluded either pursuant to a statute or a treaty. I might add in this connection there is substantial doubt in my mind about the lawfulness of adherence by this Nation by executive agreement to the General Agreement on Tariffs and Trade. As you know the GATT is both an agreement on trade matters and a secretariat in Geneva administering these trade matters, which was concluded as a multilateral executive agreement on the authority of the President only, plus the Reciprocal Trade Act of 1934. The Reciprocal Trade Act of 1934 deals only with bilateral agreements, the GATT is an example of the President going beyond the clear intent of Congress.

Whether or not adherence to the general agreement is good is not the point. The point is whether or not he was authorized to do it.

#### NO CONSTITUTIONAL AMENDMENT NECESSARY

The conclusion I reach is this: There is no constitutional amendment necessary for the Senate to enact your resolution, Senator Clark. Congress can and often has authorized the President to negotiate executive agreements; trade agreements are perhaps the clearest example. These are the so-called congressional-executive agreements.

The State Department estimates—they had to estimate, they did not even know, and that is a very interesting point, that they don't even know how many are made on the basis of the President's inherent powers—that 2 percent or 3 percent are what they call pure executive agreements. I find that a rather interesting fact, that they do not even know which ones or what is the authority for some of their agreements. Perhaps recognition of a foreign government is as clear an example of a pure executive agreement as can be made. The

point I suggest is that even in these agreements there still must be congressional action. Congress must provide funds, for example, to pay salaries, to buy an embassy, and so forth. There is no category, in summary, of international agreement recognized in American constitutional law that does not, as a general rule, require joint executive-congressional action.

If that be so for both types of executive agreements, then it surely is even more so for treaties, which have express constitutional warrant for cooperation with the legislature.

If the phrase "advise and consent" means anything, it means what it says, that the Senate can tender advice to the President. When to the "advise and consent" provision is added the terms of article I, section 8, clause 18, that Congress has the power to make "necessary and proper" laws to carry into effect the "powers vested by this Constitution in the Government of the United States, or in any department or officer thereof"—and that must include the President—it seems to me there is added, there is conclusive warrant for the validity of this resolution. Just as in the War Powers Resolution of 1973, Congress has power under the Constitution to limit Presidential discretion.

I do not think there is any doubt that Congress has the power to limit the President's discretion to make an agreement to defend another nation. To hold otherwise would be to make a mockery out of one of the most basic concepts of our fundamental law: separation of powers. In essence the State Department argues for unlimited and uncontrollable executive power in the field of international relations, a dangerous concept that is contrary to the letter and to the spirit of the Constitution.

Third, contrary to the State Department, there is no "constitutional requirement for passage of a money bill designed to implement a properly authorized and legally binding agreement."

As long ago as 1798, in connection with the Jay Treaty with Great Britain, the contention was made that Congress was bound to enact an appropriation bill to implement the treaty. After extensive arguments the funds were voted, but the House of Representatives passed a resolution offered by James Madison, the father of our Constitution, in which it was stated that while the House did not claim any power in the treatymaking process,

When a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency of carrying the treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.

#### OBLIGATION OF HOUSE TO PROVIDE FUNDS

Senator CLARK. You do not subscribe, then, to what Mr. Leigh said about there being an obligation of the House to provide funds for a treaty that the Senate has made?

Mr. MILLER. Absolutely not.

Senator. let me speak briefly on that. It is for two reasons. One, no Congress can bind its successors. The present Congress cannot bind next year's Congress, for example.

Senator CLARK. Right.

Mr. MILLER. Second, there is funding. Under normal appropriations, in any bill, domestic or international, as I understand the process, there is first an authorization bill, then a funding bill. There is no requirement for the Senate or for the House to pass a funding bill after an authorization bill has been passed.

Senator CLARK. That is right.

Mr. MILLER. I do not see Mr. Leigh's point. I think he is dead wrong. The Constitution is clear beyond doubt that the power of the purse is congressional, and that Congress may exercise that power in its sound discretion.

Fourth, on a more technical ground, it is difficult, if not impossible, to see a justiciable controversy that would fulfill the article III requirement of "cases and controversies."

#### POLITICAL QUESTION RAISED BY SENATE RESOLUTION 486

Senate Resolution 486 would surely raise a political question for there is clearly here a "textually demonstrable commitment," in the words of the Supreme Court, to another branch, in this case the Senate, to establish its own internal rules.

Beyond that I am unable to discern anyone, in private life or elsewhere, who would have standing to challenge the Senate's action. Perhaps "nonaction" would be a better word, for the resolution calls for a refusal to appropriate money.

#### LIMITS ON PRESIDENT'S POWER TO ENTER INTO EXECUTIVE AGREEMENTS

Fifth, to my knowledge, the Supreme Court—and I think this is important—has never held that the President has an independent constitutional power to enter into executive agreements when the issue was not one of federalism, the relative dignity of an executive agreement, say, with a State law or State statute, but one of disagreement with Congress.

Contrary to the State Department, it is open to question that the President has power to enter into executive agreements that are binding on the United States both in international law and constitutional law. As stated above in connection with the Jay Treaty, Congress has discretion to implement the terms of a treaty.

I might call your attention, Senator, to the case of *Seery v. United States*, which is often forgotten, and understandably so, by the State Department. It was decided in 1955 by the Court of Claims. It appears in 127 Federal Supplement at page 601. Here it was argued that an international executive agreement entered into by General Keyes, who was the High Commissioner in Austria after World War II, with Austria was to settle all claims. Mrs. Seery had a house in Austria which was taken over by the Army for an officers' club. She sued under the due process clause for just compensation. The Court of Claims said she was entitled to get it. The Supreme Court, as is my understanding, denied review on this case.

In other words, there are limits on the power of the executive to enter into executive agreements.

You mentioned earlier this morning the first amendment. There are other limits. I would think that the Constitution as a whole, is one of them, as the Court said in *Reid v. Covert*. In Justice Black's careful opinion in this case he declared unconstitutional an international executive agreement entered into pursuant to the Uniform Code of Military Justice passed by this Congress; this was the Status of Forces agreement with Great Britain. Justice Black was careful to say that executive agreements, all international agreements, must conform to the Constitution. I do not think there can be any doubt about that. The only question is what does the Constitution mean.

Should the President wish to recognize Cuba, for example, he can agree to do that and agree to exchange ambassadors. He can do that, I think, without interference. What he cannot do without congressional approval is pay the salaries of that ambassador or minister, or to buy an embassy, purchase property or to otherwise spend money. I do not believe the case of the *United States v. Lovett*, in which the Congress sought to deny funds to two or three executive branch employees is relevant to these circumstances. That was a 1946 case, striking down the provision.

Of course, it is cooperation rather than conflict that is the norm between the two political branches of Government. Our Government could scarcely operate unless Congress and the Executive routinely cooperated.

But my point, and if I understand you correctly, your point is that cooperation should be a two-way street rather than a one-way street.

Sixth, as usual, the State Department in its memo quotes the *Curtiss-Wright* case, a Supreme Court recognition of plenary Presidential power in the field of negotiation and international agreements. His quotation—that is, Mr. Leigh's—is of course accurate; but it should be remembered what Mr. Leigh did not say. First he did not say that this is mere obiter dictum. The case merely held, *Curtiss-Wright* merely held, that a delegation of power to the President in certain international matters was valid. The rest was pure dictum which Sutherland threw in and which is of dubious historical validity in that particular situation.

The State Department always forgets what Sutherland went on to say in the latter part of that statement. He said, concerning that so-called plenary Presidential power as sole organ of foreign relations, "This power, of course, like every other governmental power must be exercised in subordination of the applicable provisions of the Constitution." That is in the *Curtiss-Wright* case, too.

I doubt if you will ever see an executive branch lawyer quote the latter part of that statement.

Seventh, furthermore, the President's power to conclude international executive agreements must be accomplished in accordance with the Constitution, as I said before. The *Reid v. Covert* case I mentioned before deals with the Uniform Code of Military Justice. *Seery v. United States* is another case which limits the power. In *United States v. Capps*, the Court of Appeals for the Fourth Circuit held invalid an executive agreement with Canada on imported potatoes. The Supreme Court ruled on other grounds when it got to the Supreme Court. But

as far as the fourth circuit's decision is concerned, it was the circuit court's opinion that an executive agreement must be in accordance with the statute.

#### POSSIBILITY OF SINGLE SENATOR BLOCKING FUNDING LEGISLATION

It is simply not true, in my judgment, that a single Senator can block legislation to fund an executive agreement. If I understand the Senate rules, and I do not pretend to be an expert, those rules do permit any Senator to appeal a ruling of the presiding officer on points of order; a majority vote would either sustain or overrule that officer's ruling. I am unable to contemplate that there would not be at least one Senator available to contest any point of order under Senate Resolution 486.

I find the conclusion inescapable, Senator Clark, that the resolution is valid as an exercise of the Senate's rulemaking powers.

#### RECONSIDERATION OF NEED FOR TWO-THIRDS VOTE SUGGESTED

I should like to add this caveat because I think it is important. I think it is time, if this resolution is adopted, to reconsider the need for a two-thirds vote to consent to ratification of treaties. If the resolution is passed, there probably will be greater use of the treaty. I suggest that the need to muster a two-thirds vote of this body is one of the reasons for executive reliance on executive agreements. It would take a constitutional amendment, but I would recommend that if the Senate does pass your resolution, Senator Clark, that someone take the initiative to change that two-thirds requirement to a simple majority vote. After all, public policy made by Congress, laws passed by Congress, are routinely made by simple majority vote. Confirmation of ambassadors, of Supreme Court Justices, is by simple majority vote. Why there should be a two-thirds vote on treaties at this point in our history is beyond my ken.

Senator CLARK. That is a good question.

#### POLICY CONSIDERATIONS

Mr. MILLER. Now as to policy considerations, I would call your attention to something which I think Mr. Leigh suggested, that constitutionality goes only to power. He tried to make a distinction between power and right. I do not think it is a valid distinction as far as our law is concerned; constitutionality goes both to power and right. But the fact that a given governmental action may be valid does not necessarily mean that it is wise. Justice Frankfurter often used to say that.

The essence of the State Department's objections to this resolution is that it would unduly hamper the often delicate negotiations with other nations, so that poses this question. Are there practical considerations militating against the resolution? My answer to that is "No."

I do not believe the State Department's arguments are persuasive. But there are some matters that trouble me, and I would like to list those very briefly.

First, I do not know what "significant" means. Somebody is going to have to define that, Senator. Either the Senate is going to have to define it, or you are going to leave it up to the State Department to

define it. I do not think you should leave it up to the State Department to define it. Maybe it cannot be made more precise, but I think an effort should be made to eliminate some of the ambiguity of that particular section.

Senator CLARK. Certainly under our resolution it would be the Senate because in passing a sense of the Senate resolution we would be thereby saying that we consider this international agreement significant and therefore a treaty.

Mr. MILLER. I think this makes it a little difficult, then, for the people in the State Department unless there is close and continuing cooperation. I would like to come back to that point if I may.

Senator CLARK. Of course.

Mr. MILLER. I have the resolution before me. I am not quite sure that section 4(a) (1) is a complete sentence.

Senator CLARK. Section 4(a) (1) ?

Mr. MILLER. I am not sure it makes sense; at least I find difficulty making sense out of it.

Senator CLARK. I see what you mean.

Mr. MILLER. I would recommend that that be clarified.

#### COMPLIANCE WITH CASE ACT

Third, Senator, I don't think that the Senate is sure that the Case Act is complied with.

Senator CLARK. Is what ?

Mr. MILLER. Is complied with.

I have in my possession a report issued by the Comptroller General dated February 20, 1976, entitled, "U.S. Agreements With the Republic of Korea," in which a study was made by the General Accounting Office saying that at least 34 agreements, to their knowledge, which were executive agreements, had not been submitted to the Senate or to the Congress for its information, including, if I might add this, Senator: including—and I think this is a significant one mentioned in Mr. Staats', the Comptroller General's letter to Senator Abourezk—a \$1.5 billion agreement for modernizing the South Korean armed forces, and agreements to provide more than \$365 million of assistance for deploying Korean troops to South Vietnam, and more than \$37 million to get them back. Those are not reported to the Senate.

I do not think that you are getting full information from the State Department. The State Department always says, "Let's consult more." That is exactly what they said when Jack Stevenson was the legal adviser and the Case bill was before the Senate and the House. They said you don't need to pass it, we will tell you everything. The problem is they did not then and they do not now.

I do not think you have any means of knowing when they do.

Senator CLARK. I think you are absolutely right.

On that point, frankly, I was not aware of that GAO study. I would like to request that the staff get Mr. Leigh's response, or that of the appropriate authority in the administration to each of those examples. Why were they not reported under the Case Act? I know that Senator Case and this committee would be interested in their response to those analyses by the GAO.

Mr. MILLER. Senator, if I might say, this is letter No. B-110058, addressed to Senator Abourezk, chairman of the Subcommittee on Separation of Powers.

Senator CLARK. What is the date?

Mr. MILLER. February 20 of this year.

Senator CLARK. Thank you.

Mr. MILLER. Fourth, the occasion for classified international agreements. Mr. Leigh poses this question. I am not sure there is a case to be made for secret international agreements. My own bias is in favor of open agreements—not necessarily openly arrived at, as Woodrow Wilson said, but nevertheless open agreements.

I think the American people are entitled to know the commitments that this country is undertaking, whether it is a Portugal agreement, the Spanish bases, the Thailand agreement during the Vietnam conflict, the Cambodian thing under Nixon, and so on. I think they are entitled to know.

I would like to see the case made for secrecy in agreements. I do not think Mr. Leigh made it. He said that there are situations where secrecy is necessary, but did not give us any examples.

Senator CLARK. I think it is an excellent point. Obviously it is not just the President of the United States who is going to have to fulfill these obligations in either taxes or human life, but rather equally every other person in this country. So I do not know why a President ought to be able to obligate them to something of which they are not even advised.

Mr. MILLER. Certainly the Congress is entitled, sir, to know about this, and I think the people are entitled. It goes beyond coming up here and telling a few selected Senators that this is what we are doing. This is what was revealed in Senator Church's investigation of the CIA and the intelligence community. I do not think oversight of Congress of the intelligence community can be said to be anything other than deplorable, appalling, or bad. In short, I do not think it was adequate. And, I do not think it is adequate today, either. I don't know if the new committee is going to be any better. One would hope so. But unless we could get the secrecy problem licked in some way, the country is in trouble.

One or two more points, Senator.

#### FULL AND CONTINUOUS CONSULTATION

The State Department admits the need for full and continuous consultation. I think your resolution is merely a means of insuring that that consultation in fact takes place.

Now, the Circular 175 procedure of the State Department says that that is a requirement. It is not a "legal" requirement; it is only an internal procedural requirement of the State Department. There is no better way of making sure that the State Department follows its own rules than to pass this resolution.

Nevertheless, there is merit, in my judgment, in the House bill, which as you know provides for congressional review of executive agreements. The Trade Act of 1974 provides that agreements be submitted to Congress for approval.

I do not see how this resolution can be reconciled with H.R. 4438 unless some sort of joint resolution were to be drafted and passed. It would have to be signed by the President, or, if he vetoed it, it would have to be passed over the veto. I know the constitutional argument; I have read your statement, Senator, that the Senate alone advises and consents. But I pose the question that nevertheless cooperation may be desirable.

Senator CLARK. Of what.

Mr. MILLER. Cooperation of the two Houses may be desirable. I would personally prefer it. But if the committee, if the Senate decides to pursue this resolution as now drafted or as revised in some way and thus leaves H.R. 4438 as another piece of legislation, it is my opinion that with one proviso the resolution meets reasonable policy considerations, that proviso is this: Senate Resolution 486 delegates to this committee, the Committee on Foreign Relations, the power to advise the President as to whether a given agreement should be a treaty. This delegation is constitutionally valid; I suppose it is anyway. Nevertheless it raises the question of whether the committee has the adequate personnel resources to deal promptly and efficiently with that duty. I do not know the answer to that question, Senator Clark, but I think it should be faced.

If it is confronted and the answer is affirmative, then adoption of the resolution would help to fulfill the responsibilities of the Senate, as I understand the Constitution, in the formulation of American foreign policy.

#### SUMMARY

One further statement if I might, sir, by way of summary.

I do not believe this is the time to exalt constitutional forms over substance and spirit. Cooperation between Congress and the Executive is a necessity, not in any servile manner, but in a constructive way as conducive to the public good.

Congress has been more than cooperative in the past in the area of international agreements. It has bowed to the ostensible superior knowledge and expertise of the Executive. The time has come to rectify that imbalance, but the pendulum should not swing too far toward congressional control because it was Woodrow Wilson who also said in connection with the separation of powers that warfare between the branches could be fatal—fatal to the constitutional order.

I would say finally, sir, that powers are separated in this country, contrary to Justice Brandeis and Chief Justice Warren and numerous other people, and contrary to the conventional wisdom, not only to prevent despotism, but to promote efficiency. We had under the Articles of Confederation a legislative Government. If I may use the term, sir, it was a lousy Government. You can't run this country as a legislative Government these days. That's what I mean.

We need an efficient Government. We need an efficient Executive. We need cooperation between the Congress and the Executive. I think your resolution will do it. But I think that it should be constantly borne in mind that the American people are interested not so much in the niceties of the Constitution as in our wise and effective and compassionate foreign policies.

## NECESSITY OF COOPERATIVE EFFORT

Senator CLARK. I think you give an excellent statement. I agree entirely with your concluding statement. There has to be a cooperative effort. There is no way I think that we can simply set up the legal architecture to be assured that it is all going to work. One of the concerns that we have, in fact, with this resolution is that it take into appropriate consideration not only the House's prerogatives, but the House's interests. It seems to me that all too often in the past we have gotten bogged down in the argument of whether the House should do this or the Senate should do this. We spend too much time quarreling back and forth with one another instead of finding some resolution by way of compromise. Certainly that is one of the areas we want to explore so that we are not simply taking an action here which offends the House of Representatives and results in some other kind of impasse between the two Houses; or, indeed, with the executive branch. Without their cooperation it is going to be very difficult.

As I said at the beginning of these hearings, if we are to have a different President, particularly a President of the same party as the majority party of the Congress, that presents a great opportunity for a greater cooperative effort. At the same time, unfortunately, it presents the possibility that the Congress could become through that political alliance much more docile in its cooperation with that administration.

I thought you were quite right in talking about the necessity for cooperation, but not the necessity simply to go along with anything the administration wants. It has to be a balance which is meaningful, which preserves checks and balances and separation of powers, while at the same time is a cooperative effort in public policy. I think it was very well put.

Frankly you have answered every question but one that I had.

## DOES SENATE RESOLUTION 486 INVADE RIGHTS OF JUDICIAL BRANCH?

The one question, a somewhat minor one, on which I wanted your judgment, deals with a statement Mr. Leigh made. I will read it to you. It is a question of whether or not this resolution really impinges upon the power of the judicial branch.

I should also add here, Mr. Chairman, that the question whether the President has exceeded his statutory authority is for the courts to determine, not the legislature. In that sense, the proposed Senate Resolution 486 is also an invasion of the rights of the judicial branch.

Do you share that view?

Mr. MILLER. Senator, it is difficult for me to take a statement such as that seriously.

Senator CLARK. To take it seriously?

Mr. MILLER. Seriously. I cannot believe any serious-minded lawyer would make a statement such as that. Justice Stone in *United States v. Butler* 40 years ago said that we should always remember that there are others than the courts who have the power to govern. Congress can make constitutional decisions; it makes them all the time. The President can make constitutional decisions; he makes them routinely.

It is not an impingement on the judicial branch. If there is a justiciable case of controversy, and as I said in my statement, it is difficult for me to contemplate one, but if there is one, that is a different matter. But I don't see where negative action—in other words, the failure on the part of the Senate to vote an appropriation, would pose a justiciable controversy, in the sense of standing, and it certainly would pose a political question as well.

The court itself would refuse to rule. I think the courts would be most reluctant to get into a squabble such as this. I think Mr. Leigh's position is completely contrary to my understanding of the respective roles of the three branches of government.

#### RECONCILIATION OF SENATE RESOLUTION 486 WITH H.R. 4438

Senator CLARK. Can you elaborate at all on how this resolution, Senate Resolution 486, might be reconciled with H.R. 4438 through a joint resolution? Can you think of any ways?

I know that is kind of catching you without much preparation or thought on it.

Mr. MILLER. Well, I think you might start—and I am speaking only on a curbstone opinion—with the constitutional provision, as you quite rightly point out, of the Senate's role in the treaty making process. If you look at the whole entire spectrum of the international agreements of the United States, there may be some way in which you can reconcile this. You might even get House approval that the House would go along that certain agreements should be submitted to the Senate. There would be nothing in my judgment that is unconstitutional in the House passing such a resolution as that, and submitting certain agreements to the Senate; in other words, requiring both House and Senate action for that.

Now, whether that is wise or not. I am not sure. Again, all I am saying is that you have two bodies. The Constitution establishes them. It is clear enough that the Senate has its role in the treaty making process. It is clear enough also that the bulk of agreements are not treaties.

#### NUMBER OF TREATIES VERSUS EXECUTIVE AGREEMENTS

Whether your figures are accurate or not—I don't mean to dispute them, Senator, but I don't think they are completely accurate.

Senator CLARK. What figures?

Mr. MILLER. The figures you had in your original statement when you introduced your resolution.

Senator CLARK. On what?

Mr. MILLER. On the number of treaties vis-a-vis executive agreements.

Senator CLARK. I see.

Mr. MILLER. I took part in hearings, as a consultant to Senator Ervin, a few years ago on the resolution that Mr. Leigh quoted. At that time I understood there was some testimony, I think we got some testimony from the State Department, that literally hundreds, even thousands of agreements which could be called executive agreements

were entered into, say, pursuant to the NATO Treaty, which spell out details of the NATO Treaty, for example.

So, the numbers depend on the definition. What is an executive agreement? Now that all depends. Is it a lease of a base or some such thing as that?

Senator CLARK. Yes. I see what you are saying.

I think the figures we used were simply out of the "Congressional Quarterly." What definition was being used there is open to question.

Mr. MILLER. I think that the imbalance is hopelessly the other way; that the number is exponentially greater in favor of executive agreements over treaties. Treaties are used, as you have pointed out, by and large, with some notable exceptions, for the relatively inconsequential.

Senator CLARK. Yes.

Mr. MILLER. The desire to use executive agreements is a very understandable desire on the part of the Executive, no doubt, because of flexibility, because of not having to come up here and get two-thirds of the Senate, because of secrecy, because of other matters.

Senator CLARK. Democracy is a very difficult process.

#### DESIRABILITY OF LESS THAN TWO-THIRDS VOTE

Mr. MILLER. But the question is, and this again will come back to the point which I think is desirable, the less than two-thirds vote for approval of treaties if you go the treaty route, if you want to get the Senate this far into the situation, then I think a less than two-thirds vote would be desirable.

#### RECONCILIATION OF SENATE RESOLUTION 486 WITH H.R. 4438

Senator CLARK. Let me close by saying that within the next few days or weeks, if you have any particular thoughts on some way we could combine Senate Resolution 486 with H.R. 4438, or at least whether there may be some kind of reconciliation between the two, which seems to me very desirable, we would appreciate receiving them.

Mr. MILLER. If I might I will study them both.

Senator CLARK. I wish you would.

Mr. MILLER. I will send you a letter.

Senator CLARK. That would be very kind of you because I think that is an area we are very interested in exploring and which we feel might be fruitful. We are not here just to hold hearings and talk about it. We want to find a practical way to move ahead with this problem.

Mr. MILLER. Excuse me, Senator. I did quote from a letter I sent to Congressman Morgan on June 9 in connection with that bill. I have my only copy here with me. I would ask one of your staff to phone Mr. George Berdes over there to get a copy of the statement on my position as I looked at H.R. 4438 last month.

Senator CLARK. Good. We will do that.

Mr. MILLER. I will leave my letter to Congressman Morgan with you to copy if you wish.

Senator CLARK. We will make a copy.

[The letter referred to follows:]

JUNE 9, 1976.

HON. THOMAS E. MORGAN,  
*Chairman, Committee on International Relations, House of Representatives,  
 Congress of the United States, Washington, D.C.*

DEAR MR. MORGAN: This letter is sent following a telephone conversation with Mr. George S. Berdes, who asked me whether I could testify on H.R. 4438 dealing with "international executive agreements which create a national commitment." I told Mr. Berdes that I could not do so, owing to a trip to Europe, but would be willing to submit a written statement for the record. This is that statement.

In general, I believe that H.R. 4438 is legally sound and also that it is wise from a policy standpoint. Nevertheless, I do not think that it goes far enough; and as will be explained below, I think it should be expanded to cover other executive agreements.

Specifically: 1. There is a need for Congress to participate more fully in the formulation of foreign policies by international agreements. The Constitution makes foreign affairs a matter of shared control between the Executive and Congress. See Dahl, *Congress and Foreign Policy* (1950). The vastly increased use of "pure" executive agreements, entered into on the authority of the President alone, during this century has had the result of removing the bulk of agreement-making from Congressional scrutiny. It is true, to be sure, that Congress has often delegated power to the Executive to enter into such agreements—as in, for example, the reciprocal trade acts. But those "Congressional-Executive" agreements are a classic example of the way in which power over foreign affairs is shared between the two branches of government. Cf. *United States v. Guy W. Capps, Inc.*, 348 U.S. 296 (1954). The net consequence of the expanded use of executive agreements of both types is to remove from Congress a substantial and growing part in its constitutional role of helping to formulate foreign policy. As the late Professor Alexander Bickel said in 1971 before the Senate Foreign Relations Committee when it was considering the Case-Zablocki Bill, "Congress has too long tolerated, indeed cooperated in, a diminution of its role in the conduct of foreign affairs and in the decision of questions of war and peace—a diminution that approaches the vanishing point. In my judgment, the balance of power between Congress and the President ought to be redressed in this respect. It is up to Congress to do the redressing. . . ." Hearings before the Committee on Foreign Relations, U.S. Senate, 92d Cong., 1st Sess. on S. 596, entitled "Transmittal of Executive Agreements to Congress."

I should like, in the interests of saving time, to incorporate by reference the testimony both of Professor Bickel and of Professor Ruhl Bartlett that is reprinted in the Hearings cited above. Their testimony summarizes the pertinent arguments for increased Congressional participation in the promulgation of executive agreements.

2. The role of Congress has not only been diminished; there is a manifest failure on the part of Congress to adhere to its Constitutional duties and responsibilities. Over the past few decades, Congress has all too willingly ceded power over a range of activities to the Executive; this includes domestic as well as foreign affairs. It is my considered opinion that such a cession of power is unconstitutional—in theory, although not so of course by way of Supreme Court decisions. The Supreme Court, however, is not the only organ of government entitled to make Constitutional decisions. Even absent a judicial determination, there is a persuasive and compelling argument to be made that Congress cannot under the Constitution abdicate its powers as it has done in recent decades. Professor Gerhard Casper of the University of Chicago Law School has written an article, soon to be published, that deals with this point; and I should like to associate myself with the theme of that article.

3. Re Sec. 3(b) of H.R. 4438: This provides merely for submitting executive agreements to the Congress, with such agreements becoming effective if both Houses fail to pass a concurrent resolution disapproving an agreement. To me, this is too restrictive in that it takes affirmative action of both Houses to negate an agreement. It would be preferable, if the present terms regarding national commitments in H.R. 4438 are retained that no such executive agreement should go into force unless it had the affirmative vote of approval of both Houses of

Congress. National commitments as defined in Sec. 6 of the bill are far too important to let slip by without action by Congress—which is the way that H.R. 4438 now reads. If Congress is to perform its Constitutional responsibilities in an adequate manner then it should affirmatively confront each such executive agreement. Not to do so would mean that H.R. 4438 would be more hortatory than significant; it would enable Members of Congress to think they have done something without actually, in most instances in my judgment, doing so. Recommendation: Rewrite Sec. 3(b) to require an affirmative vote of acquiescence in the executive agreements covered by the bill.

4. The late Justice Robert H. Jackson stated in his now famous concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952): "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoined upon the branches separateness but interdependence, autonomy but reciprocity." The forgotten part of separation of powers is cooperation between the branches, without which American government could not operate. See Woodrow Wilson, *Constitutional Government in the United States* (1908). The question, here and elsewhere, is not whether the branches (Congress and President) will cooperate but how they will do so. If it is accepted that the President does have Constitutional power to enter into executive agreements without prior authorization by statute or treaty, or subsequent approval by Congress, then the crucial question becomes that of how Congress can cooperate in the formulation of foreign policy. It should be noted, en passant, that the Supreme Court has never expressly upheld as against Congress the power of the Executive to enter into such agreements. *United States v. Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942) dealt merely with the relative dignity in constitutional law of such agreements and the laws of the several states. Even *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which is often employed by Executive Branch lawyers to assert Executive supremacy in the conduct of foreign relations, did not so hold on its facts. Those lawyers rely on some obiter dicta stated by Justice Sutherland, dicta that is usually taken out of context. Said Sutherland: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." Taken alone that might be considered to uphold Executive "sovereignty" in foreign relations; but is in a mere dictum, not necessary to the decision of the Court (which dealt with delegation of Congressional power) and indeed not argued before the Court. Furthermore, lawyers in the Executive Branch usually omit the further statement of Sutherland, ending the sentence quoted above: "... but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." It is to be emphasized that this latter part of Justice Sutherland's dictum largely cancels the first part—and thus renders it even more nugatory. In short, your Committee should not be misled by Executive Branch lawyers who speak glibly as if the Supreme Court has held that the President is "the sole organ" of foreign affairs. That, emphatically, is not so.

The question thus becomes: What are the "applicable provisions of the Constitution" about which Justice Sutherland spoke? As "national commitment" is defined in Sec. 6 of H.R. 4438, certainly it is a fair implication from the following parts of Art. I, Sec. 8 of the Constitution that Congress indeed should share in the making of such commitments:

"Congress shall have power . . . to provide for the common defense . . .

"To declare war . . .

"To raise and support armies . . .

"To provide and maintain a navy . . .

"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. . . .

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"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and *all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.*" (Emphasis added.)

Surely it is a fair, even compelling, inference to be drawn from the foregoing that power over "national commitments" is shared between Congress and the President—who can draw only on his commander-in-chief power and his power to appoint and receive ambassadors to balance the express grants to Congress.

If, then, the power over national commitments is a shared power—to repeat, in my judgment, this is beyond argument—how can Congress participate in the process? I have suggested one way in paragraph 3, above, and I repeat that recommendation at this time.

Note, furthermore, the underscored part of Art. I, Sec. 8, set out above. It is the forgotten—by Congress, by the Executive, by the courts, by commentators generally—part of the Constitution. By its plain meaning, as amplified by Chief Justice John Marshall in *McCulloch v. Maryland* (1819), Congress has both express and implied powers. As Professor Bartlett has said, see Hearings cited above, "The President is assigned certain duties and rights, but none of them can be carried into effect without legislative sanction whenever the Congress chooses to exercise its constitutional power." Chief Justice Marshall, in the *McCulloch* case, did not of course deal with the power of Congress over the President; but that point was certainly taken care of by Justice Hugo Black's opinion for the Court in the *Youngstown* case, *supra*. No doubt Executive Branch lawyers would—and do—prefer to ignore the underscored portion of Art. I, Sec. 8, but the language is there—and it is high time that Congress began to exercise its Constitutional powers under it. I would go one step further and say this: Congress not only has the power to act under that clause, it has the duty to do so. Its failure thus far to employ that clause is, in my judgment, a dereliction of Constitutional responsibilities.

5. There can be no question, however, that Congress must act in accordance with the Constitution. This presents the most difficult part, speaking Constitutionally, of H.R. 4438, namely, the provision for a concurrent resolution in Sec. 3(b). By the plain language of Art. I, Sec. 7 of the Constitution, a resolution must be presented to the President for his consideration and/or veto. I assume that there is no intention or desire to submit a concurrent resolution to the President. This presents Constitutional difficulties which have not been confronted or resolved by the judiciary. Congress cannot, indeed should not, have it both ways: If it wishes to hold the Executive's feet to the Constitutional fire, then it too must abide by the terms of the fundamental law.

Nevertheless, and this is where my recommendation set forth above becomes particularly important, a failure on the part of Congress to act on an executive agreement would nullify it and such negative action need not be presented to the President. If, therefore, the bill were to be rewritten to require affirmative Congressional action, the purpose of H.R. 4438 would be carried out without running into the Constitutional obstacle—possible obstacle, I should say—of Art. I, Sec. 7. This, then, would be in accordance with any other bill that is submitted to Congress in the Administration's program: It requires affirmative action to put it into effect. That would take care of the Constitutional problems.

6. Two other matters bear mention:

(a) I perceive no reason why H.R. 4438 should be limited to executive agreements concerning national commitments. Surely a persuasive case can be made for extending the power of review—of Congressional oversight—of such agreements to cover all of those of any significance, whether or not they deal with military affairs. If it is argued, as it will be by the State Department, that there are thousands of such agreements and it would be too great a burden to have oversight of them, then Congress should consider establishing some means of screening the important from the trivial, with the Members considering only the former. This leads me to the other matter.

(b) As now constituted, Congress has neither the staff nor the expertise, speaking generally, to perform satisfactory oversight of international executive agreements, particularly if—as I think such oversight should—all such agreements are submitted to Congress. It would be my recommendation, stated here only in general terms but which I will spell out in greater detail if you wish, that Congress establish some agency, or perhaps vest the General Accounting Office, with authority to do that initial screening. Congress has failed to keep up with the times. It is still mired in procedure that may have made sense at one time in our history, but which today make it relatively impotent vis-a-vis the Executive. It is past time for that to be corrected.

7. In sum, H.R. 4438 is a good idea, but it does not go far enough.

Two other matters are worth your consideration. (a) The bill has no way by which submission of executive agreements can be insured. There is growing evidence that the Case-Zablocki bill is not being adhered to by the State Department. (The General Accounting Office has some data on this.) How, then, can you be sure of the bona fides of Executive Branch officials? This bears serious attention. (b) It is my understanding that Executive Branch lawyers have interposed no objection to H.R. 3884, passed by the House last year and now before the Senate, even though it contains a provision for Congressional veto by concurrent resolution. (This is the so-called "National Emergencies Act.") If this be so, then I think that spokesmen for the Executive Branch should be required to explain the inconsistency.

I hope that this is of some help to you and your colleagues in your consideration of this important matter.

Your sincerely,

ARTHUR S. MILLER, *Professor of Law.*

P.S.—A note on my qualifications. I am a professor of constitutional law at George Washington University's National Law Center. For several years I was a consultant to the Senate Subcommittee on Separation of Powers, which a few years ago held hearings on bills similar to H.R. 4438. Much of my professional career during the past quarter-century has been devoted to questions dealing with the powers of the three branches of the federal government.

Mr. MILLER. I will drop the caution, however, that from my limited experience in working as a consultant from time to time up here on the Hill, it is far easier to say what should be than to sit down and draft something.

Senator CLARK. That is fine. That is a good start.

Thank you very much for waiting for 3 hours to testify.

We are very appreciative.

Thank you.

Mr. MILLER. Thank you.

Senator CLARK. This committee stands adjourned.

[Whereupon, at 1:07 p.m., the committee adjourned, subject to the call of the Chair.]



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