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EXPANSION OF PRESIDENTIAL AUTHORITY IN FOREIGN AFFAIRS: THE TREATY-MAKING POWER AS INTERPRETED BY THE SUPREME COURT

Brent J. Belnap*

In creating an apparently simple and distinct division of powers in the Constitution outlining legislative and executive responsibilities to conduct foreign affairs, the Founding Fathers did not foresee fundamental constitutional questions that would arise as a result of increasingly complex foreign entanglements. Despite the intended clarity of the Constitution, which is surprisingly reticent about foreign affairs powers, numerous cases have arisen necessitating the clarification of the proper role of the Executive in exercising his constitutional authority.

Recognizing the political nature of many of the cases which have come before it, the Supreme Court has refrained from limiting or separating presidential duties into a specific sphere of authority; rather, the Court has upheld the evolution of the Chief Executive into his current role as world leader and spokesman in the international arena for the United States. The political, and thus non-justiciiable, nature of his office has forced the Court to support and promote the increasing power of the President. Thus, since the early days of the Republic, he has steadily accumulated immense powers in the field of foreign affairs.

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Early issues over the treaty-making power were often concerned with the newly acquired lands from Spain and France. As the people of the nation began to inhabit these lands, the treaty-making power regarding (vis-a-vis) the "sovereign" Indian nations was frequently questioned. Rapid changes in international relations set the stage for constitutional conflict between the political branches of government. As the United States became more involved in international affairs, especially following its burst upon the world scene of diplomacy and commerce after World War I, the expanded powers of the Executive in foreign affairs were subjected to suit.

Over the years the Supreme Court has declared the authority of the President's treaty-making power to be almost absolute in scope, limited only by those restrictions imposed by Congress. This paper will review chronologically those landmark cases delineating the evolution of the treaty-making power of the Chief Executive, marking how his responsibility over foreign affairs has grown.

John Locke, in The Second Treatise of Government, defends the occasional need for an executive to act "without the prescription of the law and sometimes even against it." Giving his reasons, he states that

in some governments the lawmaking power is not always in being, and is usually too numerous and so too slow for the dispatch requisite to execution, and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public.

Careful to limit the power of the Executive, the Framers of the Constitution granted the
President "titular" responsibility for the nation's diplomatic relations in concert with, and subject to, the will of Congress. Construed to be a rather benign but symbolic power, the Constitution granted to the President the power, "by and with the Advice and Consent of the Senate to make Treaties," and the power to nominate and appoint "Ambassadors, and other public Ministers and Consuls." The Chief Executive was thus entrusted with flexible power over foreign affairs to present a unitary voice on behalf of the United States. To Congress the Constitution granted the power to try "Offenses against the Law of Nations" and, most importantly, "To declare War." Both the President and Congress were given authority over distinct fields of international affairs, i.e., the President was assigned diplomatic authority, while Congress, the more representative body, was granted power to define the conduct and provide support for the military. It would appear that the division of powers intended by the Framers of the Constitution was carefully and clearly formulated.

The Federalist Papers, a sort of textual exegesis on the Constitution, reveals best the diplomatic scope of foreign affairs intended exclusively for the presidency. John Jay, in The Federalist No. 64, outlined the President's unique role in implementing treaties:

It seldom happens in the negotiation of treaties of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. . . . The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.
Jay said further that because of the tenuous condition of foreign affairs, where time and circumstance require special judgment, the President is best suited to manage:

Thus we see that the constitution provides that our negociations [sic] for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from secrecy and dispatch on the other.

In The Federalist No. 75, Alexander Hamilton stated that the treaty-making power did not fall exclusively within either the executive or the legislative branches, although it will be found to partake more of the legislative than of the executive character. . . . The qualities elsewhere detailed, as indispensable in the management of foreign negotiations, point out the executive as the most fit agent in those transactions. . . .

To have entrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the president, in the conduct of foreign negotiations.

Thus the apparent intent of the Framers, according to Jay and Hamilton, was to grant the Senate firm control over the negotiation process, while permitting the Executive a supportive voice.

During his first term as President, George Washington developed the practice of appointing envoys without the consent of the Senate. The President firmly believed that the Senate would function as an advisory council for conducting
foreign affairs. Over difficulties encountered with the Senate in working out Indian treaties in 1789, Washington was led to remark that he "would be damned if he ever went there again." Though refusing to appear before the Senate, Washington continued to transmit only limited information concerning the scope of any further treaties. Presidents Adams and Jefferson followed Washington's practice. Thus the role of the Senate in actively negotiating treaties was reduced to giving or withholding consent to agreements in which it took no active part. The President, therefore, assumed the power to refuse to submit a signed treaty to the Senate, as that body had not participated in its formulation.

Soon after the ratification of the Constitution, the judiciary effectively eliminated itself from playing a role in adjudicating treaties. As early as 1796, the Supreme Court in Ware v. Hylton listed several crucial questions concerning adjudication of treaty violations. It noted that "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice."10

In 1801, speaking on behalf of the Court in United States v. Schooner Peggy, Chief Justice Marshall noted the President's exclusive role in foreign affairs:

The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of
parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted.

President Thomas Jefferson, in considering legal methods of acquiring the Louisiana Purchase of 1803, believed it necessary to adopt a constitutional amendment. Finding this narrow interpretation of the Constitution impractical for quickly acquiring the territory, he next considered submitting the proposal to both houses of Congress. Wanting to expedite the purchase even sooner, Jefferson used the treaty power, requiring only the approval of the Senate. Of course, it was necessary for both houses of Congress to approve the appropriation bill.

Following involvement in the War of 1812, Chief Justice Marshall in 1818, in United States v. Palmer, recognized the Executive's inherently superior role in foreign policy. He noted that questions [concerning treaty provisions] are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations.

Eleven years later, in Foster & Elam v. Neilsen, Chief Justice Marshall reaffirmed that a treaty "addresses itself to the political, not the judicial department."

Charles Williams sought reimbursement from the Suffolk Insurance Company of Boston for a schooner seized near the Falkland Islands by the government of Buenos Aires (later Argentina). The executive branch had repeatedly refused to
recognize the territorial claims by Buenos Aires over the Falklands. In Williams v. Suffolk Insurance Company, the Supreme Court upheld the right of the ship's captain, who was acting according to the stated interests of the United States, to travel in waters near the Falklands; and the Suffolk Insurance Company was ruled liable to pay for the loss of the vessel. The Court declared:

When the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department. And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.

Beginning in the 1830s, the trend for presidents to conduct foreign affairs through executive
agreements increased rapidly. During the first fifty years following 1789, twenty-seven executive agreements were entered into by presidents without the consent of the Senate, while sixty treaties were ratified. During the next fifty years, 238 executive agreements were signed as compared with 215 treaties. For the third fifty years, 917 executive agreements and only 524 treaties were signed. As early as 1845, John C. Calhoun, in commenting upon the procedure used to annex Texas, noted the extra-constitutional method used by the President and Congress in formulating agreements to resolve questions international in scope. He commented:

It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses, instead of two-thirds of the Senate.

This same means was employed fifty years later when the United States acquired the Hawaiian Islands. Unable to muster a two-thirds majority in the Senate to approve the annexation measure, President McKinley pushed a joint resolution through both houses of Congress. This time, the constitutionality of such an action was brought before the Supreme Court. In Hawai'i v. Mankichi, the Court approved the annexation. Justice White even implied in one of the Insular cases that acquisition of territory outside the North American continent required the approval of both houses of Congress. By 1912, in B. Altman & Co. v. United States, the Supreme Court recognized executive agreements as equal to treaties, greatly expanding the powers of the President over foreign affairs.
The Court in Doe v. Braden continued to uphold the personal discretion of the Executive in matters of foreign affairs. The question of whether the King of Spain had the power to annul a grant (important in this case in determining land ownership in Florida) was deemed political and not judicial. The Court refused to go behind the treaty, saying that the President and the Senate ought to determine who was empowered to represent and speak for Spain. Since they had recognized the King as possessing this power, it was not up to the Court to inquire whether they had erred. Chief Justice Taney stated that "the courts of justice had no right to annul or disregard any . . . [treaty] provisions, unless they violate the Constitution of the United States." He continued:

It would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Such decisions, the Court decided, were the exclusive prerogative of the political branches. In De Lima v. Bidwell the Supreme Court continued to uphold its position of non-interference with the political branches over international affairs by avoiding the question of whether the House of Representatives was required to appropriate funds to activate a treaty.

In B. Altman & Company v. United States, the Supreme Court ruled on the validity of
executive agreements as treaties. Consistent with the terms of the Tariff Act of 1897, the United States had entered into a reciprocal trade agreement with France, whereby duties on certain imports were set at fixed rates. Under Presidents McKinley and Roosevelt, numerous such executive agreements had been negotiated under this act. In this case the Federal Government surprisingly argued against the proposition that an executive agreement had the same efficacy as a treaty.

The plaintiff brought suit against a high duty on imported statuary which he believed should have fallen under the negotiated agreement with France. He argued that the agreement was a treaty; that the terms "agreement," "treaty," and "convention" had historically been used interchangeably; that the Supreme Court had upheld numerous acts of Congress authorizing the contraction of executive agreements; and that these acts were deemed by Congress as formal, legal, and binding upon all parties, i.e., they were treaties. The plaintiff went so far as to argue that the treaty-making power of the President, in conjunction with the Senate, was subordinate to the legislative powers of Congress.

The question before the Court was whether it had jurisdiction, according to the Circuit Court of Appeals Act of 1891, to hear the case. That act retained the right of the Supreme Court to review cases involving the construction of treaties. Justice Day, commenting upon executive agreements, ruled on behalf of the plaintiff that executive agreements were, in effect, treaties, and that the Court had jurisdiction. He declared:

While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, sec. 3, was not a treaty possessing the dignity of one
requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act.

The Court thus recognized the authority of the President to conclude commercial agreements with foreign countries, equal in authority to treaties, as prescribed by Congress.

An act passed by Congress in 1918 implemented the Migratory Bird Treaty signed between Great Britain and the United States in 1916 designed to protect the migratory birds of Canada and the United States from extinction. Although a law had earlier been passed by Congress legislating the terms of the second law, it had been held unconstitutional. This second act, now claimed to be in force by the treaty, was also challenged. The conflict arose in Missouri over restrictions on hunting migratory birds, with Missouri declaring violation of the Tenth Amendment.

In Missouri v. Holland, Justice Holmes declared: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." The distinction made here, but often
ignored, is that there is a fundamental difference between treaties and executive agreements.

We do not mean to imply that there are no qualifications to the treaty-making power. . . . It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress [i.e., reference to the previous act passed by Congress or an executive agreement granted congressional authority] could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution.

In May 1934 Congress passed a joint resolution empowering the President to forbid the sale of arms to Bolivia and Paraguay, who were then fighting over disputed territory. President Roosevelt issued a proclamation, in force for 1½ years, embargoing the sale of arms to either nation. The Curtiss-Wright Export Corporation was indicted for selling arms to Bolivia during this period.

In United States v. Curtiss-Wright Export Corp., the Supreme Court ruled again on the validity of executive agreements. This time the appellees declared that Congress had abdicated its constitutional functions by delegating them to the President, saying that the joint resolution left the enforcement decision "to the uncontrolled discretion of the President."
Justice Sutherland stated that the contention between treaties and executive agreements was unimportant. "The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs." The issue of whether the resolution constituted a delegation of powers by Congress to the President was invalid in this case; the President is delegated authority to conduct the nation's foreign affairs. Judicial responsibility in determining the proper execution of enumerated powers necessary and proper for the functioning of government, said Sutherland, applies only to the nation's internal affairs. Justice Sutherland stated further:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

In speaking further on executive authority, Justice Sutherland stated:

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, but which . . . must be exercised in subordination to the applicable provisions of the Constitution.
Justice Sutherland strongly stressed the President's need for "discretion and freedom from statutory restriction," citing President Washington's refusal to lay before Congress the documents of negotiation for the Jay Treaty. The Court thus upheld executive agreements as valid, declaring them binding and constitutional by time-honored legislative practice.

In 1933 the United States and the Soviet Union signed the Litvinov Assignment, part of an executive agreement allowing each nation to settle claims still standing since the Russian Revolution. Each nation was assigned title to claims within its borders. The Federal Government attempted to recover funds deposited with August Belmont, a private banker who passed away in the interim. Belmont's executors claimed protection under New York law prohibiting confiscation of property.

The Supreme Court in United States v. Belmont quickly declared that "no state policy can prevail against the international compact here involved." The President, who had recognized the Soviet government and had established normal relations, created, in effect, an "international compact . . . And in respect of what was done here, the Executive had authority to speak as the sole organ" of the United States. The Court declared further that an international compact "is not always a treaty which requires the participation of the Senate." The Court pointed out the difference, citing B. Altman & Co. v. United States. In that case the Court upheld executive agreements arising under the Tariff Act of 1897, "authorizing the President to conclude commercial agreements with foreign countries in certain specified matters." In commenting upon the Altman decision, Justice Sutherland said:

We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and
proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act.\(^2\)

Thus the Court placed those executive agreements properly concluded under Altman and Curtiss-Wright precedents on par with officially ratified treaties and extended the arguments used for treaties in Missouri v. Holland to all executive agreements.\(^3\)

A second case stemming from the Litvinov Assignment was United States v. Pink,\(^4\) which concerned the recovery of funds from a Russian insurance company. The Supreme Court upheld the validity of the agreement, explaining that the resolution of claims between both nations was vital in normalizing relations. Thus two cases discussing the binding power of executive agreements reconfirmed the agreements to be enforceable as treaties.

As late as 1953, Chief Judge Parker of the Fourth Circuit declared that "it is clear that the executive may not through entering into such an agreement [with Canada restricting potato importation not authorized by Congress] avoid complying with a regulation prescribed by Congress."\(^5\)

On appeal the Supreme Court in United States v. Capps\(^6\) overturned the decision by the lower court, finding that the agreement did not contravene a congressional statute.

In Reid v. Covert,\(^7\) the Supreme Court overturned its own earlier ruling on the same case two years earlier. Mrs. Clarice Covert had been convicted of killing her husband, a sergeant in the U.S. Air Force, while residing in England. A civilian, she was tried by a court-martial for the murder. This time the Court ruled that military law cannot be applied to dependents of servicemen living in foreign countries. Justice
Black, speaking on behalf of the Court, ruled against an executive agreement between the United States and Great Britain granting United States military courts exclusive jurisdiction in Great Britain over servicemen or their dependents for crimes committed. His opinion outlines the restrictions placed upon the Executive in formulating agreements. Quoting the supremacy clause of the Constitution (art. VI), he states:

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights--let alone alien to our entire constitutional history and tradition--to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were
designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined. 

Therefore, agreements cannot bypass prohibitions or grants of power of the Constitution, but law can be formulated through them, as upheld in Missouri v. Holland.

Justice Brennan, delivering the opinion of the Court in Baker v. Carr, summarized the Court's authority to rule upon treaty law. He declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. . . . A court can construe a treaty" for an answer, but will not do so "in a manner inconsistent with a subsequent federal statute." In outlining further the power of the courts to decide upon treaty law, Justice Brennan, speaking for the Court, declared:

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the Executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the Executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that
statutes designed to assure American neutrality have become operative.

Here the authority of the Executive is beholden to judicial interpretation once the necessary political decisions by him have been made.

On December 23, 1978, President Carter notified Taiwan of the United States' intention to terminate the Mutual Defense Treaty between the two nations, a precursor to the normalization of relations with the People's Republic of China. Senator Goldwater filed suit against President Carter for the unilateral cessation of the treaty, although a clause permitted its abrogation after one year's notice. A case involving eight United States senators, Goldwater v. Carter, directly confronted the constitutional question of whether the approval of the Senate was required in the termination as well as the ratification of treaties.

The U.S. Court of Appeals for the District of Columbia concurred with the President's actions, rejecting the district court's decision that the President's powers in foreign affairs were plenary. The appellate court noted the President's role as the first and last voice in implementing treaties.

The Supreme Court vacated judgment and remanded the case to the district court, instructing it to dismiss the complaint. The view that this case involved a political question did not command a majority of the Court. Justice Rehnquist, in a concurring opinion, argued that the issue was political in part because the Constitution "is silent as to [the Senate's] participation in the abrogation of a treaty;" therefore, the question was "controlled by political standards" and was non-justiciable. Justice Powell rejected the "political question" precedent and stated that the issue was not yet ripe for adjudication, Congress not yet being united in its response to
the President. Justice Brennan, in a dissenting opinion, also rejected the political question issue; however, he recognized the precedents that "firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."

It has been argued that presidential authority in foreign affairs is the product of past unchallenged uses of power. Thus, in Dames & Moore v. Regan, the Supreme Court, following the Iranian hostage crisis, recognized the power of the Executive to settle foreign claims because congressional acquiescence to this long-standing presidential practice had created a powerful precedent.

On November 4, 1979, Iranian Islamic fundamentalists overran the United States embassy in Tehran and held their American hostages captive for 444 days. Ten days after their capture, on November 14, 1979, President Carter blocked the removal or transfer of all property and interests of the government of Iran subject to the jurisdiction of the United States, as United States practice had solidly established the resolution of claims settlements through executive agreements.

The day before leaving office, on January 19, 1981, President Carter issued a series of executive orders implementing the terms of agreements between the United States and Iran negotiated through Algeria calling for the establishment of an Iran-United States claims tribunal to arbitrate claims not settled within six months. Pursuant to the agreement, on January 20, 1981 the American hostages were released by Iran. One month later, President Reagan reaffirmed the prior executive orders of President Carter and required banks holding Iranian assets to transfer them to the Federal Reserve Bank in New York. President Reagan suspended all further claims
based on the resolution of the tribunal, saying they would no longer have effect in United States courts.

Dames and Moore challenged the President's position, claiming the President had no authority to implement the Algerian Agreement that, in effect, amounted to the taking of property in violation of the Fifth Amendment. The Supreme Court upheld the validity of the Algerian Agreement between the United States and Iran creating the international tribunal, stating that no violation of the Fifth Amendment had occurred.

The Court held that under the terms of the International Emergency Economic Powers Act of 1977, intended by Congress to severely limit the emergency powers of the Executive, the President was authorized to nullify any attachments upon Iranian assets following November 14, 1979. It also ruled that, pursuant to the Economic Powers Act and the Hostage Act, the President's authority in dealing with international crises was proper. Since Congress had implicitly approved the practice of claims settlement by executive agreement, the President was also able to suspend the claims. However, the Court, by striking down a section of the United States Code forbidding further claims, ignored the important treaty exception, thereby allowing further claims to be heard in the United States Claims Court.

One scholar, in discussing the far-reaching implications of the Dames & Moore decision, declares the decision incorrect. He states that instead of extending the powers of the President in foreign affairs, the decision may have had the opposite effect. The Supreme Court ruled section 1502 (the treaty exception) of Title 28 of the United States Code unconstitutional, and thus "the Court created a significant problem for the conduct of United States foreign policy." He continues: "The Supreme Court departed from
this tradition [relief of claims in the political arena] by recognizing an unprecedented judicial remedy for those whose interests are adversely affected by United States foreign policy. . . . [The Court] ignored a longstanding jurisdictional principle" known as the Meade Doctrine which bars judicial reexamination of international arbitration awards, thereby creating "potential complications for the conduct of United States foreign policy."61

Since President Washington's administration, successive presidents have taken advantage of their special access to information and the lack of clear constitutional definitions in dealing with other nations to formulate foreign policy. As can be seen, the complexity of the treaty-making cases such as Dames & Moore indicates the fundamental constitutional challenges in defining the enormous scope of power of the Chief Executive. The ability to act swiftly, secretly, and unitarily is a powerful force of the President.

The Supreme Court recognized early the responsibility of the Executive in formulating the nation's foreign policy. Later, as congressional acquiescence in foreign affairs decisions became a noticeable trend, presidential immunity from congressional restriction was often upheld by the Court because of the undefined scope and relative freedom of the President's foreign policy powers.

Yet the issue of how broad those powers are remains unresolved. Splits in the Supreme Court, as indicated in the discussion of Goldwater v. Carter, reveal a lack of a coherent approach to the definition of what constitutes a political question. Meanwhile, the use of executive agreements, now held to be legally binding as treaties when compatible with the Constitution, continues to increase. Further challenges in foreign policy and litigation in America's courts await as the three branches of federal government continue to
fill in the gray areas of the treaty-making power in the Constitution.
ENDNOTES


2 U.S. Const. art. II, sec. 2, cl. 2.

3 Ibid., art. I, sec. 8, cl. 10.

4 Ibid., art. I, sec. 8, cl. 11.


6 Ibid., 64:328.

7 Ibid., 75:379-81.


9 3-U.S. (3 Dallas) 199 (1796).

10 Ibid., p. 260.

11 5 U.S. (1 Cranch) 103 (1801).

12 Ibid., pp. 109-10.

13 McDougal and Lans, 54:262.

14 16 U.S. (3 Wheaton) 610 (1818).
15 Ibid., p. 634.


17 Ibid., p. 314. The distinction between self-existing and non-self-existing treaties traces back to this case.

18 38 U.S. (13 Peters) 415 (1839).

19 Ibid., p. 420.


21 190 U.S. 197 (1903).

22 57 U.S. (16 Howard) 635 (1853).

23 Ibid., p. 657.

24 182 U.S. 1 (1900).

25 224 U.S. 583 (1912).

26 Ibid., pp. 584-90.

27 Ibid., p. 601.

28 252 U.S. 416 (1920).

29 Ibid., p. 433.

30 Ibid., p. 433.

31 299 U.S. 304 (1936).

32 Ibid., p. 309.

33 Ibid., p. 315.

34 Ibid., p. 319.

Numerous federal cases have upheld executive agreements as treaties, including Yassin v. United States, 76 F. Supp. 509 (Ct. Cl. 1948); Hughes Aircraft Co. v. United States, 534 F.2d 899 (Ct. Cl. 1976); and Weinberger v. Rossi, 456 U.S. 25 (1982).

315 U.S. 203 (1942).

U.S. v. Capps, 204 F.2d 655 (4th Cir. 1953).


Ibid., pp. 16-17.

396 U.S. 186 (1962).

Ibid., p. 195.

Ibid., p. 196.


Ibid., pp. 1002-6.

Ibid., p. 997.
55 Ibid., p. 1007.


59 This case was the first this century to come before the Supreme Court involving an international claims settlement. The first case interpreting the treaty exception was United States v. Weld, 127 U.S. 51 (1888). It is this case which the Court cited, noting there must be a direct link between a treaty and a claim, thereby overturning the Meade Doctrine (mentioned below).


61 Ibid., pp. 318-19.
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