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## Executive Agreements in the Aftermath of Weinberger v. Rossi: Undermining the Constitutional Treaty-Making Power

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# Executive Agreements in the Aftermath of Weinberger v. Rossi: Undermining the Constitutional Treaty-Making Power

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## **Abstract**

This Note suggests limiting the use of international agreements which are not treaties. To accomplish this, it determines the proper limits of executive agreements and establishes a procedure by which courts should analyze their constitutional validity.

EXECUTIVE AGREEMENTS IN THE AFTERMATH OF  
*WEINBERGER V. ROSSI*: UNDERMINING THE  
CONSTITUTIONAL TREATY-MAKING POWER

INTRODUCTION

The Supreme Court, in *Weinberger v. Rossi*,<sup>1</sup> recently faced the question whether the word treaty in an act of Congress includes executive agreements.<sup>2</sup> In the absence of legislative intent, the Court construed the term treaty to encompass executive agreements.<sup>3</sup>

The United States Constitution expressly mandates that treaties are to be made with the advice and consent of two-thirds of the Senate.<sup>4</sup> An executive agreement is not submitted for Senate approval, but rather is negotiated by the President on the basis of his own constitutional authority<sup>5</sup> or pursuant to specific congressional authorization.<sup>6</sup> By equating these two distinct international instruments, the Supreme Court has placed its imprimatur on a type of compact which is not made pursuant to the Constitution's treaty-making provisions.

Equating executive agreements with treaties raises several constitutional issues. The *Rossi* decision disturbs both the established separation of powers doctrine and the constitutional authority to conduct foreign relations.<sup>7</sup> Because of these adverse domestic effects of attributing to the executive agreement the exalted status of the treaty, it is necessary to limit the use of international agreements which are not treaties.<sup>8</sup> To accomplish this, it is essential to determine the proper limits of executive agreements and to establish a procedure by which courts should analyze their constitutional validity.

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1. 456 U.S. 25 (1982).

2. *Id.* at 26.

3. *Id.* at 36.

4. U.S. CONST. art. II, § 2, cl. 2.

5. See *infra* notes 59-61 and accompanying text.

6. See *infra* text accompanying notes 54-55.

7. See *infra* text accompanying notes 76-90.

8. See *infra* text accompanying notes 109-24.

## I. WEINBERGER V. ROSSI

A. *Background of the Decision*

In 1968, the President negotiated with the Republic of the Philippines a Base Labor Agreement<sup>9</sup> (BLA) providing for the preferential hiring of local nationals at United States military facilities in the Philippines.<sup>10</sup> The agreement was not submitted for the advice and consent of the Senate.<sup>11</sup> Rather, it was concluded pursuant to a 1944 act of Congress<sup>12</sup> authorizing the President to use "such means as he finds appropriate to withhold or to acquire and to retain such bases . . . and the rights incident thereto . . . for the mutual protection of the Philippine Islands and of the United States."<sup>13</sup>

Three years after the conclusion of the BLA,<sup>14</sup> Congress enacted section 106 of the Military Selective Service Act<sup>15</sup> (the Act), which bars employment discrimination against American citizens or their dependents on United States overseas military bases unless permitted by "treaty."<sup>16</sup>

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9. Agreement Relating to the Employment of Philippine Nationals in the United States Military Bases in the Philippines, May 27, 1968, United States-Philippines, 19 U.S.T. 5892, T.I.A.S. No. 6542 [hereinafter cited as BLA].

10. *Id.* at 5892-93, T.I.A.S. No. 6542, at 1-2. Article I of the BLA provides:

1. *Preferential Employment*—The United States Armed Forces in the Philippines shall fill the needs for civilian employment by employing Filipino citizens except when the needed skills are found, in consultation with the Philippine Department of Labor, not to be locally available, or when otherwise necessary for reasons of security or special management needs, in which cases United States nationals may be employed.

*Id.*

11. *Weinberger v. Rossi*, 456 U.S. 25 (1982).

12. *Acquisition of Military and Naval Bases by United States*, 22 U.S.C. § 1392 (1976).

13. *Id.*

14. BLA, *supra* note 9.

15. Military Selective Service Act of 1967, Pub. L. No. 92-129, §106, 85 Stat. 348, 355 (1971) (codified at 5 U.S.C. § 7201 note (1976)). At the time Congress enacted § 106 of the Military Selective Service Act, there were 12 other executive agreements in force providing for the preferential hiring of local nationals on United States overseas military bases. *Rossi*, 456 U.S. at 32. Since the enactment of § 106, four more such agreements have been concluded. *Id.*

16. Section 106 provides in pertinent part:

Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States.

Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (1971).

In 1978, American game room managers at the United States Naval Station at Subic Bay were discharged from their positions in accordance with the BLA so that their jobs could be filled by Filipino nationals.<sup>17</sup> Subsequently, they brought suit<sup>18</sup> against the Secretary of Defense and the Secretary of the Navy, charging discrimination on the basis of citizenship under title VII of the Civil Rights Act of 1964,<sup>19</sup> and alleging a violation of section 106 of the Act.<sup>20</sup>

The issue confronting the courts was whether Congress intended the "treaty" exemption in section 106 to include executive agreements such as the BLA, or whether it intended to limit the exemption to article II treaties.<sup>21</sup> The district court held that the word "treaty" in section 106 means "any binding agreement between the governments of two nations."<sup>22</sup> The Court of Appeals for the District of Columbia Circuit reversed, finding that the term "treaty" was used "in the sense set forth in article II of the Constitution."<sup>23</sup> The Supreme Court, in turn, reversed the court of appeals, upholding the validity of the BLA as within the treaty exemption provision of section 106.<sup>24</sup>

### B. *The Supreme Court's Analysis in Rossi*

Justice Rehnquist stated that the question presented in *Rossi* was one of statutory construction.<sup>25</sup> He began by examining the language of the statute,<sup>26</sup> and indicated that the word "treaty" has

17. *Rossi*, 456 U.S. at 28.

18. *Rossi v. Brown*, 467 F. Supp. 960 (D.D.C. 1979), *rev'd*, 642 F.2d 553 (D.C. Cir. 1980), *rev'd sub nom. Weinberger v. Rossi*, 456 U.S. 25 (1982).

19. 42 U.S.C. § 2000e (1976). The district court, holding that the term "treaty" in § 106 should be construed to include executive agreements such as the BLA, determined that "[t]he specific provision that the Department of Defense may discriminate on the basis of citizenship if provided by treaty therefore controls over the general provisions of Title VII." *Rossi*, 467 F. Supp. at 968. The question of a violation of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), was not addressed by the court of appeals, *Rossi*, 642 F.2d at 561 n.36, nor raised in the petition for *certiorari*. Thus, the Supreme Court did not consider the issue. *Rossi*, 456 U.S. at 36 n.18.

20. Pub. L. No. 92-129, § 106, 85 Stat. 348, 355 (1971).

21. *Weinberger v. Rossi*, 456 U.S. at 26, *rev'g Rossi v. Brown*, 642 F.2d at 553 (D.C. Cir. 1980), *rev'g* 467 F. Supp. at 961 (D.D.C. 1979).

22. *Rossi*, 467 F. Supp. at 961.

23. *Rossi*, 642 F.2d at 555.

24. *Rossi*, 456 U.S. at 36.

25. *Id.* at 28.

26. *Id.* at 28-29.

more than one meaning.<sup>27</sup> He noted that international law does not distinguish between agreements designated as "treaties" and other international agreements.<sup>28</sup>

The Court also stated that numerous federal statutes reflect congressional inconsistency in distinguishing between article II treaties and other international agreements.<sup>29</sup> The Court then reviewed the legislative history of the Act.<sup>30</sup> It found that the conference reports<sup>31</sup> and congressional debates<sup>32</sup> are "entirely silent as to the scope of the 'treaty' exception."<sup>33</sup> Furthermore, the reports failed to mention twelve other presidential agreements that provide for preferential hiring of local nationals.<sup>34</sup> In scrutinizing the congressional purpose of section 106, the Supreme Court determined that "Congress was principally concerned with the financial hardship to American servicemen which resulted from discrimination against American citizens at overseas bases."<sup>35</sup> The Court stated that "no support whatsoever" was provided for the proposition that "Congress was . . . concerned with limiting the authority of the President to enter into executive agreements with the host country."<sup>36</sup>

The Supreme Court also relied heavily on the case of *B. Altman & Co. v. United States*.<sup>37</sup> In *Altman*, decided seventy years

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27. *Id.* at 29-30.

28. *Id.* at 29. See also RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 71 introductory note 3, at 73 (Tent. Draft No. 1, 1980) [hereinafter cited as DRAFT RESTATEMENT].

29. *Rossi*, 456 U.S. at 30. The Court observed that Congress has explicitly mentioned article II treaties in the Fishery Conservation and Management Act, 16 U.S.C. § 1802(23) (1976), and the Arms Control and Disarmament Act, 22 U.S.C. § 2573 (1976). *Rossi*, 456 U.S. at 30. However, Congress has used the term "treaty" to refer to international agreements other than article II treaties in the Postal Reorganization Act, 39 U.S.C. § 407(a) (1976), wherein Congress authorized the Postal Service, with the consent of the President, to "negotiate and conclude postal treaties or conventions." *Id.*, quoted in *Rossi*, 456 U.S. at 31.

30. *Rossi*, 456 U.S. at 32-35.

31. Extension and Revision of the Draft Act and Related Laws, H.R. REP. NO. 433, 92d Cong., 1st Sess. 31 (1971).

32. 117 CONG. REC. 14,389 (1971).

33. 456 U.S. at 33.

34. *Id.*

35. *Id.* at 32-33.

36. *Id.* at 33. The court of appeals, reviewing the identical house reports, concluded that exercising a check on the President's power to negotiate and conclude agreements discriminating against Americans was precisely the intent of Congress. 642 F.2d at 560 n.30.

37. 224 U.S. 583 (1912).

earlier, the Supreme Court held that the term "treaty" in section 5 of the Circuit Court of Appeals Act of 1891,<sup>38</sup> included international agreements made by the President pursuant to congressional authorization.<sup>39</sup>

Justice Rehnquist explained that the statute in *Altman* "in no way affected the foreign policy of the United States."<sup>40</sup> He therefore concluded that "[i]n the case of a statute such as § 106, that does touch upon the United States' foreign policy, there is even more reason to construe Congress' use of 'treaty' to include international agreements as well as Art. II treaties."<sup>41</sup> Accordingly, the BLA and twelve other discriminatory military base pacts were upheld by the Supreme Court.<sup>42</sup>

### *C. Interpretation of the Decision*

Justice Rehnquist stated the issue narrowly as one of statutory construction,<sup>43</sup> holding that for the purpose of section 106 of the Act, the word "treaty" was intended to include executive agreements such as the BLA.<sup>44</sup> However, the case may have broader implications. It is arguable that the *Rossi* decision raises executive agreements to the status of article II treaties, which are approved by two-thirds of the Senate.

As the Supreme Court relied on *Altman* for the proposition that a congressional-executive agreement may be accorded the same status as an article II treaty,<sup>45</sup> future courts may use *Rossi* to sup-

38. Circuit Court of Appeals Act, ch. 517, § 5, 26 Stat. 826, 827-28 (1891).

39. *Altman*, 224 U.S. at 601. Referring to a commercial reciprocity agreement entered into with France under the Tariff Act of 1897, ch. 11, 30 Stat. 151, the Court stated that: "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 . . . ." *Altman*, 224 U.S. at 601.

40. *Rossi*, 456 U.S. at 31.

41. *Id.*

42. *Id.* at 35-36.

43. *Id.* at 26. Justice Rehnquist stated:

The question in this case is whether "treaty" includes executive agreements concluded by the President with the host country, or whether the term is limited to those international agreements entered into by the President with the advice and consent of the Senate pursuant to Art. II, § 2, cl. 2, of the United States Constitution. This issue is solely one of statutory interpretation.

*Id.*

44. *Id.* at 36.

45. *Id.* at 31.

port the same proposition. Furthermore, numerous federal statutes exist which, like section 106, contain the nebulous term "treaty," yet have no legislative history specifying the proper scope of the word.<sup>46</sup> Thus, future courts construing the term "treaty" in a federal statute in which legislative intent is lacking, will be faced with the Supreme Court's presumption in *Rossi* that "some affirmative expression of congressional intent . . . is required in order to construe the word 'treaty' in § 106 as meaning only Art. II treaties."<sup>47</sup> This general presumption raises broad constitutional issues, which are especially significant in relation to the President's constitutional authority to conduct foreign relations.<sup>48</sup>

## II. THE CONSTITUTIONAL BASIS OF TREATIES AND EXECUTIVE AGREEMENTS

The Constitution gives the President the power to make treaties, but only with the advice and consent of two-thirds of the Senators present.<sup>49</sup> Thus, while the authority to make treaties is listed in article II, which concerns the executive power,<sup>50</sup> the

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46. *See, e.g.*, 10 U.S.C. § 955(a) (Supp. III 1979) ("When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders, the Secretary concerned may, with the concurrence of the Attorney General, transfer to said foreign country any offender against chapter 47 of this title. Said transfer shall be effected subject to the terms of such treaty and chapter 306 of title 18, United States Code."); The Armed Forces Act, 10 U.S.C. § 7344 (1976) ("In case of a treaty for the limitation of naval armament to which the United States is a signatory, the President may suspend so much of the authorized naval construction as is necessary to bring the naval aircraft of the United States within the limitations agreed upon. Such a suspension does not apply to aircraft under construction at the time the suspension is made."); Other Applicable Rules of the Internal Revenue Code, 26 U.S.C. § 7852(d) (1976): ("No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title."). Whether the word treaty is meant to include executive agreements in these Acts is left unresolved. *See also* Copyrights, 17 U.S.C. § 104 (1976); Foreign Relations and Intercourse, 22 U.S.C. § 1650a (1976); Shipping, 46 U.S.C. § 135 (1976).

Executive agreements far surpass treaties in number. Since the mid 1950's, the United States has entered into approximately 200 executive agreements each year while only entering into approximately 15 article II treaties in the same period. *See Rovine, Separation of Powers and International Relations*, 52 *IND. L. J.* 397, 406-07 (1977).

47. 456 U.S. at 32.

48. *See infra* text accompanying notes 49-75.

49. U.S. CONST. art. II, § 2, cl. 2.

50. *Id.*



treaty-making process may be best described as a function of a "Fourth Branch of government," the President-and-Senate (in its executive capacity).<sup>51</sup>

Although the Constitution mandates that the treaty-making power should be shared, it "does not expressly confer authority on any branch of government to make international agreements other than treaties."<sup>52</sup> However, courts have recognized on many occasions that executive agreements are valid and enforceable tools of foreign policy.<sup>53</sup>

The term "executive agreement" includes three categories of international agreements negotiated by the President: (1) agreements issued without submission to Congress (solely presidential executive agreements); (2) agreements that supplement existing treaties; and (3) agreements negotiated by the President pursuant to specific congressional authority<sup>54</sup> or issued after approval by joint resolution of Congress requiring simple majorities in both houses (congressional-executive agreements).<sup>55</sup>

Because treaties are the only international agreements described in the Constitution, the constitutional sources of authority for the President and Congress to conclude executive agreements remains subject to debate.<sup>56</sup> As to the solely presidential executive

51. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 148 (1972). Alexander Hamilton explained:

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 elsewhere detailed as 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 portion of the legislative body in the office of making them.

THE FEDERALIST NO. 75, at 466-67 (A. Hamilton) (H. Cabot Lodge ed. 1888), *quoted in* L. HENKIN, *supra*, at 148.

52. L. HENKIN, *supra* note 51, at 173.

53. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912). For a discussion of these cases, see *supra* text accompanying notes 37-39; *infra* text accompanying notes 95-97.

54. The BLA is an example of a congressional-executive agreement of the type negotiated by the President pursuant to specific congressional statutory authority. See *supra* text accompanying notes 9-13.

55. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 188 (1978); Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653, 656-63 (1942); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*:1, 54 YALE L.J. 181, 204-05 (1945).

56. The issue of the constitutionality of executive agreements was zealously debated by constitutional scholars in the 1940's. See, e.g., Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Borchard, *Treaties and Executive Agree-*

agreement, it has been asserted that the President has broad inherent power to conduct foreign affairs.<sup>57</sup> This view, however, has been widely criticized.<sup>58</sup> The more modern view is that presidential authority to enter into international arrangements is derived from

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*ments—A Reply*, 54 YALE L.J. 616 (1945); McDougal & Lans, *supra* note 55, at 216-26. More recently, the question of identifying the constitutional basis for executive agreements has been addressed in hearings of the Senate Committee on the Judiciary, *Congressional Oversight of Executive Agreements on S. 1286 Before the Subcomm. on Separation of Powers on the Judiciary*, 93d Cong., 2d Sess. 1 (1974) [hereinafter cited as *1974 Hearings*], and before the Senate Committee on Foreign Relations, *Transmittal of Executive Agreements to Congress: Hearings on S. 591 Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (1972). In Connection with the passage of the Case Act, 1 U.S.C. § 112b (1979) (requiring the text of any executive agreement to be transmitted to Congress within 60 days of entering into force) and the hearings on the Ervin bill, S. 1286, 93d Cong., 2d Sess. (1974) (authorizing a congressional veto power over executive agreements), the Senate debated the proper foreign policy role of the House in the exercise of its legislative powers under the Constitution and the extent of vested independent presidential power under the Constitution.

57. For example, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), Justice Sutherland stated that although the President is not specifically delegated constitutional power to conclude international agreements other than treaties, this power "nevertheless exist[s] as inherently inseparable from the conception of nationality." *Id.* at 318. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Stewart stated that "[i]n the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *Id.* at 727 (Stewart, J., concurring).

58. The "inherent powers" view has been criticized in dicta by a later case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring). For further criticism of Justice Sutherland's analysis in *Curtiss-Wright*, see Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 490 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981), in which the Supreme Court upheld a presidential order attaching Iranian assets in the United States and suspending the claims of American citizens against the Iranian government. *Id.* at 668. While upholding this exercise of executive power, the Court made it clear that the President's attachment order was issued pursuant to congressional authorization under the International Emergency Economic Powers Act, 50 U.S.C. § 1702 (Supp. III 1979). *Dames & Moore*, 453 U.S. at 662. As to the suspension of claims of American citizens, the Court declined to address the issue of broad presidential authority, stating:

We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But when, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute . . . and when as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

*Id.* at 688. Justice Rehnquist did, however, indicate an unwillingness to accept the *Curtiss-Wright* broad plenary powers approach to foreign affairs, asserting that there are "checks and balances" on such presidential power implicit in the Constitution. *Id.* at 662. For a general discussion of the *Dames & Moore v. Regan* decision, see Note, *Presidential Power and the Iranian Hostage Agreement*; *Dames & Moore v. Regan*, 62 B.Y.U. L. REV. 161 (1982); Comment, *Iranian Assets and Claims Settlement Agreements: A Study of Presidential Foreign Relations Power*, 56 TUL. L. REV. 1364 (1982).

the President's limited article II powers as Commander-in-Chief<sup>59</sup> and diplomatic officer.<sup>60</sup> The President does not have the authority to conclude agreements outside the scope of this limited constitutional prescription.<sup>61</sup>

There is also no consensus as to the constitutional support for congressional-executive agreements.<sup>62</sup> It has been suggested that Congress can combine its legislative powers<sup>63</sup> with the President's authority to negotiate with foreign governments.<sup>64</sup> Some scholars have urged that even if neither the President nor Congress alone has the authority to enter into international agreements, together they embody the national sovereignty in foreign affairs, and therefore may exercise all powers inherent in such sovereignty.<sup>65</sup> Thus, "the powers of the Congress can be superadded to those of the President, and the two sets of powers taken together are plenary."<sup>66</sup> Any type

59. U.S. CONST. art. II, § 2. "The President shall be Commander in Chief of the Army and Navy of the United States . . . ." *Id.*

60. *Id.* art. II, § 3. "[The President] shall receive Ambassadors and other public Ministers . . ." *Id.* For a general discussion of the specific limited constitutional authority of the President, see U.S. DEP'T OF STATE, PUB. NO. 8865, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 296-97 (1975); W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 102 (3d ed. 1971); E. CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 484 (1964); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 5, 55 (1972); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397, 399, 412-13 (1977).

61. W. BISHOP, *supra* note 60; E. CORWIN, *supra* note 60; Berger, *supra* note 60, at 43-44; Rovine, *supra* note 60, at 412-16.

62. See *supra* note 56.

63. U.S. CONST. art. I, § 8. For example, Congress has the power to collect taxes and import duties, to provide for the common defense and general welfare of the United States, to borrow money on the credit of the United States, to regulate commerce with foreign nations, to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States, to coin money and regulate its value, to establish post offices and post roads, to promote the progress of science and useful arts, to define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations, to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water, to raise and support armies, to provide and maintain a navy, to make rules for the government and to regulate land and naval forces, to make all laws which shall be necessary and proper for executing 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. *Id.* Furthermore, Congress "shall have power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States." *Id.* art. IV, § 3, cl. 2.

64. See DRAFT RESTATEMENT, *supra* note 28, § 307 & comment a. See also Comment, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 HARV. INT'L L.J. 421, 439 (1980).

65. See DRAFT RESTATEMENT, *supra* note 28, § 307 reporters' note 1; McDougal & Lans, *supra* note 55, at 238-61.

66. McDougal & Lans, *supra* note 55, at 246.

of congressional-executive agreement would therefore have a valid constitutional basis. Taking this approach to its logical conclusion, executive agreements are interchangeable with treaties. The *Restatement (Revised) of the Foreign Relations Law of the United States*<sup>67</sup> (*Draft Restatement*) is in accord with this view.<sup>68</sup>

Another possible constitutional basis for the congressional-executive agreement is said to be the "necessary and proper" clause of the Constitution.<sup>69</sup> A third proposal suggests that "if the subject matter to be regulated falls within the constitutional powers of Congress, the latter may constitutionally authorize the President to deal with it by negotiation and agreement with other governments, the treaty-making power to the contrary notwithstanding."<sup>70</sup> Examples of Congress' enumerated powers include the power to regulate foreign trade, to provide for the protection of rights in useful inventions, to make rules governing captures on land and water, to establish a uniform rule for naturalization, to establish post offices and post roads, to raise and support armies, and to provide and

67. DRAFT RESTATEMENT, *supra* note 28.

68. *Id.* § 307 comment b.

69. U.S. CONST. art. I, § 8; see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 55, at 177; Ohly, *Advice and Consent: International Executive Claims Settlement Agreements*, 5 CAL. W. INT'L L.J. 271, 273-75 (1975); Note, *Executive Agreements, The Treaty-Making Clause, and Strict Constructionism*, 8 LOY. L.A.L. REV. 587, 612 (1975). It is argued that under the "necessary and proper" clause, U.S. CONST. art. I, § 8, Congress could constitutionally enact legislation authorizing the President to make certain agreements, thus fulfilling its duty to see that the powers of the other branches of government are carried into execution. Note, *supra*, at 612. It is also proposed that:

The "necessary and proper" clause authorizes Congress to pass legislation to effectuate any of its delegated powers under the Constitution. Because Congress can effect the same domestic results by legislation as it can by authorizing a non-treaty agreement, the power to enact legislation suggests that Congress has the power to authorize non-treaty agreements.

Comment, *supra* note 64, at 440.

70. E. CORWIN, *THE PRESIDENT—OFFICE AND POWERS* 215 (4th rev. ed. 1957); see Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States*, 35 ILL. L. REV. 365, 394-95 (1940); Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 345 (1944). See also 1974 Hearings, *supra* note 56, at 5, in which the Subcommittee on Separation of Powers expressed the view that

any reading of the Constitution reveals an intent that Congress should exercise substantial power over the Nation's external affairs; for example, article I, section 8, grants Congress the power to regulate commerce with foreign nations, to declare war, to raise and support armies, and to provide and maintain a navy, all powers inextricably linked with the Nation's external relations.

*Id.*

maintain a navy.<sup>71</sup> Congress also has power to dispose of territory or property belonging to the United States.<sup>72</sup> If acting pursuant to these constitutional powers, Congress can issue directives authorizing the President to negotiate international agreements.

The *Rossi* decision, without analyzing the constitutional validity of congressional-executive agreements such as the BLA, could be interpreted to create a presumption that "treaties" and congressional-executive agreements are synonymous within the meaning of a federal statute in the absence of clear congressional intent to the contrary.<sup>73</sup> This presumption contradicts both the treaty-making<sup>74</sup> scheme envisioned in the Constitution and the separation of powers among the branches of the federal government.<sup>75</sup>

### III. DOMESTIC RAMIFICATIONS

#### A. Separation of Powers and Checks and Balances

The separation of powers doctrine is one of the most important principles of the American constitutional system.<sup>76</sup> Inherent in the doctrine is the idea that each branch of government should defend its constitutional functions from intrusion by either of the other branches.<sup>77</sup> Substituting congressional-executive agreements for article II treaties violates this established principle.<sup>78</sup>

The Constitution nowhere authorizes the combined houses of Congress to participate in making any international compact; it provides only for Senate prerogative in this area.<sup>79</sup> Congress' lim-

71. U.S. CONST. art. I, § 8. *See supra* note 62.

72. U.S. CONST. art. IV, § 3.

73. *See supra* text accompanying note 47.

74. *See supra* text accompanying notes 49-52.

75. *See infra* text accompanying notes 76-81. *See also 1974 Hearings, supra* note 56, at 3-5. Recognizing that other types of international agreements exist, the subcommittee on separation of powers is "firmly of the opinion that policymaking in foreign affairs was never intended to be concentrated in one branch of Government. It is a shared power, subject, as are other constitutional powers, to the 'checks and balances'—that is, the principal of separation of powers—implicit in the Constitution." *Id.*

76. E. CORWIN, *supra* note 70, at 9.

77. *Id.*

78. If the congressional-executive agreement is to be substituted for an article II treaty, the Senate's characteristic function as the sole treaty-making participant will be intruded upon by the House of Representatives. Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 625 (1945).

79. L. HENKIN, *supra* note 51, at 164.

ited constitutional authorization to legislate in the areas of foreign commerce, tariffs, and the mails<sup>80</sup> cannot support the proposition that Congress has the power to authorize the executive to make any agreement in any area of United States foreign relations.<sup>81</sup>

Another alarming domestic implication of *Rossi* is that the use of the congressional-executive agreement necessarily abrogates many of the "checks and balances" inherent in the treaty-making process.<sup>82</sup> For example, if an executive agreement were entered into pursuant to a vague directive allowing for broad presidential authority,<sup>83</sup> specific provisions of such authorized executive agreements would not have to be approved by the legislature. Furthermore, congressional-executive "treaties" based on vaguely formulated delegations diminish the Senate's ability to ensure that "treaties" are of a type acceptable to the voters.<sup>84</sup> Each provision of an article II treaty, however, is approved by the Senate.<sup>85</sup> The Senate frequently has imposed conditions which modify United States international obligations,<sup>86</sup> at other times, the Senate has

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80. See *supra* note 63.

81. See *supra* text accompanying notes 79-80.

82. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-4, at 171 (1978). "That the power to conclude executive agreements coincides perfectly with the treaty power seems untenable, since such a conclusion would emasculate the Senatorial check on executive discretion that the Framers so carefully embodied in the Constitution." *Id.* See also 1974 Hearings, *supra* note 56, at 5:

It is important to note that Congress is deeply involved only in treaties. Congressional-executive international agreements, which of course involve legislative action, may be analogized to the vague and nebulous delegations of power to administrative agencies. Power to conclude this middle type of agreement is ultimately derived from or dependent on Congress (either by statute or treaty), but, as with so many of the delegations of power to the agencies of public administrations, the Executive is usually left with wide discretion within hazy and uncertain limits.

*Id.*

83. The BLA was negotiated pursuant to such a broad, vague congressional directive. See *supra* text accompanying notes 12-13. It is arguable that in enacting § 106, Congress meant to "withdraw a portion of that broad power which it granted to the President in the Act of 1944." *Rossi*, 642 F.2d at 556 n.30.

84. It has been suggested that agreements, like treaties, should be subject to the "salutary influence of public opinion," and that "the country should not be bound by the stipulations of executive agreements without its knowledge and without opportunity to protest." I. MATTHEWS, *AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES* 545-46 (1938).

85. L. WILDHABER, *TREATY-MAKING POWER AND THE CONSTITUTION* 63 (1971).

86. For example, the United States Senate, on June 21, 1976, passed a resolution of advice and consent to ratification of the Treaty of Friendship and Cooperation between the

exercised control over the treaties' impact on the United States.<sup>87</sup>

The requirement of a two-thirds Senate vote provides an important "check" upon an ambitious President<sup>88</sup> since it is unlikely that a President's party will consistently control over two-thirds of the Senate. However, if a President were of the same party as the majority in both houses, the congressional-executive agreement, which makes bare majorities adequate,<sup>89</sup> would not operate as an effective "brake" on the autonomy of the presidential treaty-making power.<sup>90</sup>

### B. *Impact on Domestic Law of Spreading Use of Executive Agreements*

The effect of treaties on domestic law is well established. Under the Constitution, treaties as well as acts of Congress are the

United States and Spain, Treaty of Friendship and Cooperation, Jan. 24, 1976, United States-Spain, 27 U.S.T. 3005, T.I.A.S. No. 8360, providing for an explicit understanding that the treaty "does not expand the existing United States defense commitments in the North Atlantic Treaty Area or create a mutual defense commitment between the United States and Spain." U.S. DEP'T OF STATE, PUB. NO. 8908, reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 214-15 (1976). The resolution also provided that Senate advice and consent to ratification should be understood to apply only to the initial five year period of the treaty and that an extension shall require the further advice and consent of the Senate. *Id.*

87. The Senate's reservation to the Commercial Convention with Cuba, Dec. 11, 1902, United States-Cuba, ch. 1, 33 Stat. 2136, 2143 (1903), required that the Convention should not take effect in the United States until approved by Congress. Some Senate reservations to the Treaty of Versailles, June 28, 1919, 225 Parry's T.S. 188-406, were designed to insure Congress a major role in the implementation of the treaty in the United States. See Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 125-28, 140-42 (1920). The Senate has also provided that nothing in a treaty shall enhance the President's powers or detract from or add to the powers of Congress. For example, the Senate consented to ratification of the Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 1751, T.I.A.S. No. 4891, 888 U.N.T.S. 179, on condition that:

[N]othing in the convention, or the advice and consent of the Senate to the ratification thereof, confers any power on the Executive to bind the United States in substantive matters beyond what the Executive now has, or to bind the United States without compliance with applicable procedures imposed by domestic law, or confers any power on the Congress to take action in fields previously beyond the authority of Congress, or limits Congress in the exercise of any power it now has.

*Id.*

88. Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 660 (1945).

89. *Id.*

90. J. HENDRY, TREATIES AND FEDERAL CONSTITUTIONS 78 (1975).

supreme law of the land.<sup>91</sup> Therefore, a treaty may supersede an act of Congress and state laws.<sup>92</sup> The domestic effect of an executive agreement is not as certain.<sup>93</sup> However, there has been a trend toward imputing to executive agreements the same force of law which attaches to treaties.<sup>94</sup>

In *United States v. Belmont*<sup>95</sup> and *United States v. Pink*,<sup>96</sup> the Supreme Court expressed its view that a state law must give way when inconsistent with the provisions of an executive agreement.<sup>97</sup>

91. The supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

92. In *Whitney v. Robertson*, 124 U.S. 190 (1888), the Supreme Court declared that: By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other . . . .

*Id.* at 194. A later treaty was given effect in the face of an earlier inconsistent statute in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). In *Schooner Peggy*, an armed ship, the property of citizens of the French Republic, was arrested off the United States coast and would have been condemned pursuant to an act of Congress. *Id.* at 103-04. However, the ship was protected under the terms of the Amity, Commerce and Friendship Treaty between the United States and France, Amity, Commerce and Friendship Treaty, Feb. 6, 1778, United States-France, ch. 67, 8 Stat. 12, which was entered into subsequent to congressional enactment and, therefore, the treaty provision directing restoration prevailed. *Id.* at 103, 108-09. In *Cook v. United States*, 288 U.S. 102 (1933), a self-executing treaty, enacted subsequent to a congressional act, had the effect of superseding the act, so far as inconsistent with the act.

*Id.* at 118-19.

93. Note, *Executive Agreements and the Intent Behind the Treaty Power*, 2 HASTINGS CONST. L.Q. 757, 760 (1975).

94. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

95. 301 U.S. 324 (1937).

96. 315 U.S. 203 (1942).

97. *Id.* at 230-31; *Belmont*, 301 U.S. at 331. Both decisions involved an executive agreement with the Soviet Union, the Litvinoff-Roosevelt Debt Assignment of 1933, reprinted in II Foreign Relations of the United States 804 (1933). In *Pink*, the Court stated: "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." 315 U.S. at 230-31.



The effect of an executive agreement on federal legislation, however, is uncertain. Only the *Altman* and *Rossi* decisions are on point.<sup>98</sup> The *Draft Restatement*<sup>99</sup> takes the position that "[t]he United States may conclude international agreements other than treaties, and such agreements may have the status of law in the United States. If so, they supersede inconsistent prior federal law."<sup>100</sup> The *Draft Restatement* distinguishes between different classes of executive agreements and their proper domestic effects. According to the drafters:

An executive agreement pursuant to a treaty draws its authority from that treaty and has the same effect as the treaty to supersede federal statutes or state law or an earlier inconsistent agreement. If Congress, by joint resolution, authorizes the President to conclude an international agreement, or approves such an agreement, Congress may thereby also authorize superseding any prior inconsistent federal legislation (or international agreement) . . . although authorization to make executive agreements superseding federal law should not be inferred lightly.<sup>101</sup>

The *Draft Restatement* notes that the impact of an executive agreement made solely under the President's constitutional authority on an earlier federal statute has not been established.<sup>102</sup> In *United States v. Guy W. Capps, Inc.*,<sup>103</sup> however, the Court of Appeals for the Fourth Circuit held that a presidential executive agreement, unlike a treaty, could not prevail over an earlier act of Congress.<sup>104</sup>

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98. *Rossi*, 456 U.S. 25 (1982); *Altman*, 224 U.S. 583 (1912).

99. DRAFT RESTATEMENT, *supra* note 28.

100. *Id.* at 135 comment a.

101. *Id.*

102. *Id.*

103. 204 F.2d 655 (4th Cir. 1953) (executive agreement between the United States and Canada concerning exportation permits for seed potatoes held not authorized by Congress and a contravention of provisions of statute dealing with same subject matter), *aff'd on other grounds*, 348 U.S. 296 (1955).

104. *Capps*, 204 F.2d at 659-60. The court of appeals found that the executive agreement infringed on Congress' power to regulate commerce. *Id.* at 658. The Supreme Court affirmed on the ground that the evidence was insufficient to prove the underlying breach of contract claim, but refused to rule on the actual validity of the executive agreement. *Capps*, 348 U.S. at 297. Another instance where an executive agreement will be struck down is when it impinges on rights granted by the Constitution. *See Reid v. Covert*, 354 U.S. 1, 16-19 (1957) (executive agreement to subject overseas civilian dependents of United States armed forces personnel to military court martials held to violate constitutional right to due process and jury trial).

The *Altman* and *Rossi* decisions are in accord with the *Draft Restatement*.<sup>105</sup> By holding in both cases that the term "treaty" includes executive agreements,<sup>106</sup> the Supreme Court allows agreements inconsistent with federal legislation to become the "law of the land." Thus, an agreement which was not ratified by two-thirds of the Senate will be able to supersede a congressional act and state law.

This result is alarming because congressionally unapproved, and possibly unpopular, provisions of international agreements in nontreaty form are now becoming a third source of domestic law having no basis in the Constitution. This third source of law may reappear in the future because numerous federal laws exist containing the term "treaty" in which Congress has neglected to define the scope of the word.<sup>107</sup> Many occasions may arise, therefore, when an executive agreement will override other United States laws under the *Rossi* decision.

Invalidating all executive agreements is highly undesirable because executive agreements are binding on the United States as international obligations regardless of whether they are upheld as domestic law.<sup>108</sup> However, in light of their potentially adverse domestic ramifications, there is a need to limit the scope of executive agreements.

#### IV. THE SUGGESTED LIMITS FOR EXECUTIVE AGREEMENTS

Courts may effectively restrict the scope of congressional-executive agreements by inquiring whether they were concluded pursuant to proper constitutional authority.<sup>109</sup> In accordance with the intent of the Framers, the use of the congressional-executive agree-

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105. DRAFT RESTATEMENT, *supra* note 28, § 135(1). According to the *Draft Restatement*, "a provision of an [international] agreement that becomes effective as law in the United States supersedes any inconsistent . . . preexisting provision in the law of the United States." *Id.* According to *Rossi*, the BLA, even though it was logically inconsistent with § 106, superseded it. *See Rossi*, 456 U.S. at 32. In *Altman* the commercial reciprocity agreement prevailed over the inconsistent § 5 of the Circuit Court of Appeals Act. *See Altman*, 224 U.S. at 600-01.

106. *Rossi*, 456 U.S. at 36; *Altman*, 224 U.S. at 601.

107. *Rossi*, 456 U.S. at 31.

108. DRAFT RESTATEMENT, *supra* note 28, § 135(3). "The superseding of a rule of international law or provision of international agreement as domestic law of the United States by a subsequent act of Congress does not relieve the United States of its international obligation or of the consequences of violation." *Id.*

109. *See supra* text accompanying notes 71-72.

ment should be limited to matters which fall within the enumerated powers of Congress.<sup>110</sup> Solely presidential agreements within the President's constitutional powers as Commander-in-Chief<sup>111</sup> or diplomatic officer<sup>112</sup> should also be upheld.<sup>113</sup>

The theory that Congress and the President together can super-add their powers to form a valid constitutional basis for all congressional-executive agreements is without constitutional support<sup>114</sup> because the Constitution does not delegate to Congress the authority to conclude international agreements.<sup>115</sup> However, a constitutionally valid congressional-executive agreement may span the same subject matter as a treaty.<sup>116</sup> In light of this inevitable overlap, two options exist. Either, Congress and the President may, at their discretion, conduct foreign relations through a constitutionally valid congressional-executive agreement or a treaty, or they may use a congressional-executive agreement if limited to those matters which should be the proper focus of a nontreaty instrument.

Congress and the President should not have unfettered discretion in choosing whether to employ executive agreements or treaties.<sup>117</sup> The treaty-making power is explicitly granted in the constitution while the constitutionality of executive agreements can at best only be inferred.<sup>118</sup> Furthermore, treaties have an exalted place in domestic law.<sup>119</sup> Therefore, criteria must be established to further limit the scope of constitutional nontreaty agreements.

The "importance standard" limits executive agreements to matters which are informal in nature, of mere administrative char-

110. See *supra* note 63 and accompanying text.

111. See *supra* note 59 and accompanying text.

112. See *supra* note 60 and accompanying text.

113. See *supra* notes 59-61 and accompanying text. Unlike the *Altman* decision, in which the Court upheld the constitutional validity of the reciprocal trade agreement, 224 U.S. at 598, the *Rossi* Court neglected to inquire into the constitutional basis for the BLA.

114. See *supra* text accompanying notes 78-81.

115. See *id.*

116. L. WILDHABER, *supra* note 85, at 117.

117. According to the *Draft Restatement*, the judgment as to the form of instrument to be employed is a political one. DRAFT RESTATEMENT, *supra* note 28, § 307 comment b. However, in accordance with constitutional doctrine, Congress can only delegate to the President those powers which it is constitutionally authorized to legislate domestically. See L. TRIBE, *supra* note 82, §§ 5-17, at 285.

118. See *supra* text accompanying note 52.

119. See *supra* notes 91-92 and accompanying text.

acter, routine, unimportant, or previously authorized by Congress.<sup>120</sup> The "durability standard" requires that agreements "embracing continuous executory obligations" and "permanent transactions" be treaties, while agreements of "temporary interest" may be concluded in nontreaty form.<sup>121</sup> Although these standards in the abstract may appear to be easily applied, they raise acute problems of definitional vagueness and subjectivity.

The Department of State has issued guidelines for delineating the proper scope of executive agreements and treaties.<sup>122</sup> The criteria to examine are:

- a) The extent to which the agreement involves commitments or risks affecting the Nation as a whole;
- b) Whether the agreement is intended to affect State laws;

120. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 670 (1944). In developing the criteria for the "importance" test, Borchard relied on the theories of Emmerich de Vattel, a Swiss writer and jurist, who distinguished forms of international agreements as follows:

A treaty . . . [is] a pact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time . . . . Pacts which have for their object matters of temporary interest are called agreements, conventions, compacts. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these pacts are executed once for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty exists.

*Id.* at 668 (quoting E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Fenwick trans. 1758)). Proponents of the "importance" test argue that the compact clause of the United States Constitution, art. I, § 10, cl. 3, permitting states to "enter into any Agreement or Compact with another State, or with a foreign Power" with the consent of Congress but forbidding states to "enter into any Treaty," *id.* cl. 1, relegates all international agreements not designated as treaties to subjects of minor importance. See Note, *supra* note 93, at 761-62. The Treaty Powers Resolution, S. 536, 95th Cong., 2d Sess., 124 CONG. REC. 28,545 (1978), shows that some Senators advocate an "importance" test. The resolution provides that "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. U.S. DEP'T OF STATE PUB. NO. 8908, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 256 (1976).

121. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 668 (1944). "International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties . . . . [T]hose involving arrangements of a more or less temporary nature usually take the form of executive agreements." Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939).

122. DEP'T OF STATE, CIRCULAR NO. 175, 11 FOREIGN AFFAIRS MANUAL 710 (1955); U.S. DEP'T OF STATE, PUB. NO. 8809, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 201 (1974).

- c) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d) Past United States practice with respect to similar agreements;
- e) The preference of the Congress with respect to a particular type of agreement;
- f) the degree of formality desired for an agreement;
- g) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h) The general international practice with respect to similar agreements.<sup>123</sup>

There is no constitutional, statutory, or case law standard for distinguishing between treaties and executive agreements.<sup>124</sup> Therefore, the State Department's restrictions for the use of congressional-executive agreements are the best formulation available and should be employed in restricting the scope of executive agreements.

#### V. JUDICIAL REVIEW OF EXECUTIVE AGREEMENTS: PROPOSED ANALYSIS

Future courts faced with the issue presented in *Rossi* and *Altman* should engage in a three-step analysis. The first question a court should address is whether there was valid constitutional authority to conclude such an executive agreement.<sup>125</sup> If Congress and

123. *Id.*

124. The district court in *Dole v. Carter*, 444 F. Supp. 1065 (D.C. Kan.), *motion for injunction pending appeal denied*, 569 F.2d 1109 (10th Cir. 1977), stated that no constitutional standard exists for line-drawing between treaties and presidential agreements. *Id.* at 1070. In holding that President Carter's decision to return various Hungarian regalia to Hungary did not require the treaty process, the court considered the fact that the agreement involved "no substantial ongoing commitment on the part of the United States . . . and contemplates American action of an extremely limited duration in time." *Id.*

125. *See supra* notes 109-13 and accompanying text. It may be argued that such a constitutional analysis is subject to the "political question doctrine" and is thus inherently nonjusticiable. L. TRIBE, *supra* note 82, § 3-16, at 72-73. However, the political question doctrine "does not deprive Courts of all power to interpret a constitutional provision: it retains the power to determine whether a particular congressional or executive action comes within the terms of the constitutional grant of authority." *Id.* §§ 3-16 at 73. The Supreme Court, in *Goldwater v. Carter*, 444 U.S. 996 (1979), held that the president's unilateral decision to terminate a treaty was a "political" and therefore nonjusticiable question because it involved "the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." *Id.* at 1002. Prime considerations of the Court were the "absence of any constitu-

the President are found to have constitutional power, the court should then consider whether it was appropriate for the President to use a nontreaty instrument rather than seek an article II treaty.<sup>126</sup> Only after completing the first two steps of the analysis should a court turn to available evidence of legislative intent. If clear congressional intent indicates that the term "treaty" was used in its constitutional article II sense, then a court should give effect to such legislative purpose and construe the term narrowly. However, if there is no indication of congressional intent, the *Rossi* decision suggests that a court presume the term "treaty" to include congressional-executive agreements.<sup>127</sup> Because the interchangeability of executive agreements with treaties is not desirable,<sup>128</sup> the proposed requirement that courts look into the constitutional authority and subject matter of the executive agreement limits this presumed interchangeability when Congress is silent.

This limitation is in accord with congressional desire not to exalt executive agreements to the level of treaties.<sup>129</sup> The Senate did

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tional provision governing the termination of a treaty and the fact that different termination procedures may be appropriate for different treaties." *Id.* at 1003. The analysis proposed for future courts faced with a *Rossi* problem will not require examination of nonjusticiable issues. The Constitution enumerates specific congressional powers. *See supra* note 63. Courts are merely advised to determine whether in fact Congress has exceeded its specific constitutional authority in authorizing the President to conclude an international agreement.

Courts have analyzed the constitutionality of acts of Congress by examining what powers are vested in Congress under the Constitution. *Davis v. Boston & M.R. Co.*, 89 F.2d 368, 372 (1st Cir. 1937). When the Supreme Court was faced with the issue of whether certain provisions of an act of Congress conflicted with the Constitution, the Supreme Court expressed its position that the constitutionality of a congressional enactment may be reviewed:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

*United States v. Butler*, 297 U.S. 1, 62 (1936). As the Supreme Court stated in *Baker v. Carr*, 369 U.S. 186 (1962), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. "The doctrine of which we treat is one of 'political questions', not of political cases. The courts cannot reject as 'no lawsuit' a bona fide controversy as to whether some action dominated 'political' exceeds constitutional authority." *Id.* at 217.

126. *See supra* notes 109-13 and accompanying text.

127. *See supra* notes 120-23 and accompanying text.

128. *See supra* notes 76-108 and accompanying text.

129. *See, e.g.*, Case Act, 1 U.S.C. § 112b (1977) (requiring that any international agreement other than a treaty be transmitted to Congress no later than 60 days after the agreement has entered into force). The popularly named Case Act, which received unanimous Senate approval in 1971 and passed the House in 1972, represents the final version

not consent, for example, to ratification of the Vienna Convention on the Law of Treaties<sup>130</sup> because the Senate objected to the Convention's general usage of the term "treaty."<sup>131</sup> The Senate insisted on inserting qualifying language that "treaty" means only a treaty enacted with the advice and consent of the Senate.<sup>132</sup>

There are no constitutional grounds to suggest that the President has discretion to choose between treaties and executive agreements when negotiating United States international obligations.<sup>133</sup> The *Rossi* presumption, by raising executive agreements to the level of treaties, gives the President this option. Future courts, by engaging in a three-step analysis of executive agreements, can prevent this interchangeability by scrutinizing their constitutional authority

of the Transmittal Act of 1972. S. 3475, 92d Cong., 2d Sess., 118 CONG. REC. 5787-88 (1972). The passage of the 1972 Transmittal Act (Case Act) has been interpreted as a congressional reaction to the President's increasing use of executive agreements and circumvention of legislative prerogative in the conduct of foreign affairs. Berger, *supra* note 60, at 3, 35. Enthused by the successful passage of the Case Bill, S. 596, 92d Cong., 1st Sess., 118 CONG. REC. 1904-10 (1972), Senator Samuel Ervin shortly thereafter introduced a bill that would have given Congress the power to veto any executive agreement concluded by the President within 60 days after its transmittal to Congress. S. 3475, 92d Cong., 2d Sess., 118 CONG. REC. 5787-88 (1972). The Ervin bill passed the Senate in 1974, S. REP. NO. 1286, 93 Cong., 2d Sess. (1974). The House, however, refused to consider the bill in that session or thereafter, thus dooming the "congressional veto" bill to defeat. The 1974 Hearings, *supra* note 56, in which the wisdom of the Ervin "congressional veto" bill was debated, however, reveals a strong senatorial desire "to prevent the use of executive agreements to bypass the treaty-making provisions of the Constitution." *Id.* at 14.

Furthermore, in the early 1950's, Senator Bricker proposed a constitutional amendment aimed at limiting presidential discretion in concluding executive agreements. The Bricker Amendment movement is additional evidence of a senatorial desire not to exalt executive agreements to the level of treaties. Section three of one version of the Bricker Amendment, which proposed that "Congress shall have power to regulate all executive and other agreements with any foreign or international organization," Revised Version of S.J. Res. 1, 83d Cong., 1st Sess. § 3, 99 CONG. REC. 6777, 6777-78 (1953), was actually passed by the Senate Committee on the Judiciary. *Id.* In 1954, however, a less ambitious compromise version of the Amendment received a vote of 60 in favor and 31 against, thus lacking only one vote for the necessary two-thirds Senate majority. S.J. Res. 181, 83d Cong., 2d Sess., 100 CONG. REC. 13,456 (1954). For an extended discussion of the Bricker Amendment, see Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953).

130. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679.

131. For a general discussion of the Committee on Foreign Relations of the United States Senate rejection of the Convention, see U.S. DEP'T OF STATE, PUB. NO. 8809, *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 195-97 (1974).

132. *Id.*

133. See *supra* text accompanying notes 73-81.

and subject matter. This approach is most in accord with constitutional mandates and the Senate's views.

### CONCLUSION

In *Rossi*, the Supreme Court, by construing the term "treaty" to include executive agreements barring clear congressional intent to the contrary, essentially grants a license to the President and Congress to utilize the congressional-executive agreement at their discretion. In doing so, the Court failed to recognize the distinctive character of an article II treaty.

Creating an alternative method for concluding "treaties" poses a danger to the fundamental principles of American government. The Constitution designates a treaty as the "supreme law of the land." Identifying congressional-executive agreements with "treaties" raises this less formal instrument to a status which it has not been constitutionally accorded. Furthermore, the congressional-executive agreement lacks the political and constitutional protections inherent in the treaty-making process. The Senate's characteristic function in approving treaties is either eliminated or usurped by a mere majority of both houses of Congress depending upon the type of congressional-executive agreement concluded. The Executive is accorded virtual autonomy in the formation of international agreements.

Pursuant to constitutional doctrine, Congress and the President may engage in joint action to conclude certain agreements in nontreaty form. However, the interchangeable use of these two instruments is clearly undesirable and a violation of constitutional mandate. Thus, the use of the congressional-executive agreement should be restricted to subject matter relating to the enumerated powers of Congress and the President.

Future courts faced with a *Rossi* issue should initially scrutinize the constitutional basis for the congressional-executive agreement in accordance with constitutional principles and congressional wishes. Only in this way can we effectuate the Framers' intent and avoid a subversion of the Constitution.

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