CLARIFYING THE SCOPE OF

THE CONGRESSIONAL-EXECUTIVE AGREEMENT

THESIS

Presented to the Graduate Council of
Southwest Texas State University
in Partial Fulfillment of
the Requirements

For the Degree

Master of ARTS

By

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San Marcos, Texas

August 2002

ACKNOWLEDGMENT

My wife, Lanette Cutter, shares equally with me any credit for this thesis. Her understanding and generous spirit kept me afloat through the most trying times. I would also like to thank the members of my thesis committee, Drs. Robert Gorman, Arnold Leder, and Ed Mihalkanin, for their thoughtful comments.

This manuscript was submitted on July 2, 2002.

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INTRODUCTION

Although the Constitution only articulates one international agreement-making procedure, that of the formal treaty,[1] two other modes of agreement are also commonly used.[2] The first is the "sole" executive agreement.[3] Sole executive agreements are concluded on the basis of the President's independent constitutional powers and may be effected without express legislative approval.[4] The second alternative mode of agreement is the congressional-executive

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[1] **U.S. Const.**, art. II, § 2, cl. 2, "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."

[2] See Steve Charnovitz, The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking, 8 **Temp. Int'l & Comp. L.J.** 257, 295 (1994)(describing sole executive agreements, congressional-executive agreements, and treaties as the three broad categories of U.S. international agreements). An "international agreement" is defined in the Restatement as "an agreement between states or international organizations by which there is manifested an intention to create, change or define relationships under international law." **Restatement (Third) of Foreign Relations Law** §303 cmt. e(1986).

[3] See **Louis Henkin, Foreign Affairs and the Constitution** 219-224 (2d ed. 1992)(describing historical development of the sole executive agreement).

[4] See id. at 219-220 (describing legal basis for sole executive agreements).

agreement.[5] These agreements are either explicitly or implicitly authorized by prior congressional legislation or are subject to subsequent congressional approval.[6] Congressional-executive agreements are, essentially, executive agreements authorized by statute.

The use of non-treaty international agreements has provoked periodic controversy since the nation's founding.[7] These controversies have derived primarily from persisting ambiguity over the proper scope of such agreements. Although the scope of sole executive agreements has consequently been clarified through various legislative and executive measures,[8] the scope of the congressional-

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[5] See **Restatement,** supra note 2 at § 303 cmt. e (describing the congressional-executive agreement). Although the constitutionality of congressional-executive agreements is the subject of ongoing controversy, its general validity has been strongly suggested in several federal cases. See discussion infra, Part I.

[6] See id.

[7] See **Messages and Papers of the Presidents** 33 (message from President Monroe to the Senate, April 6, 1818)(James D. Richardson, ed., 1896)(expressing uncertainty whether the President could make an international agreement for the naval disarmament of the Great Lakes without Senate advice and consent); see 5 **Annals of Cong.** 466-474 (1796)(statement of Rep. Gallatin)(arguing that the "[t]reaty-making power . . . may be considered as clashing" with Congress's "authority of regulating trade. . .").

[8] See discussion infra, Part II.

executive agreement remains unclear.[9]

Challenges to the legality of three recent congressional-executive agreements have prompted renewed discussion of this issue.[10] NAFTA,[11] the Uruguay Round of GATT[12] and an extradition agreement with the International Criminal Tribunal for Rwanda (ICTR)[13] all met with considerable resistance from those claiming that these agreements fell outside the scope of the congressional-

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[9] See discussion infra, Part III.

[10] See 140 **Cong. Rec.** S1057-02, S10583 (daily ed. Aug. 4, 1994) (statement of Sen. Helms) (arguing against submitting the Uruguay Round of GATT as a congressional-executive agreement); Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 **Harv. L.Rev.** 799 (arguing that treaties and congressional-executive agreements are virtually interchangeable); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 **Harv. L. Rev.** 1221, 1242 (1995) (arguing that the Treaty Clause should be read as exclusive for important agreements); See Made in the USA Found. v. United States, 56 F.Supp. 2d 1226 (N.D. Ala. 1999) (addressing plaintiff's challenge that NAFTA was invalid because it was improperly concluded as a congressional-executive agreement instead of as a treaty); Ntakirutimana v. Reno, 184 F.3d 419, 426 (5th Cir. 1999) (deciding on the validity of an extradition agreement executed by congressional-executive agreement instead of through the formal treaty process).

[11] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (effective Jan. 1,1994).

[12] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501-3624 (1994 & Supp. IV 1998)).

[13] Agreement on Surrender of Persons [hereinafter Surrender Agreement], Oct. 5, 1994, U.S.-Int'l Trib. Rwanda.

executive agreement and should have been concluded as treaties. The validity of NAFTA and the ICTR Surrender Agreement were ultimately challenged in federal court; and, although the government successfully defended these agreements,[14] the full scope of the congressional-executive agreement remains an unsettled issue.

This thesis seeks to develop a means of clarifying the scope of congressional-executive agreements. Part I presents a brief historical overview of the nation's evolving approach to international agreement-making. This part argues that efforts to shape international agreement-making procedures have been driven largely by two related factors: 1) the interbranch struggle for primacy in foreign affairs; and 2) the desire to reduce or expand U.S. international engagement.

Part II focuses specifically on the evolution of the sole executive agreement. This part describes legislative and executive measures that were implemented to clarify the scope of this mode of agreement. The purpose of this discussion is to provide a point of reference for understanding many of the problems attending the

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[14] See Made in the USA Found., 56 F.Supp. 2d at 1226 (holding that NAFTA was properly concluded as congressional-executive agreement); see Ntakirutimana, 184 F.3d at 419(holding that the ICTR Surrender Agreement was properly concluded as a congressional-executive agreement).

congressional-executive agreement.

Part III discusses three leading interpretive views regarding the scope of the congressional-executive agreement. This part concludes that none of these views define the scope of the congressional-executive agreement in a manner that is both persuasive and desirable.

Part IV argues that the scope of the congressional-executive agreement should be clarified. While recognizing that the political process provides adequate interbranch accommodation regarding whether to use a congressional-executive agreement or formal treaty in any given instance, this part notes that the political forces that have historically shaped U.S. international agreement-making procedures nevertheless exert a destabilizing influence on agreements effected through the former method. Moreover, the absence of any principled rationale for making the choice of instruments further undermines the sustainability and perceived legitimacy of congressional-executive agreements.[15] For purposes of illustrating this problem,

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[15] See Louis Fisher, Congressional Participation in the Treaty Process, 137 **U. Pa. L. Rev.** 1511 (1991)(asserting that "the ultimate objective of the treaty process is to enter into foreign commitments capable of being sustained."); Louis Henkin, Treaties in a Constitutional Democracy 10 **Mich. J. Int'l L.** 406, 408 (1989)(asserting that questions over the legitimacy of non-treaty agreements severely strain relations with foreign governments); Charles Tiefer, Adjusting Sovereignty: Contemporary Congressional-

Part IV concludes with a discussion of the political and legal controversy surrounding NAFTA, the Uruguay Round, and the ICTR Surrender Agreement.

Part V recommends developing a principled choice-of-instruments process that accurately reflects the qualitative differences between treaties and congressional-executive agreements. As a starting point, this part identifies three such differences: level of deliberation, form of representation, and degree of formality. This part further recommends incorporating these criteria by executive order into existing choice-of-instruments procedures. This thesis concludes that, although an executive order of this nature would not carry the force of law, it would help establish a principled basis for determining when to use treaties and when to use congressional-executive agreements. This would, in turn, enhance the legitimacy of congressional-executive agreements and, ultimately, the credibility of the United States, both as a treaty partner and as an international leader.[16]

Executive Controversies About International Organizations, 35 **Tex. Int'l L.J.** 239, 263 (2000) (arguing that conflict between the congressional and executive branches over the appropriate level of U.S. involvement in international organizations consistently and persistently undermines the credibility of American commitments).

[16] See **Congressional Research Service, 95th Cong., 1st Sess., International Agreements: An Analysis of Executive**

I. THE EVOLUTION OF U.S. INTERNATIONAL AGREEMENT-MAKING PROCEDURES

A. ISOLATIONISM[17] AT THE FOUNDING

If the Constitution is generally a "spare charter,"[18] it is especially so with regard to international agreement-making.[19] The Treaty Clause itself merely states that the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the

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Regulations and Practices 47 (Comm. Print 1977) [hereinafter Congressional Research Serv., Executive Regulations] (recommending clear international agreement-making procedures for the purpose of giving the process "international legitimacy and reduc[ing] domestic political conflict over the handling of agreements."); **Louis Henkin, Constitutionalism, Democracy, and Foreign Affairs** 61 (1990) (arguing that it is time "to develop a general principle for identifying international agreements that might be sent to both houses for approval rather than to the Senate alone."); Michael F. Glennon, Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy, 52 **U. Cinn. L. Rev.** 84 (1983) (arguing that, in the absence of stable and legitimate agreement-making procedures, "it may become difficult to achieve the stability of shared expectations necessary for successful international compacts.").

[17] This term is used to denote a general inclination favoring disengagement from international involvement.

[18] See Poe v. Ullman, 367 U.S. 497, 539-40 (1961) (Harlan, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)) (describing the Constitution as "the basic charter of our society, setting out in spare but meaningful terms the principles of government.").

[19] See Kenneth C. Randall, The Treaty Power, 51 **Ohio St. L.J.** 1089 (1990) (discussing brevity of Constitution regarding treaties).

Senators present concur."[20] In Article III, the Constitution extends the "judicial power . . . to all Cases in Law and Equity, arising under . . . Treaties made, or which shall be made."[21] Article VI expressly provides that treaty law, along with federal legislation, is the "supreme Law of the Land."[22] And Article I simply states that "No State shall enter into any Treaty."[23]

As abbreviated as the Constitution may be regarding treaties, however, it is almost silent on the use of other forms of international agreement. Non-treaty agreements are mentioned, somewhat obliquely, in a single clause: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power."[24] The Constitution offers no direct guidance on the proper scope of non-treaty agreements vis-a-vis that of formal treaties.[25] Throughout history, this ambiguity has provided

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[20] **U.S. Const.** art. II, § 2, cl. 2.

[21] Id. art. III, § 2, cl. 1.

[22] Id. art. VI, cl. 2.

[23] Id. art. I, § 10, cl. 1.

[24] Id. art. I, § 10 cl. 2.

[25] See **Elbert M. Byrd, Jr., Treaties and Executive Agreements in the United States: Their Separate Roles and Limitations** (1960)(summarizing the uncertainties attendant to the Treaty Clause).

a wide playing field for two competing visions of the U.S. international agreement-making regime. Those seeking to limit U.S. international engagement have generally adopted a restrictive view of the Treaty Clause; whereas those seeking to increase U.S. international engagement have generally supported additional, alternative means of international agreement-making.

As originally understood,[26] the Treaty Clause embodied an approach to international agreement-making best characterized by President Washington's famous farewell exhortation: "our true policy is to steer clear of permanent alliances with any portion of the foreign world."[27] Indeed, the pervasive sentiment during the Founding period was that international commitments would only weaken a nation whose tenuous independence had been so recently won.[28] The public

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[26] See Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 **N. C. L. Rev.** 133 (1998)(arguing that the procedural safeguards of the Treaty Clause were originally understood to apply to the vast majority of international agreements). The "non-treaty" power was deemed to be limited to relatively insignificant agreements, or to those of short duration. Id.

[27] George Washington, Farewell Address, Sept. 17, 1796, reprinted in **National Security Documents** 8 (John Norton Moore et. al. eds. 1995).

[28] See Myres S. McDougal & Asher Lans, Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy, 54 **Yale L. J.** 534, 549 (1945)(noting that the pervasive mood of isolationism during the Founding period was due, in large part, to a perception

outcry against the perceived loss of independence wrought by the Jay Treaty of 1794 with Great Britain highlights the strength and prevalence of this sentiment.[29] During this period, the nation was far more interested in avoiding "entangling alliances" than developing relations abroad.[30]

Isolationist concerns were therefore a significant factor in drafting the Treaty Clause.[31] Dissatisfied with the ease of treaty-making procedures under the Articles of Confederation,[32] the Framers sought to maximize the caution

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that foreign powers would be likely to interfere with the domestic politics of the new nation). The authors compare the "isolationist agoraphobia" of the United States during the Founding period to that of the new Soviet state during the 1920s. Id.

[29] See **James Roger Sharp, American Politics in the Early Republic: The New Nation in Crisis** 117 (1993)(noting that public criticism of the Jay Treaty derived not from its specific terms but from the perception that it generally compromised the independence of the Republic). See also **Alexander DeConde, Entangling Alliance: Politics & Diplomacy Under George Washington** 101-140 (1958)(detailing the domestic political crisis caused by the Jay Treaty).

[30] Thomas Jefferson, First Inaugural Address, Mar. 4, 1801.

[31] See **W. Stull Holt, Treaties Defeated by the Senate: A Study of the Struggle Between President and Senate over the Conduct of Foreign Relations** 10 (1933)(noting that "[t]here can be no doubt that [the Framers] neither desired nor expected to make many treaties.").

[32] **James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America** 533 (1787)(Gaillard Hunt & James Brown Scott, eds., 1920). "Mr. Madison observed that it had been too easy in the present Congress to make Treaties although nine

with which the country approached its international commitments.[33] They believed that requiring a Senate supermajority for the passage of treaties would effectively serve this purpose, ensuring that the independence of the nation could never be bargained away by a simple majority.[34] The two-thirds rule of the Treaty Clause was thus expressly designed to help maintain the country's isolationist posture.[35]

B. THE TREATY OF VERSAILLES: TENSION BETWEEN THE TREATY CLAUSE AND THE CHANGING INTERNATIONAL LANDSCAPE

For over a century, the Framers' agenda prevailed, and the Senate was regarded by many as the "grave-yard of treaties."[36] With the onset of World War I, however, isolationism became increasingly impracticable as a guiding

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States were required for the purpose." Id.

[33] See **Thomas M. Franck & Edward Weisband, Foreign Policy by Congress**, 144 (1979).

[34] See **Madison,** supra note 32 at 533.

[35] See Solomon Slonim, Congressional-Executive Agreements, 14 **Colum. J. Transnat'l L.** 434, 447 (1975) (arguing that the two-thirds rule was a deliberate policy decision on the part of the Framers to address concerns that treaties might otherwise be too easily effected).

[36] **Louis Henkin, Foreign Affairs and the Constitution** 132 (1972).

principle of foreign policy.[37] The tension between the strictures of the Treaty Clause and the imperatives of international politics thus intensified.[38] This tension was dramatically illustrated in the well-known controversy over the Treaty of Versailles.[39] The catastrophic results of World War I had provoked considerable demand in the U.S. for a stronger commitment to international cooperation.[40] The Versailles treaty sought to provide a mechanism for this cooperation by, among other things, establishing a League of Nations.[41] But U.S. membership in such a body was anathema

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[37] See **Cornelia Navari, Internationalism and the State in the Twentieth Century** 99 (2000) (noting that the magnitude of the First World War "revealed the hitherto unnoticed connections between states and societies, their reliance on one another or diplomatic and political support, for food, for trade and for exchange.").

[38] See David Golove, From Versailles to San Francisco: The Revolutionary Transformation of the War Powers, 10 **U. Colo. L. Rev.** 1491, 1495 (1999) (describing pressures for international engagement during and after the First World War).

[39] See generally **The Treaty of Versailles: A Reassessment After 75 Years** (Manfred F. Boemke et al. eds., 1998) (providing a comprehensive reassessment of the origins and consequences of the treaty).

[40] See Thomas J. Knock, Wilsonian Concepts and International Realities at the End of the War, in id. at 111 (noting that a new internationalist movement had come into being after the First World War).

[41] See Antoine Fleury, The League of Nations: Toward a New Appreciation of its History, in id. at 507 (describing the intentions of the framers of Versailles to create in the League of Nations the keystone to a new international

to a minority of Senators who still adhered to principles of isolationism.[42] By virtue of the Treaty Clause's two-thirds rule,[43] this "little group of willful men,"[44] in President Wilson's words, managed to deadlock Versailles. Despite radical changes in the international political landscape, therefore, the Treaty Clause continued to serve its original purpose of limiting U.S. international engagement.

But the failure of Versailles focused national attention on the U.S. treaty-making process.[45] The ease with which such an important treaty could be rejected by a

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order).

[42] See **Holt,** supra note 21 at 252 (describing Republican efforts at the time to frame the issue as one of internationalism versus "Americanism"). The controversy was, of course, more complex than this. Republican Senators' desire to discredit Wilson in an election year, also played a significant role in deadlocking Versailles. Id. Nevertheless, the isolationist impulse was clearly the predominant factor. See **Navari,** supra note 37 at 242 (noting that the congressional revolution against Versailles signaled the end of "international progressivism").

[43] See Herbert Wright, The Two-Thirds Vote of the Senate in Treaty-Making, 38 **Yale L.J.** 643, 644 (1944)(citing Senator Claude Pepper for the argument that the two-thirds rule provides a minority of the Senate, representing a potentially minute percentage of the population, with undue power over the treatymaking process).

[44] See **Edward S. Corwin, The President: Office and Powers** 240 (1948)(quoting President Wilson).

[45] See **Holt,** supra note 31 at 307.

small minority of the Senate alarmed many Americans.[46] One commentator at the time complained that the treaty process was capable only of producing "impotence and friction," noting that,

> if the United States was to play the part in world affairs demanded by its interests and its strength, a deadlock between the President and the Senate over a treaty involving a really critical foreign problem may end in ruin.[47]

Consequently, although the failure of Versailles ushered in a period of disengagement, it also set the stage for a major transformation in the U.S. approach to international agreement-making.[48] But this transformation would not take place until after World War II once again forced the U.S. back into the international arena.[49]

C. THE RISING TIDE OF INTERNATIONALISM FOLLOWING WORLD WAR II

At the close of World War II, the specter of Versailles loomed large. The perceived imperatives of collective

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[46] See **Henkin**, supra at 36 (describing American reaction to the failure of Versailles).

[47] See **Holt,** supra note 31 at 307.

[48] See **Ackerman & Golove**, supra note 10 at 837 (describing the period after the First World War as a return to relative disengagement).

[49] See id. at 862-866 (describing World War II as the transformative event for U.S. international agreement making).

security and international cooperation led scholars,[50] jurists, and policymakers to conclude that a minority of the U.S. Senate could no longer hold American foreign policy hostage.[51] Sole executive agreements and congressional-executive agreements were thus considered necessary means of facilitating international cooperation.[52] Under this new agreement-making regime,[53] U.S. engagement grew both deeper and wider. It grew deeper in the sense that the U.S. began

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[50] See **McDougal & Lans**, supra note 28 at 549(arguing that ; **Edwin Corwin, The Constitution and World Organization** 31-54 (1944)(arguing that the Constitution permits the use of executive agreements as an alternative to treaties).

[51] See **Golove**, supra note 38 at 1495 (describing Roosevelt's efforts to ensure by legitimizing the use of congressional-executive agreements that "a minority group of Senate isolationists" not be permitted to stand in the way of his internationalist agenda); **McDougal & Lans**, supra note 28 at 553-73(asserting the Senate's history of "obstructionism" as evidence of the need for interchangeability).

[52] See **Ackerman & Golove**, supra note 10 at 873-883(chronicling the struggle between the executive and legislative branches over recognition of the congressional-executive agreement as an alternative to formal treaties after World War II); **Ramsey**, supra note 26 at 142-143 (noting that the proponents of the congressional-executive agreement and the nonexclusive view of the Treaty Clause generally prevailed after World War II); **McDougal & Lans**, supra note 28 at 553-73(asserting the Senate's history of "obstructionism" as evidence of the need for interchangeability after World War II).

[53] See **Ramsey**, supra note 26 at 142-143 (1998)(noting that the proponents of the congressional-executive agreement and the nonexclusive view of the Treaty Clause generally prevailed after World War II).

taking a leading role in a number of major internationalist initiatives. The Bretton Woods agreement, which created the International Monetary Fund, for example, was concluded as a non-treaty agreement.[54] U.S. engagement grew wider in the sense that the sheer number of international agreements inclined steeply.[55] While the average number of treaties remained relatively constant at about 13 per year, the number of non-treaty agreements rose from 127 in 1946 to 325 in 1962.[56] Relaxing the Senate treaty-making prerogative thus opened the floodgates for international engagement.

D. THE BACKLASH AGAINST POST-WORLD WAR II INTERNATIONALISM

These developments did not, of course, meet with universal approval.[57] Many claimed that non-treaty agreements were unconstitutional, arguing, among other things, that the Treaty Clause contains the only constitutionally enumerated mode of agreement-making and should therefore be considered exclusive. The underlying

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[54] See **Ackerman & Golove**, supra note 10 at 891 (describing Bretton Woods as one of the first major internationalist initiatives concluded as a congressional-executive agreement).

[55] See **Congressional Research Service, 95th Cong., 1st Sess., International Agreements: An Analysis of Executive Regulations and Practices,** 20 (Comm. Print 1977).

[56] Id.

[57] See **Ackerman & Golove**, supra note 10 at 872.

concern of these critics was clearly to limit U.S. international engagement. The chief antagonist of non-treaty agreements during this period, Professor Edwin Borchard, for example, ends one of his many published critiques with a quote from a colleague stating that:

> [t]he Senate's treaty power is probably the last remaining bulwark of our national safety--even more, perhaps, than our armed forces--and it should be fought for and maintained at all costs.[58]

Although Professor Borchard's article otherwise frames the debate as a separation-of-powers question,[59] this concluding quote suggests an additional underlying concern. Comparing the protection provided by the nation's armed forces to that provided by the "bulwark" of the Senate treaty prerogative, Borchard invokes a powerful image in favor of disengagement--an image that was particularly potent in light of the American lives lost in the ongoing war in Europe and the Far East.[60] For Borchard, who elsewhere in his article decries

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[58] Edwin Borchard, Shall the Executive Agreement Replace the Treaty?, 38 **Am. J. Int'l L.** 637, 643 (1944).

[59] Id. at 637-639.

[60] Id.

the Treaty of Versailles as "a charter for the production of more or less universal human misery,"[61] preserving the exclusivity of the Treaty Clause was part of the larger goal of renewing U.S. disengagement.

But the impetus to withdraw from the international sphere was not driven solely by the desire to avoid military conflict. Another significant factor was the desire to protect U.S. sovereignty. This factor predominated a movement in the early 1950s to amend the Constitution's international agreement provisions. The Bricker Amendment, named after its chief proponent, Senator John Bricker of Ohio, contained two bold provisions. First, it provided that a treaty would become effective as internal law only with the passage of enabling legislation; in other words, treaties could not be self-executing. Second, the proposed Amendment would have required that all executive agreements between the President and international organizations or foreign nations "be made only in the manner and to the extent prescribed by law." Furthermore, under the Bricker Amendment, such agreements would be "subject to the limitations imposed on treaties, or the making of treaties." This provision was intended to ensure that the Executive

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[61] Id. at 638.

Branch could not circumvent the requirements of the Treaty Clause by using executive agreements instead of formal treaties.

Not surprisingly, President Eisenhower opposed the amendment, arguing that "the President must not be deprived of his historic position as spokesman for the nation in its relations with other countries."[62] Commentators argued that the Bricker Amendment "would so alter the historic relationship between the Executive and the legislature in [the field of international relations] that it could very easily destroy America's place of leadership in the world today."[63] The debate over the Bricker Amendment was also fueled by a split in the Republican Party that had been growing for years between the so-called "Taft wing" and the more internationalist wing of the GOP that Eisenhower had come to represent.

Ultimately, the spirit of internationalism prevailed, and a watered-down version of the Bricker Amendment was defeated in February of 1954, albeit by a single vote. But the Bricker Amendment retains a remarkable level of currency among those who view the modern treaty power as a "grave

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[62] **Melvin Small, Democracy & Diplomacy** 100-01 (1996).

[63] Editorial, "Pathway to Chaos," **New York Times**, April 8, 1953, p. 19.

threat to self-government[,]"[64] illustrating that the forces of disengagement and internationalism will continue to exert a powerful influence over U.S. international agreement-making procedures.

II. DEFINING THE SCOPE OF THE SOLE EXECUTIVE AGREEMENT

As the Bricker episode demonstrates, the use of sole executive agreements has been a particularly controversial mode of international agreement-making.[65] It has long been accepted that the President has unilateral authority to conclude international agreements within the sphere of his constitutional duties as the nation's Commander-in-Chief and chief diplomatic representative.[66] But the extent of this

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[64] Thomas E. Woods, Jr., Globalism and Sovereignty: A Short History of the Bricker Amendment, **The Freeman**, April 1996, Vol. 46, No. 4.

[65] See Allison Lippa, The Legality, Efficacy, and Future Use of International Executive Agreements: An Analysis of Agreements in Criminal Matters, 29 **Am. Crim. L.R.** 1301, 1314 (1992)(discussing extensive congressional efforts to check presidential power to conclude sole executive agreements); **Harold Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair** 43 (1990)(discussing the lack of accountability in executive agreement making); Sharon G. Hyman, Executive Agreements: Beyond Constitutional Limits?, 11 **Hofstra L. Rev.** 805, 844 (1983)(discussing constitutional problems associated with sole executive agreements).

[66] See **U.S. Const.** art. II, § 1 (enumerating powers of the President as the Chief Executive). See id. at §§ 2-3 (enumerating powers of the President as chief diplomat). See also **Restatement** supra note 2, § 303(4)("The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent

authority has been subject to various interpretations.[67] During the 1950s and 1960s the exigencies of the Cold War strengthened the presumption in favor of executive discretion regarding the use of sole executive agreements.[68] But the presidential activism that this presumption engendered produced extremely mixed results. One of the most frequently cited examples of the perceived abuse of presidential power to make sole executive agreements is President Eisenhower's agreement to commit military and economic aid to South Vietnam.[69] Another example of the perceived abuse of presidential agreement-making authority is the so-called "Spanish Bases Agreement" which contained,

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powers under the Constitution."); Belmont, 301 U.S. at 330-31 (finding that the authority to enter into executive agreements derives from the power over foreign relations accorded to the President by the Constitution); Neal-Cooper Grain Co. v. Kissinger, 385 F.Supp. 769, 773-74 (D.C.D.C. 1974).

[67] See Joel R. Paul, The Constitution: Executive Expediency and Executive Agreements, 86 **Cal. L. Rev.** 671 (1998)(discussing the expanding interpretation of the executive's constitutional authority over foreign affairs).

[68] See id. (arguing that the Cold War had produced a "discourse of executive expediency" which was used to justify almost total presidential control over foreign policy).

[69] See **Stephen M. Millett, The Constitutionality of Executive Agreements** 253-254 (1990)(discussing constitutional questions relating to American involvement in Vietnam).

among other things, a mutual defense provision.[70] Many believed these sole executive agreements reflected unbridled presidential power in international agreement-making.

The expansion of presidential power drew criticism from even the staunchest advocates of executive discretion. The writings of Senator William Fulbright during this period illustrate this change of heart. In his 1961 article, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, Fulbright argued that the level of executive discretion inherent in totalitarian regimes rendered the United States at a distinct disadvantage in the conduct of foreign affairs. Consequently, Fulbright concluded that expanded executive discretion in international agreement-making was critical to the success of American foreign policy relating to the Soviet Union.[71]

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[70] See John F. Murphy, Treaties and International Agreements Other than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate, 23 **Kan. L. Rev.** 221, 225 (1975) (discussing Senator Fulbright's resistance to the conclusion of this agreement as a sole executive agreement). See also 121 **Cong. Rec.** S34676-78 (1975) (statement of Sen. Clark) (arguing that Spanish Bases agreement should have been submitted to the Senate as an Article II treaty). See generally, **Arthur Schlesinger, The Imperial Presidency** (1974) (offering critical analysis of presidential foreign affairs powers).

[71] See J. William Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 **Cornell L.Q.** 1, 10-12 (1961).

This position stands in stark contrast to Fulbright's later comments on the question of executive discretion:

> Having experienced the frenetic mobility and oscillation of American policy in the years after the 1950s - having experienced nearly three decades of overheated activism, global messianism, and undue militarism - I came to see merit in occasional delay or inaction.[72]

Like many Americans, Senator Fulbright had come to view the "imperial presidency" as a threat almost as pressing as that posed by foreign totalitarian regimes. The Watergate debacle further undermined presidential credibility and prompted a comprehensive reexamination of presidential war,[73] emergency,[74] and international agreement-making powers.[75]

In 1969 the Senate considered a measure, called the National Commitments Resolution, expressing the sense of the Senate that "a national commitment by the United States

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[72] See J. William Fulbright, Foreward to **Michael J. Glennon, Constitutional Diplomacy** at xiv (1990).

[73] See War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982).

[74] See National Emergencies Act, 50 U.S.C. §§ 1601-1651 (1982).

[75] See William B. Spong, Jr., Introduction to Symposium, Organizing the Government to Conduct Foreign Policy: The Constitutional Questions, 61 **Va. L. Rev.** 747, 750 (1975)(ascribing the impetus behind reformative measures to enhance executive accountability to the nation's experience with Vietnam and Watergate).

results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment."[76] The committee report indicates that the measure was aimed specifically at limiting the President's ability to act unilaterally in matters involving U.S. military commitments.[77] But this measure went far beyond merely excluding military commitments from the scope of sole executive agreements.[78] Had the resolution passed into law,[79] a plain reading of the term "national commitment"[80] would clearly have had the effect of prohibiting the use of sole executive agreements altogether.[81]

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[76] S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. 3603, 17,245 (1969).

[77] See **S. Rep. No.** 91-129, at 30 (1969)(discussing the "spurious" origins of an interpretation of the Constitution that provides unlimited executive power over U.S. armed forces).

[78] See **Lippa**, supra note 65 at 1314 (discussing potential effects of the National Commitments Resolution).

[79] The House of Representatives never acted on the measure.

[80] See **S. Res. 85**, supra note 76.

[81] See **Lippa,** supra note 65 at 1314. This fact was not lost on the minority at the time who claimed that the resolution "smacks of neo-isolationism." See **S. Rep. No.** 91-129, at 41 (1969).

A more modest proposal was adopted in 1972.[82] The Case-Zablocki Act (the "Case Act") required the President to transmit to Congress all non-treaty agreements within 60 days of the time they are concluded.[83] The specific impetus behind this legislation was to prevent the executive branch from entering into secret agreements.[84] Under the Case Act, copies of agreements are transmitted to the Senate and the House as soon as practicable.[85] All agreements are then printed in the United States Treaties and Other International Agreements publication, unless they are deemed too technical or trivial to warrant publication.[86] The Case Act provided Congress with basic notification regarding sole

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[82] The Case-Zablocki Act, Pub. L. No. 92-404, 86 Stat. 619 (codified at 1 U.S.C. § 112(b) (1972))[hereinafter Case Act].

[83] Id.

[84] See **Congressional Research Service, 103d Cong., 1st Sess., Treaties and Other International Agreements: The Role of the United States Senate** 176 (Comm. Print 1993)[hereinafter Congressional Research Serv., Treaties]. Senator Case introduced the legislation in response to secret agreements uncovered during the Symington Subcommittee hearings. Id.

[85] See 22 C.F.R. § 181.7(a)(1997)("International agreements other than treaties shall be transmitted . . . to the President of the Senate and the Speaker of the House of Representatives as soon as practicable after the entry into force of such agreements not later than 60 days thereafter.").

[86] See 22 C.F.R. § 181.8(a)(1997).

executive agreements and was, therefore, a necessary preliminary step to defining their scope.

Congressional oversight of sole executive agreements was further augmented in 1978.[87] The Case Act's post hoc notification requirements failed to address concerns that the executive branch might improperly circumvent the Senate's treaty prerogative by simply presenting a sole executive agreement as a fait accompli.[88] Consequently, the Senate Foreign Relations Committee, the House Foreign Affairs Committee, and the State Department agreed on procedures that provide for interbranch consultation on the choice of instruments in matters deemed particularly "significant."[89]

This arrangement was made in response to the proposed Senate Resolution 536, also known as the "Clark Resolution." That measure would have compelled the executive branch to consult with the Senate regarding the choice of

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[87] See **S. Rep. No.** 95-1171 (1978).

[88] See **Congressional Research Serv., Treaties**, supra note 84 at 193. There has also been concern expressed by Congress that the executive branch has not always exercised due diligence in fulfilling the reporting requirements of the Case Act. See id. at 187-193 (discussing problems relating to late and insufficient transmittal of agreements to Congress).

[89] See **S. Rep. No.** 95-1171 (1978).

instruments.[90] Though less prohibitive than the National Commitments Resolution, this measure also reflected a resurgence of isolationism in the Senate. An expert testifying at the request of the bill's sponsor cautioned the Senate against rejecting the measure, arguing that it should do so only "[i]f it is believed that the United States should . . . have alliances - some of them secret - with many nations and large numbers of its Armed Forces stationed abroad, and should interfere at will in the domestic affairs of other sovereign states."[91]

Under the compromise procedures developed in response to Senate Resolution 536, the administration presents a selective list of agreements cleared for negotiation.[92] Each agreement is listed along with the administration's proposed choice of instrument.[93] The committees then have

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[90] See S. Res. 536 95th Cong. (1978). "The principle purpose of Senate Resolution 536 . . . is to facilitate the implementation of the 'advice' portion of the treaty clause to the extent that such provision is applicable to the question of whether a given international agreement should be submitted as a treaty." Id.

[91] Transmittal of Executive Agreements to Congress: Hearings on S. 596 Before the Senate Comm. on Foreign Relations, 92nd Cong. 17 (1971)(statement of Ruhl Bartlett, Professor, Fletcher School of Law and Diplomacy).

[92] See **Congressional Research Serv., Treaties,** supra note 84 at 193.

[93] Id.

the opportunity to consult with the administration on whether the proposed choice of instruments is acceptable.[94] These consultative measures thus provided Congress with substantial power to shape the scope of sole executive agreements.[95]

In an effort to comply with Congress's manifest desire to limit the scope of sole executive agreements, the State Department also implemented internal guidelines for determining when an agreement should be concluded as a treaty or as a sole executive agreement. "Circular 175" procedures were first adopted in 1955, in the midst of the Bricker movement.[96] They were substantially amended in 1974 to provide for greater consultation pursuant to the Case Act.[97]

Circular 175 guidelines attempt to provide a principled rationale for making this determination. These guidelines

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[94] Id.

[95] Id. Although these recommendations do not carry the force of law, a president would obviously be unwise to pursue a sole executive agreement against the express will of Congress since most international agreements require some form of implementing legislation. Id.

[96] See Arthur E. Sutherland, Jr., Restricting the Treaty Power, 65 **Harv. L. Rev.** 1305 (1952)(discussing the "Bricker Amendment")

[97] See **Congressional Research Serv., Executive Regulations,** supra note 16 (describing the evolution of Circular 175 procedures).

advise decisionmakers to consider: 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; c) whether the agreement can be given effect without the enactment of subsequent legislation by the Congress; d.) past U.S. practice as to similar agreements; e.) the preference of the Congress as 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 as to similar agreements. In addition to these decisionmaking guidelines, Circular 175 requires the State Department's Office of Legal Adviser (OLA) to prepare a legal memorandum setting forth the legal basis for the chosen form of agreement.[98]

The oversight measures discussed above have been instrumental in helping the executive and legislative branches reach political accommodation regarding the acceptable scope of sole executive agreements.[99] This

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[98] **U.S. Dep't of State**, 11 **Foreign Affairs Manual**, Chpt. 700, 721.3. (1985).

[99] See **Congressional Research Serv., Treaties,** supra note 84 (noting that consultative and deliberative measures

political accommodation has furthered what is, presumably, the fundamental purpose of any agreement-making procedure: to construct agreements that are perceived as legitimate and are therefore capable of being sustained.[100] By establishing a principled choice-of-instruments process,[101] Circular 175 has furthered this fundamental goal in two additional ways. First, Circular 175 enables State Department officials to determine, in the early stages of negotiation, whether a given agreement will exceed the acceptable scope of the sole executive agreement.[102] Officials may tailor an agreement under negotiation accordingly, greatly reducing the potential for subsequent controversy. Second, OLA's legal memorandum also mitigates the potential for controversy by

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have improved relations between the Senate, the House, and the Executive branch).

[100] See **Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements** 25 (1995)(arguing that "the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.").

[101] See **Murphy**, supra note 70 at 239 (noting that Circular No. 175 guidelines provide broad principles on which to base the choice of instruments).

[102] See Dr. Richard J. Erickson, The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress, 13 **B.U. Int'l L.J.** 45, 56 (1995)(discussing problems that arise when U.S. negotiators are unable to determine the "metes and bounds" of the legal framework regarding executive agreements).

providing a considered legal opinion justifying the choice of instruments.

These two benefits of the Circular 175 Procedure substantially decrease the probability of subsequent litigation over the validity of agreements, and, in combination with the oversight measures previously discussed, Circular 175 has helped define the proper scope of sole executive agreements, substantially improving their sustainability and legitimacy in the process.[103] In a comprehensive analysis of the State Department's compliance with Circular 175 procedures, the Congressional Research Service found that, although expediency tends to be the primary concern for State Department officials, the procedures provide a significant level of consultation and deliberation.[104]

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[103] See **Congressional Research Serv, Treaties**, supra note 84.

[104] See generally Thomas M. Franck, Legitimacy in the International System, 82 **Am. J. Int'l L.** 705 (1998)(defining "legitimacy" as "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process."). See also Arthur W. Rovine, Separation of Powers and International Executive Agreements, 52 **Ind. L.J.** 397, 421 (1977)("This has always been, and will continue to be, an area of great difficulty. Since clear lines between treaty and executive agreement are not available, it is important that the executive and legislative branches, through consultation, seek common ground to the greatest possible extent in resolving these issues."); Dept. of State, "The Making of Treaties and Executive Agreements,"

III. THE SCOPE OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

Although the scope of the sole executive agreement has thus been clarified to a great extent, the same cannot be said of the congressional-executive agreement.[105] In part, this is because congressional-executive agreements, by definition, involve legislative participation; interbranch political accommodation is inherent in this mode of agreement, and the political animus that drove Congress to circumscribe the sole executive agreement is therefore lacking.[106] Consequently, the proper scope of congressional-executive agreements has not been defined through the legislative process.

Of course, the persisting ambiguity of the scope of congressional-executive agreements need not result in uncertain governance, for it is "the proper and peculiar

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State Department Bulletin, 28 Apr. 20, 1953 at 595 (statement of Secretary John F. Dulles) ("In the interest of orderly procedures, I feel that the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed.").

[105] See Jack S. Weiss, The Approval of Arms Control Agreements as Congressional-Executive Agreements, 38 **UCLA L. Rev.** 1533, 1546 (1991) (noting that the historical record provides no substantive guidance on the choice of instruments as between treaties and congressional-executive agreements).

[106] See id. at 1567 (discussing manner in which congressional-executive agreements provide for political accommodation between branches).

province of the courts" to ascertain the Constitution's meaning.[107] Unfortunately, although the Supreme Court has recognized the legitimacy of non-treaty agreements, it has not directly addressed the scope of congressional-executive agreements.[108] In Dames & Moore v. Regan, for example, the Court noted that the President may, with the support or acquiescence of Congress, conclude international agreements through procedures other than those established under Article II;[109] but the Court neither established a limiting principle for this finding nor went so far as to say that the President, with the support or acquiescence of Congress, may always use an alternative to the formal treaty process.[110] In Weinberger v. Rossi the Court recognized that a congressional-executive agreement was, effectively, a "treaty" for the purposes of the statute under consideration in that case;[111] but, again, the Court neither qualified its

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[107] **The Federalist No.** 78 (Alexander Hamilton).

[108] See **Weiss**, supra note 105 at 1546 (noting that the Supreme Court has never "directly addressed the issue whether the President must submit an international agreement to the Senate as an Article II treaty for approval by a two-thirds majority, or whether he may submit it to the House and the Senate as a congressional-executive agreement.").

[109] See Dames & Moore, 453 U.S. at 654.

[110] See id. at 660 (emphasizing the narrowness of the holding).

[111] See Weinberger, 456 U.S. at 25.

holding to certain classes of agreements nor expanded it to include all classes of agreements.[112]

Thus, although the Court's jurisprudence generally supports the constitutionality of non-treaty agreements, it has done very little to clarify their scope.[113] However, the persisting ambiguity over the scope of the congressional-executive agreement has resulted in a number of destabilizing developments, in some cases posing a direct threat to the sustainability of agreements.[114] But before discussing these problems and exploring possible solutions, it will be useful to examine four leading views regarding the scope of the congressional-executive agreement. This analysis will demonstrate that none of these views, in themselves, is wholly persuasive or desirable, and the scope of the congressional-executive agreement therefore requires additional clarification. The terms used to denote these views are "strong" and "weak" exclusivity and "strong" and

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[112] Id.

[113] See Memorandum for Walter Dellinger, Abner J. Mikva, George J. Mitchell and Robert Dole, from Laurence H. Tribe, Re: The Constitutional Requirement of Submitting the Uruguay Round as a Treaty at 12 (Oct. 5, 1994)(noting that "the Supreme Court has never ruled on the constitutionality of using the congressional-executive agreement to deal with matters that fall within the Constitution's 'treaty' category.").

[114] See discussion infra Part IV.

"weak" interchangeability. Although these terms are not used in the literature, they provide a convenient analytical framework for explaining the relationship between the predominant interpretive approaches to the Treaty Clause.

A. "STRONG" EXCLUSIVITY

Under a theory of "strong" exclusivity the Treaty Clause provides the only means of effecting binding international agreements.[115] Strong exclusivity thus holds congressional-executive agreements per se unconstitutional, rendering the question of scope moot.[116] The textual argument for this view is largely premised on the doctrine of expressio unius est exclusio alterius - the expression of one thing is the exclusion of others.[117] In short, strong exclusivists argue that the Treaty Clause, by expressing a process of international agreement making, necessarily embodies the only process of international agreement

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[115] For an exhaustive defense of this view, see Edwin M. Borchard, Against the Proposed Amendment as to the Ratification of Treaties, 30 **A.B.A. J.** 608 (1944); Edwin Borchard, Shall the Executive Agreement Replace the Treaty?, 38 **Am. J. Int'l. L.** 637 (1944) [hereinafter Borchard, Replace].

[116] See Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 **Mich. L. Rev.** 1, 33-58 (1972) (arguing that congressional-executive agreements are per se unconstitutional).

[117] See **Federalist No.** 83 (Alexander Hamilton) (discussing how the expressio unius doctrine applies to constitutional interpretation).

making.[118]

Although strong exclusivity has a certain bright-line elegance, it is fundamentally unworkable given the complexity of the modern international arena.[119] Indeed, even the Senate has rejected the view, recognizing that submitting all agreements as treaties would be overwhelming, and would force the Senate's approval process to become perfunctory.[120] Furthermore, the textual argument in favor of strong exclusivity is inconclusive, for it is questionable that the expressio unius doctrine should even apply to the Treaty Clause.[121] The doctrine is not expressly

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[118] See **Borchard, Replace,** supra note 116 at 637.

[119] See **Randall** supra note 19 at 1095 (citing Myres S. McDougal & Asher Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 **Yale L. J.** 534, 572-582 (1945) for the proposition that, given the multitude of every-day international accords needed in modern foreign affairs, it would be far too burdensome to strictly follow the Treaty Clause).

[120] See **Congressional Research Serv., Executive Regulations,** supra note 16 at xxxv.

[121] See David M. Golove, Against Free-Form Formalism, 73 **N.Y.U.L.Rev.** 1791, 1815-1836 (1998)(arguing that the expressio unius doctrine should not apply to the Treaty Clause). Relying on Hamilton's discussion of the doctrine in **Federalist No.** 83, Golove argues that expressio unius should only be applied where a non-exclusive reading of the provision in question would render that provision "mere surplusage." Id. Here, according to Golove, a non-exclusive reading of the Treaty Clause does not render it a nullity, but simply provides the President with an optional procedure for bypassing bicameral approval. Id.

implicated in the text of the Constitution, and many commentators have cautioned against its being applied mechanically.[122] Given the practical difficulty of adhering to this interpretation, and given its questionable textual basis, strong exclusivity fails to provide a satisfactory solution regarding the scope of the congressional-executive agreement.

B. "STRONG" INTERCHANGEABILITY

"Strong" interchangeability is diametrically opposed to the previous view and holds that congressional-executive agreements are a complete alternative to treaties in every instance.[123] Under this theory, the two modes of agreement have precisely the same contours, and using one or the other

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[122] See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 **Harv. L. Rev.** 405, 455-56 (1989)(arguing that "[t]he expressio unius canon should not be used mechanically"). The Founders also cautioned against uniform application of the doctrine. See **Federalist No.** 83 (Alexander Hamilton)(arguing that the exclusio unius doctrine must not be applied categorically - its use must be justified in the context of the provision under consideration).

[123] **Restatement,** supra note 2 at § 303 cmt. e. The Restatement presents this as "the prevailing view," but the literature seems to favor "weak" interchangeability as the prevailing view. See **Golove** supra note 121 at 1807 (characterizing the "modern consensus" in the following terms: "The Senate has plenary power over all international agreements, but exclusive authority only over those falling outside the scope of Congress's legislative authority.").

is purely a matter of political discretion.[124] In effect, therefore, this view dispenses with the question of scope by simply equating the congressional-executive agreement to the formal treaty.[125] The theoretical basis for strong interchangeability is, in a sense, an inversion of the expressio unius doctrine.[126] Advocates of this view argue that the absence of any exclusive language in the Treaty Clause amounts to a de facto grant of authority to the President and Congress to engage in alternative means of agreement making.[127]

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[124] See **Restatement,** supra note 2 at § 303; see **Dean Acheson, Present at the Creation: My Years in the State Department,** 72 (1969)(characterizing the difference between an executive agreement and a congressional-executive agreement as merely one of semantics).

[125] Id.

[126] See discussion supra Part III.A.

[127] See **McDougal & Lans** supra note 28 at 255. Proponents of strong interchangeability also take an expansive view of Congress's Article I, Section 8 enumerated powers, arguing that, when read in conjunction with the Necessary and Proper Clause, they provide ample authority for congressional participation in international agreement-making. See **U.S. Const.** art. I, § 8, cl. 3 "[The Congress shall have the power] to regulate Commerce with foreign Nations"; id. at art. I, § 8, cl. 11 "[The Congress shall have the power] to declare War"; id. at art. I, § 8, cl. 12 "[The Congress shall have the power] to raise and support Armies." Justice Jackson's famous concurrence in the "Steel Seizure Case" is also supportive of interchangeability. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(Jackson, J., concurring)(arguing that presidential authority is at its height when he acts with express congressional authorization).

Like strong exclusivity, strong interchangeability has an appealing simplicity; but it, too, presents significant textual and practical difficulties. Reading a constitutional provision as permissive merely because it fails to provide for its express exclusivity is, at best, a controversial method of constitutional interpretation.[128] The more significant problem with strong interchangeability, however, is that it ignores important qualitative differences between congressional-executive agreements and treaties. These differences will be discussed at length in Part V.[129] It is sufficient to note here that strong interchangeability ignores these important qualitative differences and, in so doing, substantially increases the probability that a given agreement will be concluded in a manner not suited to its nature and scope.[130] Furthermore, as discussed, this view relies on a questionable method of constitutional interpretation.[131] Therefore, strong interchangeability, like strong exclusivity, fails to provide a satisfactory solution regarding the scope of the

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[128] See **Weiss** supra note 105 at 1559 (observing that the view espoused by McDougal and Lans "is bound to remain controversial").

[129] See discussion infra Part V.

[130] Id.

[131] See discussion supra Part III.B.

congressional-executive agreement.

C. "WEAK" EXCLUSIVITY

"Weak" exclusivity holds that the Constitution implicitly recognizes a hierarchy of international agreements, with treaties occupying the highest order.[132] This view is premised on the provisions in Article I dealing with treaties and non-treaties. Section 10, clause 1 of that Article states that "[n]o State shall enter any Treaty, Alliance, or Confederation."[133] Clause 3 of the same section provides that "[n]o State shall, without Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power."[134] According to advocates of weak exclusivity, these provisions draw a distinction between "treaties," which states are prohibited from entering, and other kinds of foreign "agreements," which states may enter with congressional consent.[135] The inference drawn by weak exclusivists is that agreements having a particularly significant effect on national sovereignty must be concluded

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[132] See **Tribe**, supra note 10 at 1266(discussing the hierarchy of international agreements implied in Article I).

[133] **U.S. Const.** art. I, § 10, cl. 1.

[134] Id. art. I, § 10, cl. 3.

[135] See **Tribe,** supra note 10 at 1266.

as treaties.[136]

However, although the degree to which an agreement affects national sovereignty may be a legitimate limiting factor on the scope of congressional-executive agreements, it is not sufficient in itself.[137] All international agreements affect sovereignty insofar as they limit a nation's range of options.[138] Weak exclusivity therefore begs the question as to how one determines what constitutes a "significant effect." Consequently, this view, in itself, does not adequately define the scope of the congressional-executive agreement.

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[136] Id. See U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978)(discussing Founders' views regarding the distinctions between "treaties" and "compacts" and "agreements"). Proponents of weak exclusivity argue that the Founders relied principally on the writings of Vattel in defining these terms. See Weinfeld, What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?, 3 **U. Chi. L.Rev.** 453 (1936)(discussing the impact of Vattel's writings on the Founders). The principal distinction for Vattel was the duration of the agreement. **E. Vattel, Law of Nations** 192 (J. Chitty ed. 1883). Treaties were considered to be those agreements that were perpetual or of very long duration. Id.

[137] See **Lord McNair, The Law of Treaties** 757 (1961)(noting that sovereignty is an ambiguous term and does not lend itself to precise legal application).

[138] See **Ramsey**, supra note 26 at 133(observing that international agreements are, by their nature, limitations on sovereignty because they prospectively limit a nation's freedom of action); id. at 758 (noting that the norm of pacta sunt servanda itself is in tension with the concept of absolute sovereignty).

D. "WEAK" INTERCHANGEABILITY

"Weak" interchangeability is the prevailing view of the Treaty Clause, and it holds that the scope of the congressional-executive agreement is determined by reference to Congress's Article I powers.[139] In other words, under weak interchangeability, Congress has the power to approve international agreements that are necessary and proper to the fulfillment of its enumerated and implied powers.[140] Those agreements that fall outside the scope of these powers, should be concluded by treaty.[141] The view finds support by analogy with the President's authority to make sole executive agreements.[142] That is, if the President may make some agreements pursuant to his constitutional powers without the advice and consent of the Senate, then it follows that Congress has a similar ability to approve agreements within its constitutional powers.[143]

However, this analogy reveals the principal difficulty with weak interchangeability. In light of the earlier

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[139] See **Golove** supra note 121.

[140] Id.

[141] Id.

[142] See discussion supra Part II.

[143] Id.

discussion of sole executive agreements,[144] it is questionable that Congress's foreign affairs powers, and the broad interpretation to which those powers are typically subjected,[145] may serve as a meaningful limit on the use of congressional-executive agreements. Indeed, as one commentator has noted, weak interchangeability, though formally distinct, tends to collapse into strong interchangeability due to the vast breadth of Congress's foreign affairs powers.[146] Given this tendency, the criticism directed against strong interchangeability - that it ignores important qualitative differences between treaties and congressional-executive agreements - applies

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[144] See discussion supra Part II.

[145] This is particularly true regarding Congress's foreign commerce powers. See California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974)(holding that Congress has plenary authority to regulate foreign commerce); Board of Trustees of Univ. of Illinois v. U.S., 289 U.S. 48 (1933)(holding that the power of Congress to regulate foreign commerce is exclusive and plenary, and its exercise may not be limited or impeded by statute). Furthermore, if the expansion of Congress's Commerce Clause powers are any indication, the power to regulate foreign commerce under the Foreign Commerce Clause could be interpreted to encompass virtually any international agreement. See Gibbons v. Ogden, 22 U.S. 1 (1824)(holding congressional power over interstate commerce to be plenary). See also Katzenbach v. McClung, 379 U.S. 294 (1964)(holding that the power of Congress to regulate commerce is broad and sweeping).

[146] See **Golove** supra note 121 at 28.

here with equal force.[147]

IV. THE SCOPE OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT SHOULD BE CLARIFIED

The leading views regarding the scope of the congressional-executive agreement are thus neither wholly persuasive nor desirable.[148] Yet it does not necessarily follow that clarification is required. In a sense, the political process itself already serves as a limiting factor.[149] If, for example, a majority of the Senate feels that a congressional-executive agreement should be submitted as a formal treaty, they need only vote against it when transmitted from the House.[150] Furthermore, the consultative procedures previously discussed provide early notification regarding all significant international agreements,

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[147] See discussion supra, Part III.B; see also discussion infra, Part V.

[148] See discussion supra, Part III.

[149] See **Weiss** supra note 105 at 1564-1568 (arguing that the political process is sufficient for choice of instruments); see also **Murphy**, supra note 70 at 237(stating that "if one accepts that a congressional-executive agreement is a complete alternative to a treaty, the decision to employ one or the other method in concluding a particular agreement becomes a policy question.").

[150] See **Restatement,** supra note 2("Which procedure should be used is a political judgment, made in the first instance by the President, subject to the possibility that the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting that the President submit the agreement as a treaty.").

including congressional-executive agreements.[151] Through these procedures, the relevant Senate and House committees may easily recommend that a proposed congressional-executive agreement be submitted as a treaty instead.[152] Congress therefore has ample opportunity to shape the scope of congressional-executive agreements.[153]

However, while the political process provides adequate interbranch accommodation regarding the acceptable scope of the congressional-executive agreement vis-a-vis that of the formal treaty, it does not provide a principled rationale for choosing between the two modes of agreement.[154] It is generally recognized that international agreements must evince the highest possible level of sustainability and legitimacy; the absence of any principled rationale guiding the democratic process in the choice of instruments

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[151] See discussion supra Part II.

[152] Id.

[153] Id. See generally, **Loch K. Johnson, The Making of International Agreements: Congress Confronts the Executive** 158 (1984)("[T]he first rule of international agreement-making in a democracy is that foreign commitments - if they are to be sustained - must rest upon the consent of the public.").

[154] Given the current orthodoxy - that treaties and congressional-executive agreements are completely, or virtually, interchangeable - Circular 175 procedures do not apply to congressional-executive agreements. See discussion supra Part III.D.

undermines this fundamental goal.

This is true primarily because the absence of a principled rationale exacerbates the vulnerability of congressional-executive agreements to legal challenge.[155] Two factors combine to make this concern particularly concrete. First, as has been discussed, the Constitution and the Supreme Court's jurisprudence are indeterminate regarding the proper scope of congressional-executive agreements.[156] Consequently, even if Congress and the President have reached consensus on using a congressional-executive agreement in a given instance, it is impossible to state with certainty that the agreement does not improperly circumvent the Treaty Clause.[157]

Second, as discussed, the ongoing dialectic between advocates of internationalism[158] and isolationism has had an

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[155] See Constance Z. Wagner, Another Attack on the Fast Track, 44 **St. Louis U.L.J.** 1047, 1052 (2000)(noting that uncertainty over the scope of the congressional-executive agreement has sometimes resulted in litigation); see Weinberger, 456 U.S. at 25; Dames & Moore, 453 U.S. at 654; Belmont, 301 U.S. at 324.

[156] See discussion supra Part I.

[157] Id.

[158] See **Bruce Robbins, Feeling Global: Internationalism in Distress** 16 (1999)(discussing various definitions of the term "internationalism"). The term has diverse meanings. As it is used here "internationalism" is characterized by the belief that "international peace and security benefit if international institutions are strengthened and cooperative

historically significant impact on the nation's international agreement-making regime. To a large extent, the level of U.S. international engagement is determined by the procedural facility with which the nation concludes its international agreements.[159] Furthermore, international agreements increasingly aim at expanding the number and jurisdiction of international organizations, which substantially affects the national sovereignty of member states.[160] Since congressional-executive agreements are arguably easier to effect than formal treaties, advocates of disengagement view the congressional-executive agreement as a direct threat to U.S. sovereignty.[161] This political

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ties multiply across borders." See id. at 16 (quoting **Kjell Goldman, The Logic of Internationalism: Coercion and Accommodation** (1994)).

[159] See **Henkin**, supra note 3 at 219 (noting that U.S. foreign policymaking is largely a function of U.S. international agreement-making).

[160] See John J. Kim & Gregory Gerdes, International Legal Developments in Review: 1997 Public International Law, International Institutions, 32 **Int'l Law.** 575 (1998) (discussing recent developments in the growth of international institutions). The authors document the recent activities of several important international organizations, like the ICTR, NAFTA, and the WTO. Id. Their findings demonstrate that these organizations are becoming increasingly important international actors, exercising jurisdiction over many areas traditionally deemed the exclusive purview of the sovereign state. Id.

[161] See Detlev F. Vagts, Taking Treaties Less Seriously, 92 **Am. J. Int'l L.** 458 (1998) ("[T]here seems to be a sense that too much power over matters properly handled by the

dynamic, combined with the ambiguous state of the law,

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institutions of this country or even of its states is gravitating toward international organizations and international agreements."). Vagts compares the phenomenon in the United States with that of Europe where concerns have been raised that a "democratic deficit" exists due to the surrender of localized control to centralized and purportedly unaccountable EU bodies. Id. See Peter L. Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 **Colum. L. Rev.** 628, 633 (1999)(noting the presence of a "democratic deficit" in Europe due to the absence of any "direct connection to the perceived source of sovereign power upon which democratic legitimacy is based . . ."). But see **Steven Kull & I.M. Destler, Misreading the Public: The Myth of a New Isolationism**, 9-24 (1999)(presenting results of 1997 poll regarding public sentiment toward U.S. international involvement). The results of this poll clearly indicate a disconnect between actual public sentiment and the perception of public sentiment by policymakers and members of the media. Id. at 12-16. The thrust of the poll's findings are that a significant majority of Americans favor participation in international organizations and other forms of international cooperation, despite the misperceptions of policymakers and the media to the contrary. Id. at 249-260. For example, contrary to perceptions of policymakers, public attitudes toward U.S. participation in the Unite Nations are very favorable: 89 percent say that "it is important for the United States to cooperate with other countries by working through the UN." Id. at 53. 90 percent say that "it is important for the United States to build unified support in the UN before making a major foreign policy decision." Id. at 68. And only nine percent say "that the United States should give up its membership in the UN." Id. at 47. The internationalist/isolationist element to the current congressional-executive agreement debate is also evident from the other side of the ideological spectrum. See Phillip R. Trimble & Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, 16 **Berkeley J. Int'l L.** 55, 56 (arguing that President Clinton's concession that "militarily significant" agreements, like the "CFE Flank Agreement," should be submitted as treaties could lead to an increase in the influence of the "conservative, isolationist minority" in the Senate).

significantly increases the vulnerability of congressional-executive agreements to legal challenge.[162] Indeed, the legality of three recent congressional-executive agreements--NAFTA, the Uruguay Round of GATT, and the Agreement on Surrender of Persons with the International Criminal Tribunal of Rwanda (Surrender Agreement) - has been seriously questioned. The following analysis of these agreements will further illustrate the need for a principled rationale to guide the choice of instruments.

A. THE URUGUAY ROUND, NAFTA, AND MADE IN THE USA V.UNITED STATES

NAFTA and the Uruguay Round of GATT are two of the most comprehensive, innovative, and controversial international trade agreements to which the United States has ever been a party.[163] Signed in 1994, NAFTA created a free trade area including the U.S., Canada, and Mexico.[164] NAFTA is an

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[162] See Benjamin D. Knaupp, Classifying International Agreements Under U.S. Law: The Beijing Platform as a Case Study, 1998 **B.Y.U.L. Rev.** 239 (1998)(arguing that the status of non-treaty agreements under U.S. law is an important question facing U.S. courts and policymakers).

[163] See **H.R. Rep. No.** 103-361, at 8 (1993)(referring to NAFTA as "the most comprehensive trade agreement ever negotiated"); see 140 **Cong. Rec.** S8872 (1994)(highlighting the significance of the WTO Agreement)(statement of Sen. Byrd).

[164] For a comprehensive overview of NAFTA, see **NAFTA and Beyond: A New Framework for Doing Business in the Americas** (N. Kofele-Kale, J.J. Norton, R. Auerback, eds. 1995).

ambitious plan, with the ultimate goal of eliminating trade barriers in agriculture, manufacturing, and services.[165] The Uruguay Round was signed in April of 1994, and encompasses a wide range of reforms to the original 1947 GATT agreement.[166] The most significant of these is the establishment of the World Trade Organization (WTO),[167] which provides a forum for negotiations among its members.[168] Both NAFTA and the Uruguay Round were concluded as congressional-executive agreements pursuant to the "fast track" provisions of the 1974 Trade Act.[169]

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[165] See Michael R. Skahan, The NAFTA Trucking Dispute with Mexico: Problem? What Problem?, 5 **NAFTA: L. & Bus. Rev. Am.** 603, 604-605 (1999)(discussing NAFTA's goals).

[166] The Agreement Establishing the World Trade Organization, 33 I.L.M. 13 (1994)[hereinafter Uruguay Round].

[167] For a list of authoritative sources pertaining to the WTO, see **World Trade Organization: Issues and Bibliography** (A.M. Babkina, ed. 2000).

[168] See **Uruguay Round**, art. VI. The agreement also provides "a framework for the implementation of the results of such negotiations." Id. See also David W. Leebron, An Overview of the Uruguay Round Results, 34 **Colum. J. Transnat'l L.** 11 (discussing provisions of the WTO Agreement).

[169] See 1974 Trade Act § 19 U.S.C. ch.12 (1999). Fast track is an expedited procedure for negotiating and implementing international trade agreements. Under fast track, Congress is required to vote yes or no on the agreement within a specified period of time, without the opportunity for extended debate or amendment. The result of this process is an expedited congressional-executive agreement. See **Wagner**, supra note 155 at 1054.

The political and constitutional fallout that attended these two agreements came as a surprise to many observers.[170] A long line of precedent supports the use of congressional-executive agreements in matters of international trade.[171] Congress's broad powers under the Foreign Commerce Clause further support bicameral participation in these kinds of agreements.[172] But in the current atmosphere favoring disengagement,[173] the sweeping scope of NAFTA and the Uruguay

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[170] See **Wagner,** supra note 155 at 1052 (discussing scholarly reaction to controversy over NAFTA).

[171] See Harold H. Koh, Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha, 18 **N.Y.U. J. Int'l L. & Pol.** 1191, 1192-1208 (1986)(surveying the various statutory regimes relating to international trade agreements from 1930 onwards). Indeed, it has been argued that the enactment of the 1974 Trade Act, which provides for "fast track" congressional approval of international trade agreements, amounts to an official recognition of the legitimacy of congressional-executive agreements of this kind. See **Ackerman & Golove**, supra note 10 at 900.

[172] **U.S. Const.** art. I, § 8, cl. 3. See Downes v. Bidwell, 182 U.S. 244, 313 (1901)(White, J., joined by Shiras and McKenna, JJ., concurring)(finding that the Treaty Clause should not be interpreted to limit Congress's foreign commerce powers).

[173] With the end of the Cold War, the last decade has witnessed a resurgence of isolationist sentiment. See **Navari,** supra note 37 at 111(arguing that the decline of Russia as a world power has undermined one of the chief justifications for U.S. international involvement). The perceived incentives for international involvement have diminished significantly. Id. By most objective measures, notwithstanding major military operations in Kuwait and Kosovo, the United States has sharply reduced its level of international engagement. See **Larry Nowels, International**

Round prompted heavy resistance to their being concluded as congressional-executive agreements. On the floor of the Senate, for example, Senator Jesse Helms argued strenuously that allowing the Uruguay Round to be concluded by statute would amount to an "assault on the sovereignty of the United States of America."[174] Similar complaints were leveled

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Affairs Budget Trends FY1978-FY1998, Congressional Research Service at 5 (1998). Since 1991, the U.S. international affairs budget, which includes all expenditures by the State Department and all contributions to international organizations, has fallen by twenty five percent. Id. Foreign aid spending has dropped by thirty four percent in the same period. Id. at 12. And perhaps the most dramatic victim of U.S. disengagement has been the United Nations, who until recently has been locked in a two-year struggle with Congress over $2 billion in U.S. arrears on membership dues. See **Teifer,** supra note 15 at 252-254 (describing the struggle over UN dues payments). As these objective measures indicate, isolationism's modern incarnation is manifested forcefully in its resistance to U.S. participation in international organizations. Id. at 263 (noting that congressional isolationism has manifested itself most prevalently in an unwillingness to cede any degree of sovereignty to international organizations). See also Jim Mann, Isolationist Trend Imperils Activist U.S. Foreign Policy, **Los Angeles Times**, Feb. 19, 1995, at A1 ("The strongest currents of isolationist sentiment in half a century are washing across the country . . . threatening to sweep away a 50-year-old tradition of activist U.S. foreign policy.").

[174] 140 **Cong. Rec.** S1057-02, S10583 (daily ed. Aug. 4, 1994)(statement of Sen. Helms). In reference to the arbitration provisions of the agreement, Senator Helms further commented that, "[i]t is like having a gun held to the head of Uncle Sam: 'Change your law, give us money, or we will shoot.'" Id. Numerous other Senators also expressed their belief that the Uruguay Round implicated important sovereignty concerns and should, therefore, be concluded as a formal treaty. See 140 **Cong. Rec.** S8850 (1994)(resolution proposed by Senator Thurmond and co-sponsored by Senators

against NAFTA.[175]

The controversy over the Uruguay Round was effectively mooted when that agreement passed with over two-thirds Senate approval;[176] but NAFTA received only sixty-one out of ninety-nine votes, prompting criticism that the agreement improperly circumvented the Treaty Clause's supermajority requirement.[177] This contention culminated in a law suit filed in federal district court. In Made in the USA Foundation v. United States, the United Steel Workers of America claimed that NAFTA was "null, void and of no

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Hollings and Byrd, stating that "traditionally the United States has entered into international obligations that impact on domestic sovereignty and law that have the legal structure and permanence of the WTO has, by using treaty ratification procedures").

[175] See Rachel S. Brass, Made in the USA Foundation v. United States: NAFTA, the Treaty Clause, and Constitutional Obsolescence, 9 **Minn. J. Global Trade** 663, 680-681 (2000)(arguing that because NAFTA substantially constrains state sovereignty it should have been concluded as a formal treaty); see **Wagner**, supra note 155 at 1056-1057 (noting that proponents of the use of congressional-executive agreements in trade matters characterize the issue as that of "free trade versus protectionism"); see Estella Duran, NAFTA Unconstitutional, Steelworker's Suit Says, **Boston Globe**, July 14, 1998(quoting Laurence Tribe)("Short of creating a government of the Western Hemisphere, NAFTA does everything else a treaty could do.").

[176] See Made in the USA, 56 F.Supp. 2d at 158 note 218 (noting that the issue was arguably mooted when the Senate passed the agreement by a two-thirds vote).

[177] See 139 Cong. Rec. S16, 712-713 (daily ed. Nov. 20, 1993)(listing voting record on Uruguay Round).

effect."[178] Advocating weak exclusivity, the plaintiffs asked the court to direct the President to terminate NAFTA because it significantly affected national sovereignty and therefore should have been concluded as a formal treaty.[179]

Although the court declined to adopt the plaintiffs' approach, it also rejected the notion that treaties and congressional-executive agreements are completely interchangeable, noting that "there may exist circumstances where the procedures outlined in the Treaty Clause must be adhered to in order to adopt an international agreement."[180] However, the court did not speculate as to what these circumstances might be.[181] Instead, the court adopted a weak-interchangeability approach to the Treaty Clause, finding that NAFTA was validly concluded as a congressional-executive agreement because it was within Congress's broad powers under the Foreign Commerce Clause.[182]

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[178] See Made in the USA, 56 F.Supp. 2d at 218.

[179] Id.

[180] Id. at 290 (emphasis added).

[181] Id.

[182] Id.

B. THE ICTR SURRENDER AGREEMENT AND NTAKIRUTIMANA V. RENO

The scope of the congressional-executive agreement was also the focus of a dispute over an extradition agreement between the U.S. and the International Criminal Tribunal for Rwanda (ICTR).[183] The ICTR Surrender Agreement[184] closely resembles a traditional bilateral extradition agreement.[185] However, it broke with tradition in one significant respect. Contrary to longstanding government practice in extradition matters, the ICTR Surrender Agreement was concluded not as a treaty but as a congressional-executive agreement. Although extradition from the U.S. has been granted on a few occasions in the absence of a treaty, extradition has only been granted on two occasions pursuant to a congressional-

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[183] The enabling Security Council Resolution for the ICTR is listed as follows: Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, SC Res. 955 (Nov. 8, 1994), reprinted in 33 ILM 1602 (1994).

[184] Agreement on Surrender of Persons [hereinafter Surrender Agreement], Oct. 5, 1994, U.S.-Int'l Trib. Rwanda.

[185] See Robert Kushen & Kenneth J. Harris, Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda, 7 **Am. J. Int'l L.** 510, 512 (1996)(noting that "[t]he Agreements read to some extent like streamlined bilateral extradition treaties").

executive agreement prior to Ntakirutimana.[186] The Surrender Agreement also differed from traditional extradition agreements in other respects.[187] For example, the agreement provides for rendition of fugitives to an international tribunal instead of a sovereign state--a new development in U.S. extradition law.

The Surrender Agreement was passed into law[188] with no substantive debate on the merits of the agreement or on the method of its execution.[189] But the agreement faced serious

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[186] See Robert Kushen & Kenneth J. Harris, Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution, 7 **Crim. L.F.** 561, 578 (noting that one congressional-executive agreement has been used as the basis for extradition in two instances). See also **M. Cherif Bassiouni, International Extradition: United States Law and Practice** 53 (1996)(discussing the few instances in which the U.S. has granted or requested extradition in the absence of a treaty); **Michael Abbell and Bruno Ristau, International Judicial Assistance Criminal: Extradition**, Vol. 4, 24-25 (1998). Also, the ICTR Surrender Agreement only enables rendition in one direction, from the U.S. to the ICTR. Id. Also, several of the standard exceptions found in extradition treaties - like the political offense exception and the dual criminality requirement - were not included in the agreement due to the unique nature and jurisdiction of the Tribunal. Id.

[187] See **Kushen & Harris,** supra note 186 at 512-513.

[188] National Defense Authorization Act, Pub. L. No. 104-106, § 1342, 110 Stat. 486 (1996).

[189] See Ntakirutimana v. Reno, 184 F.3d 419, 432-433 (5th Cir. 1999)(DeMoss, J., dissenting)(discussing legislative history of the Surrender Agreement's enabling legislation).

opposition in the courts. In September of 1996, the ICTR sought extradition of Elizaphan Ntakirutimana, a Rwandan Hutu residing in Texas.[190] Ntakirutimana was wanted for serious human rights violations allegedly committed during the Rwandan civil war in 1994.[191] The first magistrate to hear the case summarily dismissed the government's request for extradition on the ground that a congressional-executive agreement may never substitute for a treaty in matters of extradition.[192] In a second hearing before another magistrate, the court reached the contrary conclusion, finding that a statutory grant of authority would suffice for purposes of extradition.[193] Under the second

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[190] George S. Yacoubian, Jr. "Sanctioning alternatives in international criminal law: recommendations for the International Criminal Tribunals for Rwanda and the former Yugoslavia," World Affairs (June 22, 1998).

[191] Indictment of Elizaphan Ntakirutimana, International Criminal Tribunal for Rwanda (June 17, 1996). Ntakirutimana was charged offenses: 1. "Genocide" as recognized by Articles 22 and 23 of the Statute of the Tribunal; 2. "Complicity in Genocide" as recognized by Article 2(3)(e) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal; 3. "Conspiracy to Commit Genocide" as recognized by Article 2(3)(e) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal; 4. "Crime Against Humanity" as recognized by Article 2(3)(e) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

[192] In re Surrender of Elizaphan Ntakirutimana, 988 F.Supp. 1038, 1042 (S.D. Tex. 1997).

[193] In re The Surrender of Elizaphan Ntakirutimana, 1998 WL 655708 *17 (S.D. Tex 1998). Under U.S. law, there is no

magistrate's ruling, Ntakirutimana's extradition was thus deemed lawful.

The question whether extradition agreements could be effected by statute was also at the forefront of the Fifth Circuit's subsequent habeas corpus review.[194] In Ntakirutimana v. Reno, the majority upheld the validity of the congressional-executive agreement, implicitly adopting a theory of weak interchangeability.[195] The court reasoned that the Constitution clearly "contemplates alternate modes of international agreement,"[196] and, at least regarding extradition matters, the congressional-executive agreement is a valid means of international agreement.[197] The dissenting opinion, however, advocated weak exclusivity, arguing that "[i]f the Treaty Clause is to have any meaning[, some] variety of agreements must be accomplished

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direct appeal from the magistrate's decision in an extradition proceeding. See **Bassiouni,** supra note 186 at 737 (discussing the review process in extradition cases). The requesting party's remedy to an adverse holding is to resubmit the request for extradition. Id. The requesting party may resubmit an unlimited number of times. Id. The requested party's remedy to an adverse holding is by means of habeas corpus. Id.

[194] See Ntakirutimana v. Reno, 184 F.3d 419, 426 (1999).

[195] Id.

[196] See id. at 425(quoting **Laurence H. Tribe, American Constitutional Law** at 228-229 (1988)).

[197] Id.

through the formal Article II process."[198] The dissent concluded that extradition is a characteristic act of sovereignty and is appropriately governed by the highest form of U.S. international agreement making - the Article II treaty.[199]

The political dimension to this case, though less pronounced than that of Made in the USA, was significant. For example, after concluding that the Surrender Agreement unconstitutionally circumvented the Treaty Clause, the dissenting judge tellingly refers to a newspaper editorial in which the author argues that non-treaty international agreements facilitate the erosion of U.S. sovereignty and the "debilitation of democracy."[200] Commentators also recognized the political significance of Ntakirutimana, noting that, if Ntakirutimana's constitutional argument had prevailed, it would have seriously compromised U.S. cooperation with the enforcement of international criminal law.[201]

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[198] Ntakirutimana, 184 F.3d at 435(DeMoss, J., dissenting).

[199] Id.

[200] George Will, Editorial, See you in Congress . . ., **Wash. Post**, May 20, 1999, at A29.

[201] Editorial, "War Crimes and Extradition," **Wash. Post**, Apr. 10, 1999, at A20 (arguing that if Ntakirutimana's constitutional argument had prevailed it would have

The questions raised by the litigants in Ntakirutimana and Made in the USA concerning the proper scope of the congressional-executive agreement were left substantially unanswered.[202] In both cases, the courts adopted a weak-interchangeability view of the Treaty Clause and found that, whatever the actual scope of the congressional-executive agreement, it had not been exceeded by the agreements under consideration.[203] Although these findings suggest that most extradition agreements and most international trade agreements may be validly concluded by statute, they say little more.[204] Future agreements that push the boundaries of established practice, particularly those that implicate national sovereignty concerns, will still be vulnerable to legal challenge. Moreover, the contentious political backdrop to these cases suggests that these kinds of challenges will continue to arise.[205] It is evident, therefore, that the political process and the current

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seriously "diminish[ed] the ability of the United States to cooperate in international war crimes prosecutions - including in courts this country was instrumental in establishing.").

[202] See discussion supra, Part IV.A.

[203] Id.

[204] Id.

[205] Id.

interpretive approaches to the Treaty Clause cannot define the scope of the congressional-executive agreement with adequate specificity. By implementing a principled choice-of-instruments process, however, many of the persisting ambiguities may be clarified, thus greatly enhancing the perceived legitimacy and sustainability of congressional-executive agreements.

V. RECOMMENDATION FOR CLARIFYING THE SCOPE OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

The challenge, then, is to determine what criteria should form the basis of such a principled choice-of-instruments process.[206] As was previously suggested, there are important qualitative differences between treaties and congressional-executive agreements.[207] These differences thus provide a natural starting point for developing a principled choice-of-instruments process. The first of these differences relates to the level of deliberation inherent in the two procedures. Due to the Treaty Clause's supermajority requirement, treaties tend to undergo substantially more rigorous deliberation than standard

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[206] See **Henkin,** supra note 16 at 61(arguing that it is time "to develop a general principle for identifying international agreements that might be sent to both houses for approval rather than to the Senate alone.").

[207] See discussion, supra Part III.B.

legislation.[208] This factor is particularly relevant in two situations: first, when an agreement is highly complex or subtly nuanced, the nation would presumably benefit from increased deliberation;[209] and, second, when an agreement addresses an emergency or attempts to take advantage of a passing diplomatic opportunity, the more expedient congressional-executive agreement would better serve the national interest.[210]

A second qualitative difference between treaties and congressional-executive agreements derives not from their respective majority requirements but from the distinct representational characteristics of the Senate and the House. Senators are statewide representatives, and each state has an equal vote in the Senate.[211] House members, by contrast, represent discrete congressional districts, and a state's total voting power in the House is determined by

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[208] See **Franck & Weisband,** supra note 33 at 135 (noting higher level of deliberation afforded in the formal treaty process).

[209] Id.

[210] See **Erickson,** supra note 102 at 59 (noting that executive agreements are well-suited for circumstances in which quick agreement is required).

[211] See **Congressional Quarterly, Guide to Congress** 17-22 (5th ed. 1999).

population.[212] Accordingly, the Senate is in a unique position to represent the states as states in the national government.[213] Where an agreement significantly alters the relationship between federal and state government, therefore, the treaty process provides significant consensus-building advantages.[214]

Finally, the two procedures are significantly different with regard to the degree of formality that each provides. The treaty procedure derives from an express provision of

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[212] Id.

[213] See Letter from Laurence H. Tribe, Harvard Law School, to Senator Robert Byrd (July 19, 1994)(arguing that the representational qualities of the Senate render it the most appropriate body to decide on international agreements "affecting the power alignment between the National Government and the States."). The original purpose of vesting the treaty power in the Senate was also based in large part on the unique representational characteristics of that body. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 **Mich. L. Rev.** 390, 412 (1998)(arguing that the Founders envisioned the treaty power as a safeguard for sectional interests insofar as each state has equal representation in the Senate); **Slonim**, supra note 35 at 447 (arguing that conferral of the treaty power on the Senate was a deliberate policy decision on the part of the Founders for the purpose of ensuring adequate protection of sectional interests).

[214] With this same consideration in mind, one commentator goes so far as to argue that treaties should be used only when an agreement affects the powers reserved to the states. See **Byrd,** supra note 25 at 276. But see **Henkin**, supra note 3 at 422 (1989)(arguing that the congressional-executive agreement is superior to the formal treaty process insofar as it "avoids law-making by less than a full, democratic legislature.").

the Constitution and, therefore, carries the full weight of the nation's founding document.[215] Treaties are widely recognized, domestically and internationally, as being imbued with a level of dignity unmatched by congressional-executive agreements.[216] The relevance of this distinction is self-evident. Although both modes of agreement are equally binding as a matter of international law,[217] the choice of instruments has a potentially significant symbolic effect.[218]

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[215] See Andrew T. Hyman, The Unconstitutionality of Long-Term Nuclear Pacts That Are Rejected by Over One-Third of the Senate, 23 **Denv. J. Int'l L. & Pol'y** 313, 342-346 (1995)(arguing that the enumeration of the treaty process in the Constitution bespeaks its elevated status).

[216] See **Erickson,** supra note 102 at 61 (noting that foreign negotiating partners, at times, request the use of the treaty process for the purpose of elevating the formal status of the agreement).

[217] See **Lassa Oppenheim, International Law: A Treatise** 877 (5th ed. 1935)(defining the term "treaty" generically: "International treaties are agreements, of a contractual character, between States or organisations of States, creating legal rights and obligations between Parties."). The domestic procedure used to conclude an international agreement is of no consequence as a matter of international law, so long as the agreement is otherwise valid. Id.

[218] As Professor Henkin has noted, a congressional-executive agreement may be less effective in a situation "that seems to ask for the additional 'dignity' of a treaty." **Louis Henkin, Foreign Affairs and the Constitution,** 217 (2d ed. 1992). The enhanced formality of treaties may also work against the best interests of the nation. See **Murphy,** supra note 70 at 243 (citing statement of Sen. Case, **Hearings on S. Res. 214 Before Comm. on Foreign Relations**, 92d Cong., at 3 (1972)(noting that,

Level of deliberation, form of representation, and degree of formality are therefore three important areas in which treaties and congressional-executive agreements differ. Although some decisionmakers may take these differences into consideration, given the assumption of the current orthodoxy - that treaties and congressional-executive agreements are completely, or virtually, interchangeable - it is unlikely that these differences substantially affect the choice of instruments.[219] To the extent that this is the case, there is an increased probability that agreements will be concluded in a manner not suited to their purpose and scope. Implementing a choice-of-instruments process that expressly recognizes these differences, however, would not only decrease this probability, but would also significantly strengthen the justification for using the chosen instrument. Tailoring

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regarding U.S. military base agreements with Portugal and Bahrain, the use of the treaty procedure may give agreements the level of "formality which implied an importance and a U.S. commitment which are neither involved nor desired.")).

[219] See Louis Fisher, **Congressional Research Service, 104th Cong., 1st Sess., Agreed Framework with North Korea** S4050-03 (Comm. Print 1995)("No clear guidelines are available from parliamentary practice or federal court decisions on the issue of whether to submit international matters in bill form or as a treaty."). Legislators seem to share in this appraisal. See GATT Implementing Legislation: Hearings on S. 2467, 103d Cong. 285-339 (1994)(commenting that there are no "hard and fast rules" guiding the choice of instruments).

the choice of instruments to the particular agreement being contemplated would reduce the impetus for legal challenge, and, in the event that an agreement was challenged, the government's decision would be supported by rational, rather than purely political, considerations.

Existing Circular 175 Procedures provide a convenient framework within which to implement a choice-of-instruments process reflecting the qualitative distinctions outlined above. Circular 175 could easily be amended by executive order,[220] and only three changes would be required to achieve the desired result. First, Circular 175 should be made expressly applicable to congressional-executive agreements. Second, Circular 175 guidelines should contain a provision requiring officials to consider whether the complexity of the contemplated agreement necessitates the higher level of deliberation embodied in the treaty process, or whether exigent circumstances justify the use of a congressional-executive agreement. And third, a provision should be added that requires officials to consider the degree to which a given agreement affects the distribution of power between

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[220] See Levinson, Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers, 9 **Vand. J. Transnat'l L. Rev.** 695, 711 (1976)(discussing the use of executive orders as the most effective means of presidential rulemaking because it has been used more frequently than other means).

the states and the federal government.[221] If the anticipated effect is significant, the treaty procedure should be required.

Conclusion

Admittedly, implementing these changes will not neutralize political opposition to international engagement; nor will it prevent parties from questioning the validity of congressional-executive agreements in court. Implementing these changes would, however, help define the scope of congressional-executive agreements, substantially enhancing their perceived legitimacy and sustainability in the process.[222]

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[221] Circular 175 already contains a provision relating to desired level of formality, so no additional change would be needed in this regard. See **U.S. Dep't of State**, 11 **Foreign Affairs Manual**, Chpt. 700, 721.3. (f)(1985).

[222] See **Congressional Research Serv., Executive Regulations**, supra note 16 (recommending clear international agreement-making procedures for the purpose of giving the process "international legitimacy and reduc[ing] domestic political conflict over the handling of agreements.").

VITA

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