Executive Agreements

William C. Green

In Thomas Lewis and Richard Wilson
The Supreme Court, 332-33.
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Definition: An international agreement made by a president on his own constitutional authority or in co-operation with Congress.

Significance: Executive agreements have enhanced presidential leadership in foreign affairs and served as the form for key international commitments from the Yalta Agreement to the North American Free Trade Agreement (NAFTA).

Executive agreements vary widely in formality and importance. Many address routine economic, military, and political subjects such as postal regulations and trade agreements while others, such as the Yalta Agreement in 1945, the Vietnam peace settlement in 1973, and the North American Free Trade Agreement in 1993, have had significant international political and economic consequences.

The Constitution in Article I, Section 10 implicitly recognizes executive agreements by its prohibition on states making agreements and compacts with foreign powers, but it does not indicate how they are related to treaties made by the president with the advice and consent of two thirds of the Senate. The Supreme Court provided some assistance in *Weinberger v. Rossi* (1982) when it observed that the word treaty in international law referred to a compact between sovereign states, but the Constitution distinguished Article II treaties from those governed by Article IV, Section 2, the supremacy clause, which also included executive agreements. As the Court said in *United States v. Pink* (1942), this meant that a state law inconsistent with an executive agreement had to yield, because the agreement, like a treaty, was the supreme law of the land. Executive agreements and treaties also have to comply with personal constitutional guarantees. In *Reid v. Covert* (1957), the Court held that an executive agreement providing for trial by court marshal for American military personnel and their dependents violated the constitutional right to trial by jury. Still, the Constitution and the Court have not clearly indicated how treaties and agreements differ or defined the president's sole power to make agreements without the Senate and to collaborate with both chambers.

Sole Executive Agreement. Presidents have used their Article II power as commander-in-chief to make armistice and cease fire agreements, enter into agreements to protect troops, control occupied areas, and arrange post-war territorial and political matters as at Yalta and Potsdam. Presidents have also construed their Article II diplomatic powers broadly to argue that their authority to settle claims lies within the penumbra of their power to recognize foreign governments. In 1933, President Franklin Roosevelt recognized the Soviet Union, established diplomatic relations, and negotiated a claims settlement agreement. In *United States v. Belmont* (1937) and *United States v. Pink* (1942), the Supreme Court held that the Litvinov claims settlement agreement was a legally enforceable international compact which the President, as the sole organ of the federal government in foreign relations, had the authority to negotiate without consulting the Senate. In 1980, President Carter negotiated the release of diplomatic personnel held hostage by Iran on the basis of an executive agreement that provided for the arbitration of claims, but in *Dames and Moore v. Regan* (1981), the Court was more cautious. *Pink* gave president a measure of authority to enter into an agreement providing for claims settlement when it was necessary to resolve a major foreign policy dispute, but the Court emphasized that the crucial factor in upholding the agreement was a history of congressional acquiescence that had invited similar presidential actions.

Congressional-Executive Agreements. Presidential collaboration with Congress is based on Article I's requirement that revenue bills originate in the House of Representatives and its grant of power over foreign commerce and under the necessary and proper clause to make all laws reasonably related to foreign commerce and to the president's foreign relations powers. Congress has taken the initiative and provided presidents with prior authorization to make agreements on postal rates, trademark and copyright regulations, foreign assistance, and reciprocal trade agreements. Presidents has also taken the initiative and negotiated agreements with foreign governments and then sought authorization from Congress in the form of a statute or a joint resolution. The congressional-initiated agreement has a long historical pedigree, but the use of the presidentially-initiated agreement traces its origins to World War II and takes its current form from the Trade Act of 1974: congressional involvement in the negotiation process and a fast track approval procedure (limited debate, and an up or down vote with no amendments) which President Clinton used with NAFTA.

Executive agreements initiated by presidents have become a largely interchangeable alternative to treaties. They substitute the one-third plus one Senate veto for a simple majority of both chambers, provide the

House of Representatives with an equal voice, and eliminate the danger that the House may refuse to approve the appropriation of funds necessary to implement a treaty. The Supreme Court has not addressed the constitutional status of these agreements. If it does, its reliance in *Dames and Moore v. Regan*_(1981) on Justice Robert Jackson's concurring opinion in *Youngstown Sheet and Tube v. Sawyer* (1952) could allow it to frame a decision in terms of whether the president's action was taken with the support of, in opposition to, or in the absence of congressional authorization. Still the Court is unlikely to address the larger issue of a president's use of an agreement instead of treaty, because it is a political question inappropriate for judicial inquiry.

A president's use of executive agreements will continue be defined by his relationship with Congress and by his awareness that the Senate has objected to their extensive. The Bricker Amendment (1954), though it would have conferred explicit constitutional recognition on executive agreements, sought to curtail and regulate them by providing that they would only be effective as internal law if they were supported by legislation. Congress has also been troubled by covert agreements and in Case Act (1972) required their publication. As a consequence, a president's use of executive agreements will be disciplined by his respect for the Senate and its treaty power, his awareness that treaties have greater dignity, and his knowledge that their constitutional status is beyond doubt.

Bibliography

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