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92D CONGRESS
2d Session

SENATE

REPORT
No. 92-591

TRANSMITTAL OF EXECUTIVE AGREEMENTS TO CONGRESS

JANUARY 19, 1972.—Ordered to be printed

Mr. FULBRIGHT, from the Committe on Foreign Relations, submitted the following

REPORT

[To accompany S. 596]

The Committee on Foreign Relations, to which was referred the bill (S. 596) to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within 60 days after the execution thereof, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

The bill was approved by the committee on December 7, 1971, without amendment. The essential provision of the bill reads as follows:

> "The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than 60 days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

COMMITTEE ACTION

Public hearings on S. 596, which had been introduced in the Senate by Senator Case on February 4, 1971, provided the committee with testimony expressing the favorable views of a distinguished historian and a leading academician and the unfavorable views of the admin-

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istration. On October 20, 1971, Prof. Ruhl J. Bartlett of the Fletcher School of Law and Diplomacy provided the committee with an analysis of the problem of secrecy to which this bill addresses itself in the broader context of the historical problem of executive agreements as means of contracting significant foreign commitments. On the basis of this historical perspective, Professor Bartlett expressed his view that—"this proposed measure is so limited in its scope, so inherently reasonable, so obviously needed, so mild and gentle in its demands, and so entirely unexceptionable that it should receive the unanimous approval of the Congress."

On the same day the committee heard testimony by Prof. Alexander M. Bickel of the Yale University Law School, who also expressed strong support for the measure. "In requiring, as S. 596 would do," said Professor Bickel, "that international agreements other than treaties to which the United States is a party be transmitted to it, Congress would be exercising a power that, in my opinion, clearly belongs to Congress under the Constitution."

Professor Bickel also expressed his belief that "Congress has too long tolerated, indeed cooperated in, a diminution of its role in the conduct of foreign affairs and in the decision of questions of war and peace—a diminution that approaches the vanishing point."

In this respect, Professor Bickel concluded, the balance of power between Congress and the President ought to be redressed, to which end S. 596 would constitute "an important step."

The views of the administration were presented to the Committee on October 21, 1971, by Mr. John R. Stevenson, Legal Advisor to the Department of State. Mr. Stevenson expressed the administration's view that the provision of a reliable flow of information to Congress could best be provided for by "practical arrangements" of a nonlegislative nature. Conceding that in the past they (the Congress) have not been informed on a current basis but only ad hoc some years later, Mr. Stevenson concluded nonetheless that "we are dealing with a question of practical arrangements, not with a question of right or authority which would in any way be altered by statute."

On December 7, 1971, the bill was considered by the committee in executive session and ordered reported without amendment and without dissent.

BACKGROUND OF THE BILL

The legislative history of S. 596 goes back to 1954 when a similar proposal was introduced in the Senate by Senators Homer Ferguson of Michigan and William Knowland of California. It was reported favorably to the Senate in August 1954 but no action was taken on the bill. The proposal was revived by Senator Knowland in 1955 and subsequently, in July 1956, favorably reported and then adopted unanimously by the Senate. No action was taken by the House of Representatives.

As adopted in 1956, and as introduced by Senator Case in February 1971, the bill was in a form which had made it acceptable to the Eisenhower administration. As originally conceived in 1954, the proposal called for the submission of all executive agreements to the Senate within 30 days. The Eisenhower administration, through its Assistant Secretary of State for Congressional Relations, Thruston B. Morton,

objected that the 30-day time period was too short and objected further to the absence of a provision for the protection of highly classified agreements. In order to meet that objection, the bill was amended to provide for a 60-day transmittal period and also to permit the President, at his option, to submit sensitive agreements not to the Senate as a whole but to the Committee on Foreign Relations "under an appropriate injunction of secrecy." With these amendments the Eisenhower administration offered no objection to the bill.

As reintroduced by Senator Case in 1971, S. 596 was broadened to require the reporting of agreements to the House of Representatives and its Committee on Foreign Affairs as well as to the Senate and its Committee on Foreign Relations. In all other respects the bill as introduced by Senator Case and favorably reported by the Foreign Relations Committee in 1971 is the same as the proposal to which the Eisenhower administration offered no objection in 1954 and 1955.

COMMITTEE COMMENTS

In the view of the Foreign Relations Committee, S. 596 embodies a proposal which is highly significant in its constitutional implications. The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy. The committee shares Professor Bickel's view that the adoption of this bill would be "an important step" in the direction of redressing the balance of power between Congress and the President in the conduct of foreign relations.

The committee does not accept the administration's view, as expressed by Mr. Stevenson, that the sole requirement for the flow of reliable information to Congress is the working out of "practical arrangements." As outlined by Mr. Stevenson, these "practical arrangements" would still fail to establish the *obligation* of the executive to report all agreements with foreign powers to the Congress. In the absence of legislation, even the soundest of "practical arrangements" would leave the ultimate decision as to whether a matter was to be reported or withheld to the unregulated judgment of the executive.

It is well and good to speak, as Mr. Stevenson does, of the executive's recognition of the needs of Congress and of the desirability of "mutual cooperation and accommodation" between the two branches of government. These are highly desirable, but the principle of mandatory reporting of agreements with foreign countries to the Congress is more than desirable; it is, from a constitutional standpoint, crucial and indispensable. For the Congress to accept anything less would represent a resignation from responsibility and an alienation of an authority which is vested in the Congress by the Constitution. If Congress is to meet its responsibilities in the formulation of foreign policy, no information is more crucial than the fact and content of agreements with foreign nations.

As the committee has discovered, there have been numerous agreements contracted with foreign governments in recent years, particularly agreements of a military nature, which remain wholly unknown

to Congress and to the people. A number of these agreements have been uncovered by the Symington Subcommittee on Security Agreements and Commitments Abroad, including, for example, an agreement with Ethiopia in 1960, agreements with Laos in 1963, with Thailand in 1964 and again in 1967, with Korea in 1966, and certain secret annexes to the Spanish bases agreement.

Section 112(a) of title I of the United States Code now requires the Secretary of State to compile and publish all international agreements other than treaties concluded by the United States during each calendar year. The executive, however, has long made it a practice to withhold those agreements which, in its judgment, are of a "sensitive" nature. Such agreements, often involving military arrangements with foreign countries, are frequently not only "sensitive" but exceedingly significant as broadened commitments for the United States. Although they are sometimes characterized as "contingency plans," they may in practice involve the United States in war. For this reason the committee attaches the greatest importance to the establishment of a legislative requirement that all such agreements be submitted to Congress.

The committee fully recognizes the sensitive nature of many of the agreements the executive enters with foreign governments. At some point the committee may wish to explore the question whether the executive is exceeding his constitutional authority in making some of these agreements. That, however, is not the issue to which S. 596 addresses itself. Its concern is with the prior, more elemental obligation of the executive to keep the Congress informed of all of its foreign transactions, including those of a "sensitive" nature. Whatever objection on security grounds the executive might have to the submission of such information to Congress is met by the provision of the bill which authorizes the President, at his option, to transmit certain agreements not to the Congress as a whole, but to the two foreign affairs committees "under an appropriate injunction of secrecy to be removed only upon due notice from the President."

As reported by the Foreign Relations Committee, S. 596 would not require the submission to Congress of international agreements entered into prior to the enactment of the bill. It is the strongly held view of the committee, however, that the absence of a retroactive provision in this bill is not to be interpreted as license or authority to withhold previously contracted agreements from the Congress. In keeping with the spirit and intent of the bill, the committee would expect the executive to make all such previously enacted agreements available to the Congress or its foreign affairs committees at their request and in accordance with the procedures defined in the bill.

In conclusion, the committee reiterates its view that the proposal contained in S. 596 is a significant step toward redressing the imbalance between Congress and the executive in making of foreign policy. Twenty years ago Congres undertook an examination of the broader issue of the treaty power through its consideration of the so-called Bricker amendment. One of the essential purposes of the Bricker amendment, in the various forms in which it was considered by Congress, was to place restrictions on the use of executive agreements as a means of contracting significant agreements with foreign powers in circumvention or violation of the treaty power of the Senate.

The present proposal, which was originally initiated as a modest alternative to the Bricker amendment, does not purport to resolve the underlying constitutional question of the Senate's treaty power. It may well be interpreted, however, as an invitation to further consideration of this critical constitutional issue. For the present, however, the committee strongly recommends the adoption of S. 596 as an effective means of dealing with the prior question of secrecy and of asserting the obligation of the executive to report its foreign commitments to Congress.

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92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 92-1301

TRANSMITTAL OF EXECUTIVE AGREEMENTS TO CONGRESS

AUGUST 3, 1972—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ZABLOCKI, from the Committee on Foreign Affairs, submitted the following

REPORT

[To accompany S. 596]

The Committee on Foreign Affairs, to whom was referred the bill (S. 596) to require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

COMMITTEE ACTION

S. 596 was passed by vote of 81 to 0 in the Senate on February 16, 1972. It was referred to the Foreign Affairs Committee on February 17, where identical bills (H.R. 14365 by Mr. Zablocki and H.R. 14647 by Mr. Whalen) were already pending. A hearing on the measures was held by the Subcommittee on National Security Policy and Scientific Developments on June 19. Witnesses were Senator Clifford P. Case of New Jersey, the author of S. 596, and Mr. Carl Salans, deputy legal adviser to the Department of State.

The subcommittee subsequently approved sending S. 596 to the full committee for consideration. On August ———, the committee by voice vote approved the measure without amendment and ordered it reported to the House.

MEANING AND BACKGROUND OF THE BILL

The legislation is not complex.

First, it provides that the Secretary of State will transmit to Congress the text of any international agreement—other than a treaty—to which the United States is a party as soon as practicable after the

agreement has entered into force, but in no case more than 60 days thereafter.

Second, for those agreements which are sensitive and must be kept secret in the national interest, S. 596 provides that the President should transmit them not to the Congress as a whole, but to the House Foreign Affairs Committee and the Senate Foreign Relations Committee. Those agreements would be held under an appropriate injunction of secrecy which could be removed only upon due notice from the President.

The bill is not retroactive and would not require that the more than 4,360 existing international agreements to which the United States is presently a party be transmitted to the Congress. All international executive agreements executed after the legislation goes into effect, however, would be covered. The United States enters into approximately 200 such agreements each year.

As State Department witnesses have readily admitted the Congress has not always been kept adequately informed about the international executive agreements entered into by the President and officials of the executive branch on behalf of the United States.

For example, the provisions of the Yalta agreement at the end of World War II were not publicly disclosed for 3 years, and the entire text of the Yalta agreement was not published until 1947—a situation which resulted in considerable controversy in the Congress and among the American public.

More recently, the Symington Subcommittee on National Commitments uncovered contemporary examples of secret agreements entered into without adequate reference to the Congress.

Each incident in which such secret agreements become known create tensions and irritations between the Congress and the executive branch which severely inhibit carrying out an effective foreign policy. In recent testimony before House Foreign Affairs Subcommittee on National Security Policy and Scientific Developments, Mr. McGeorge Bundy stated that:

> The most serious present difficulty in the framing and execution of the foreign policy of the United States is the almost complete breakdown of effective relations between the executive and legislative branches of the government.

S. 596 is a step toward restoring a proper working relationship between the Congress and the executive branch in the area of foreign affairs. By establishing in law a formal procedure for the transmittal to Congress of all executive agreements, the bill would eliminate one potential source of friction.

State Department spokesmen have expressed their preference for informal "practical arrangements" for providing Congress with information about executive agreements, rather than passage of legislation in this area.

Informal procedures would not, however, address the basic problem involved. Such arrangements would still leave with the executive branch the discretion to disclose or not to disclose as it saw fit. Moreover, informal procedures worked out by the present administration with the Congress would not be binding on future administrations and likely would require renegotiation every few years.

Working on a "case by case" basis, therefore, is not likely to be a satisfactory answer to the present difficulties and might well result in an exacerbation of tensions.

It should be pointed out that this legislation is not new. Its history goes back to 1954 when a similar proposal was introduced in the Senate by Senators Homer Ferguson of Michigan and William Knowland of California. In 1956 it was adopted unanimously in the Senate but the House failed to act.

The Eisenhower administration had a hand in shaping the bill, which was seen as an acceptable alternative to measures affecting executive agreements which had been offered by Senator John Bricker of Ohio. S. 596 is virtually identical to the earlier legislation.

In hearings before the Senate Foreign Relations Committee last October, the State Department recommended against the adoption of S. 596 in favor of mutually acceptable practical arrangements. In May, following unanimous Senate passage, the Department changed its position and stated that the executive branch would not oppose the bill's adoption if Congress believed that to be desirable.

Spokesmen for the Department of State have, however, raised several issues about the legislation which require additional committee comment.

ADDITIONAL COMMITTEE COMMENTS

1. *What constitutes an international agreement.*—During committee hearings a State Department spokesman raised the question of what kind of arrangements constitute international executive agreements within the meaning of the legislation. He pointed out that many exchanges involve administrative working details for carrying out a treaty or agreement or are in the nature of commercial contracts relating to sales of equipment and commodities.

Clearly the Congress does not want to be inundated with trivia. At the same time, it would wish to have transmitted all agreements of any significance.

2. *Physical security of classified agreements.*—A question was raised by the State Department spokesman on possible difficulties involved in establishing a viable working procedure for transmitting sensitive agreements, including measures for their storage, rules on their removal from storage areas, and questions of access by various personnel.

The committee does not believe that the situation poses any real problem. A number of classified materials already repose within the committee offices. They are safeguarded by security procedures which have proved effective in the past. Should the executive branch believe that the present system requires enhancement as a result of the passage of S. 596, the committee stands ready to cooperate.

In that context, it should be noted that the bill leaves to the discretion of the President which agreements shall be made public and which shall be kept secret. Further, under the bill, once an agreement has been classified, only he has the right to declassify it. The right of declassification is not open to the committee or to any Member of Congress. Thus, the legislation helps protect against unauthorized disclosures.

3. *Transmittal of all executive agreements.*—Question was also raised by the State Department spokesman about the authority of

Congress to oblige the President to transmit the texts of *all* international executive agreements. The contention was that in some cases the Congress would not have a legitimate interest in the texts of agreements concluded by the President with foreign states and that he could keep that information from Congress under a right of executive privilege.

Study of this issue by the committee, aided by specialists from the American Law Division of the Congressional Research Service, Library of Congress, does not indicate any constitutional or other legal basis for such a view.

The right of the President to *conclude* executive agreements is not in question here, or in any way affected by S. 596. Thus, the bill in no way transgresses on the independent authority of the Executive in the area of foreign affairs.

As the State Department itself has recognized, however, executive agreements have the same effect as treaties in international law. To the nations with which they have been concluded, there is no difference between the two. That is, executive agreements no less than treaties bind the United States of America as a whole nation—not just the President or administration which makes them—under international law.

Nor, under international law, is the duration of an executive agreement limited by the tenure of the President who concluded it. It continues to be binding on the Nation after he has left the scene, just as a treaty would.

If the contention of the Department of State is accepted, the Congress, in effect, would agree that the President has the right to bind it, and the rest of the Nation, to agreements in perpetuity with foreign nations about which the Congress has no right to know.

Such a situation is clearly a distortion of the constitutional grant of power to both the executive and legislative branches in the area of foreign affairs, and smacks of the practice of the English sovereigns against which our Founding Fathers were reacting.

Under Article I, Section 8, of the Constitution the Congress is empowered to make laws "necessary and proper" for carrying into execution all powers vested by the Constitution in the Government of the United States or in any officer of that government. Under that authority, which includes the domain of foreign affairs, the Congress clearly has the power to require the disclosure to itself of the texts of *all* international executive agreements.

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