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INTERNATIONAL EXECUTIVE AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS

OF THE

COMMITTEE ON FOREIGN AFFAIRS

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 596, H.R. 14365, and H.R. 14647

MEASURES REQUIRING THAT THE TEXTS OF ALL FUTURE INTERNATIONAL EXECUTIVE AGREEMENTS BE TRANSMITTED TO CONGRESS

JUNE 19, 1972

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CONTENTS

WITNESSES

	Page
Case, Hon. Clifford P., a U.S. Senator from the State of New Jersey	2
Salans, Carl F., Deputy Adviser, Department of State	10

APPENDIX

"The Legal Basis Upon Which Congress May Have a Right of Access to the Text of All Executive Agreements," prepared by the Congressional Research Service of the Library of Congress	23

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

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INTERNATIONAL EXECUTIVE AGREEMENTS

MONDAY, JUNE 19, 1972

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2:10 p.m., in room 2255, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. ZABLOCKI. The subcommittee will come to order.

The afternoon the Subcommittee on National Security Policy and Scientific Developments is meeting to hear witnesses on legislation which would require that the texts of all future executive agreements concluded by the President with foreign states must be transmitted to Congress within 60 days after their execution.

More specifically, the bills under consideration are S. 596, a bill which passed the Senate on February 16 by a vote of 81 to 0, and identical proposals introduced in the House by Mr. Whalen of Ohio and myself.

Mr. Whalen's bill is H.R. 14647 and mine is H.R. 14365.

The legislation is very simple:

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 must be kept secret in the national interest, the legislation provides that the President should transmit those 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" until the President gave notice that they could be made public.

INTRODUCTION OF SENATOR CASE

The first witness before the subcommittee this afternoon is the author of S. 596, Hon. Clifford P. Case, U.S. Senator from New Jersey. Senator Case is a longtime member of the Senate Foreign Relations Committee who has taken an active role in the attempt to restore the Congress to its constitutionally ordained role in the area of foreign policy.

Senator Case, we welcome you. It is an honor and a privilege to have you with us today.

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STATEMENT OF HON. CLIFFORD P. CASE, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CASE. Thank you, Mr. Chairman, Mr. Whalen.

I wish that I could stay with you for the entire hearing. Mr. Chairman, I can't do that because we are actively engaged in the consideration of legislation on the Senate floor and amendments are coming up one after the other. I would like to ask the indulgence of the committee to permit my statement to be inserted in the record and to submit myself to you for any questions you might have.

I think that consideration of this bill is an excellent move on your part. The legislation is not radical in any sense. Senator Knowland, who was well known as a stalwart conservative in every way, and a strong administration supporter, was the original sponsor of this bill 20-odd years ago. While it passed the Senate, it was not acted upon by the House.

Now, with the sponsorship of the chairman of this subcommittee and the interest of many in this body—plus the additional provision that these executive agreements be sent both to the Foreign Relations Committee and the Foreign Affairs Committee of the House, properly recognizing our equal interest—I am most hopeful that the measure may become law.

If you have any questions, Mr. Chairman, before I must go, I would be happy to try and answer them for you.

Mr. ZABLOCKI. Without objection your statement will be made a part of the record at this time.

(The statement and press release of Hon. Clifford P. Case follow:)

STATEMENT OF SENATOR CLIFFORD P. CASE OF NEW JERSEY

I am extremely pleased that Congressman Zablocki has introduced in the House my bill on the transmittal of executive agreements. I am honored that you have asked me here today to testify in its behalf.

Since the passage of the bill by the Senate, there has been a notable change in the Executive Branch's position.

Before, although agreeing that it had been remiss in informing Congress of these agreements, the State Department had opposed enactment of a statute to insure Congressional access to the terms of United States commitments. Instead, the State Department had advocated "cooperative arrangements" to brief Congress on these agreements.

STATE DEPARTMENT DROPS OPPOSITION

Now, while still maintaining its preference for informal remedies, the State Department has let it be known ". . . the Executive Branch will not oppose (this bill) if Congress truly feels this is the wisest manner in which to proceed."

This recognition on the part of the Executive Branch that only Congress can determine how it is to fulfill its own Constitutional responsibilities is an encouraging sign that the formerly prevailing concept of Executive dominance in the control and making of American foreign policy may be in the process of moderation.

Be that as it may, I think we should not lose sight of the fact that this offer of cooperation in the sharing of information on executive agreements—let alone the recognition that Congress has the right to its own decision in the matter—only came about after the issue was raised in the Congress.

The lesson of this, I submit, is that past informal understandings, the assumption that important information will be freely volunteered and shared, are neither sufficient nor proper guarantees when a Constitutional principle is at stake.

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"GENTLEMEN'S AGREEMENT" INSUFFICIENT

Underlying the formulation of the most recent Executive Branch position on this bill seems to be an unspoken hint that it would be boorish or ill-bred of the Congress, once having "the handshake" of the Executive in the form of an administrative arrangement, to insist upon "having it in writing" as it will be if Congressional access to the terms of these agreements is embodied in a statute.

I do not believe that, as the law-making body in a government of laws, Congress can accede to yet another "gentlemen's agreement."

We know that the Congress has not had full knowledge of this nation's commitments.

As I have more fully outlined in a February 16 statement which I would like to have included in the record, the State Department itself has gone on record as saying that Congress has not been kept fully informed.

CONTINUED PRACTICE OF SELECTIVE DISCLOSURE

Similarly, as spelled out in the State Department's own testimony which I cited in my February statement, the evidence is that the informal arrangements earlier proposed would preserve in every important aspect the executive's present ability to withhold or disclose at will the terms of this nation's international agreements:

The executive would reserve to itself the decision as to whether Congress should be even told of an agreement.

The executive would determine how Congress would be informed, and in some instances even presumably dictate whether the full committee membership should have the information or whether it should go to certain selected members only.

The executive would decide which sections of an agreement Congress could know about, and certain categories of information would be completely excluded.

How could we so accede to a continuation of the practice of selective disclosure to the Congress of this nation's commitments?

For it is not enough that Congress be "told about" or "be made aware" that the executive has entered into a new agreement stationing U.S. forces abroad or extending U.S. assistance in return for some political concession. Rather, it must be possible for Congress to participate and reach an independent judgment on these policy decisions.

In the words of former Justice Jackson of the Supreme Court, the Congress itself must act and the remedy must be in the law. He said:

"With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under law, and that the law be made by parliamentary deliberations."

I respectfully urge that this committee approve this bill.

Senator Case Urges Passage of S. 596, Requiring the Transmittal of All International Agreements to Congress

PARTIAL TEXT OF REMARKS BY SENATOR CLIFFORD P. CASE, PREPARED FOR DELIVERY ON THE SENATE FLOOR PRIOR TO THE VOTE ON SENATOR CASE'S BILL

Under the terms of the bill which I have introduced, all international agreements entered into by this government will henceforth be transmitted to the Congress within 60 days of their execution. Sensitive agreements will be transmitted to the Senate Foreign Relations and House Foreign Affairs Committees under an appropriate injunction of secrecy.

THE FOCUS OF THIS BILL

No problem presently exists with the transmittal of unclassified international agreements to the Congress. Under existing statute (sec. 112a, title I, United States Code) the Secretary of State presently compiles and publishes all international agreements other than treaties concluded by the United States during each calendar year.

Although the provision of this statute on its face is all-inclusive, the position of the Executive Branch has been to withhold from regular dissemination to Congress—even on a classified basis—those documents which it deems sensitive in view of security considerations.

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My bill is designed to end such an exception to the principle that Congress has the right to know the terms of all this country's commitments.

THE EXTENT OF THE PROBLEM

The Constitution contains no explicit provision authorizing the President to enter into executive agreements. They began under George Washington and during this century have increased at a rate which has paralleled our progressive involvement in world affairs. In numbers, executive agreements—which do not require the advice and consent of the Congress—have come to far exceed treaties, which do require congressional approval.

During the year 1930, 25 treaties and only nine executive agreements were entered into by the United States. By 1968, this ratio had been overwhelmingly reversed, with the record reflecting more than 200 executive agreements in comparison with only 16 treaties. As of January 1, 1969, according to the State Department, the United States was party to 909 treaties still in force; the number of publicly disclosed executive agreements in force totalled 3,973.

Although the equivalent number of secret agreements entered into by the executive is not a matter of public record, enough is known to establish the key role they have played at critical junctures in this nation's history.

At the turn of the century, in an example cited by the distinguished historian Prof. Ruhl J. Bartlett, President Theodore Roosevelt, through the Taft-Katsura agreement of 1905, agreed to Japanese hegemony over Korea in return for Japan's accession to U.S. control over the Philippine Islands. In 1917, according to Professor Bartlett, the Lansing-Ishii agreement went so far as to include a secret protocol which nullified the very agreement to which it was attached.

In 1943, the understandings reached at the Cairo Conference were made public, but the provisions of the Yalta agreement which altered the Cairo compact were not publicly disclosed for three years. And the Yalta agreement in its entirety was not published until 1947.

More recently, the Symington Subcommittee on National Commitments uncovered contemporary examples of secret agreements entered into without reference to the Congress: with Ethiopia in 1960: Laos, 1963; Thailand, 1964; South Korea, 1966; Thailand, 1967; and the secret annexes to the Spanish Bases Agreement of 1953.

In the case of the Ethiopian agreement, the executive's pledge to equip the Ethiopian army (at a cost of $147 million through 1970) and commit U.S. resources to the maintenance of Ethiopia's territorial integrity, had the clear potential of involving this country in the almost continuous civil war and border disputes of this section of Africa. This agreement, concluded in 1960, was transmitted to the Senate Foreign Relations Committee on May 18, 1970, and this occurred only after the Symington subcommittee had learned of the commitment.

Unlike the other agreements uncovered through the independent efforts of this subcommittee, notably those concerning Laos and Thailand, the Ethiopian commitment did not embroil the United States in yet another open-ended conflict. But it could have.

These and other similar international agreements—those we know of and those whose existence are still unknown to the Congress—affect our survival and defense in the most fundamental sense. They go to the heart of our foreign policy.

In this age of instant communications and U.S. military deployment abroad in the eye of potential conflict, these agreements, which can in an instant commit or involve this country in possible hostilities, must be formally and systematically examined by the Congress before they are triggered by events.

Failing such prior examinations, the U.S. Congress, as increasingly has been the case since World War II, is reduced to postmortem review of accomplished facts.

THE EXECUTIVE BRANCH'S PROPOSAL

Both the existence of this problem of congressional access to those agreements and the need for new procedures is admitted to by the executive branch itself.

During hearings on my bill on October 21, 1971, Mr. John R. Stevenson, legal adviser to the State Department, confirmed this point on several occasions:

"* * * in certain instances in the past they (the Congress) have not been informed on a current basis but only ad hoc some years later."

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"* * * we recognize there is a problem here. I think the problem that has been most pinpointed is the fact that the information hasn't been obtained until a number of years after the event."

"It seems to me that a systematic procedure is required for keeping Congress informed."

"There is a problem which you referred to of having the Congress informed on a more current basis * * *."

Nonetheless, although conceding that Congress has not been fully informed, the State Department, in its official response, declared itself "* * * firmly of the opinion that legislation on this subject would be undesirable."

Instead, the State Department recommended that the Department of State and the committees concerned "meet to work out mutually acceptable practical arrangements."

As further defined by the State Department during the course of hearings, however, these "practical arrangements" would preserve in every important aspect the executive's present ability to withhold or disclose at will the terms of these agreements. For Congress to accede even informally to these practices would be to acknowledge the subordination of Congress to the executive branch. In effect, it would legitimatize what in fact has been an unconstitutional assumption of power by that branch:

The executive would reserve to itself the decision as to whether Congress should be even told of an agreement. Mr. Stevenson, State Department legal adviser: "I cannot tell you right now that there wouldn't be some reservation of Presidential discretion of the President's ultimate power to decide what he wanted to do in a particular case."

The executive would determine how Congress would be informed, and in some instances even presumably dictate whether the full committee membership should have the information or whether it should go to certain selected members only. Mr. Stevenson: "In some cases there would be a briefing with respect to the subject matter of the agreement. In other cases the agreement could be shown to several interested members of the committee but not permanently retained by the committee."

The executive would decide which sections of an agreement Congress could know about, and certain categories of information would be completely excluded. Mr. Stevenson: "If in a briefing you got the substance of what was involved, that would not necessarily mean that you had to have detailed annexes which might have vital military significance but very little foreign affairs significance."

WHY LEGISLATION IS NECESSARY

In 1954, the Eisenhower administration, in a letter from then Assistant Secretary of State Thruston B. Morton to the Senate Foreign Relations Committee, said: "The Department would be glad to supply the Senate with copies of all such (international) agreements."

There were no quibbles, no exceptions to the principle that the Senate should receive all international agreements in their full and original text. Indeed, the State Department cooperated in drawing up the language which is in my bill regarding the handling of classified agreements, and legislation similar to mine, except that it did not provide for the transmittal of agreements to the House of Representatives, subsequently passed the Senate in 1956.

In explaining why this legislation, once agreed to by the Eisenhower administration, is now being opposed by the present administration, the State Department response was:

"I think this administration, reviewing the problem in the context of the ongoing discussions we have had with this committee, feels that the respective interests of the President and Congress could be better reconciled without having quite the rigidity that this bill proposes.

In my view, the lessons of the years since 1956, let alone the relations between the State Department and the Senate Foreign Relations Committee, have shown us that this "rigidity"—which I interpret to mean strict accountability by the Executive Branch—is essential to the task of restoring the people's confidence in their government.

If any reminder is necessary of these lessons we have learned so painfully in the intervening years since this legislation was last considered, it was provided in a recent editorial in a major eastern newspaper:

80-010—72——2

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"If the dreary story of our involvement in the Vietnam war demonstrates anything, it is that the Executive Branch does not necessarily know best; it is that an uninformed Congress will make uninformed decisions or none at all; it is that secrecy breeds distrust and that neither Congress nor the public can be expected to support policies unless they have the basic data upon which to make their judgments."

We know the consequences of unchecked executive power. How, then, can we accede to a continuation of this practice of selective disclosure to the Congress of this nation's commitments?

For it is not enough that Congress be "told about" or "be made aware" that the executive has entered into a new agreement stationing U.S. forces abroad or extending U.S. assistance in return for some political concession. Rather, it must be possible that Congress can participate and offer an independent judgment on these policy decisions.

To fulfill this role, Congress must be able to inform itself with precision of the terms of all international agreements. And this is not possible unless, in the case of sensitive agreements, the designated committees of Congress have the opportunity to study and weigh the exact language of every document in its entirety.

Even apart from the question of exact language which commits this country to a course of action, there should be no a priori judgment as to which annex or which section may or may not be of concern to the Congress.

As previously noted, the State Department witness in testifying on my bill asserted that Congress did not "have to have detailed annexes which might have vital military significance but very little foreign affairs significance."

How an agreement can be of "vital military significance" and not affect foreign policy, I do not know.

But I am aware of a chilling example of how crucially significant to the future of this country such an "annex" can be.

In the transcript of the White House meetings surrounding the India-Pakistan war released by columnist Jack Anderson on January 4, Presidential adviser Henry Kissinger was quoted as saying:

"When I visited Pakistan in January 1962, I was briefed on a secret document or oral understanding about contingencies arising in other than the SEATO context. Perhaps it was a Presidential letter. This was a special interpretation of the March 1959 bilateral agreement."

Whether in fact such a "special interpretation" existed which could have directly involved the United States in the Indian-Pakistan war, this is an example of how an annex of mere "military" significance, although perhaps concluded in a time of relative tranquillity when its application seemed remote, can have an overriding importance to this country's foreign policy. Selective disclosure in any of its forms is unacceptable.

This bill, in the terms used by the executive branch in opposing it, is "rigid." It offers no loopholes. Every international agreement entered into by the United States would be formally transmitted to the Congress in its full and original text. And, as made clear in the Senate Foreign Relations Committee report accompanying the bill, the intent is clear that the executive should make available to the Congress all such agreements now in force.

This bill does not represent an attack upon the executive branch. Instead, it is designed to restore the constitutional role of Congress in the making of this country's foreign policy.

In the words of former Justice Jackson of the Supreme Court, redressing this balance is the responsibility of Congress itself:

"With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."

REQUIREMENT TO SEND ALL AGREEMENTS

Mr. ZABLOCKI. Senator, the letter that you received from Mr. Dave Abshire, and Mr. Salans' testimony this afternoon, I undertand, develops a question as to whether the President would have to send up all agreements. Now, if this bill becomes law, in your opinion would the President have the right to withhold the text of any executive agree-

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ment that he saw fit to do so, or would he be required automatically to submit them all?

Senator CASE. I think the obligation is complete. It is intended in my judgment to be a complete obligation.

Mr. ZABLOCKI. In your bill, and bills which we "plagiarized" from your bill——

Senator CASE. No one was ever happier than I when you did that.

Mr. ZABLOCKI. There is a provision in the legislation that if it were a highly sensitive agreement, it would not be made open to the public but would be held in great secrecy.

Senator CASE. I think, as a matter of fact, there may be a question as to whether we may not go too far in keeping such agreements secret, but the bill, as the chairman suggests, does provide an absolute bar against disclosure until the President deems that disclosure would not affect the security of the United States.

STATE DEPARTMENT STATEMENTS IN SENATE

Mr. ZABLOCKI. Senator, did the State Department witnesses during their testimony in the hearings before the Senate Foreign Relations Committee raise this question of whether transmittal of all agreements was indeed required? Was the question raised?

Senator CASE. The question was raised—not as I recall it in the hearing—but there was a question raised in the letter which the Department sent up, indicating that the State Department thought that in most, but not all cases, transmittal of these agreements would be acceptable, As far as I am concerned, I do not think that the Congress should permit any exception except on the grounds of secrecy, and secret agreements, of course, should be handled as the bill specifics. I can't imagine every possible situation that might arise, but I can see nothing now which in my judgment ought to be accepted as an exception to the absolute requirement under the terms of the bill.

NO PROBLEM OF SECURITY SEEN

Mr. ZABLOCKI. There has been some question about the security arrangement in Congress with regard to the handling of those agreements which might be sensitive. Do you see this as a real problem if S. 596 is passed?

Senator CASE. Mr. Chairman, I don't.

Mr. ZABLOCKI. I don't think we have any greater amount of leaks in the legislative branch than we find in some of the executive agencies.

Senator CASE. In order to be absolutely fair and absolutely realistic about it, I think you are quite right in that observation that there are no more leaks in Congress than there are in the executive branch. On matters of real importance where secrecy is ever important, I believe it has been preserved.

I would like to emphasize, however, that one of the reasons I am so strongly for this bill is that I think it will be a move toward far greater public participation in our international relations. I think that the provision as it stands is adequate to take care of any proper security concerns. On the question of whether the President should have

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discretion to refuse to send agreements to Congress, I now weigh the answer as no.

VIEWS OF SENATORS ON BILL'S MEANING

Mr. ZABLOCKI. Senator, for the purpose of legislative history, when your bill passed the Senate by a vote of 81 to 0, did any of the Senators to your knowledge vote with the understanding that some executive agreements might be exempted from the requirements of the bill by unilateral action of the President?

Senator CASE. So far as I know, Mr. Chairman, nobody did. As I recall, the way the vote went originally, there was one vote against it and that vote was changed. The Senator in question was Senator Hruska of Nebraska. He may have made some statement in explanation of his change along the lines you suggest, and I can only refer you to the record on that. I am not aware of any myself.

Mr. ZABLOCKI. Thank you very much.

Mr. Whalen.

Mr. WHALEN. Thank you, Mr. Chairman. I appreciate this opportunity to sit with the subcommittee to question witnesses today.

I certainly welcome you, Senator Case.

Senator CASE. Thank you.

NUMBERS OF EXECUTIVE AGREEMENTS

Mr. WHALEN. Senator Case, for the record, approximately how many executive agreements are we talking about since, say, 1945? Do you have a general idea?

Senator CASE. I will be glad to provide that information for you. We are talking about hundreds without any question. The question has been raised of course whether these agreements are going to swamp us. I think it is purely a matter of our making the necessary arrangements to see that the agreements are handled in a proper way, indexing, staff study, reference, and so forth.

EXAMPLES OF AGREEMENTS WITHHELD FROM CONGRESS

Mr. WHALEN. From your own personal study can you cite any examples of where the interests of our country have been harmed by Congress failure to know about these executive agreements?

Senator CASE. I think I would be inclined to put those various arrangements with other countries in connection with Vietnam as one example. Senator Symington opened up the question recently in regard to those involving the United States, for instance, in the defense of Thailand. In this connection, I would like to add that I don't happen to be one of those who thinks that our involvement in Southeast Asia was initially wrong or immoral.

Mr. WHALEN. I concur with your view there, Senator, although really, I didn't raise the question in connection with Vietnam.

Senator CASE. I know, but it seems to me that Vietnam is one of those instances in which our involvement has come about through the accumulation of a number of commitments and arrangements. I don't think I would want to go beyond this rather general treatment.

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SECRECY OF THE YALTA AGREEMENTS

Mr. WHALEN. I recall reading, for example, that it was perhaps 10 or more years after the Yalta agreement before we found out the details of that agreement with the Russians.

Senator CASE. That is true. Yalta, I think, was a very high point of executive secrecy and public and congressional acquiescence. Now those agreements were made during actual war and while I think they did exceed the President's authority in some sense, nevertheless he does have more authority in conducting a war and he was dealing with very complex problems. I'm still not certain that what he did was wise, but I honestly think that even in the conduct of a war a man in the office of President can't make agreements that should be made by treaty.

POSSIBLE APPLICATION TO MOSCOW AGREEMENTS

Mr. WHALEN. Along that line, using Russia as an illustration, it has been suggested that perhaps President Nixon and the Russian leaders agreed to more than was divulged. Now if this law were in effect, then the President would be required to submit to the two committees at least the contents of those agreements, is that correct, Senator Case?

Senator CASE. On that point, Mr. Kissinger said we have all the contents. I take him at his word, as I know you do.

Mr. WHALEN. Right.

Senator CASE. Although the question has been raised. Certainly this bill would tend to discourage secret agreements and protocols, and as far as I am concerned that is all to the good.

EXECUTIVE AGREEMENTS—U.S. TREATIES

Mr. WHALEN. What has concerned many of us, Senator, is the fact that the executive branch is now using executive agreements to carry out policy rather than resorting to treaties which would be subject to Senate ratification. Would this in any way affect that approach or philosophy?

Senator CASE. I think, Mr. Whalen, we must know whether there are such agreements so we can know whether to move against them. Interestingly enough, what we have before us in the Senate today, is this very question of whether particular agreements, dealing in this case with Portugal and Bahrein, should be sent to Congress for consideration as treaties or whether they should be left as executive agreements. I am happy to say that, up to this moment, the Senate has stood by its former view that they should be treated as treaties. The bearing that Mr. Zablocki's bill has on this is that we would know whether agreements were being made and know whether to insist upon our constitutional duty.

IS THE LEGISLATION NEEDED?

Mr. WHALEN. One final question, Mr. Chairman.

Senator Case, I think it is the administration's contention that, while agreeing with you in principle, as a matter of practice this kind of legislation really is not needed. How would you respond to that view?

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Senator CASE. Well, I am not one that thinks we have to conduct our relations between the Congress and the President in a spirit of acrimony. But I do think we should conduct these relations at all times at arm's length—pleasantly enough, but each insisting that it has a duty to perform. In the words of the saying I found useful, each branch should walk a little wide of the other. This is not wrong, it is not hostile, but it does prevent the kind of clubby spirit that in the long run is liable to be dangerous and is likely to bring about a lulling of alertness on the part of the Congress to situations in which we ought not to be lulled.

So I think we should always conduct ourselves in a friendly way. We are Americans and interested in the same goal. But, again, I think we should also be very conscious that we in the Congress have a separate role to follow and that we cannot do it by tipping our hat, bending the knee, and saying, "Yes, Mr. President."

ARRANGEMENTS WOULD NOT BIND FUTURE ADMINISTRATIONS

Mr. WHALEN. Even assuming that the present administration agreed to divulge to Congress all of its Executive agreements, it would seem that in the absence of any statutory requirements this would not bind any future administrations.

Senator CASE. That is true. I think that our relationship ought not to rest upon such weak foundation.

Mr. WHALEN. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Steele.

Mr. STEELE. I have no questions at this time. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Senator Case.

Senator CASE. Thank you, Mr. Chairman. You have been most gracious in allowing me to simply respond to your questions and provide my prepared statement for the record.

Mr. ZABLOCKI. I can assure you that it will be carefully read.

Senator CASE. Thank you.

It makes me feel good to be back in my old stomping grounds.

INTRODUCTION OF STATE DEPARTMENT WITNESS

Mr. ZABLOCKI. Our second witness today was to have been Hon. John R. Stevenson, Legal Adviser to the Department of State. Mr. Stevenson has, however, been dispatched to Moscow on a special mission.

Replacing him is Mr. Carl F. Salans, Deputy Legal Adviser to the Department of State. Accompanying Mr. Salans is Mr. Bevans, also of the State Department.

Mr. Salans, if you will proceed, please.

STATEMENT OF CARL F. SALANS, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. SALANS. Thank you, Mr. Chairman.

Mr. ZABLOCKI. If you have any news for us as to what Mr. Stevenson's role in Moscow will be, we will be happy to hear it.

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Mr. SALANS. As a matter of fact, it is to work on a treaty. Mr. Stevenson is off on a trip in Europe in connection with his role as the coordinator of our law of the sea effort and he is carrying on consultations there with a number of our partners in that effort.

Mr. ZABLOCKI. You may proceed, sir.

Mr. SALANS. Thank you, Mr. Chairman.

Mr. Chairman, the Department of State appreciates the opportunity to present its views to this distinguished subcommittee on S. 596 and their counterparts in the House, H.R. 14365 and H.R. 14647.

These bills would require the Secretary of State to transmit to the Congress, within 60 days of their conclusion, the texts of international agreements other than treaties. The bill provides that if, in the opinion of the President, the immediate public disclosure of any such agreement would be prejudicial to the national security, that agreement shall be transmitted only to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs under an appropriate injunction of secrecy.

As you know from the testimony of the State Department's legal adviser, John R. Stevenson, last year before the Senate Foreign Relations Committee, the Department is very much in agreement with the objective of these bills, which, as we understand it, is to insure that Congress will be informed on a regular and timely basis of the conclusion of international agreements other than treaties. We recognize that this represents an understandable and legitimate interest on the part of the Congress in agreements which bear on the effective fulfillment of its own constitutional responsibilities.

DEPARTMENT FAVORS INFORMAL ARRANGEMENTS

Nevertheless it has been our view that legislation was neither necessary nor helpful in achieving this objective. Whatever shortcomings there may be in the present situation—and we certainly believe there can be improvements—have, in our opinion, resulted from the fact that there has never been a joint effort on the part of the Congress and the executive branch to develop a systematic procedure for the handling of these agreements. Thus it has seemed to us that what we were faced with was not really a difference in principle as to what should be done but, rather, simply, a lack of agreed procedures which could be put into effect on an automatic basis.

We believed it was a problem which reasonable men could easily resolve if they were only willing to take the time to work out the practical details. So in the Department's testimony before the Senate Foreign Relations Committee last fall, we proposed that we should discuss with the committee staff arrangements of a practical nature which would achieve the objective and meet our concerns as well.

EXECUTIVE BRANCH WILL NOT OPPOSE LEGISLATION

That offer was not accepted and the Senate, as you know, did pass the legislation. Subsequently, on May 18, 1972, the legal adviser, in testimony before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, reiterated the point that we would very much welcome a willingness on the part of the relevant committees to discuss cooperative arrangements in this area. He made it clear, how-

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

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ever, that the executive branch would not oppose the legislation if Congress truly felt this was the wisest manner in which to proceed.

In this connection, Mr. Chairman, I should make clear that we do not understand that these bills are intended to, nor do we believe they can, alter the constitutional responsibility or authority of the President with respect to the disclosure of information. We recognize that Congress has a legitimate interest in very nearly all agreements concluded by the executive branch; and the responsibility and authority of the President would therefore not preclude disclosure in any but the most highly exceptional circumstances.

TRANSMITTAL PROCEDURES NOW BEING DEVELOPED

Mr. Chairman, the Department is presently in the process of trying to develop procedures for the transmittal to Congress of executive agreements other than treaties within 60 days, as would be required by these bills. Since we believe such procedures would be a healthy improvement in the relations between the executive branch and Congress in the area of foreign relations, it is our intention to implement them whether or not the bill is enacted into law. We still believe it would be very helpful if we could consult with the staffs of the appropriate committees in the course of our effort to arrive at procedures which will best meet our mutual needs.

Of course one question we are always faced with is whether a particular arrangement constitutes an international agreement. 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, commodities, et cetera. We do not consider many of these exchanges to constitute international agreements, for example, for the purpose of registering them with the United Nations or publishing them in the annual volumes of the U.S. Treaties and Other International Agreements.

PROBLEM OF "SENSITIVE" AGREEMENTS

I will mention briefly one other aspect of the problem which is involved in establishing a viable working procedure for transmitting sensitive agreements—the question of the physical security of classified agreements. The problems in this area include measures for the actual storage of such documents, rules concerning their removal from storage areas, and questions of access by various personnel. At the present time there is a lack of well-established practical arrangements which will insure proper protection of sensitive international agreements in the Congress. As I am sure this subcommittee will recognize, transmittal of sensitive agreements to the Congress will depend in no small measure on formulation and implementation of adequate arrangements for the safeguarding of information concerning such agreements.

Let me interject at this point, Mr. Chairman, I don't envision this as an obstacle to transmission of agreements at all. It is simply a question of making the necessary technical arrangements for safeguarding this information.

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

COMMITTEE ALREADY HANDLES CLASSIFIED MATERIALS

Mr. ZABLOCKI. On this point I am sure you are aware that the House Foreign Affairs Committee at the present time receives top secret documents and we have a security room.

Mr. SALANS. I am aware of that, Mr. Chairman.

Mr. ZABLOCKI. And I am sure we get some documents that are of a higher classification of secrecy than most agreements that you would send on.

Mr. SALANS. Yes, but there is always——

Mr. ZABLOCKI. So have no fear about how we handle them.

Mr. SALANS. As I say, we are not in fear on this point, we simply thought it was wise to bring to your attention——

Mr. ZABLOCKI. I can understand why you mentioned it but I am sure we are all pleased that you should have no need to be apprehensive.

Mr. SALANS. Right.

SETTLE DIFFERENCES ON CASE-BY-CASE BASIS

Even with the best technical arrangements there will, of course, still be—as there have been in the past—a limited number of very sensitive executive agreements concerning which there may be differences of view between the executive and legislative branches regarding their transmittal to Congress. It is our view that such differences can only be resolved on a case-by-case basis through cooperation and accommodation between the two branches. This has invariably been the case in the past; and we believe that if more systematic arrangements are worked out for the future, the ability to amicably work out differences will be greatly improved.

In fact, it is in this very area that we have difficulty in seeing how the proposed bills would improve the relationships between the executive branch and the legislative branch above and beyond what could be worked out on a mutually cooperative basis through practical arrangements of the kind we are suggesting. This is, Mr. Chairman, an area involving the constitutional responsibilities of both the President and the Congress. It is an area of shared powers under the Constitution springing from the separation of powers. Effective interaction between the two branches in this area requires cooperation and is not furthered by legislation which fails to take into account the complexities of the constitutional issues involved.

WILLINGNESS TO WORK WITH INTERESTED COMMITTEES

Let me conclude, Mr. Chairman, by reemphasizing the willingness of the Department to work with the interested committees of Congress in developing practical measures for the resolution of this problem. We are convinced that the problem is in essence one of practice rather than one of principle. It is really an integral part of the question of Congress' need for information to enable it to carry out its constitutional responsibilities in the field of foreign affairs.

The Department of State has made suggestions for improving the flow of information, as well as consultations, between the two branches and has indicated its willingness to consider other possibilities Con-

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gress may wish to suggest. We are, at the moment, for example, undertaking a thorough review of the Department's circular 175 procedure which, in part, deals with executive-legislative relations in the area of international agreementmaking. We would welcome your subcommittee's views on whether, and if so, how the Department's circular 175 should be revised. We believe we share a common perspective as to the need for cooperation in this area, and we are anxious to do whatever we can to improve that cooperation.

Thank you, Mr. Chairman.

DEPARTMENT POSITION ON LEGISLATION

Mr. ZABLOCKI. Thank you, Mr. Salans.

I gather the Department is not opposed to the legislation.

Mr. SALANS. That is correct, Mr. Chairman.

Mr. ZABLOCKI. You just have mental reservations about some sections of it.

Mr. SALANS. We still think that the legislation is not necessary to achieve the objective which it is designed to achieve.

Mr. ZABLOCKI. That reminds me of a modern couple that is against getting married. They say, "Of course, we will be faithful to each other but we don't want to say 'I do.' "

Regarding your statement on page 3, are you attempting to tell the Congress that we can pass a bill requiring that all executive agreements must be transmitted to Congress but that does not mean the President will comply?

Mr. SALANS. Well, what I think it means, Mr. Chairman, is that there are certain responsibilities and authorities that the President has as a matter of constitutional law which cannot be affected by legislation. Our objective here is to cooperate to the fullest extent possible with the Congress in providing it with agreements and with information about agreements, but we are saying that there may be occasions in the future as there have been in the past when the Congress has requested the tests of a particular document or agreement from the executive branch and when the President has felt that he could not provide the text. He may provide information about it, he may provide a briefing about it, but he may feel that for some reason it is not compatible with his constitutional responsibility to provide the text of the agreement.

SCOPE OF EXECUTIVE PRIVILEGE

Mr. ZABLOCKI. I can understand executive privilege when some documents or exchange of papers between departments within the executive branch are involved but not when the President makes an executive agreement with a foreign nation. There is no reason why the President should not share such information with Congress if Congress is supposed to carry out its constitutional obligations. If the President can bind our Nation internationally through the use of executive agreements, then the Congress or a designated committee of Congress has the right to know what those executive agreements contain.

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

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Mr. SALANS. I think, Mr. Chairman, that there are certain areas where the President concludes international agreements on the basis of his own constitutional authority. These agreements do not spring from authority granted to him by legislation, from the Congress or from any other source of authority other than his own responsibility.

EXAMPLES OF "PRIVILEGED" EXECUTIVE AGREEMENTS

Mr. ZABLOCKI. Could you give me an example of one or two instances where the Constitution gives a right to the President to enter into executive agreements that the Congress has no business knowing about?

Mr. SALANS. Well, as one example let me quote from the testimony before the Senate Foreign Relations Committee on this very bill by Prof. Alexander Bickel of Yale. As an example I quote from page 27 of the hearings before that committee.

"I should suppose that if his function as Commander in Chief, responsible for the safety of troops, was involved he might well be on sound constitutional ground in invoking executive privilege and withholding a document"—and in that case he was talking about an agreement—"from Congress."

Mr. ZABLOCKI. Was Dr. Bickel referring to an immediate release to Congress or an indefinite period of withholding the agreement?

Mr. SALANS. He was asked the question whether he saw any constitutional difficulties in S. 596. If you have it in front of you, you will see at the bottom of page 27 he said the only possible difficulty he could see was that the President might decline to transmit an agreement which he views as executed in exercise of his own independent power and of no proper concern to Congress.

AGREEMENTS IN "ZONE OF TWILIGHT"

Mr. ZABLOCKI. In the middle of the page, if I can refer to the same hearings, the hearings say:

> Executive agreements which lie in the "zone of twilight" between presidential and legislative powers are of obvious concern and legitimate interest to Congress in the exercise of the function assigned to it by the Constitution. For the "zone of twilight" may be occupied by Congress at will; that is the significance of it. It exists, and independent presidential power can exist within it, only by Congress' leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act. What Congress may act on, it can require to be informed about.

Mr. SALANS. Yes, Mr. Chairman. In that portion of his testimony he was talking about the concurrent powers of the Congress and the President. What I am talking about is an area where the President is acting on his own constitutional authority.

Let me add at this point I think it is in a very limited number of cases, very exceptional cases, that that happens. We have studied our international executive agreements over a period of many years and found that in almost 97 percent of the cases these executive agreements are based on some sort of legislative authority. It is only in 2 or 3 percent of the cases that the President acts solely on the basis of

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Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

his own constitutional authority and not in the twilight zone that you just referred to.

AGREEMENT ON NUCLEAR WEAPONS STORAGE

Mr. ZABLOCKI. Even in the 2 or 3 percent of the cases can you give an example where the Congress should not be advised?

Mr. SALANS. Well, I referred to Professor Bickel's testimony as to one area which he saw.

Mr. ZABLOCKI. He said "supposedly." He didn't make quite so determined a decision.

Mr. SALANS. Well, it is hard for me to speak for the President.

Mr. ZABLOCKI. Can you give an example other than Professor Bickel's?

Mr. SALANS. I know that in the past there has been a great reluctance in the executive branch to provide the texts of agreements relating to the storing of nuclear weapons abroad. We have been willing to brief the Congress about these agreements but there are oftentimes details in these agreements which are not really of significance for congressional responsibility.

Mr. ZABLOCKI. I beg to differ. If it is necessary for the Congress to be briefed about some of the matters agreed to, I think that Congress certainly should be advised of the details. What you are saying is: "Well, we will just tell the Congress what we think we want it to know." The very fact that the Department has been so reluctant in the past to me means it is very vital that we pass this legislation. Then you will be less reluctant in the future. You say the Department wants to work with the Congress, work out some plans. Unless we have legislation no plans would be worth the paper they are written on—given our past experience in this area.

I am sure others have questions and we have a rollcall. If I may ask one other question.

CATEGORIES OF AGREEMENTS COVERED

On page 4 you point out another problem, that there are many, many agreements that deal with sales of equipment, commodities and commercial contracts and you point out that many of them are published in the annual volumes of the United States Treaties and Other International Agreements. It appears to be a problem for you as to what we really want.

I might very clearly say any agreement—that is, any agreement other than a treaty—is what we are interested in. Whatever treaties are published you don't have to bother with, we will find them, we have access to them. It is those agreements that you are so reluctant to share with Congress which we think this legislation should make available to us.

Mr. SALANS. This paragraph, Mr. Chairman, was not referring to information that we were reluctant to furnish.

Mr. ZABLOCKI. I know.

Mr. SALANS. It is perfectly unclassified.

Mr. ZABLOCKI. You could not be reluctant when they are published.

Mr. SALANS. These are often exchanges that are not even published

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because we don't consider that they amount to international agreements. We don't publish them, we don't register them with the United Nations. In fact, the United Nations won't even accept them because they look at them and they say, "This does not rise to the distinction of being an international agreement."

Mr. ZABLOCKI. No, but in that paragraph do you not say you do register them with the United Nations or publish them in the annual volumes of the United States Treaties and Other International Agreements?

Mr. SALANS. No, sir. That sentence says, "We do not consider many of these exchanges to constitute international agreements, for example, for the purpose of registering them." We do not consider them to be agreements for the purpose of registering them, so we do not register them and we do not publish them.

Mr. ZABLOCKI. Mr. Steele.

TESTIMONY SUPPORTS NEED FOR LEGISLATION

Mr. STEELE. Thank you, Mr. Chairman.

I don't really think there is anything left to ask. I think that this testimony is the strongest support that could possibly be given for enactment of this legislation. The statement appears on page 3, "We recognize that Congress has a legitimate interest in very nearly all agreements concluded by the executive branch." I would very hotly dispute that. I think that Congress has a legitimate interest in all the agreements and I think my colleagues are going to feel exactly the same way. I think your testimony is an able one but it is one which clearly supports this legislation, just as the chairman in his questioning has made clear.

I don't have any questions.

Mr. ZABLOCKI. Mr. Whalen.

OBJECTIONS TO BILLS EXPLORED

Mr. WHALEN. Thank you, Mr. Chairman.

I would like to pursue what Congressman Steele has said, that in your statement you have indicated the need for greater cooperation between the two branches of government. Therefore, it is a little difficult to understand why you would object to this being put in statutory form.

Mr. SALANS. Mr. Whalen, we do not object. We think that it is not necessary to put it in legislative form because we believe that when Congress requests international agreements that we can respond to that request and work out arrangements for providing the agreements or providing information.

OBTAINING INFORMATION ON EXECUTIVE AGREEMENTS

Mr. WHALEN. Well, I think the significant question is when we request agreements, how do we know that agreements have been made?

Mr. SALANS. We are prepared to sit down with the staff of this committee or the staff of the Foreign Relations Committee or with you yourself to work out a continuing arrangement whereby without your

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Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

knowing whether an agreement has been concluded or not we would automatically provide the agreement to you or brief you about an agreement that was in the process of being negotiated or whatever the case is.

Mr. WHALEN. What you are saying is we will do exactly what you want but don't put it in statutory form. If that is the case, personally I cannot see why there is any objection to putting it in statutory form as Congressman Steele has pointed out.

Mr. SALANS. We think that there are a variety of different ways of providing information to the Congress about executive agreements and that the greater amount of flexibility that can be preserved between the two branches the more information in fact that will flow. We have often found in the past that where we could not provide a particular document to Congress we could nevertheless provide the information that was in the document if the Congress didn't insist on seeing the particular document itself.

Mr. WHALEN. I don't understand that.

Mr. SALANS. You know that that has been the case. We just think that that is more conducive to a good working relationship than to reduce it to legislation.

Again we are not going to oppose this bill if you all feel that this is the proper way to proceed.

NO GUARANTEE FOR FUTURE RELATIONSHIPS

Mr. WHALEN. Let me repeat a question which I posed to Senator Case. Let's assume that we can work out a relationship with the present administration. Is this any guarantee that this relationship would continue with the succeeding administrations? They may take an entirely different view and cut off this flow of information.

Mr. SALANS. I think once we establish a relationship of this kind it would be impossible to turn it off. That is bound to continue in the future.

Mr. WHALEN. Well, two more questions, Mr. Chairman. One has to do with Mr. Salans' concern about security arrangements. I think that the security arrangements are implied in this bill. However, would you recommend that some specific reference be made to it in the legislation itself?

Mr. SALANS. No, I would not, Mr. Whalen. I think it would be satisfactory if the appropriate people from the State Department got together with your staffs and just worked out the mechanical arrangements for storing and access, and if there are security clearances that need to be acquired by the staff who will have access to those documents they can be provided. It is a matter of mechanics.

"ON-SITE INSPECTION" OF AGREEMENTS?

Mr. WHALEN. Let me raise one final question to which I alluded before. The Congress, of course, is not aware when executive agreements are reached. If the administration feels that, well, this is one really Congress should not get, how would we know about it? Would you object to any provision for "on-site inspection"?

Mr. SALANS. Well, I had not considered that but I suppose we would object. One of the reasons we thought that making a practical arrangement was preferable was that we might, for example, provide in such

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

an arrangement for briefing the Congress, not only when the agreement had been concluded but perhaps as the negotiation was underway and this would help to solve the problem that you are talking about. You might find that in a particularly sensitive area one would not be willing to provide the precise text, but if we knew that the text need not be provided we could keep you informed on a continuing basis of the progress of negotiation and conclusion of these agreements. Again it is an element of flexibility.

Mr. WHALEN. Mr. Chairman, I have no further questions.

Mr. ZABLOCKI. I am sure the committee appreciates your additional offer for consultation before an agreement is concluded. This is further than the legislation goes and I hope that indeed the Department will foster consultation.

Referring to the question whether an arrangement—not a statute but an arrangement—with the executive branch would be continued with a new President, I think any arrangement that was made in the past need not be continued and very likely would be in jeopardy of continuing.

EXECUTIVE AGREEMENTS BIND NATION INTERNATIONALLY

There is one final question. There is no question as to treaties, they have to be ratified by the Senate. Now may I ask this question because I think it is very relevant. Do international executive agreements have the same standing and effect in international law as treaties?

Mr. SALANS. In international law?

Mr. ZABLOCKI. Yes.

Mr. SALANS. Yes, they do.

Mr. ZABLOCKI. Well, if they do then they bind the U.S. Government and Nation as a whole under international law.

Mr. SALANS. Yes.

Mr. ZABLOCKI. Since Congress is a coequal branch of government are you saying that the President can bind the Congress and the entire Nation to an international agreement about which the Congress knows nothing?

AGREEMENTS MADE BY COMMANDER IN CHIEF

Mr. SALANS. I think he can, yes. I think that he has the constitutional power. For example, if the President wants to make an arrangement right now in Vietnam with the Vietnamese Government to somehow protect our troops there, he is acting as Commander in Chief and he can do that. The Congress may not know anything about it, but it binds the United States and it is perfectly lawful.

Mr. ZABLOCKI. But what is the harm in keeping it secret and not sharing it with the Congress and the people?

Mr. SALANS. Well, in that particular case I would not think there would be any problem.

Mr. ZABLOCKI. I cannot think of any particular case where the President would enter into an international agreement which I would want to keep secret from the Congress.

Mr. SALANS. We certainly know that there have been in the past cases when the executive branch did not wish to provide certain information to Congress.

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Mr. ZABLOCKI. There is no doubt about it, not only in international affairs but domestic affairs as well.

Mr. SALANS. And I assume there will continue to be in the future, Mr. Chairman. I am only going on the basis of past experience when I say that.

MEANINGFUL COOPERATION REQUIRES LEGISLATION

Mr. ZABLOCKI. Well, we hope that the past experiences will be something of history, and that the future will be better for cooperation between the executive branch and the legislative branch and that there will be meaningful cooperation. In my opinion I think we can only have meaningful arrangements between the executive branch and the legislative branch if we do have a statutory provision; otherwise, I submit, the reluctance to be candid on the part of the executive branch will continue and suitable arrangements will not be made.

Mr. SALANS. We certainly want to cooperate with you. I personally am working to that end, and I think we all are in the State Department.

Mr. ZABLOCKI. We want to be most cooperative and helpful to the Department and we appreciate the fact that you are indeed not opposing the legislation. We would hope that you would enthusiastically endorse it.

Thank you very much, Mr. Salans.

Mr. WHALEN. Mr. Chairman, I have a brief statement in support of this legislation.

Mr. ZABLOCKI. Without objection the statement will be made part of the record.

(The statement follows) :

STATEMENT OF HON. CHARLES W. WHALEN JR., OF OHIO

Mr. Chairman, I am very appreciative of your invitation to participate in the hearing this afternoon on S. 596 and its House companion bills, H.R. 14365 and H.R. 14647 which you and I have sponsored. These proposals would require the transmission of international agreements other than treaties to the Congress within sixty days after their execution.

Mr. Chairman, a free people must have access to the decisions of their government if they are to remain free. As representatives of a free people, we in Congress have a responsibility to keep apprised of governmental matters in even greater detail than our constituents. Unfortunately, however, in the area of international agreements, it is often difficult for Congress to be fully informed. This is so because the executive branch, under both Republican and Democratic Administrations, has taken the position that it can withhold from regular dissemination to Congress—even on a classified basis—those documents which it deems sensitive in view of security considerations.

In recent years, the number and the subject matter of these secret agreements make it imperative that Congress be aware of their existence. Many of these commitments affect our survival and defense in the most fundamental sense. Certainly, in this age of instant communication and military deployment aboard, agreements which could involve the United States in hostilities must be known to the Congress before, not after, they have triggered events. Thus, the purpose of the legislation we are considering today is to re-enforce the right of Congress to know the terms of all of this country's commitments.

These proposals also recognize that it might not be in the Nation's interest for some agreements to be disclosed publicly. For that reason, these bills stipulate that agreements which the executive wishes to remain classified would be transmitted not to the Congress at large but to the House Foreign Affairs and Senate Foreign Relations Committees. These committees are charged with the responsi-

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bility of being Congress' focal point in the international field. Without complete information, neither the committees nor the entire Congress can discharge their duties properly.

Mr. Chairman, I strongly urge that the Subcommittee act favorably on this legislation.

In closing, I would like to note the contribution made in this area by our former colleague, the present U.S. Under Secretary General for Political and General Assembly affairs, Brad Morse. Brad was the sponsor of the first bill introduced in the House on this subject in the 92nd Congress. I am sure that he is greatly pleased that the efforts he commenced have resulted in our study of the legislation this afternoon.

Mr. Chairman, again, thank you for this opportunity to meet with your Subcommittee.

Mr. ZABLOCKI. Thank you very much, gentlemen.

The subcommittee stands adjourned.

(Whereupon, at 3:05 p.m., the subcommittee adjourned.)

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

APPENDIX

The Legal Basis Upon Which Congress May Have a Right of Access to the Texts of All Executive Agreements*

(By David M. Sale, American Law Division, Congressional Research Service, Library of Congress, June 27, 1972)

I. Introduction

This memorandum is in response to your request concerning the legal basis upon which Congress may predicate a right to the disclosure of the texts of all Executive agreements which, under international law, are binding upon the United States.

Although Executive agreements may be grouped into various categories, in order to simplify the discussion it would seem advisable to follow the suggestion of one commentator that basically there are only two types: (1) those authorized by Congress and (2) those negotiated by the President on his own authority.[1] The most difficult constitutional questions seem to arise from the latter category. This memorandum, therefore, will focus primarily upon the right of Congress to require the disclosure of those Executive agreements which are made pursuant to the President's own constitutional authority.

The power of the President to conclude Executive agreements on his own authority would seem to be well established:

"Nowhere in the Constitution can there be found an explicit provision granting to the President the power to conclude international agreements without the sanction of Congress or the Senate. Yet this power has been exercised consistently since the beginning of our history. And in the process the President has acquired the exclusive right to *negotiate* all agreements with foreign nations, including those concluded as treaties. The President's authority to enter an agreement which becomes an international obligation of the United States is so indispensable to his power to initiate foreign policy that it may reasonably be derived by implication from the language of the Constitution. . . ."[2]

It should be noted, however, that the "scope" of the President's power to conclude Executive agreements on his own authority does not seem to be as well settled:

"The question which remains unanswered today concerns not the existence but the scope of the President's independent power to conclude international agreements. In the absence of a clause in the Constitution explicitly granting and limiting the power, its boundaries must be discovered by determining the scope of the substantive foreign affairs powers of the President; for his authority to make international agreements must be coextensive with these substantive powers if he is not to be deprived of a frequently indispensable instrument for exercising them."[3]

Although there are no judicial precedents which raise the question of the right of Congress to require the disclosure of the texts of all Executive agreements which are concluded pursuant to the foreign affairs powers of the President, several arguments may be made in support of the proposition that Congress does have this right.

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*Prepared at the request of the Subcommittee on National Security Policy and Scientific Developments for its use and is not intended to represent the opinion of the author or the Congressional Research Service.

[1] Hopson, "The Executive Agreement in United States Practice," 12 *AFJAG L. Rev.* 252, 257 (1970).

[2] Mathews, "The Constitutional Power of the President to Conclude International Agreements," 64 *Yale L. J.* 320, 351 (1955).

[3] *Id.*

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II. Congressional Power Under Article I, Section 8 of the Constitution

Article I, section 8, of the Constitution provides that Congress shall have power—

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Professor Ruhl Bartlett of the Fletcher School of Law and Diplomacy at Tufts University has indicated that Article I, section 8, is a constitutional legal basis upon which Congress may predicate its authority in the area of foreign policy:

"It is often remarked that in the interpretation of legal documents they must be examined as a whole and therefore that this provision of the Constitution must be considered in relation to all other grants of power.

"This is true and it is precisely because it is true that article I, section 8, is so transcendent. It covers all other powers granted in the Constitution. The President is assigned certain duties and rights, but none of them can be carried into effect without legislative sanction whenever the Congress chooses to exercise its constitutional power. *The solid fact is that the Congress is the authoritative organ of the government in the determination of foreign policy.*[4] [Emphasis added]."

Professor Philip Kurland of the University of Chicago Law School has also contended that Article I, section 8, is a broad legal basis of Congressional authority:

"Since John Marshall used the 'necessary and proper' clause to expand the national authority in the *Bank* case (*McCulloch* v. *Maryland,* 4 Wheat, 316 (1819),), it has generally been regarded as a device for the allocation of power between the nation and the states. A reading of its proivsions suggests that it is at least as relevant to the division of authority within the national government itself. The provision, as you may recall, reads: 'The Congress shall have Power . . . . To make all Laws which shall be necessary and proper for carrying into execution the *foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.*' [Emphasis added]." [5]

In this connection, Professor Kurland has suggested the extent to which Congress may still be a "viable institution:"

"It [Congress] can, I think, even legislate the terms and conditions under which the executive privilege may be asserted for the protection of the national interests. I think that the real problem is that Congress cannot—because of the way it is organized—or will not, for whatever reason, undertake the duties that are ascribed to it by the Constitution. . . . I expect that Congress will continue to condone Presidential actions that find no warrant in Congressional legislation. We will continue, for example, to see . . . secret executive agreements substitute for treaties. . . . I suggested several years ago that the failure of Congress proves or will prove the failure of democracy. And I still think that the danger is nothing less than that." [6]

There is some indication, however, that Congress may be beginning, to use Professor Kurland's terminology, *supra,* to "undertake the duties that are ascribed to it by the Constitution." The Report of the Senate Foreign Relations Committee, concerning the recent War Powers Legislation, contained the following language:

"It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. Members of Congress have themselves perhaps underestimated the authority vested in them by the 'necessary and proper' clause of Article I, Section 8, of the Constitution. That clause entrusts the Congress to make all laws 'necessary and proper for carrying into execution' not only its own powers but 'all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' Strictly interpreted, the 'necessary and proper' clause entrusts the Congress not only to 'carry into execution' its own constitutional war power, but also, should it be thought neces-

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[4] Hearings before the Committee on Foreign Relations of the U.S. Senate on S. 596, 92d Cong., 1st sess., 18–19 (1971).

[5] Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the U.S. Senate on S. 1125, 92d Cong., 1st sess., 539 (1971).

[6] *Id.*

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

sary, to define and codify the powers of the government as a whole, including those of the President as its principal officer." [7]

If Congress is to assert its constitutional power under Article I, section 8, as the "authoritative organ of the government in the determination of foreign policy" (Bartlett, *supra*) it would seem implicit that Congress should have the right to require the disclosure of the texts of all Executive agreements which, of course, bind the United States under international law. The Report of the Senate Foreign Relations Committee on S. 596 seems in accord on this point:

". . . 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 the content of agreements with foreign nations." [8]

III. Curtiss-Wright and the Power of Congress in the Field of Foreign Affairs

In *United States* v. *Curtiss-Wright Corporation*,[9] the Supreme Court, in an opinion by Justice Sutherland, presented the following interpretation of the President's role in the field of foreign affairs:

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

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President, as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." [10]

This language has been the subject of strong criticism by Professor Alexander Bickel of Yale University Law School:

". . . the grandiose conception, the almost regal conception of the President's independent role in Foreign Affairs suggested by Justice Sutherland's dicta in *United States* v. *Curtiss-Wright Corporation*. . . . and which was widely taken up in the first flush of the enthusiasm with which we assumed the world in the mid-1940's, this grandiose conception never had any warrant in the Constitution, is wrong in theory and unworkable in practice." [11]

More specifically, Professor Bickel offers the following explanation of Justice Sutherland's opinion:

"The eloquent assertions of independent Presidential power in the 'vast external realm,' which was Justice Sutherland's phrase, which were largely dicta, were largely restricted to statements that the President alone can 'speak or listen as a representative of the Nation'; that he alone negotiates treaties, and that the Senate cannot intrude, although it must give advice and consent ultimately; that the President has 'plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations,' which in context must be taken as a restatement of his role as chief spokesman and chief listener, especially since the court added that the President's powers 'must be exercised in subordination to the applicable provisions of the Constitution'; and that the President, and not Congress, has the better opportunity of knowing the conditions in foreign countries, because the President has his agents, and is better able to maintain secrecy. That was all." [12]

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[7] S. Rep. No. 92–606, 92d Cong., 2d sess., 15–16 (1972).
[8] S. Rep. No. 92–591, 92d Cong., 2d sess., 3 (1972).
[9] 299 U.S. 304 (1936).
[10] 299 U.S. at 319–320.
[11] Hearings before the Committee on Foreign Relations of the U.S. Senate on S. 596, 92d Cong. 1st sess., 26 (1971).
[12] Hearings before the Committee on Foreign Relations of the U.S. Senate on S. 731, S.J. Res. 18 and S.J. Res. 59, 92d Cong., 1st sess. 555 (1971).

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Professor Bartlett also believes that the scope of Justice Sutherland's opinion should be limited:

"As far as the authority of the Congress is concerned, the *Curtiss-Wright* decision, or anything derived from it, has only one validity: The Court decided that in the particular case before it the Congress had not delegated its essential legislative functions. It did not and could not make the President's fiat law beyond effective challenge of the Congress nor make the Executive either the primary or the exclusive organ of the Government in the making of foreign policy." [13]

In light of these criticisms, it would seem that the *Curtiss-Wright* decision presents no bar to the assertion of Congress' full responsibility in the field of foreign affairs. Both Professor Bartlett and Professor Bickel have noted that in the second part of Justice Sutherland's passage, quoted *supra*, the President's powers were "of course" made subject to the "applicable provisions of the Constitution." It has already been suggested in Part II that one of the "applicable provisions of the Constitution" is Article I, section 8, the Necessary and Proper Clause.

IV. Executive Agreements and the "Zone of Twilight"

To assert that the President's power to conclude Executive agreements is subject to limitations under Article I, section 8, is not to avoid recognizing the difficulty of delineating precise constitutional boundaries in an area where some degree of concurrent authority exists. The interplay of Congressional and Presidential authority with respect to Executive agreements has received explanation by Professor Bickel:

"The President's independent power to conclude executive agreements with other nations, like other of his powers, can exist only in context, and subject to the limitations, of our singular American doctrine of the separation and joinder of powers, the chief modern authoritative statement of which came from the Supreme Court in the famous *Steel Seizure* case of 1952." [14]

The case to which Professor Bickel refers is *Youngstown Sheet and Tube Co.* v. *Sawyer*.[15] In that decision, Justice Jackson's concurring opinion stated as follows:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction with those of Congress.

"2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." [16]

Professor Bickel believes that most Executive agreements which the President concludes on his own independent authority fall within Justice Jackson's "zone of twilight" and that Congress' authority in this zone is of sufficient magnitude to require the requisite degree of Executive disclosure:

"Executive agreements which lie in the 'zone of twilight' between Presidential and legislative powers are of obvious concern and legitimate interest to Congress in the exercise of the function assigned to it by the Constitution. For the 'zone of twilight' may be occupied by Congress at will; that is the significance of it. It exists, and independent Presidential power can exist within it, only by Congress' leave, or because of the inertia of Congress. It is redefined or it vanishes whenever Congress chooses to act. *What Congress may act on, it can require to be informed about*." [17] [Emphasis added].

It should be noted that there may be some Executive agreements which do not lie within the "zone of twilight." Professor Bickel has suggested, for example,

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[13] Hearings before the Committee on Foreign Relations of the U.S. Senate on S. 596, 92d Cong., 1st sess., 19 (1971).

[14] *Id.*, at 26.

[15] 343 U.S. 579 (1952).

[16] *Id.*, at 635–637.

[17] Hearings before the Committee on Foreign Relations of the U.S. Senate on S. 596, 92d Cong., 1st sess., 27 (1971).

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

that "if his [the President's] function as Commander-in-Chief responsible for the safety of troops was involved, he might well be on sound constitutional ground in invoking executive privilege and withholding a document from Congress." [18] But Professor Bickel has also indicated his belief that the President cannot use his powers as Commander-in-Chief as a subterfuge for the "full conduct of foreign policy." [19] It would seem, therefore, that if the President improperly refused to disclose the text of an Executive agreement on the basis of his powers as Commander-in-Chief, and thereby hampered Congress' power as the "authoritative organ of the government in the determination of foreign policy" (Bartlett, *supra*), Congress would be constitutionally entitled to assert its right to the disclosure of the Executive agreement.

Professor Raoul Berger has also made some observations, concerning the use of the Commander-in-Chief power to withhold information, which may be relevant to the President's use of this power to withhold the text of Executive agreements [Professor Berger's citations are to his article "Executive Privilege v. Congressional Inquiry" in 12 *U.C.L.A. L. Rev.* 1043 (1965)]:

"What does the role of the President as Commander-in-Chief add to his right to withhold information; does it immunize Military affairs from disclosure? He can only act as Commander if Congress furnishes him with an Army By Article I, § 8, only Congress can raise and support armies; and it is required to limit appropriations for that use to two years. Additionally Article I, § 9, provides that 'No money shall be drawn from the Treasury but in consequence of appropriations made by law.' It follows that Congress may withdraw an appropriation for the Army and completely deflate the Commander's powers. Can it be that Congress cannot preliminarily inquire whether such withdrawal is necessary? Must it like Charles Lamb's Chinaman burn down the barn to roast the pig? An early precedent shows that the Commander-in-Chief function is no shelter from investigation. In 1792 the Congress appointed a Committee to inquire into the failure of the expedition led by General St. Clair, with power 'to call for such persons, papers . . . as may be necessary to assist their inquiries.' The Committee then asked the Secretary of War for documents. (RB 1079). A Cabinet meeting was called to consider the request, of which our only record is an 'unofficial note' found in Jefferson's private papers. (RB 1080 n. 192). Time will not permit discussion of the weight of this note; it is discussed in detail in my study (RB 1079–84). More important, there is no record that Washington asserted to Congress a claim of plenary power to withhold documents. On the contrary, the Secretaries of the Treasury and War departments appeared to make 'explanations . . . in person' and all of the documents were turned over to the Committee. In the words of Douglas Freeman, 'not even the ugliest line on the flight of the beaten troops was eliminated.' (RB 1080). Thus St. Clair demonstrates executive recognition that the House could inquire into conduct of military affairs under the Commander-in-Chief." [20]

V. Executive Responsibility Under Article II, Section 3 of the Constitution

Article II, section 3, of the Constitution provides in pertinent part as follows:

"He [the President] shall from time to time give to the Congress Information of the State of the Union. . . ."

Professor Berger has indicated that this provision places a "duty" on the President which has received insufficient attention:

"It has too mechanically been associated with annual presidential messages, but Justice Story properly read it more broadly. The President, he stated,

> "must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to the Congress. The true workings of the laws . . . are more readily seen, and more constantly under the view of the executive. . . . There is great wisdom, therefore . . . in requiring the President to lay before Congress all facts and information which may assist their deliberations. . . . [2 Story 367]. [21]

"This duty to supply 'all facts and information' which the President has and the Congress has not and 'which may assist their deliberations' is the obverse of the

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[18] *Id.*
[19] *Id.*, at 43.
[20] Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the U.S. Senate on S. 1125, 92d Cong., 1st sess., 293 (1971).
[21] 2 Story 367 as quoted by Berger in 12 *U.C.L.A. L. Rev.* 1043, 1077 (1965).

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

then familiar power of the Grand Inquest to inquire. A good reason for a restrictive reading of the phrase has yet to be proffered, and it is contrary to common sense." [22]

It is perhaps worth noting, as does Professor Berger,[23] the comments of Senator Edmunds in 1886:

"The 'state of the union' is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law. . . ." [24]

If the proper understanding of Article II, section 3, is that suggested above, it would seem that the President may have a "duty" to disclose all Executive agreements to the Congress.

VI. Historical Precedents and Executive Disclosure

Although no historical precedents have been found which raise the precise question of Congress' right to require the disclosure of the texts of all Executive agreements, two early incidents should be mentioned for they may provide historical impetus for Congress' power in this regard. Professor Berger has recently examined both events:

". . . the Continental Congress, in creating a Department of Foreign Affairs presided over by a Secretary, provided that 'any member of Congress shall have access [to 'all . . . papers of his office'] : provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.' Here we have a clear reflection of British and colonial practices, demonstrating that not even 'secret' matters pertaining to foreign affairs could be withheld from the legislature." [25]

It has been argued that the failure of the First Congress to adopt a similar provision indicated that Congress would no longer have the same right of inspection:

"The Members who sat in the New Congress in 1789 could not have been unfamiliar with the fact that during the existence of the Continental Congress its Members had been entitled to see all kinds of secret data. The conclusion is therefore inescapable that the founders of our Government, and those who sat in the First Congress, meant to give no power to the Congress to see secret data in the executive departments against the wishes of the President. That was a power which the Continental Congress had and which the framers of the Constitution meant for the new Congress, created by the Constitution, not to have." [26]

This view, however, has received detailed criticism from Professor Berger,[27] and may be briefly summarized as follows [Professor Berger's citations are to his more detailed analysis in 12 *U.C.L.A. L. Rev.* 1043 (1965)]:

"The Attorney General argues that the failure of the First Congress to make a similar provision bespeaks an intention to withhold from Congress a similar right of inspection. (RB 1063). But he overlooked that the First Congress required the Secretary of the Treasury to furnish information to either House respecting 'all matters' pertaining his office, a measure confirmed by Washington and drafted by Hamilton (RB 1060), and that Attorney General Cushing later advised the President that all branches of the Executive department were by 'legal implication' under the same duty. (RB 1064)." [28]

With respect to the impact of early history upon the legislative power of inquiry in general, Professor Berger offers the following conclusion:

"History delineates a virtually unlimited legislative power to demand information from the executive branch. And if history, traditionally the index of constitutional construction, is to be our guide, it may be concluded that the federal executive power came into being subject to the established power of the legislature to demand information. It cannot therefore constitute an invasion of the

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[22] 12 *U.C.L.A. L. Rev.* 1076–1077 (1965).
[23] *Id.*, at 1077.
[24] 17 *Cong. Rec.* 2215 (1886).
[25] 12 *U.C.L.A. L. Rev.* 1043, 1059 (1965).
[26] "Power of the President to Withhold Information from the Congress," Memorandum of U.S. Attorney General, 141 (1957), as quoted in Berger, 12 *U.C.L.A. L. Rev.* 1063 (1965).
[27] 12 *U.C.L.A. Rev.* 1063–1066 (1965).
[28] Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the U.S. Senate on S. 1125, 92d Cong., 1st sess., 294 (1971).

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

Approved For Release 2001/07/26 : CIA-RDP73B00296R000400130003-1

traditional executive powers to demand information which Parliament and colonial legislatures have long been accustomed to require."[29]

A second incident which may be of historical significance in regard to Congress' power to require the disclosure of the texts of all Executive agreements concerns the demand of the House of Representatives, in 1796, for certain information relating to the Jay Treaty. Professor Berger's analysis of the incident follows:

"Great stress is placed in the Attorney General's Memorandum on Washington's refusal in 1796 to furnish information respecting the Jay treaty to the House of Representatives. Washington, however, had delivered the documents to the Senate, and the papers were open to inspection by such members of the House as chose to go over to the Senate to read them. (RB 1085–86, 1089). The incident repays close scrutiny. Washington explained that the House had no 'right' to the papers because treaty making had been made the sole prerogative of the President and the Senate. But he emphasized that he had no disposition to withhold 'any information . . . which could be required of him by either House as a right.' And he indicated that such a right would have existed, for example, had the House required the papers for purposes of impeachment. (RB 1086). In short, given a relevant legislative function, Washington indicated, the House had a *right*, which he would honor, to see executive documents.

"Even so, Washington had overlooked his own precedents. In the debate preceding the House request for the Jay papers, Edward Livingston, perhaps the most learned lawyer who ever sat in the Congress, pointed out that 'from the first establishment of the Constitution . . . the Executive had been in the habit of free communication with the Legislature as to our external relations.' (RB 1089). I checked out his citations as well as those of his fellow-Congressmen, Lyman and Smith, and they fully confirm his statement. (RB 1089–90). On December 5, 1793, Washington wrote to *both* Senate and House that negotiations between this country and Spain were pending, and that they would 'be made known to the Legislature in confidence only.' (RB 1090, n.242). In 1793, he also transmitted to Congress documents of a 'confidential' nature respecting the proclamation of Neutrality. (RB 1090, n.240). Jefferson recorded in November, 1793, that he had urged Washington with respect to certain matters concerning France and England to 'lay before the legislature and the public what had passed on the inexecution of the treaty,' and that the President 'decided without reserve' to do so. (RB 1090 n.249). Later Jefferson, as Vice President, wrote a Manual of Procedure at the request of the Senate, and stated in § 52, 'It has been the usage for the Executive, when it communicates a treaty to the Senate for their ratification, to communicate also the correspondence of the negotiators.'

"John Adams was Vice President when Washington refused the Jay papers to the House, and he commented, 'I cannot deny the right of the House to ask for papers. . . . My ideas are very high of the rights of the House of Representatives.' (RB 1085). And his son, John Quincy Adams, after moving from the Presidency to the House, said that 'The House had the right to demand and receive all the papers' respecting President Polk's instructions to our Minister to Mexico. (RB 1093). Both John Adams and his son had distinguished diplomatic careers and knew full well how far the need for secrecy stretched; and yet both affirmed the House's right to know."[30]

VII. Conclusion

This memorandum has attempted to present a legal basis upon which Congress may predicate a right to access to the texts of all Executive agreements. The various arguments set forth above would seem to provide a tenable basis for a constitutional and constitutional/historical right of this kind. Perhaps the ultimate significance of these arguments for those who believe that Congress has this right can be summarized as follows:

"Negotiations with foreign powers are difficult to conduct when a lynx-eyed Opposition sits suspiciously on watch. We might have a better foreign policy if we had no Parliament, but we might have a worse. . . . We are a free people because we can criticize freely."[31]

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[29] 12 *U.C.L.A. L. Rev.* 1043, 1060 (1965).
[30] See note 28, *supra.*
[31] Jennings, *The British Constitution* 82 (3d ed. 1950), as quoted by Berger in 12 *U.C.L.A. L. Rev.* 1291 (1965).

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