COMMENTS

UNITED STATES-CHINA RELATIONS: HAS PRESIDENT REAGAN'S COMMUNIQUE REVISED INTERNATIONAL OBLIGATIONS TOWARDS TAIWAN?

Recently, the manner in which the United States has entered into international agreements suggests that our government is more an aristocracy than a democracy. Webster[1] defines democracy as "government by the people"[2] and aristocracy as "government by a noble or privileged class."[3] In the last decade the United States has revised its foreign policy with the Peoples Republic of China (PRC)[4] and Taiwan.[5] The instrument used to effect these changes has been neither a treaty nor an executive agreement, but rather an equally effective document termed a communique.

The United States Constitution requires that international agreements be made by a treaty which receives Senate approval.[6] Presidents throughout our nation's history,[7] however, have circum-

1. THE MERRIAM-WEBSTER DICTIONARY (19th ed. 1974).

2. *Id.* at 196.

3. *Id.* at 53.

4. "The United States of America and the Peoples Republic of China . . . agreed to recognize each other and to establish diplomatic relations as of January 1, 1979." President Carter's Address to the Nation, Announcing Establishment of Diplomatic Relations Between the United States and the Peoples Republic of China, December 15, 1978, *reprinted in* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SELECTED DOCUMENTS No. 9, U.S. POLICY TOWARD CHINA, July 15, 1971-January 15, 1979 (1979).

5. Prior to the recognition of the Peoples Republic of China (PRC), the United States recognized the Republic of China (Taiwan) as the legal government of all China. Although the United Nations excluded the Republic of China from participation in 1971, the United States continued to advocate the representation of the people of Taiwan in international agencies with the United Nations and other international institutions. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SELECTED DOCUMENTS No. 9 U.S. POLICY TOWARD CHINA, July 15, 1971-January 15, 1979 (1979) [hereinafter cited as DOCUMENTS].

6. U.S. CONST. art. II, § 2, cl. 2. James Wilson said at the Pennsylvania ratifying convention, "Neither the President nor the Senate solely, can complete a treaty, they are checks and balances upon each other and are so balanced as to produce security to the people." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 166-67 (M. Farrand ed. 1937).

7. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 177 (1972) [hereinafter cited as HENKIN].

vented this requirement and entered into agreements with foreign states through an instrument termed an executive agreement.[8] These agreements are executed without Senate approval[9] and allow the Executive to unilaterally create international obligations. In conducting relations with the PRC, a different form of executive agreement, namely a communique, has been utilized by the executive branch to redirect United States-China policy.[10] In August 1982 President Reagan issued a joint communique[11] with the PRC that appears to contradict and amend congressional legislation[12] which controls United States policy toward Taiwan.[13]

This Comment will question whether, absent congressional approval, President Reagan's communique can constitutionally be given the legal effect of a treaty or an executive agreement under international and domestic law. The analysis will begin with an overview of United States-PRC-Taiwan relations this past decade. Next, a comparison will be made between President Reagan's communique and the Taiwan Relations Act.[14] The focus will then narrow to an analysis of the executive branch's response to a congressional inquiry[15] into the propriety of President Reagan's action. This investigation will address the international and domestic effect of the communique. The Comment will then suggest a need for judicial review of the communique which should result in nullifying both the international and the domestic legal effect of the President's action.

I. OVERVIEW OF UNITED STATES-CHINA RELATIONS

A. Presidential Communiques

1. *Shanghai Communique.* The United States began moving toward normalization of relations with the PRC when President Nixon visited Peking in 1972.[16] This visit resulted in both countries

8. *Id.* at 176.

9. *Id.*

10. DOCUMENTS *supra* note 5.

11. BUREAU OF PUBLIC AFAIRS, U.S. DEP'T OF STATE, CURRENCY POLICY NO. 413, U.S.-CHINA JOINT COMMUNIQUE (Aug. 1982) [hereinafter cited as JOINT COMMUNIQUE].

12. The Taiwan Relations Act, 22 U.S.C.S. § 3301, Pub. L. No. 96-8 (1979).

13. *Id.* § 3301(b). For full discussion see *infra* notes 29-49 and accompanying text.

14. 22 U.S.C.S. § 3301.

15. *President Reagan's Communique: Hearings on the Separation of Powers Questions Raised by the Communique Before the Subcomm. on Separation of Powers of the Senate Judiciary Committee* (Hearings not in publication at this date) (statement of Davis R. Robinson, Legal Adviser, Dep't of State, September 27, 1982) [hereinafter cited as *Hearings*].

16. DOCUMENTS, *supra* note 5, at 6.

reaching an agreement as to the principles of international conduct[17] which would govern their future relations. These principles, termed the basic charter[18] of the new relationship, were encompassed in a document called the Shanghai communique.[19]

The major impediment to the normalization of relations was the country of Taiwan.[20] The PRC maintained that Taiwan was a province of the mainland and that the United States should recognize the PRC as the sole government of all China.[21] The United States, however, maintained that Taiwan was the recognized government of China[22] and refused to alter this position. The divergent views inhibited the normalization process with the PRC through both the Nixon and Ford[23] Administrations.

2. *President Carter's Communique.* In December 1978 President Carter revised United States policy toward the PRC and Taiwan. In a communique[24] issued jointly with the PRC, the executive branch agreed to: (1) terminate the mutual defense treaty[25] with Taiwan, (2) recognize the PRC as the sole legal government of China and derecognize Taiwan, (3) withdraw all United States troops from Taiwan, and (4) freeze arms sales to Taiwan for one year.[26] This agreement was effected while the Congress was not in

17. *Id.* at 9.

18. *Id.* at 11.

19. *Id.* at 8. President Nixon has stated, "The turning point came at the summit in February 1972 when the leaders of the Peoples Republic of China and the United States met and put their personal imprint on a new direction for our two nations, and with it new contours for the world." PUB. PAPERS 358 (1973).

20. DOCUMENTS, *supra* note 5, at 7.

21. *Id.* at 7-8. The Chinese maintained, "The Taiwan question is the crucial question obstructing the normalization of relations between China and the United States"; and, "Taiwan is a province of China which has long been returned to the motherland"; and lastly, "the liberation of Taiwan is China's internal affair in which no other country has the right to interfere." *Id.*

22. *Id.*

23. *Id.* at 21-28.

24. *Id.* at 48. President Carter's communique stated in part, "As of January 1, 1979, the United States of America recognizes the Peoples Republic of China as the sole legal government of China . . . On the same date . . . the United States of America will notify Taiwan that it is terminating diplomatic relations and that the Mutual Defense Treaty between the United States and the Republic of China is being terminated . . ." *Id.*

25. Mutual Defense Treaty between the United States of America and the Repubic of China, December 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213 [hereinafter cited as Mutual Defense Treaty].

26. DOCUMENTS, *supra* note 10, at 48-50. The PRC requested the freeze on the sale of arms be a permanent one. However, this is one concession President Carter did not agree to. Rather, as a compromise, he agreed that while the Mutual Defense Treaty followed its one year expiration clause, the United States would not sell arms to Taiwan. *Id.*

session[27] and without the approval of either the Senate or the House of Representatives. The Executive's action also ignored a sense of congressional resolution[28] requiring consultation on any matter affecting the mutual defense treaty with Taiwan.

3. *The Congressional Response.* When Congress reconvened in January 1979, the reaction was one of outrage. Some legislators[29] attempted to block President Carter's action by bringing suit.[30] However, the Supreme Court considered the matter a political question.[31] The result was full implementation of this new United States policy, and as one legislator[32] suggested, "all that Congress can do is to try and pick up the pieces of our relations with Taiwan."

One of the major concerns of the Congress was the termination of the defense treaty with Taiwan.[33] In response, Congress enacted the Taiwan Relations Act (TRA).[34] The TRA mandated the following: (1) "it is the policy of the United States to provide Taiwan

27. President Carter's communique was issued on December 15, 1978, while the Congress was in recess for the Christmas holidays.

28. The International Security Assistance Act of 1978, § 26(b). "It is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."

29. 125 CONG. REC. H1745 (daily ed. March 28, 1979) (statement of Rep. Zablocki) "It is bad enough the President would usurp the authority of the Congress—and indeed I believe he did, and I hope the lawsuit will prove that."

30. Goldwater v. Carter, 444 U.S. 996 (1979) *cert. granted* and dismissal of the complaint was directed, without argument. Sen. Goldwater brought this suit against President Carter for his unilateral action in terminating the Mutual Defense Treaty with Taiwan. The trial court agreed with plaintiff Goldwater that the President did not have the unilateral authority to terminate the treaty. On appeal the District of Columbia circuit reversed and found the President did have authority for his actions. The Supreme Court was presented with the question and vacated the appellate court's decision with directions to remand and dismiss.

31. *Id.* Chief Justice Burger, along with Justices Rhenquist, Stewart and White, believed the case presented a political question. One Justice believed the plaintiffs lacked standing.

32. 125 CONG. REC. H1285 (daily ed. March 13, 1979) (statement of Rep. Duncan) "Our job is to salvage what we can of our relationship with Taiwan." *see also* 125 CONG. REC. H1156 (daily ed. March 8, 1979) (statement of Rep. Broomfield) "Mr. Chairman, no amount of soft words, pious hopes or propaganda can remove the stain on American honor that the President's actions have inflicted. It is left to us to try to salvage what we can."

33. 125 CONG. REC. H1741 (daily ed. March 28, 1979) (statement of Rep. Zablocki) "As members will recall, the basic purpose of the legislation . . . is to establish a peace and security framework . . . for Taiwan."

34. 22 U.S.C.S. § 3301.

with arms of a defensive character,"[35] and (2) "the United States will make such defensive articles and services[36] in such quantity as may be necessary to enable Taiwan to maintain a sufficient self defense."[37] In an attempt to prohibit future unilateral executive action, the TRA also mandates that determinations regarding the sale of arms to Taiwan be made jointly[38] by the President and Congress.

The majority of legislators believed that the TRA was a clear message of congressional dissatisfaction with President Carter's action.[39] However, there were some[40] who felt that the legislation impliedly gave congressional approval to the President's communique. Specifically, they did not believe that the President had the unilateral authority to terminate a treaty[41] or to regulate foreign commerce.[42] They felt that the legislation not only condoned the President's action, but was also another example of congressional acquiescence[43] to Executive prerogative. Considering the recent action by President Reagan, this concern was apparently not unfounded.

4. *President Reagan's Communique.* On August 17, 1982, President Reagan issued another joint communique with the PRC.[44] This communique set forth United States policy which appears contrary to the policy mandated by the TRA. According to the communique, the United States does not seek to carry out a policy of long term arms sales to Taiwan, but rather intends to gradually reduce those sales. The communique further resolves that

35. *Id.* at § 3301(b)(5).

36. *Id.* at § 3302(a).

37. *Id.*

38. *Id.* at § 3302(b).

39. 125 CONG. REC. H1744-45 (daily ed. March 28, 1979) (statement of Rep. Fountain) "This legislation is seen by the President and his advisers as a forthright and compelling response by the Congress to his ill-advised single handed recognition of Red China."

40. 125 CONG REC. S2325 (daily ed. March 8, 1979) (statement of Sen. Humphrey) "I would like the security section even stronger. All that is being attempted here is to firm up some wobly [sic] gums . . . so that in the future we cannot so readily speak out of both sides of our mouths on this sort of issue."

41. *See supra* note 30.

42. 125 CONG REC. H1179 (daily ed. March 8, 1979) (statement of Rep. Edwards) "[T]he President is another branch of government. He is an equal branch of government and I do not want us to continue to proceed on the assumption that it is the responsibility of this House to abdicate its responsibilities in the international affairs of this country."

43. 125 CONG. REC. H1742 (daily ed. March 28, 1979) (statement of Rep. Bauman) "Mr. Speaker, some of us have a strong feeling that they do not wish to be a party to any legislation that terminates our diplomatic recognition of the Republic of China on Taiwan."

44. JOINT COMMUNIQUE, *supra* note 11.

the quantity and quality of arms will not exceed the nature and number of arms sold to Taiwan in the previous year.[45]

These policy statements do not correspond with the language or policy of the TRA. The Act states that ". . . it is the policy of the United States to provide Taiwan with arms of a defensive character."[46] This language does not suggest any limitations or reduction in the arms to be sold. Adding to the dilemma, the TRA specifically requires ". . . the President and the Congress"[47] to jointly determine the nature and quantity of arms to be provided. However, President Reagan, like President Carter, appears to have issued his communique without prior congressional consultation.

These contradictions have resulted in congressional inquiry[48] regarding the Executive's authority for such unilateral action. Two difficulties arise as a result of President Reagan's action. First, should a communique be afforded the status of an international agreement upon which a foreign state can rely? Second, will a communique be afforded supremacy[49] where it is inconsistent with prior legislation? To answer these questions, the analysis will now focus on the international and domestic legal effect of President Reagan's communique.

---

45. *Id.* at sec. 6. The communique formally states:

> Having in mind the foregoing statements of both sides, the United States Government states that it does not seek to carry out a long term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution.

46. 22 U.S.C.S. § 3301(b)(5).

47. *Id.* at § 3302(b). "The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determinations of Taiwan's defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress." *Id.*

48. *Hearings*, *supra* note 15.

49. U.S. CONST. art. VI, cl. 2. Under United States law, the last in time takes priority over previous inconsistent law. This "supremacy" is usually afforded to treaties and executive agreements. However, considering the ability of President Carter's communique to supercede the Mutual Defense Treaty with Taiwan, communiques may have the status of treaties or executive agreements.

II. THE INTERNATIONAL LEGAL EFFECT

A. External View—The International Court of Justice[50] *Perspective*

The first position maintained by the executive branch is that the communique ". . . is not an international agreement and thus imposes no obligations on either party under international law."[51] To support this position, the Legal Adviser[52] states that the communique does nothing more than "set forth parallel and interrelated statements of policy by the United States and China."[53] If the executive branch is suggesting by this remark that presidential statements of policy have little effect on United States foreign relations, this is a difficult concept to accept. From the perspective of international law, the position is less than persuasive.

An international tribunal[54] has addressed the legal effect to be given statements made by officers of foreign states. The case concerned the legal status of Eastern Greenland.[55] The dispute was between Norway and Denmark concerning which state controlled a portion of Greenland. The Norwegian government proclaimed that it occupied certain territories in Greenland which the Danish government contended were subject to the sovereignty of Denmark.[56] The Danish government supported this contention by arguing that Norway had recognized Danish sovereignty over this part of Greenland and therefore could not dispute it.[57] As evidence, the Danes offered a declaration by the Norwegian Minister for Foreign Affairs.[58] The Minister's statement was made in response to the Danish government's request that Norway not interfere with Denmark's claim over this area of Greenland.[59] The Norwegian Minister stated that "The Norwegian government

50. The International Court of Justice was brought into being by the Charter of the United Nations on June 26, 1945. Prior to this, from 1920 until 1945, the tribunal was known as the Permanent Court of International Justice. J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 54 (2d ed. 1981) [hereinafter cited as SWEENEY, OLIVER & LEECH].

51. *Hearings*, *supra* note 15.

52. *Id.*

53. *Id.*

54. The Permanent Court of International Justice.

55. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 43 at 35 (judgment of April 5, 1933).

56. *Id.* at 42.

57. *Id.* at 49.

58. *Id.*

59. *Id.*

would not make any difficulties in the settlement of this question."[60] The Government of Norway contended that the statement was in verbal form and that the Minister was not competent to bind the State internationally.[61]

The question before the court was whether authorized discussions and statements made by foreign ministers would be binding on their respective States. The court found that "[i]t is beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs . . . in regard to a question within his province is binding upon the country to which the Minister belongs."[62]

Applying the rationale of the International Court of Justice (I.C.J.) to President Reagan's communique would suggest that a statement by the President of the United States should have an equal or greater status than one made by a foreign minister. To consider an officially documented communique[63] issued by the President as inferior to that of a statement by a foreign minister would be inappropriate. Therefore, although the I.C.J. is not bound by *stare decisis*,[64] and notwithstanding the Connolly reservation,[65] this court would be hard pressed to find President Reagan's communique not a legally binding international agreement.

B. Internal View—The Department of State's Position

Further supporting the view that the President's communique is an international agreement is the following position of the United States Department of State. The United States and Vene-

60. *Id.*

61. *Id.* at 52.

62. *Id.* at 71.

63. *See supra* note 11.

64. The Statute of the International Court of Justice, Art. 38 provides:

1. This Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This privision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.

65. The reservation states: "Jurisdicition will not apply to disputes with regard to matters which are essentially within the domestic jurisdicition of the United States." (This reservation allows the United States to unilaterally determine if it will accept the jurisdiction of the I.C.J.). *See* SWEENEY, OLIVER & LEECH, *supra* note 50, at 739.

zuela made an agreement, by way of protocol,[66] whereby Venezuela agreed to pay $470,000.00 to the United States in settlement of a claim.[67] After the agreement was made, a new government council in Venezuela came into existence. There was concern in the embassy that this new council would have to reapprove the protocol.[68] When notified of this concern the Department of State took the following position: "Protocol is *fait accompli*, internationally speaking . . . upon those assurances (protocol) this government is, internationally speaking, entitled to rely . . ."[69]

If the State Department considers a memorandum such as protocol to be legally binding at the international level, then a communique issued jointly by the Executive and a foreign state should be afforded the same status. Therefore, considering the *Denmark v. Norway* decision[70] and our own State Department's view,[71] it is difficult to consider President Reagan's communique as anything less than an international agreement creating the attendant obligations. Internationally speaking, these obligations would entitle the PRC to rely on President Reagan's amendments[72] to the TRA.

C. Exception to the Creation of International Obligations

There is one caveat nullifying the effect of an international agreement. This exception may be afforded if the agreement can be found to violate an internal law of the consorting state.[73] Although there is conflict over this issue,[74] the Vienna Convention on the Law of Treaties has attempted to resolve the question.

It should be noted that the Vienna Convention[75] does not dif-

66. "A preliminary memorandum of diplomatic negotiation." THE MERRIAM-WEBSTER DICTIONARY 559 (19th ed. 1974).

67. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 156 (1943) [hereinafter cited as HACKWORTH].

68. *Id.* at 157.

69. *Id.*

70. *See* Denmark v. Norway, *supra* note 55.

71. *See* HACKWORTH, *supra* note 67.

72. *See supra* notes 45-48.

73. Vienna Convention on the Law of Treaties, § 2, art. 46, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27. [hereinafter cited as Vienna Convention] "A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and good faith." (The Convention entered into force on Jan. 27, 1980; the United States has signed the convention, but as of this date has not ratified the Convention on Treaties.)

74. Fairman, *Competence to Bind the State to an International Agreement*, 30 AM. J. INT'L L. 439 (1936).

75. *See* Vienna Convention, *supra* note 73.

ferentiate between treaties and other forms of international commitments, but rather consolidates both into the term "international agreements."[76] Since President Reagan's communique is arguably an international agreement, the Convention's exception would be applicable. Supporting this view is the Restatement of Foreign Relations' position.[77] The Restatement considers the President's statements to be legally binding upon the United States under international law, but from a domestic view, would permit the exception to apply.

The Vienna Convention would obligate a state to comply with the agreement unless the internal constitutional violation it created was manifest and the internal rule was of fundamental importance.[78] However, what constitutes a manifest and fundamentally important violation is not clear. One position[79] is that the United States Constitution requires Senate approval of international agreements, such as treaties, and any agreement which lacks Senate approval is fundamentally deficient.[80] Negating this contention[81] are the many international agreements made and constitutionally supported without Senate approval.[82] The suggestion is that the importance of senatorial approval is questionable and apparently not a manifest violation since many international agreements are effective without that approval.

Assuming the latter argument more persuasive, it would appear that President Reagan's communique would be considered binding under international law. However, if it can be shown that the President's action resulted in a failure to uphold a law of the land, specifically the TRA, then it might be considered a manifest and fundamental constitutional violation.[83] To investigate this contention, the domestic legality of President Reagan's communique requires analysis.

---

76. *Id.*

77. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 130-131 (1965).

78. *See* Vienna Convention, *supra* note 73.

79. Fairman, *supra* note 74.

80. *Id.* at 439.

81. HENKIN, *supra* note 7, at 427.

82. *Id.*

83. U.S. CONST. art. VI, cl. 2, "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made . . . shall be the supreme law of the land."

III. THE DOMESTIC LEGAL EFFECT

A. Communiques Compared with Executive Agreements

From an international perspective, a communique is capable of effecting an international agreement. However, from a domestic view, the United States generally utilizes treaties or executive agreements[84] to create international commitments. Therefore, before an analysis of a communique's domestic legal effect can be undertaken, a communique must be shown to compare with the force and effect of an executive agreement.

One usual method of comparison is by definition. The definition of an executive agreement however, is less than clear. The State Department, when asked to define the difference[85] between an executive agreement and a treaty, offered the following explanation: "A treaty is something we have to send over to the Senate, an executive agreement we don't have to send over."[86]

The difference between an executive agreement and a communique is equally vague. Considering the elements of a communique and an executive agreement, however, reveals similarities. An executive agreement appears to be: (1) a statement by the executive branch; (2) directing a course of action the United States intends to pursue; (3) communicated to a foreign state, either written or oral;[87] and (4) executed with prior, subsequent or no congressional approval.[88] The components of President Reagan's communique appear to satisfy these elements. Specifically, it was: (1) a statement made to the PRC, (2) stating the arms sales policy of the United States and Taiwan, (3) jointly issued by the United States and the PRC, (4) without congressional approval.[89]

Additionally, past communiques[90] issued by the United States and the PRC have had the force and effect of an executive agreement. For example, President Nixon's communique[91] was consid-

84. HENKIN, *supra* note 7, at 173.

85. A. SCHLESINGER JR., THE IMPERIAL PRESIDENCY 69 (1973) [hereinafter cited as IMPERIAL PRESIDENCY].

86. *Id.*

87. HENKIN, *supra* note 7, at 184.

88. *Id.* at 174.

89. *Hearings, supra* note 15. (Statement of Harold C. Hinton, Professor of Political Science and International Affairs, The George Washington Univeristy, Washington, D.C., Sept. 17, 1982).

90. *See supra* note 23.

91. DOCUMENTS, *supra* note 5, at 37.

ered to be binding policy which the United States would follow.[92] President Carter's communique had the power to "derecognize" a country and terminate a treaty which substantively changed United States law.[93] To consider President Reagan's communique as less forceful is difficult to support. Accordingly, for purposes of this analysis, communiques and executive agreements will be considered synonomous.

B. Executive Agreement—An Overview

1. *Historical Perspective.* In 1789 President Washington went to the Senate to discuss a proposed treaty.[94] After a lengthy debate that focused on Senate procedures rather than the treaty, Washington is said to have left the Senate declaring that ". . . he would be damned if he ever went there again."[95] As a result, Presidents from Washington to Reagan[96] have circumvented senatorial participation in international affairs.[97] The instrument most often utilized has been the executive agreement. The growth[98] in the number of executive agreements has resulted in their being referred to as "a sorcerer's apprentice"[99] and "the instrument for major international commitments."[100]

2. *Constitutional Authority for Executive Agreements.* Article II of the Constitution confers on the Executive the power to make treaties, provided that two-thirds of the Senate present concur.[101] However, the Constitution is silent regarding executive agreements. The Constitution does give the Executive unilateral authority as Commander in Chief[102] and the authority to receive ambassadors

92. *Id.*

93. *See* Mutual Defense Treaty, *supra* note 25.

94. II. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 150 (1963), *reprinted in* SWEENEY, OLIVER & LEECH, *supra* note 50, at 1040.

95. *Id.*

96. HENKIN, *supra* note 7, at 177.

97. *Id.*

98. IMPERIAL PRESIDENCY, *supra* note 85, at 313.

99. *Id.* "We are not put in the Senate," said Senator Case, "to deal only with treaties on copyrights, extradition, stamp collections, and minor questions of protocol. If that is the meaning of the Constitution, then I think the Founding Fathers wasted their time."

100. *Id.* According to the State Department as of January 1, 1982, the United States had entered into international commitments through 983 treaties and 6,371 executive agreements. Telephone interview with Ann Simmons, U.S. Dep't of State (Jan. 6, 1983.)

101. U.S. CONST. art II, § 2, cl. 2.

102. *Id.* at cl. 1.

and other public ministers.[103] This authority has been extended by implication[104] to give the Executive the power to formally recognize[105] a foreign state. These powers, combined with the general powers which the Executive derives from Article I, form the basis for the constitutional validity of executive agreements. The result has been what one writer[106] has termed "an invitation to struggle for the privilege of directing American foreign policy"[107] between the Executive and Congress.

3. *Types of Executive Agreements and their Judicial Support.* Generally, two[108] and sometimes three[109] types of executive agreements have been recognized. They have been categorized as: (1) congressional-executive agreements having the prior approval of Congress,[110] (2) agreements made unilaterally by the President which receive subsequent congressional approval,[111] and (3) sole-executive agreements which receive neither prior nor subsequent approval by Congress.[112]

Executive agreements said to have prior congressional approval usually find authority through the express or implied language of a statute.[113] For example, in *United States v. Curtis-Wright Export Corp.*,[114] the Supreme Court upheld an executive agreement prohibiting the sale of arms to Bolivia and Paraguay.[115] Prior to this executive proclamation, Congress had passed a joint resolution authorizing presidential discretion to take this type of action.[116] Defendant Curtis-Wright argued that this delegation of foreign commerce power to the President was unconstitutional.[117]

---

103. *Id.* at cl. 2.

104. HENKIN, *supra* note 7, at 168.

105. *Id.*; *see also* IMPERIAL PRESIDENCY, *supra* note 85, at 14.

106. E.S. CORWIN, THE PRESIDENT, OFFICE AND POWERS, 1787-1957, *reprinted in* IMPERIAL PRESIDENCY, *supra* note 85, at 7.

107. IMPERIAL PRESIDENCY, *supra* note 85, at 7.

108. HENKIN, *supra* note 7, at 173-176.

109. *See* SCHWARTZ, *supra* note 94, at 150.

110. HENKIN, *supra* note 7, at 173.

111. *Id.* at 174.

112. *Id.*

113. HENKIN, *supra* note 7, at 173-176.

114. 299 U.S. 304 (1936).

115. *Id.* at 312-13.

116. *Id.* at 304. The resolution provided in part: "That if the President finds that the prohibition of the sale of arms . . . may contribute to the reestablishment of peace . . . it shall be unlawful to sell . . . any arms . . . until otherwise ordered by the President or the Congress."

117. *Id.* at 315.

The Supreme Court rejected the defendant's argument and found that legislation in foreign affairs "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[118] The Court, in dictum, also suggested that even absent an Act of Congress, the President would still have constitutional authority for this executive agreement.[119] The apparent source of this authority lies within the exclusive power of the President as the "sole-organ" of the government in the field of foreign relations.[120]

Executive agreements enacted solely by the President, without prior or subsequent congressional approval, have also received judicial support. In *United States v. Belmont*,[121] the Supreme Court upheld such an agreement between the United States and the Soviet Union. Through an exchange of a diplomatic correspondence called the Litvinov Agreement,[122] the Soviet Union had assigned to the United States government all accounts due the Soviets from American nationals.[123] The Soviets had acquired these accounts as a result of the nationalization of their government.[124] The defendant argued that the actions of the United States government were confiscatory and against the policy of the State of New York.[125] The Court took judicial notice that the agreement was coincidental with the recognition and establishment of normal relations with the Soviet Union.[126] Echoing the "sole-organ" prerogative of the President,[127] the Court then found that while "a treaty signified a compact made between two or more independent nations, there are international compacts which are not treaties and do not require the participation of the Senate."[128] The Court suggested that examples of such compacts would be protocols, *modus vivendi*, postal conventions, and agreements such as the one under consideration.[129]

118. *Id.* at 320.
119. *Id.*
120. *Id.* at 319.
121. 301 U.S. 324 (1937).
122. *Id.* at 326.
123. *Id.*
124. *Id.* at 327.
125. *Id.*
126. *Id.* at 330.
127. *Id.* at 331.
128. *Id.*
129. *Id.* Justice Sutherland also stated "that the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted." *Id.*

Five years later in *United States v. Pink*,[130] the Supreme Court was again presented with the question of the propriety of the Litvinov Agreement. Although now a revamped Court,[131] the decision was identical to the one in *Belmont*.[132] Again the defendant's argument was that the agreement was confiscatory and contrary to state law.[133] The Court reiterated the ability of an executive agreement to have supremacy over state law.[134] Quoting the Federalist No. 64;[135] Article II, clause 2 (the Supremacy Clause);[136] and *Belmont*,[137] the Court held that: "All constitutional acts of power, whether in the Executive or in the Judicial department, have as much legal validity and obligation as if they proceeded from the Legislature."[138] Emphasizing the point, the Court also noted that: "State law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement."[139] The Court was also careful to note ". . . that even treaties cannot derogate the authority of the states . . . unless clearly necessary to effectuate national policy."[140]

Although *Belmont*[141] and *Pink*[142] support the validity of executive agreements taking precedence over state law, neither decision suggests that executive agreements would take precedence over federal law.[143] It is worthy to note that both Courts found an executive agreement to have the supremacy status of a treaty in certain instances. Specifically, it was held that the last in time controls over

130. 315 U.S. 203 (1942).

131. Justice Sutherland was no longer sitting on the Court. Professor Henkin, speaking of the Justice, has said, "there are agreements the President can make on his own authority and others he cannot, but neither Justice Sutherland or anyone else has told us which are which." HENKIN *supra* note 7 at 179. *See also Imperial Presidency, supra* note 25, at 103 quoting Professor Powell of Harvard Law School speaking to his students: "just because Justice Sutherland writes clearly, you must not suppose he thinks clearly."

132. 301 U.S. 324 (1937).

133. 315 U.S. 203, 214 (1942).

134. *Id.* at 215.

135. *Id.* at 230.

136. *Id.* U.S. CONST. art VI, cl. 2. "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made . . . shall be the supreme Law of the Land."

137. 301 U.S. 324 (1937).

138. 315 U.S. 203, 230 (1942).

139. *Id.*

140. *Id.*

141. 301 U.S. 324 (1937).

142. 315 U.S. 203 (1942).

143. *Id.*

prior inconsistent law.[144]

The Supreme Court has attempted to restrict the power of executive agreements on certain occasions. One case restricting the power of an executive agreement is *Youngstown Sheet and Tube Co. v. Sawyer*.[145] In *Youngstown*, the President was concerned that a strike by steel workers would hamper United States interests in protecting South Korea.[146] As a result, he attempted to proclaim a military takeover of the steel plants.[147] The question before the Court was whether the President, acting in the foreign-affairs interests of the United States, could order a military takeover of steel plants, thereby contravening prior legislation.[148] The Supreme Court found that the Executive has: "neither explicit nor inherent power to set aside an Act of Congress for the benefit of the United States foreign-affairs interests as seen by the President."[149]

Youngstown has caused some[150] to question whether *Pink* has survived this decision.[151] Although the issue is blurred, the concurring opinion[152] in *Youngstown* has received praise for its analysis of the levels of Executive power *vis-a-vis* the power of Congress. The opinion suggested that the maximum level of Executive power is found when it is exercised by the express or implied will of the Congress.[153] The next level is a middle ground or "zone of twilight"[154] where the Executive and the Congress may have concurrent power or in which the distinction is uncertain.[155] The "lowest ebb"[156] of Executive power is when it is in contradiction or conflict with the will of the Congress.

These categories are applicable to the cases previously dis-

144. *Id.* at 230 (quoting The Federalist No. 64).
145. 343 U.S. 579 (1952).
146. *Id.* at 583.
147. *Id.*
148. *Id.* at 586. (The legislation referred to in the decision was the Taft-Hartley Act in which Congress refused to adopt a seizure method for settling labor disputes. The result was the Court noting specifically that the Congress did not provide for seizure under any circumstances).
149. *Id.* at 588.
150. SWEENEY, OLIVER, & LEECH, *supra* note 50, at 1055.
151. *Id.* The authors suggest that the Supreme Court has not subsequently addressed the issue of whether executive agreements may supercede state legislation even if such action may not supercede Federal legislation. *But see* Dames & Moore v. Regan and Weinberger v. Ross *infra* notes 169-203 and accompanying text.
152. 343 U.S. 579, 635, 637 (1952) (Jackson, J. concurring).
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

cussed. For example, *Curtis-Wright*[157] would be consistent with the first level of Executive power. Both *Belmont*[158] and *Pink*[159] would arguably fall within the "zone of twilight"[160]" and concurrent authority. The *Youngstown*[161] decision would be a demonstration of the "lowest ebb"[162] of the Executive's power. However, which category Executive action may fall into is not always clear. For instance, whether a President has acted with the implied will of Congress, through statutory vagueness or in contravention of Congressional policy, is difficult to ascertain. President Reagan's communique poses such a dilemma.

C. President Reagan's Communique

1. *The Executive's Position.* In defense of the President's action, the executive branch[163] maintains that the communique's ". . . status under domestic law is that of a statement by the President of a policy which he intends to pursue."[164] When questioned[165] about the TRA joint decision-making requirement, the executive branch acknowledged that the TRA does provide "that determinations with respect to . . . defensive articles . . . be made by the President and Congress in accordance with procedures established by law."[166] However, the executive branch also noted that "the TRA itself specifies no procedures for joint action by the Congress and the President."[167]

One inference to be drawn from this statement is that the President intends to comply with relevant laws, but since the TRA is procedurally silent on joint action, Executive discretion may be implied. The executive branch can point to recent Supreme Court decisions[168] which support this contention.

In *Dames & Moore v. Reagan*[169] the dispute questioned the Ex-

157. 299 U.S. 304 (1936).
158. 301 U.S. 324 (1937).
159. 315 U.S. 203 (1942).
160. 343 U.S. 579, 635 (1952) (Jackson, J. concurring).
161. *Id.*
162. *Id.* at 637.
163. *Hearings, supra* note 15.
164. *Id.*
165. *Id.* The Legal Adviser was responding to letters sent by the Congress to the Departments of State and Defense, the Arms Control and Disarmament Agency, and the National Security Council.
166. *Id.*
167. *Id.*
168. *See infra* notes 169-203 and accompanying text.
169. 453 U.S. 654 (1981).

ecutive's power to settle unilaterally claims between United States nationals and a foreign state.[170] The case involved the settlement of claims, by executive agreement, arising out of the Iranian hostage[171] situation. As part of the settlement, the executive branch agreed to suspend claims against Iran in American courts and have the matters resolved through arbitration.[172] *Dames & Moore* alleged that the Executive's action exceeded his constitutional powers and that the executive agreement did not comport with legislation which addressed this issue.[173]

The Supreme Court found that, although not specifically authorized by Congress, the President did have the power to suspend the claims.[174] Relying on *Pink*[175] and enlarging the categories of Executive power suggested in *Youngstown*,[176] the Court found that the previous legislation indicated a congressional willingness ". . . to implicitly allow for broad Executive discretion"[177] in certain areas of foreign relations. The Court expanded *Youngstown*[178] by finding that Executive authority does not fit ". . . neatly into one of three pigeonholes, but rather, at some point along a spectrum running from explicit congressional authorization to explicit prohibition."[179]

The interesting aspect of this decision is the Court's expansion of the *Youngstown* doctrine.[180] There is arguably no longer a middle ground "zone of twilight,"[181] but rather a continuing twilight between explicit prohibition and approval. Applying this rationale to President Reagan's communique would suggest that since the TRA is silent on joint determination procedures there is not explicit congressional prohibition. Therefore, absent prohibition, presidential discretion would be implied.

Another decision supporting liberal interpretation of a statute

170. *Id.*

171. *Id.* The government of Iran seized the American Embassy in Tehran on November 4, 1979, and held the personnel hostage until a release was negotiated on January 19, 1981.

172. Exec. Order Nos. 12,276-12,284, 46 Fed. Reg. 7913-30 (1981). (These orders were issued by President Carter and endorsed by President Reagan on January 20, 1982).

173. 453 U.S. 654, 655-66 (1981).

174. *Id.* at 669-70.

175. 315 U.S. 203 (1942).

176. 343 U.S. 579 (1952).

177. 453 U.S. 654, 677 (1981).

178. 343 U.S. 579 (1952).

179. 453 U.S. 654, 669 (1981).

180. 343 U.S. 579 (1952).

181. *Id.* at 635.

is *Weinberger v. Rossi*.[182] Prior to the suit, Congress had enacted legislation which prohibited discrimination, in favor of local nationals, in hiring preference at overseas military installations.[183] The one exception to this statute was that provisions in a treaty would allow preference to be given to local nationals.[184] At the time of enactment, there were thirteen executive agreements in effect which required that preference be given to local citizens over United States citizens.[185] After the statute[186] took effect, four more executive agreements were made which again gave preference to the local citizens.[187] None of these executive agreements were submitted to the Senate for its advice and consent.[188]

In 1978, United States citizens working at the naval facility at Subic Bay in the Phillipines were notified that their jobs were being taken by local nationals in accordance with an executive agreement known as the Base Labor Agreement (BLA).[189] This agreement was in force prior to the enactment of the above-mentioned statute. The argument presented to the Supreme Court was, *inter alia*, that the BLA violated the statute. At issue was whether an executive agreement would be considered a treaty and would thereby fall within the exception provided in the statute.[190]

The Court, in a footnote, discussed how the Executive may enter into certain binding agreements with foreign nations without complying with the Treaty clause[191] of the Constitution. In support, the Court noted *Dames & Moore*,[192] *Pink*,[193] and *Belmont*.[194] The Court also stated that Congress has not been consistent in dis-

182. 456 U.S. 25 (1982).

183. 5 U.S.C. § 7201 (1976 ed. Supp. III).

184. *Id.*

185. 456 U.S. 25, 31 (1982).

186. 5 U.S.C. § 7201 (1976 ed. Supp. III).

187. 456 U.S. 25, 31 (1982).

188. *Id.* at 32. The Court strongly emphasized that if Congress had not intended for the word "treaty" to include executive agreements then they would have opposed these agreements effected after the statute was enacted.

189. *Id.* at 28. The Base Labor Agreement, *inter alia*, provides for the preferential hiring of Filipino citizens at United States facilities in the Phillipines.

190. *Id.* The Court noted that simply because the question presented is entirely one of statutory construction does not mean that the question necessarily admits of an easy answer. (Quoting Chief Justice Marshall who long ago observed: "[W]here the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived . . ." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)).

191. *Id.* at 29.

192. 453 U.S. 654 (1981).

193. 315 U.S. 203 (1942).

194. 301 U.S. 324 (1937).

tinguishing between Article II treaties,[195] and other international agreements made by the President.[196] Additionally, notice was taken of the four executive agreements effected after enactment of the statute[197] which were not challenged by the Congress.[198] As a result, the Court inferred that the Congress intended the word "treaty," as used in the legislation, to include an executive agreement.[199]

The Supreme Court acknowledged the lower court's reliance on legislative history which indicated a disfavor of executive agreements requiring preferential hiring.[200] However, this "history" was discarded as being out of context and too isolated a remark to indicate true legislative intent.[201] As a result, the Court held that: "the treaty exception in the statute extends to executive agreements as well as Article II treaties."[202]

When *Dames & Moore*[203] and *Weinberger*[204] are considered together in relation to President Reagan's communique, the repercussions of the President's action begin to surface. Under *Dames & Moore*,[205] the communique would arguably fall within a "new" grey area since procedures for joint decision making were not specified in the TRA. *Weinberger*[206] would suggest that the communique, as an executive agreement, should be given treaty status under domestic United States law. The implication would be that President Reagan's communique has created international obligations[207] and has amended substantive United States law.[208] Whether the Framers[209] of the Constitution intended the Executive to have such sweeping unilateral authority is questionable.

---

195. 456 U.S. 25, 30 (1982).
196. *Id.*
197. *Id.* at 31.
198. *Id.*
199. *Id.*
200. *Id.* at 33.
201. *Id.* The Court noted the remark of Senator Hughes. Specifically, the dependents of unlisted personnel are denied the opportunity to work at overseas bases, by agreement with the country in which they are located, and are forced to live in poverty. The Court found that this statement was made after remarks regarding NATO agreements and believed that taken in context it did not apply to the agreement at issue.
202. *Id.* at 35.
203. 453 U.S. 654 (1981).
204. 456 U.S. 25 (1982).
205. 453 U.S. 654 (1981).
206. 456 U.S. 25 (1982).
207. *See supra* notes 54-77 and accompanying text.
208. *See supra* notes 30-39 and accompanying text.
209. IMPERIAL PRESIDENCY, *supra* note 85, at 279. "The Founding Fathers were deter-

2. *The Congressional Position.* The strongest language restricting the power of the Executive can be found in *United States v. Guy W. Capps, Inc.*[210] In *Capps*, the executive branch entered into an agreement with Canada regulating the importation of certain produce into the United States.[211] However, this agreement was in contravention of previous legislation, the Agricultural Act of 1948.[212] Defendant Capps violated the terms of the executive agreement. The trial court held for the defendant on the ground there had not been a sufficient showing of breach of contract or damages to the United States.[213] On appeal, the Fourth Circuit[214] affirmed, but on different grounds. The appellate court held: "whatever the power of the Executive absent congressional action, the Executive, through an executive agreement, cannot avoid complying with previous congressional legislation."[215] The court stated that, ". . . while the President has certain inherent powers under the Constitution . . . the power to regulate interstate and foreign commerce is not among the powers incident to the presidential office, but is expressly vested by the Constitution in the Congress."[216]

The Supreme Court decided *Capps*[217] three years after its decision in *Youngstown.*[218] *Capps* provided the opportunity to settle the question as to whether an executive agreement would have supremacy over a prior inconsistent federal law. The Court affirmed the appellate court's decision, but on the trial court's grounds of insufficient showing of damages.[219] In so doing, the Supreme Court made suspect the appellate court's decision, which has resulted in criticism of the Fourth District's holding.[220] However, *Capps* is useful for fostering the constitutional principle that Congress has the plenary power to regulate foreign commerce. This commerce power is the strong suit of Congress in any attempt to restrict Executive power.

---

mined to insure that no one man," in Lincoln's phrase, "should hold the power of bringing this oppression upon us."

210. 204 F.2d 655 (5th Cir. 1953), *aff'd. on other grounds*, 348 U.S. 296 (1955).
211. 204 F.2d 655, 657 (4th Cir. 1953).
212. *Id.*
213. *Id.* at 655.
214. *Id.* at 661.
215. *Id.* at 659, 660.
216. *Id.*
217. 348 U.S. 296 (1955).
218. 343 U.S. 579 (1952).
219. 348 U.S. 296, 302 (1955).
220. HENKIN, *supra* note 7, at 181.

President Reagan's communique appears to limit arms sales to a foreign country and thereby regulate foreign commerce. Although there are areas[221] in which the Congress has delegated commerce authority to the President, the TRA does not do so.[222] This recent action by the President is difficult to align with previous executive agreements which have received judicial support.[223]

When the cases supporting executive agreements are compared with the communique, the President's action has arguably exceeded his constitutional powers. These cases suggest that the following types of executive agreements are permissible. First, agreements executed with prior congressional approval, such as *Curtis-Wright*,[224] in which Congress gave the President discretion to control arms sales would be within the Executive's authority.[225] Second, agreements which do not have domestic effect, but rather address external international situations would be allowable. Examples of this type would be *Belmont*[226] and *Pink*,[227] which did not have a deleterious effect on United States citizens.[228] Additionally, as noted previously, the *Pink* court placed emphasis on the agreement's relation to the formal recognition of the Soviet government. Finally, executive agreements executed under exigent circumstances, such as *Dames & Moore*,[229] would be within the authority of the Executive. Although the *Dames & Moore* court liberally construed two statutes,[230] given the sensitive nature of the Iranian situation the statutory interpretation becomes more understandable.

These decisions, however, cannot be aligned with President Reagan's action. First, the TRA does not allow for Executive discretion as did the legislation questioned in *Curtis-Wright*.[231] Sec-

221. *Id.* at 182, 183.

222. *See supra* notes 44-48 and accompanying text.

223. *See e.g.* Curtis-Wright, Belmont, Pink, and Dames & Moore, *supra* notes 130-203 and accompanying text.

224. 299 U.S. 304 (1936).

225. *Id.* at 305.

226. 301 U.S. 324 (1937).

227. 315 U.S. 203 (1942).

228. *Id.* In Belmont, all United States citizens had received full payment on their accounts. In Pink, the litigant was an Insurance Company with foreign creditors.

229. 453 U.S. 654 (1981).

230. *Id.*; *see* International Emergency Economic Power Act, 50 U.S.C. 1701-1706 (1976, Supp. II 1978 & Supp. IV 1980). The President's authority, "may be exercised to deal with any unusual and extraordinary threat which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."

231. 299 U.S. 304 (1936).

ond, the incidental-to-recognition concept suggested in *Pink*[232] would not apply, since this agreement was effected three years after the formal recognition of the PRC. Finally, the exigent circumstances, as in *Dames & Moore*,[233] are not present.

The President's communique, in contrast, is analogous to executive agreements which have been nullified by the judicial branch. Decisions such as *Youngstown*[234] and *Capps*[235] suggest that when an executive agreement attempts to override a statute, courts will not look favorably on this type of Executive action. Although a line has not been clearly drawn, given the language and legislative history of the TRA, this communique appears to have resulted in an abuse of Executive privilege.

IV. CONCLUSION

The past ten years have witnessed a revision in United States policy toward the PRC and Taiwan. International obligations have been created and nullified, not by treaty or executive agreement, but rather by a variant of an executive agreement called a communique. These communiques have changed substantive United States law[236] and have resulted in congressional action attempting to curtail further unilateral action by the Executive which would affect the security of Taiwan. However, a recent communique by President Reagan appears to have ignored this legislation.

The Executive maintains that the communique did not and has not modified the terms of a statute enacted by Congress.[237] The analysis in this Comment, on the other hand, has attempted to demonstrate that the President's communique is as effective as an executive agreement and is an attempt to modify the statute.

The difficulty with the communique is not whether Taiwan will receive the arms it needs for survival; most commentators[238] agree the President will continue to support the defense of Taiwan.

---

232. 315 U.S. 203 (1942).

233. 453 U.S. 654 (1981).

234. 343 U.S. 579 (1952).

235. 204 F.2d 655 (4th Cir. 1953).

236. *See supra* notes 32-43 and accompanying text.

237. 22 U.S.C.S. § 3301; *see supra* notes 44-48 and accompanying text.

238. Kilpatrick, *On Taiwan, The President is Sincere—and Wrong*, L.A. Times, Aug. 31, 1982 at 22 col. 2; *see also China Hints Arms Sales to Taiwan*, San Diego Union, March 11, 1984 at A8, col. 1. An unidentified spokesman quoted by the official Xinhua News Agency, said China demanded that the U.S. government gradually reduce such sales (arms) to Taiwan, as it pledged to do on Aug. 17, 1982 agreement with Peking.

The real problems are the possible international and domestic legal effects which can result from such unilateral Executive action. The Framers of the Constitution were explicit in their attempt to inhibit[239] one branch of the government from having aristocratic control over our country's destiny. The growth in the number and form of executive agreements demand a review of our constitutional principles.

In today's fast paced international arena, the Executive must have the ability to act swiftly and unilaterally. The Executive must be able to negotiate and act as the "sole-organ" in this country's foreign relations. However, absent congressional or constitutional authorization, the Executive should not, and constitutionally does not have the authority to unilaterally amend a statute enacted by the people (Congress).

One solution to the present dilemma would be for Congress to amend the TRA and delineate specific joint decision-making procedures for the Executive to follow. However, this solution would not alleviate the core problem of the "Executive aristocracy." A scenario of the Congress and the Executive constantly usurping each other's authority would be a futile exercise. President Carter's communique, the subsequent legislation and now President Reagan's action demonstrate the futility of this type of ping-pong foreign relations struggle.

This Comment suggests that either the Congress, as a body, or an independent arms manufacturer bring this matter before the judiciary for resolution. The position of the executive branch is tenuous at best. Judicial precedent and constitutional principles would present a strong case against the executive branch.

The term "Executive" is used because the real actor in this dilemma is not President Reagan, but rather, the executive branch itself. For example, when questioned by a Congressman[240] regarding the contradictions between the communique and the TRA, the President stated that he was ". . . under the impression that this communique was sent up to the White House from a lower level of the State Department."[241]

Such a response highlights how the power of the Executive of-

239. *See supra* note 209.

240. *Hearings*, supra note 15 (statement by Rep. Soloman, Sept. 17, 1982). The Congressman responded to the President by suggesting he " . . . send the communique back down to the bowels of the State Department."

241. *Id.*

fice can be manipulated by the executive branch and emphasizes the need to restrict unilateral action by any one branch of our government. The judicial branch must be asked to intervene and reacquaint the executive branch with the axiom that the United States is a democracy and not an aristocracy.

John E. Wolfinger