COMMENTS

UNITED STATES MILITARY AND ECONOMIC ASSURANCES TO ISRAEL: ARE EXECUTIVE AGREEMENTS LEGALLY BINDING?

International agreements are a means of pacifying differences and developing common goals between nations. Of all the existing types of international agreements, military security agreements are the most critical. Dollars, lives and the national security of each signing party are the crucial factors negotiated. On September 1, 1975, Israel and the United States signed the Memorandum of Agreement Between the United States of America and Israel, otherwise known as Agreement E.[1] The Agreement assured Israel of military and economic support from the United States in certain crises.[2]

Two interrelated problems concerning the validity and effect of Agreement E have given rise to much debate. First, Agreement E did not receive the advice and consent of the Senate and therefore is an executive agreement. Executive agreements have been a matter of controversy since the enactment of the Constitution,[3] and present themselves today as a struggle between the legislative and executive branches. The legislative branch insists that agreements such as Agreement E must be formulated as a treaty, receiving the advice and consent of the Senate. Conversely, the executive branch contends that in certain exigencies the President may bypass Senate approval, and that executive agreements have been recognized as valid by the Framers of the Constitution, the United States Supreme Court and custom and usage.[4] One of the most important

1. Memorandum of Agreement Between the Governments of Israel and the United States of September 1, 1975 , 30 U.N. SCOR Supp. (July-Sept. 1975) at 54, U.N. Doc. S/11818/Add. 1 (1975), *reprinted in* 14 I.L.M. 1450 (1975) [hereinafter cited as Agreement E].

2. *Id.*

3. Feinrider, *America's Oil Pledges to Israel: Illegal but Binding Executive Agreements*, 13 N.Y.U.J. INT'L L. & POL. 525, 525 (1981).

4. *See generally* M. Glennon, Memorandum of Law and Appendices (Sept. 24, 1975), *reprinted in* 121 CONG. REC. 32,705 (1975) [hereinafter cited as Sept. 24 Glennon Memo]; M. Glennon, Memorandum of Law-Response to Memorandum of Department of State Legal

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constitutional issues affecting international diplomacy is whether the President has the constitutional authority to commit the United States to crucial international agreements, such as Agreement E.[5] The legislative branch is now seeking to regain certain rights to control agreements of "exceptional national importance" while the executive branch is attempting to retain these powers.

The second major problem with Agreement E is its subject matter. The United States has granted both military and economic assurances to Israel. However, whether these assurances are to be given the heightened level of consideration accorded to treaties made with the advice and consent of the Senate, or whether the assurances are given lesser importance by calling them mere executive policy declarations and promises, will have a great impact on future United States-Middle East diplomacy. The moral and diplomatic implications are tantamount to Agreement E's validity. Intrinsic to the agreement's validity is the good faith of the United States.[6]

This Comment will review the historical development and examine the subject matter content of Agreement E, primarily focusing on paragraphs one, seven, ten, eleven and fourteen. The following sections will analyze the validity of Agreement E under United States domestic law. Specifically addressed are the issues of whether Agreement E should have been formulated as a treaty, or whether as an executive agreement, Agreement E will be upheld as legally binding. The parameters defining the proper usage of treaties and executive agreements are nebulous. This Comment, however, concludes that Agreement E is legally binding. Finally, given Agreement E's validity or invalidity under domestic law, this Comment will examine Agreement E's effect under international law and specify the degree of assurance Israel can expect from the United States.

Adviser Regarding Secret Middle East Agreements (Oct. 22, 1975), *reprinted in* 121 CONG. REC. 36,722 (1975) [hereinafter cited as Oct. 22 Glennon Reply]; A. Rovine, Department of State Assistant Legal Adviser's Reply to Second Memorandum of Senate Office of Legislative Counsel Concerning Certain Middle East Agreements (Feb. 4, 1976), *reprinted in* 15 I.L.M. 190 (1976) [hereinafter cited as Feb. 4 Rovine Reply].

5. Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 345 (1955).

6. Feinrider, *supra* note 3, at 531 n.34.

I. AGREEMENT E

A. *Historical Development*

In 1975, the road to peace in the Middle East centered upon the Sinai Accords.[7] This historic peace effort materialized as a result of the combined impetus of the United States, Israel and Egypt.[8] One of the most significant aspects of the Sinai Accords was Israel's consent to withdraw from the Sinai.[9] The realization of this major relinquishment, as with attaining peace altogether, was predicated on certain United States commitments.[10] One such commitment which fostered Israeli cooperation was Agreement E.[11]

The birth of peace in the Middle East was to occur when the United States supplied and staffed an early-warning system in the Sinai and extended collateral assurances formulated under Agreement E.[12] The early-warning system issue was before the Senate Foreign Relations Committee and the House Committee on International Relations.[13] In an effort to encourage congressional approval, the legal authority for each of Agreement E's provisions was proferred by the Department of State and its Office of Legal Advisor.[14] After Congress voted on the early-warning system,[15] Agreement E was consumed in controversy because of questionable

7. The Sinai Accords include: the Agreement on the Sinai and Suez Canal, Sept. 4, 1975, Egypt-Israel, 30 U.N. SCOR Supp. (July-Sept. 1975) at 54, U.N. Doc. S/11818/Add. 1 (1975), *reprinted in* 14 I.L.M. 1450 (1975); Memorandum of Agreement Between the Governments of Israel and the United States of America of Sept. 1, 1975; Memorandum of Agreement Between the Governments of Israel and the United States (The Geneva Peace Conference)(undated).

8. *Id. See* Sinai Accords cited *supra* note 7.

9. The Agreement on the Sinai and Suez canal, Sept. 4, 1975, Egypt-Israel, 30 U.N. SCOR Supp. (July-Sept. 1975) at 54, U.N. Doc. S/11818/Add. 1 (1975), *reprinted in* 14 I.L.M. 1450 (1975).

10. *See generally* Agreement E, *supra* note 1.

11. Feinrider, *supra* note 3, at 528 n.17.

12. *See generally* Agreement E, *supra* note 1.

13. Feinrider, *supra* note 3, at 529.

14. *See* Letter from Monroe Leigh, Legal Adviser to the State Department, to Thomas E. Morgan, Chairman, House International Relations Committee (Sept. 29, 1975), *reprinted in* 121 CONG. REC. 32,724 (1975) [hereinafter cited as Sept. 29 Leigh Letter]; Letter from Monroe Leigh, Legal Adviser to the State Department, to Thomas E. Morgan, Chairman, House International Relations Committee (Sept. 18, 1975), *reprinted in* 121 CONG. REC. 32,724 (1975) [hereinafter cited as Sept. 18 Leigh Letter]; M. Leigh, Department of State Legal Adviser's Reply to Senate Office of Legislative Counsel Memorandum on Certain Middle East Agreements (Oct. 8, 1975), *reprinted in* 121 CONG. REC. 36,718 (1975) [hereinafter cited as Oct. 8 Leigh Reply].

15. *See supra* notes 4 and 14.

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assurances and their binding status. The Senate Legislative Counsel acted as the Executive's opposition in the debate over Agreement E.[16] The legal memoranda were matched against one another, evidencing valid criteria both for and against Agreement E's proper legal authority.[17]

Since the creation of the Constitution, much debate has occurred over the constitutionality of executive agreements. Two principal main issues in the legal memoranda epitomize this historic debate. First, is whether Agreement E is constitutionally permissible under the powers granted to the President by the Constitution.[18] Second, given that executive agreements are constitutionally valid, is whether Agreement E, due to its subject matter, should have been formulated as a treaty and therefore passed before the Senate.[19] Evidence used for argument focused upon executive agreements per se and the subject matter of Agreement E.[20]

B. *The Military and Economic Assurances of Agreement E*

Agreement E was signed on September 1, 1975, by Yigal Allon, Deputy Prime Minister and Minister of Foreign Affairs for Israel and Henry Kissinger, Secretary of State for the United States.[21] In paragraph one, the United States guarantees that "it will make every effort to be fully responsive within the limits of its resources and Congressional authorization and appropriation, in an on-going and long term basis to Israel's military equipment and other defense requirements, to its energy requirements, and to its economic needs."[22] The term "fully responsive" has drawn much debate concerning its lack of clarity.[23] The executive and legislative branches primarily based Agreement E's legal status on the "importance" of the assurances. The level of United States commitment to Israel, and the manner in which it would be "fully re-

16. The Senate Legislative Counsel claimed that Agreement E was beyond the President's constitutional authority, while the Department of State Legal Adviser asserted that the agreement is a legally binding executive agreement. *See supra* notes 4 and 14.

17. Both government branches relied on opinions by the Supreme Court, the intentions of the Founding Fathers, the Constitution, Senate resolutions, and custom and usage. *See supra* notes 4 and 14.

18. *See supra* notes 4 and 14.

19. *See supra* notes 4 and 14.

20. *See supra* notes 4 and 14.

21. Agreement E, *supra* note 1.

22. *Id.* para. 1.

23. Feb. 4 Rovine Reply, *supra* note 4, at 196.

https://scholarlycommons.law.cwsl.edu/cwilj/vol13/iss2/5

sponsive," determined Agreement E's "importance."[24] Both government branches concluded their memoranda with disparate interpretations of Agreement E's legal status.[25]

Paragraph ten has created much controversy over the extent of the United States commitment to Israel and the manner in which the United States will be responsive. Paragraph ten states that:

> In view of the long-standing United States commitment to the survival and security of Israel, the United States Government will view with particular gravity threats to Israel's security or sovereignty by a world power. In support of this objective the United States Government will in the event of such threat consult promptly with the Government of Israel with respect to what support, diplomatic or otherwise, or assistance it can lend to Israel in accordance with its constitutional practices.[26]

Paragraph ten has been given disparate forms of construction. The legislative branch interprets it to mean that the United States will introduce its armed forces into hostilities for certain purposes.[27] The executive branch construes paragraph ten as mere policy declarations and presidential promises to make certain requests of Congress for Israel's defense.[28] Based on the interpretation of paragraph ten, the manner in which the United States responded to an Israeli crisis would be indicative of Agreement E's importance and, arguably, its validity.

The ambiguous language contained in paragraphs seven, eleven and fourteen is vulnerable to the broad interpretation similarly given to paragraph ten.[29] Paragraph seven assures "possible

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24. *See supra* notes 4 and 14.

25. The Department of State concluded that "importance" is not determinative of the formality to be given an international agreement. Regardless of the United States level of commitment, the President acted within his constitutional authority and, therefore, Agreement E is legally valid. The Senate Legislative Counsel concluded that Agreement E is invalid because the "importance" of the assurances warranted the formality of a treaty. Without Senate advice and consent, the Counsel argued, Agreement E is invalid. *See generally supra* notes 4 and 14.

26. Agreement E, *supra* note 1, para. 10.

27. The United States would introduce its forces for reasons of:

a. taking remedial action in the case of an Egyptian violation of any of the provisions of the agreement (¶ 70);
b. defending Israel against threats by a world power (¶ 10);
c. maintaining Israel's right to free and unimpeded passage through the Straits of Bab-el-Mandab and the Strait of Gibraltar (¶ 14);
d. carrying out a military supply operation to Israel in an emergency situation (¶ 11).

Sept. 24 Glennon Memo, *supra* note 4, at 198.

28. Feb. 4. Rovine Reply, *supra* note 4, at 198.

29. *See generally* Agreement E, *supra* note 1.

remedial action by the United States" if Egypt violates Agreement E.[30] Paragraph eleven provides for the establishment of a contingency plan for a military supply operation to Israel in an emergency situation.[31] Paragraph fourteen assures Israel that the United States will "support Israel's right to free and unimpeded passage through the Straits of Bab-el-Mandab and the Strait of Gibraltar."[32]

The subject matter of paragraphs seven, eleven, and fourteen, as well as paragraphs one and ten, has been the catalyst for the debate between the executive and legislative branches.[33] The legal status of Agreement E is not clearly dispositive because of the nebulous parameters defining what subject matter should be accorded to either the formality of a treaty or executive agreement.[34] The legislative branch argues that Agreement E should have been formulated as a treaty and therefore received Senate consent.[35] The executive branch contends that the promulgation of Agreement E is within the President's authority and is therefore a valid executive agreement.[36]

II. VALIDITY OF AGREEMENT E UNDER UNITED STATES LAW

A. *The Legislative Interpretation of Agreement E as a Treaty*

Under the United States Constitution, the President may make treaties provided that such an agreement is made with the advice and consent of the Senate, and two-thirds of the Senators present concur.[37] Under the supremacy clause, all treaties made pursuant

30. "In case of an Egyptian violation of any of the provisions of the Agreement, the United States Government is prepared to consult with Israel as to the significance of the violation and possible remedial action by the United States Government." Agreement E, *supra* note 1, para. 7.

31. "The United States Government and the Government of Israel will, at the earliest possible time, and if possible, within two months after the signature of this document, conclude the contingency plan for a military supply operation to Israel in an emergency situation." Agreement E, *supra* note 1, para. 11.

32. In accordance with the principles of freedom of navigation on the high seas and free and unimpeded passage through and over straits connecting international waters, the United States Government regards the straits of Bab-el-Mandab and the Strait of Gibraltar as international waterways. It will support Israel's right to free and unimpeded passage through such straits.

Agreement E, *supra* note 1, para. 14. The remainder of paragraph 14 assures diplomatic support to Israel's right to freedom of flights over the Red Sea and such straits.

33. *See generally supra* notes 4 and 14.

34. *See generally* Mathews, *supra* note 5.

35. Sept. 24 Glennon Memo, *supra* note 4, at 32,705.

36. Oct. 8 Leigh Reply, *supra* note 14, at 36,721.

37. U.S. CONST. art. II, § 2, cl. 2.

to the Constitution shall be the "supreme Law of the Land."[38] The United States constitutional framework for a treaty is narrower in comparison to the international codification of a treaty.[39] The Vienna Convention of the Law of Treaties defined treaty as an "international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instructions and whatever its particular designation."[40]

The application of United States treaties in foreign affairs is practically limitless.[41] A treaty exists as a valid legal device so long as the government or its department's actions are not unconstitutional and the "treaty does not authorize what the Constitution forbids."[42] The rules of law governing treaties fill a spectrum ranging from concise and dispositive to amorphous and controversial.

> Treaties can deal with any subject appropriate to international negotiation. To be binding, treaties must be ratified by the Senate and furthermore, treaties confer legislative powers on Congress. Congress can repeal a treaty for domestic purposes only; the international obligation remains binding. A treaty, however, can repeal an act of Congress. The duration of a treaty lasts as long as its terms provide. Treaties must be published and therefore cannot be secret.[43]

1. *The Clark Resolution*. Congress, in an attempt to regain its treaty-making powers[44] which were diluted by the increased use of

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38. *Id.* art. VI, cl. 2.

39. The Vienna Convention on the Law of Treaties, May 23, 1969 art. II, U.N. Doc. A/CONF. 39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969).

40. *Id.*

41. Charles Evan Hughes, a former Secretary of State and Chief Justice, commenting on permissible subjects for treaties, stated that "any limitation to be implied (on the Treaty Power) might be found in the nature of the treaty making power." The power is to deal with foreign nations with regard to matters of international concern. 23 PROC. AM. SOC'Y INT'L L. 194-96 (1929). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 117(1) comment b (1965). "Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern." *Id.*

42. Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

43. Bouchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616, 628-29 (1945).

44. For example, Senator Dick Clark in making the committee's opening statement at the Senate Foreign Relations Committee hearings on the Treaty Powers Resolution on July 21, 1976, stated, "It is fair to say that this requirement of Senate advice and consent has been circumvented in recent years by various administrations—Democratic and Republican—by calling agreements 'executive agreements' when the subject matter of these agreements was sufficiently important to require their submission as treaties." Kuchenbecker, *Agency—Level*

executive agreements,[45] introduced the Clark Resolution.[46] The Clark Resolution codified certain subject matter which must be made as treaties.[47] Any international agreement not authorized by statute, treaty, or under an emergency situation, which involves a significant political, military, or economic commitment to a foreign country, constitutes a treaty.[48] In such event, therefore, the agreement should be submitted to the Senate for its advice and consent.[49]

Although introduced subsequent to Agreement E, the Clark Resolution is persuasive for the argument that Agreement E should have been made as a treaty. The issue again would be whether the assurances are mere executive policy declarations or commitments to introduce United States forces with congressional approval. Paragraphs one, seven, ten, eleven, and fourteen could arguably be construed as "significant political, military, or economic commitments to a foreign country."[50] The level of involvement or commitment intended by the President, when making the agreement, would determine the formality of the agreement under the Clark Resolution. The Clark Resolution, however, was not the only legislative attempt at regaining treaty-making powers, which in essence might invalidate Agreement E.

2. *The National Commitments Resolution*. The Senate Legislative Counsel concluded that Agreement E is in violation of the National Commitments Resolution.[51] "National Commitment" is

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Executive Agreements: A New Era in U.S. Treaty Practice, 18 COLUM. J. OF TRANS. L. 1, 3 (1979).

45. From 1972 to 1977 the ratio of executive agreements to treaties was twenty-five to one; entering into force were 1,590 executive agreements as compared to only sixty-three treaties. *Id.* at 2.

46. *Treaty Powers Resolution: Hearings on S. Res. 486 Before the Comm. on Foreign Relations*, 94th Cong., 2d Sess. 123 (1976).

47. *Id.*

48. *Id.*

49. *Id.*

50. Agreement E's provisions were interpreted as significant by the Senate Legislative Counsel. Viewing Agreement E in terms of the "broadest reasonable construction" to which it could be subjected, either by Israel or by a United States President, the agreement provides that the United States will introduce its armed forces into hostilities. The reasons for sending armed forces are delineated *supra* note 27. The Counsel applied the "broadest reasonable construction" because of Agreement E's ambiguous language. Ambiguities in the law, "makes possible broad but still reasonable interpretations, which could cause unpredictable results." Sept. 24 Glennon Memo, *supra* note 4, at 196. The "broadest reasonable construction" is not consonant with the intentions of the parties or the meaning of the agreements.

51. S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17,245 (1969) [hereinafter cited as

defined as "the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events."[52] The Counsel determined that Agreement E related to a subject matter of "exceptional national importance," and therefore was a matter within the National Commitments Resolution.[53] The resolution further stated that "no significant foreign commitment ought to be undertaken without affirmative action by both the legislative and executive branches."[54] The conclusion of the Counsel, therefore, is that Agreement E "cannot result in a commitment by the United States."[55] The "exceptional national importance" view also provided a basis for arguing that Agreement E should have been regarded constitutionally as a treaty.[56]

3. *The United States Constitution: Article II, section 2*. The Senate Legislative Counsel alleged that article II, section 2 is evidence that "some international agreements must be regarded, constitutionally as treaties."[57] The treaty clause provides that the President "shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senate present concur . . . ." If the President has unlimited discretion to con-

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Commitments Resolution]. The resolution is not law but provides the "sense of the Senate." *Treaty Powers Resolution: Hearings on S. Res. 486 Before the Comm. on Foreign Relations*, 94th Cong., 2d Sess. 123 (1976). The seventy United States Senators who voted in favor of the resolution—as well as the Committee on Foreign Relations from which it was unanimously reported—hold an unconstitutionally narrow view of presidential power; the Constitution requires affirmative action by the legislative branch. Oct. 22 Glennon Reply, *supra* note 4, at 36,723.

52. Commitments Resolution, *supra* note 51, at 17,245.

53. The Senate Legislative Counsel, in determining "exceptional national importance," again relied on the "broadest reasonable interpretation."

> Agreement E seems clearly to be a 'promise to assist' Israel at least 'by the use of the . . . financial resources of the United States,' both 'immediately' and also 'upon the happening of certain events.' Thus the obligations undertaken in Agreement E clearly constitute a 'national commitment' within the meaning of clause 1 of the National Commitments Resolution.

Sept. 24 Glennon Memo, *supra* note 4, at 32,708.

54. Commitments Resolution, *supra* note 51, at 17,245.

55. *Id. But see* Feb. 4 Rovine Reply, *supra* note 4, at 197. First, the resolution does not eliminate the problem of choosing between a treaty and an executive agreement should the latter be authorized by statute; second, even if the resolution were legally binding, it does not require a treaty in any given case; and third, the resolution is not legally binding.

56. Oct. 22 Glennon Reply, *supra* note 4, at 36,722.

57. *Id.*

clude any agreement as an executive agreement, the advice and consent of the Senate would be rendered meaningless.[58] The use of treaties, therefore, would be "required" at the discretion of the President.[59] The Counsel asserts, on the other hand, that if some international agreements must be regarded as treaties, agreements of "exceptional national importance" must be so regarded.[60]

This view of the Senate Legislative Counsel has been supported by many leading scholars and statesmen.[61] The most cogent reasoning, given by Senator Sam Ervin, states that:

> [It] is inconceivable that the Founding Fathers would have taken the trouble to spell out in Article II, section 2, exactly how a treaty should be made and at the same time to have an inherent power in a President, one man, to make an agreement with a foreign nation without any formality and not consulting with anybody but himself.[62]

Arguably, Agreement E portends to be an agreement of exceptional national importance[63] and therefore should have received the advice and consent of the Senate. Without Senate approval, Agreement E is in violation of the Constitution.[64]

The Senate Legislative Counsel primarily depends on the "significance"[65] or "exceptional national importance"[66] criteria in espousing that Agreement E is constitutionally deficient. The rationale relied on in determining that Agreement E is significant or important is the "broadest reasonable interpretation" that either Israel or the United States could give to the Agreement's provisions.[67] Agreement E, which could be interpreted to mean that the

58. *Id.*

59. *Id.*

60. *Id.*

61. The Framers intended the closest possible collaboration between the President and the Senate when making international agreements. John Jay declared that international agreements, especially those relating to war, peace and commerce, should not be delegated outside the treaty-making process. THE FEDERALIST No. 64, at 195 (J. Jay) (M. Beloff ed. 1952). Alexander Hamilton, "no advocate of legislative power, believed that the legislative branch had to be included in the powers of making international commitments." THE FEDERALIST No. 75, at 223 (A. Hamilton) (M. Beloff ed. 1948). James Madison regarded the making of international pacts as more of a legislative function than an executive function. Sept. 24 Glennon Memo, *supra* note 4, at 32,706.

62. Oct. 22 Glennon Reply, *supra* note 4, at 36,724.

63. *See supra* notes 48, 50, 53 and accompanying text.

64. Oct. 22 Glennon Reply, *supra* note 4, at 36,722.

65. *See generally* replies and memo cited *supra* note 4.

66. *See* Commitments Resolution, *supra* note 51; Sept. 24 Glennon Memo, *supra* note 4, at 32,708.

67. *See supra* notes 49, 53 and accompanying text.

United States will introduce its armed forces to protect Israel, is an agreement which warrants Senate advice and consent; without Senate approval, Agreement E is invalid and therefore not legally binding.[68] Historically, international agreements possessing "important" subject matter similar to Agreement E received the advice and consent of the Senate.

4. *Custom and Usage*. The foundation of the Senate's attack on Agreement E's validity related to its subject matter.[69] The issue was what subject matter was to be legally appropriated to either treaties or executive agreements. One means of determining what subject matter is constitutional is to review what customarily has been the language and substance of treaties.[70] The custom and usage previously accorded to agreements similar to Agreement E, more specifically to paragraph ten, has primarily been treaties.[71]

Five treaties support the Counsel's assertion that Agreement E should have been formulated as a treaty. Article 5 of the North Atlantic Treaty states that any armed attack against one of the ratifying parties shall be considered an attack against all the parties.[72] It was agreed that such an attack could necessitate the use of armed forces.[73] The Mutual Defense Treaty between the United States and the Republic of the Phillipines[74] directs the two parties to consult when either is threatened, in case the treaty need be imple-

68. Sept. 24 Glennon Memo, *supra* note 4, at 32,707.

69. *See supra* notes 49, 53 and accompanying text.

70. The Supreme Court has held that usage and practice are valid guides to the meaning of the Constitution and statutes. Inland Waters Corp. v. Young, 309 U.S. 517, 524 (1940).

71. Sept. 24 Glennon Memo, *supra* note 4, at 32,709.

72. North Atlantic Treaty, Apr. 14, 1949, art. V, 66 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243, provides as follows:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

73. *Id.*

74. The Mutual Defense Treaty between the United States of America and the Republic of the Phillipines, Aug. 30, 1951, art. III, 3 U.S.T. 3947, T.I.A.S. No. 2529, 177 U.N.T.S. 133, provides as follows:

> [t]he Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.

mented.[75] Other treaties bearing the same assurances are: The Security Treaty between Australia, New Zealand, and the United States of America,[76] The Mutual Defense Treaty between the United States of America and the Republic of Korea,[77] and the Southeast Asia Collective Defense Treaty.[78] Each administration responsible for these mutual defense and collective security treaties, which are similar to Agreement E, sought the advice and consent of the Senate.

Recent agreements which promised the same types of assurances, but were formulated as executive agreements between President Nixon, of the United States, and President Thieu, of South Vietnam, lacked validity.[79] The agreements promised that "the United States would respond with full force in the event of certain violations of the Paris Agreement by North Vietnam,"[80] and "[President Thieu] has the absolute assurance that if Hanoi fails to abide by the terms of the [Paris Agreement], it is the intention of the United States to take swift and severe retaliatory action."[81] When the United States failed to comply with these executive agreements, the question was raised whether the United States violated international law.[82] The Senate Legislative Counsel answered in the negative for the reasons that: (1) the agreement was beyond

75. *Id.*

76. Security Treaty between Australia, New Zealand, and the United States of America, Sept. 1, 1951, art. III, 3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83, provides that "the Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific."

77. Mutual Defense Treaty, Oct. 1, 1953, United States-Republic of Korea, art. III, 5 U.S.T. 2368, T.I.A.S. No. 3097, provides as follows:

> The Parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack. Separately and jointly, by self help and mutual aid, the Parties will maintain and develop appropriate means to deter armed attack and will take suitable measures in consultation and agreement to implement this Treaty and to further its purposes.

78. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1, 6 U.S.T. 81, T.I.A.S. No. 3170, 209 U.N.T.S. 28, provides as follows:

> Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

79. Letter from former President Nixon to former President Thieu (Nov. 14, 1912 and Jan. 5, 1973) *reprinted in* N.Y. Times, May 1, 1975, at 16. The former President continues to withhold these letters from public review.

80. *Id.*

81. *Id.*

82. Sept. 24 Glennon Memo, *supra* note 4, at 32,712.

the constitutional authority of the President, acting alone, to make; (2) South Vietnam should reasonably have known of such defect;[83] (3) the agreements were invalid executive agreements, without force and effect under international law.[84] The Counsel further concluded that such invalid agreements can lead to political and diplomatic misunderstandings, recriminations, and generally undesirable international and domestic repercussions.[85] One cannot absolutely deny, therefore, that Agreement E could not suffer the same consequences as that of the Nixon-Thieu agreements, since it too is an executive agreement guaranteeing similar assurances.

The bases of the Senate Legislative Counsel's assertions lend much credence to its conclusion that Agreement E is invalid. To ignore the sense of the Senate, the opinions of scholars and statesman, custom and usage, and the Constitution would constitute an impropriety within the legal analysis of Agreement E's validity. The Senate Legislative Counsel's decision that there exists no United States commitment under Agreement E cannot be adequately tested, however, until weighed against the competing factors of executive agreements.

B. Upholding Agreement E as a Legally Binding Executive Agreement

Executive agreements fall outside the treaty process. Executive agreements either implement treaties or certain acts of Congress, or are made solely on the basis of the President's constitutional powers.[86] Agreements made without the consent of the Senate,[87] the approval of Congress, or the support of a treaty are called "sole-executive agreements."[88] Congressional-executive agreements, since formulated with Congressional approval and the opportunity for debate, are less likely to stir congressional anger than "sole-executive agreements."

When the President makes an agreement based on his constitutional powers, they are seldom articulated.[89] The President's

83. *See infra* note 170 and accompanying text.

84. Sept. 24 Glennon Memo, *supra* note 4, at 32,712.

85. *Id.*

86. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 177 (1972).

87. *Id.*

88. Leary, *International Executive Agreements: A Guide to the Legal Issues and Research Sources*, 72 LAW LIBR. J. 1, 3 (1979).

89. *Id.* at 6.

power to make "sole-executive agreements" rests upon article II of the United States Constitution which states:

> [t]he executive power shall be vested in a President of the United States of America . . . [t]he President shall be Commander in Chief of the Army and Navy . . . [h]e shall have the power, by and with the Advice and Consent of the Senate to make treaties . . . ; and he shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls . . . [h]e shall take care that the laws be faithfully executed . . .[90]

The majority of "sole-executive agreements" have been made pursuant to the President's authority as Commander in Chief.[91] Most controversies arise from the subject matter comprising the agreements.

The Department of State, in its *Foreign Affairs Manual*, provides procedural guidance when considering the formality to be given an international agreement.[92]

> In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.[93]

Presidential agreements will sometimes unavoidably overlap into domestic areas of congressional authority.[94] In such an instance the "domestic effects" doctrine may apply.[95]

The "domestic effects" doctrine provides that Congress may abrogate the domestic effect of any international agreement when that agreement concerns a subject which Congress could have legislated domestically.[96] Congress may indirectly overrule an international agreement by refusing to implement such legislation, or supersede an agreement with new legislation.[97] Agreement E, in paragraph one, provides that "the [United States] will make every effort to be fully responsive, within the limits of its resources and Congressional authorization and appropriation."[98] Congress will,

90. U.S. CONST. art. II.
91. Leary, *supra* note 88, at 5.
92. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, vol. II, ch. 70 (1974).
93. *Id.*
94. Mathews, *supra* note 5, at 380.
95. *Id.*
96. *Id.*
97. *Id.*
98. Agreement E, *supra* note 1, para. 1.

therefore, in accordance with Agreement E's provisions, have the ability to make the limitations it considers necessary.

Executive agreements cannot confer on the government powers which are "free from the restraints of the Constitution."[99] Rules pertaining to "sole-executive agreements" are:

> The agreement is strictly limited to the powers invested in the President by the Constitution; the agreement cannot confer on Congress powers of legislation it did not have before; the agreement need not be ratified by the United States; the agreement cannot repeal an act of Congress and can be nullified by treaty; and an executive agreement invites secrecy since the President can make it without notifying anybody.[100]

Traditionally, treaties involved matters of significance, while executive agreements carried out administrative affairs.[101] In a 1969 Senate Foreign Relations Committee report,[102] this concept, notably known as the "importance test," was said to have broken down. "In some instances we have come close to reversing the traditional distinction between the treaty as the instrument of a major commitment and the executive agreement as the instrument of a minor one."[103]

Executive agreements made pursuant to statute, treaty or the Constitution have been accepted, historically, as constitutionally appropriate.[104] The authority for Agreement E derives from both the statute and the President's constitutional powers.[105] Paragraphs one through four cover undertakings and statements focusing on economic assistance, defense equipment supply and the sale of oil.[106] Paragraphs seven, ten, eleven and fourteen[107] are alleged to

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99. Reid v. Covert, 354 U.S. 1, 16 (1957).

100. Bouchard, *supra* note 43, at 628-29.

101. In 1939 an Assistant Secretary of State wrote:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

Sayer, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 755 (1939).

102. REPORT ON NATIONAL COMMITMENTS, COMMITTEE ON FOREIGN RELATIONS, S. REP. No. 129, 91st Cong., 1st Sess. 26 (1969).

103. *Id*. at 28.

104. Feb. 4 Rovine Reply, *supra* note 4, at 195.

105. *Id*. at 197.

106. Agreement E, *supra* note 1, para. 1-4.

107. Economic assistance, if funds are appropriated, would be implemented by the authority contained in section 531 of the Foreign Assistance Act of 1961. Defense equipment supply would be sold by the provisions of chapter 2 of the Foreign Military Sales Act. The

rest upon the President's constitutional powers to conduct foreign relations.[108] Agreement E, if severable, would therefore be a congressional-executive agreement as to paragraphs one through four and a "sole-executive agreement" as to paragraphs seven, ten, eleven and fourteen.

1. *Matters of Expediency*. A valid contention for the reversal of roles between treaties and executive agreements is foreign-affair dynamics.[109] Quite often important factors require the prompt conclusion of an agreement.[110] The President may thus choose the formality of an executive agreement for matters of expediency.[111] "In some instances, the executive departments would face disaster if they relied on the less expedient treaty making process in dealing with foreign governments."[112] In addition, many foreign governments frequently prefer the certainty of knowing that an agreement with the United States will enter into effect as negotiated; the signing of an executive agreement assures this preference.[113]

The degree of crisis and available decision-making time have customarily dictated the President's "substantive powers" and therefore his scope of authority to make international agreements.[114] When the crisis is severe and time is short, the President attains powers which in less critical times would be a usurpation of power.[115] Presented with an opportunity to establish peace in the Middle East through the Sinai Accords, the formality of having made Agreement E an executive agreement seems most appropriate. The Arab-Israeli conflict and the viability of the "stop shooting-start talking" initiative were the central issues after the Six Day

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sale of oil is authorized by section 12(b) of the Outer Continental Shelf Lands Act and section 607 of the Foreign Assistance Act of 1961. Feb. 4 Rovine Reply, *supra* note 4, at 197.

108. *Id.*

109. *Id.* at 192.

110. Cease-fire and other military agreements, for example, which must be timed precisely to the hour and minute, are concluded as executive agreements rather than treaties. An example is the 1973 Agreement on Ending the War and Restoring the Peace in Vietnam (T.I.A.S. 7542; 24 U.S.T. 1). War-time agreements dealing with the actual military conduct of the war may be of crucial significance for the nation, and yet it has never been suggested that profoundly important agreements must be treaties.

Id.

111. *Id.*

112. Wendel, *Constitutional Authority for Executive Agreements Pertaining to the Armed Forces*, 20 A.F. L. REV. 71, 81 (1978).

113. Kuchenbecker, *supra* note 44, at 4.

114. Mathews, *supra* note 5, at 375.

115. *Id.*

War of June 1967.[116] The United States also viewed the United States-Soviet rivalry in the Middle East as having the "potential, if not actual danger of possibly rising to confrontation or conflict."[117] The United States, therefore, initiated extensive diplomatic maneuvering and intensive debate.[118] To lose a hard sought-after opportunity for peace to the deliberations of the Senate could have caused deleterious effects.

It is a primary requisite in conducting foreign affairs that the United States have the ability to act expeditiously.[119] The determinative factors which the President considers before selecting the formality of an international agreement, in addition to expediency, are trustworthiness, accuracy and secrecy.[120] The executive agreement is highly suitable in fulfilling such considerations and therefore, historically, has been applied in many diverse areas of foreign affairs.

2. *Custom and Usage*. The Supreme Court has held that usage and practice are valid guides for determining the meaning of the Constitution and statutes.[121] Between 1972 and 1977, the ratio of executive agreements to treaties was twenty-five to one.[122] Reasons for such inequality have been attributed to the increase in nations, the general increase of United States participation in world politics, and the existence of many more subjects for agreements. This has created the need for the expeditious executive agreement.[123]

The consensus of the Founding Fathers was that all international agreements should pass before the Senate.[124] A few years after the enactment of the Constitution, however, some of the framers of the document were ignoring the treaty process.[125] In 1799, President John Adams authorized an agreement with the Nether-

116. Reich, *United States Policy in the Middle East*, 60 CURRENT HIST. 1, 6 (1971).

117. *Id.*

118. *Id.*

119. Congress is poorly equipped to [act swiftly]. . . . In the domestic field, we can afford friction among the three branches of government, which, by its effect of slowing decision and inducing compromise, has the consequence of promoting the responsiveness of policy makers to the country as a whole. But in matters involving the external relations of the nation, this friction may become a great source of serious danger.

Mathews, *supra* note 5, at 375-76.

120. Kuchenbecker, *supra* note 44, at 4.

121. Inland Waters Corp. v. Young, 309 U.S. 517, 525 (1940).

122. *See supra* note 45.

123. *But see supra* text accompanying notes 69-85.

124. Oct. 22 Glennon Reply, *supra* note 4, at 36,722-23.

125. Sept. 24 Glennon Memo, *supra* note 4, at 32,706.

lands for settling private American claims.[126] The agreement was neither submitted to the Senate nor ratified.[127] In 1817, the Rush-Bagot Agreement was concluded to disarm the Great Lakes.[128] This agreement had been initiated by President James Madison and concluded by President James Monroe.[129] Other wide-ranging executive agreements were created without "reflecting any principle of limitation."[130]

> Root-Takahira and Lansing-Ishii defined American policy in the Far East. A Gentleman's Agreement with Japan (1907) limited Japanese immigration into the United States. Theodore Roosevelt put the bankrupt customs houses of Santo Domingo under American control to prevent European creditors from seizing them. McKinley agreed to contribute troops to protect Western legations during the Boxer Rebellion and later accepted the Boxer Indemnity Protocol for the United States. Franklin Roosevelt exchanged over-age destroyers from British bases. Potsdam and Yalta shaped the political face of the world after the Second World War.[131]

The weight of evidence, in numbers alone, indicates that the treaty-making procedure is neither the exclusive nor sole recourse of the Federal Government for making "important" international agreements. The Department of State Legal Adviser refuted the Senate Legislative Counsel's conclusion that Agreement E constituted an agreement of "exceptional national importance" and therefore should receive the formality of a treaty, unlike other executive agreements.[132] The legal adviser claimed that the Counsel's "broadest reasonable construction" did not regard: (1) financial costs; (2) aggressive acts by Israel; (3) acts violating the United Nations Charter; and, (4) change in the relationship between the United States and Israel.[133] Arguably, previous executive agreements made by the United States have been both important and unimportant. To espouse that the vague provisions of Agreement E, which are subject to broad interpretation, should unequivocally have been made as a treaty, disregards the overwhelming historical application of executive agreements.

126. Feb. 4 Rovine Reply, *supra* note 4, at 194.
127. *Id.*
128. *Id.* at 192.
129. *Id.* at 193.
130. L. HENKIN, *supra* note 86, at 179.
131. *Id.*
132. Feb. 4 Rovine Reply, *supra* note 4, at 198.
133. *Id.* at 196.

John Marshall stated in 1799 that the "President is the sole organ of a nation in its external relations and its sole representative with foreign nations."[134] As noted by a legal adviser to the Department of State, however, "the President's choice is not totally unfettered; [he] will rarely disregard customs and practices,[135] [nor] willingly or lightly flout the general expectations and preferences of the Congress."[136] To remove the President's power of discretion and assign it to a legal requirement that a particular type of agreement be made would severely interfere with the administration of effective foreign policy.[137] The Supreme Court of the United States has never prescribed a legal requirement in formulating executive agreements.[138]

3. *Supreme Court Opinions*. The Supreme Court has not held any executive agreement *ultra vires* for lack of Senate consent; nor has it given guidance that might define the President's power to act alone.[139] In *United States v. Curtiss-Wright Corp.*, Justice Sutherland stated that the power to make international agreements does exist, although not expressed in the Constitution.[140] This power exists "as inherently inseperable from the conception of nationality."[141] In *United States v. Pink*, the Supreme Court, quoting from *The Federalist*, stated 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."[142]

The Department of State asserts that paragraph one is derived from statutory authority while paragraphs seven, ten, eleven and fourteen are based upon the President's constitutional powers to conduct foreign affairs.[143] Following the reasoning of *Pink*, since Agreement E is made pursuant to proper legal authority, the Agree-

134. Wendel, *supra* note 112, at 74.

135. *But see supra* text accompanying notes 69-85.

136. *But see supra* notes 79-85 and accompanying text. President Nixon abused his presidential powers and formulated invalid international agreements. *See also supra* text accompanying notes 44-56; Oct. 8 Leigh Reply, *supra* note 14, at 36,719.

137. *See supra* note 136.

138. L. HENKIN, *supra* note 86, at 179.

139. *Id.*

140. United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936).

141. *Id.*

142. United States v. Pink, 315 U.S. 203, 230 (1942) [hereinafter cited as Pink].

143. The Senate Legislative Counsel claims that the President does have the constitutional powers to conduct foreign relations, but they are limited by "exceptional national important" matters. Agreement E, therefore, does not follow the reasoning in *Pink*. *See supra* note 51 and accompanying text.

ment is constitutional, having the same "validity and obligation" as if it received Senate advice and consent.

"Sole-executive agreements" may be self-executing.[144] Once made, the agreement cannot be "refused full force and effect in either municipal or international law simply because it was not submitted to the Senate as a treaty."[145] A "sole-executive agreement," outside the President's constitutional authority and without the advice and consent of the Senate, will be without force and effect under domestic law.[146] An excellent delineation of levels of Presidential authority when making executive agreements is given in *Youngstown Sheet and Tube Co. v. Sawyer*.[147] The Supreme Court held that when the President makes an agreement based on his constitutional authority and concurrently Congress remains neutral, his authority is at medium.[148] The Constitution in itself, however, may limit the President's powers by the guarantees of private rights vested in the first amendment.[149] Although the first amendment is directed at congressional acts, the fifth amendment's due process clause extends this protection to all federal action.[150]

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144. See *United States v. Belmont*, 301 U.S. 324, 330 (1937) [hereinafter cited as Belmont] and *Pink*, 315 U.S. at 229.

145. Oct. 8 Leigh Reply, *supra* note 14, at 36,721.

146. *See generally* Oct. 22 Glennon Reply, *supra* note 4.

147. (a) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation and the burden of persuasion would rest heavily upon any who might attack it.

(b) 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 of 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 abstract theories of law.

(c) When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson J., concurring in the judgment).

148. *Id.* at 635-36.

149. Mathews, *supra* note 5, at 377.

150. *Id.*

The judiciary has recognized certain aspects of presidential agreements when reviewing "sole-executive agreements."[151] Presidential agreements may modify or terminate prior treaties.[152] Contrary to a state's ability to control foreign policy, an executive agreement has priority over state law.[153] Presidential agreements are superior to inconsistent state legislation.[154] Some authors, in opposition to the general rule, have proposed that "if the subject of the agreement is a matter within the President's special constitutional competence . . . the separation of powers doctrine might in some situations appropriately permit the President to disregard a (federal) statute as an unconstitutional invasion of his own powers."[155] The established rule was laid down by the Court of Appeals for the Fourth Circuit. The court held that "in areas of concurrent jurisdiction the President may not enter into an executive agreement in violation of regulations prescribed by Congress."[156]

The Constitution provides that treaties are to be considered the "supreme Law of the Land."[157] In *Pink*[158] and *Belmont*[159] the Court held that "sole-executive agreements" are of equal dignity with treaties under the supremacy clause.[160] Furthermore, under international and domestic law, "the legal consequences of a treaty, an independently concluded executive agreement, and a congressional-executive agreement are substantially the same."[161]

The constitutionality of executive agreements has been substantiated by the Supreme Court, the actions of the Founding Fathers and the fundamental requisites enabling the President to conduct foreign affairs. The most cogent claim is that the President, solely, has the power to determine which type of agreement shall be utilized.[162] The Executive, more than any other branch of government, is able to direct foreign affairs in the most acute man-

151. *See* Belmont, 301 U.S. at 324, 330.

152. CORWIN, THE PRESIDENT: OFFICE AND POWERS 243 (1941).

153. *Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 Before the Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 247 (1953).

154. Belmont, 301 U.S. at 331.

155. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 317 (1945).

156. United States v. Capps, 204 F.2d 655, 658 (4th Cir. 1953).

157. U.S. CONST. art. VI, cl. 2.

158. Pink, 315 U.S. at 230.

159. Belmont, 301 U.S. at 324.

160. *See* cases cited *supra* notes 142 and 144.

161. Mathews, *supra* note 5, at 378.

162. *Id*. at 374.

ner. The President establishes all foreign policy and is privy to foreign relations information to which no other government branch is entitled.[163] Members of Congress, on the other hand, are elected on the basis of local issues and possess a greater degree of information and competence in domestic matters than in foreign affairs.[164]

To this point, it has first been determined that executive agreements are legally valid. Second, the President has discretionary authority to select the type of international agreement, provided it is within his constitutional powers. Third, executive agreements are a necessary tool of foreign policy, providing expediency, accuracy, trustworthiness and secrecy.

What now remains to be determined are the international implications arising from the foregoing domestic law considerations. It is vitally important to the welfare of the United States to understand the Federal Government's capabilities and limitations in conducting foreign affairs. Equally important, however, is a realization of the international repercussions of such determinations and their viability under international law.

III. THE IMPLICATIONS OF AGREEMENT E UNDER INTERNATIONAL LAW

Under international law a treaty made in violation of a nation's constitution is binding unless it is of "fundamental importance" and the other party had reason to know or knew of the violations.[165] There are two central issues in the international law analysis. First, as previously discussed, is whether Agreement E is unconstitutional since it was not formulated as a treaty and is therefore a "fundamental violation." Second, is whether Israel knew or should have had knowledge of any fundamental violation.

The United States, arguably, has a dichotomy of interest in the application of international law. One interest might support the validity of Agreement E under international law for reasons of: (1) good faith of the United States in foreign affairs; (2) maintenance of good moral and diplomatic standing in the Middle East; and, (3) having an executive agreement deemed unconstitutional makes the Senate Legislative Counsel's position that much stronger. On the other hand, if Israel does find need to request assistance under Agreement E, the United States might not want to be legally bound

163. *Id.*
164. *Id.*
165. L. HENKIN, *supra* note 86, at 137.

because of: (1) the financial cost; (2) change in United States-Israeli relations; (3) an aggressive act by Israel; or, (4) change in United States national policy.

A. Agreement E is Unconstitutional

Entering into an agreement beyond the President's constitutional authority, without the advice and consent of the Senate, constitutes a "fundamental violation" of the United States Constitution.[166] If the Senate Legislative Counsel's position is valid, then Agreement E's present existence as an executive agreement is a fundamental violation of the Constitution.

As to Israel's knowledge of a fundamental violation, several factors support the contention that Israel should have known that Agreement E is unconstitutional. Executive agreements have been a matter of controversy since the enactment of the Constitution.[167] This controversy, arguably, constituted a warning light to Israel that Agreement E might be defective. The United States Constitution makes no mention of the executive agreement.[168] It would not be unreasonable, therefore, to hold that Israel should be aware of the provisions of the United States Constitution, which only provides for the making of a treaty.[169]

The historical conduct of the United States in foreign affairs might also impute knowledge to Israel. The Nixon-Thieu agreements[170] were deemed illegally binding executive agreements which the United States never fulfilled. An Israeli assertion of ignorance concerning the events taking place in Vietnam would not be plausible. Furthermore, Israel should have known that agreements containing language similar to Agreement E's language have been formulated as treaties.[171] Finally, the legislative branch has been struggling for some time to regain its treaty-making powers. Through such acts as the National Commitments Resolution[172] and the Clark Resolution,[173] Israel should have been aware of the uncertainties surrounding the President's abilities to make "important" national commitments on his own authority. Depending on

166. Sept. 24 Glennon Memo, *supra* note 4, at 32,711.
167. Feinrider, *supra* note 3, at 525.
168. U.S. CONST. art. II.
169. *Id.*
170. *See supra* note 79 and accompanying text.
171. *See supra* notes 72-78 and accompanying text.
172. *See supra* note 51 and accompanying text.
173. *See supra* notes 130-31 and accompanying text.

Israel's rebuttal of each contention, Agreement E could be held invalid under international law.

Israel, on the other hand, might refute having knowledge of a fundamental violation for four reasons. First, executive agreements, customarily, have been implemented in practically all areas of foreign affairs.[174] Second, since the treaty-executive agreement debate is unresolved in the United States, Israel could not be expected to have known that Agreement E should have been a treaty. Third, the Supreme Court of the United States has held that executive agreements are constitutional.[175] Fourth, the President's powers are expanded during critical times. The crises in the Middle East warranted the President to make Agreement E as an executive agreement. Valid criteria exists on both sides of the knowledge issue, which could or could not implicate Israel with knowledge of a fundamental violation.

B. Executive Agreements are Constitutional

Agreement E is constitutional in its present form if the President has the constitutional authority to make executive agreements. Obviously, if valid domestically, there is no issue under international law as to Agreement E's legality. The question still remains, however, as to what degree Israel can rely on Agreement E's assurances. In reality, this issue will remain unresolved until either the United States or Israel seek to implement one of the provisions.

IV. SUMMARY AND CONCLUSION

The creation of Agreement E as an executive agreement has caused much constitutional debate and epitomizes the power struggle between the executive and legislative branches to conduct foreign affairs. The executive branch asserts that Agreement E is legally binding, having been created under the President's constitutional powers. The legislative branch claims that due to Agreement E's military and economic assurances, it is an agreement of "exceptional national importance" and therefore is invalid without Senate advice and consent. This debate, concerning the proper application of treaties and executive agreements, has been in existence since the enactment of the Constitution.

The Constitution expressly provides for the making of treaties,

174. *See supra* notes 139-61 and accompanying text.

175. *See supra* notes 114-15 and accompanying text.

but makes no mention of the President's authority for formulating executive agreements. Custom and usage, and the Supreme Court of the United States, however, quell any absolute determination that Agreement E is unconstitutional. Executive agreements have customarily been applied to many areas of foreign affairs. The Supreme Court has also recognized the utilization of executive agreements as constitutionally permissible. Expediency, trustworthiness, secrecy and accuracy make executive agreements a vital tool in conducting foreign affairs. Treaties, however, are subject to the deliberations of the Senate, safeguarding any Presidential usurpation of power. It is noted that in moments of crisis, the President's scope of authority is expanded into areas where normally his actions would be unconstitutional.

The parameters defining what subject matter should be appropriated to either treaties or executive agreements are nebulous. The constitutional uncertainties surrounding Agreement E leave much opportunity for debate over the binding-nonbinding status of the Agreement under international law. Many factors support a finding that Israel should have known that Agreement E might be a fundamental violation of the United States Constitution. In reality, however, one cannot expect Israel to have known of such a violation, since the treaty versus executive agreement debate is still unresolved. The questionable assurances of Agreement E would have stirred little or no debate if the Agreement had been made as a treaty, and therefore received the advice and consent of the Senate. Due to the potential dangers in the Middle East, however, expediency may have warranted the use of an executive agreement.

One of the major considerations enveloping Agreement E is the moral and diplomatic impact of these assurances. Whether these assurances are given the heightened level of consideration that the Office of Legislative Counsel accords these assurances, or whether they are given lesser importance by calling them mere executive policy declarations and promises, the final determination will be of critical importance.

Paragraphs one, seven, ten, eleven and fourteen are tantamount to Israel's national security and indirectly vital to United States national security. If the United States intended these assurances to be mere declarations and promises couched in questionable legal authority, any sincere future Middle East diplomatic efforts could be weakened severely. Israel is engulfed in a hostile environment and most assuredly relies heavily on these promises.

Assurances lacking legal authority raise strong moral and diplomatic questions, and compromise unified diplomacy. Agreement E's legal status is far from being settled absolutely due to the lack of dispositive authority on executive agreements. The extent of the United States obligation under Agreement E will remain unresolved until either party acts or the constitutional debate is ended. Greater weight, however, should be given to paragraphs one, seven, ten, eleven and fourteen before dismissing them as mere executive declarations and promises.

Bruce Francis De Pol