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THE BINDING EFFECT OF EXECUTIVE AGREEMENTS
UNDER THE UNITED STATES CONSTITUTION

1. In view of the questions presented in Mr. Oxman's letter to you of 9 May 1973, a further review has been conducted concerning the constitutional validity of executive agreements concluded by the Executive branch other than by the treaty-making process called for in the Constitution. From the questions posed in Mr. Oxman's letter, perhaps my previous memorandum did not quite clearly delineate the force and effect of the various forms of executive agreements that can be concluded, both internationally and domestically. Consequently, this memorandum shall attempt to provide further elucidation of the points made previously, as well as submit some practical suggestions for approaching an interim agreement on an ocean regime.

2. Mr. Oxman's question concerning the authority of the Executive to sign an interim agreement alone, either on an inherent powers basis or supplementary to existing conventions on the law of the sea, actually requires two answers to two questions: (1) Can the Executive "sign and bind" the United States to an interim agreement internationally? and (2) Can he "sign and bind" the United States domestically? And, if he can so "sign and bind", the next question would be how can he do so with a minimum of delay and obstruction? This memorandum shall attempt to attack the problem from these questions.

3. The international aspects of the signing of an executive agreement by the executive without the normal treaty-making procedures should be fairly well evident from the memorandum submitted on 2 May 1973. As stated by the U. S. Supreme Court:

> . . .(I)t may be said that, as a general rule, in the opinion of the Courts all international agreements, treaties or executive agreements, bind the State and engage its international responsibility, irrespective of the forum of the treaty-making power exercised in the conclusion of the agreement B. Altman & Co. v. United States, 224 U. S. 583 (1912).

Furthermore, the U. S. State Department, in its official pronouncements, has taken a clear position that the Constitutional treaty-making limitations contained in a State's constitution are not viewed by this Government as any limitation on the authority of the Executive of that State to affirmatively bind that State to an agreement concluded with the United States. Rather, "an agreement concluded by the Executive, even if an exchange of notes, is internationally binding and the State on whose behalf it has been concluded cannot plead excess of authority under its domestic law. Also, the U. S. does not rely on the "notorious" character of Article 2 clause 2 (of the U. S. Constitution) to safeguard Senate approval. If the treaty or agreement specifies that it will not become effective until ratification with advice and consent, then it does not; but any agreement concluded ultra vires, even unconstitutional domestically, nevertheless is binding internationally." K. Holloway, MODERN TRENDS IN TREATY LAW 332-333 (1967).

Consequently, the conclusion reached in the earlier memorandum, i.e. that the Executive not only has the power to negotiate and conclude international agreements pursuant to purely execu-

tive powers; but also to affirmatively bind this nation to such agreements internationally, has not been altered by this review. International law is in accord. The Legal Status of Greenland, (Denmark v. Norway), P.C.I.J. 1933.

4. The crux of Mr. Oxman's question concerns the domestic effect of the signing of an interim ocean regime agreement without the use of Constitutional procedures. His concern is well-founded, particularly because the United States is a Federalism and thus international commitments may be breached simply by the failure or refusal of the Congress to appropriate funds or enact legislation implementing international agreements concluded. In my previous memorandum, three "bases" for domestically binding executive agreements were suggested (as taken from the Restatement, Foreign Relations Law of the U. S., sections 119-121 (1965)):

(1) Executive agreements concluded in the exercise of the executive's own Constitutionally delegated powers;

(2) Executive agreements concluded in pursuance of an authorization contained in a prior treaty; or

(3) Executive agreements concluded pursuant to Congressional legislation. (Cf. 2 May memorandum, p. 11)

Whether or not the executive may domestically bind this nation to international agreements concluded under either the Constitutionally delegated powers, or under the implied "inherent powers" contained in Article 2 is a source of major controversy today, particularly in view of current military operations in

Cambodia and Laos. Books have been written on the treaty-making and executive agreement making power of the executive and the role played by Congress and the Senate therein, so this writer does not pretend to even scratch the surface of the myriad claims and counter-claims that can be made in this area. However, after researching major articles and materials on the subject, the following information and opinions are submitted to possibly provide a basis for discussion of the power of the Executive to bind this nation domestically, and possible means of accomplishing this within the modern interpretations of our Constitution.

5. The major delegations of power to the Executive are contained in Article 2, clauses (1), (2) and (3), U. S. Constitution:

> The executive power shall be vested in a President of the United States of America. . . .The President shall be the Commander-in-Chief of the Army and Navy of the United States. . . .he shall have power by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint ambassadors and other public ministers; he shall take care that the laws be faithfully executed and shall commission all of the officers of the United States.

In 1945, McDougal and Lans conducted a thorough review of the treaty-making power and executive agreements (McDougal and Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy 54 Yale L.J. 181 (1945)). In discussing the above-mentioned delegation of powers to the Executive, they state that:

> . . .(T)he President may conduct negotiations with other governments upon all subject matters, and upon a subject matter within the scope of his own powers he may conclude agreements, in accordance with his own policies, and make these agreements the law of the land, implementing them to the full extent that his powers permit(McDougal & Lans, at 245).

The agreements concluded under the powers delegated to the Executive as Commander-in-Chief and his powers to receive and appoint Ambassadors were discussed in my previous memorandum, and need not be discussed at length here, primarily because they have little relevance to the conclusion of an interim law of the sea regime under the aegis of delegated powers. Rather, the important factors contained in the delegation of powers to the Executive are those phrases which invest the President with the executive power and which require him to assure that the laws be faithfully executed. Thus, the grant that "The Executive Power Shall be vested in a President of the United States of America" has been been interpreted as a grant of the broadest of powers to conclude agreements. This grant has enabled the President, from the earliest days of the Republic, to conclude international agreements such as the following:

(1) Washington's 1793 declaration of neutrality.

(2) Jefferson's dispatch of naval units against Tripolitan depredations in 1801 and succeeding employment of U. S. forces outside U. S. territory (providing the basis for the doctrine that the Executive has authority on his own initiative to use diplomatic pressures or military forces to protect the extranational interests of American citizens).

(3) President Jackson's 1835 veto of a congressional act consolidating two claims against the King of the Two Sicilies on grounds that the President was authorized to proceed on his own initiative and the act was an unconstitutional intrusion into executive powers.

(4) The Rush-Bagot Agreement of 1817 concerning limitation of naval armaments on the Great Lakes

(5) The Monroe Doctrine

(6) The actions of various Presidents in granting commercial rights to foreign enterprises in the absence of statutory authorization. (McDougal and Lans, p. 251).

The broad construction placed on this clause of the Constitution was given the imprimatur of judicial approval in Meyers v. United States, 272 U. S. 52 (1926) where the Court held that the presence of specific grants of powers to the executive later in Article 2 constituted no limitation on the general investiture of power in that first "investing" clause (McDougal and Lans, at 252).

6. McDougal and Lans take the position that treaties and executive agreements concluded under the above-mentioned bases of authority are completely interchangeable, as demonstrated by practice over the years. The authors cite several examples of such interchangeability between executive agreements, Congressional-executive agreements, and treaties. The following examples are given in areas which are considered to be closely allied to the possible factors contained in an interim law of the sea agreement:

(a) Acquisition of territory: Prime examples are the cession of Texas and Hawaii which were both first attempted by treaty and failed, but succeeded through joint resolution and executive agreement, circumventing constitutional provisions. Most instances concerning acquisition of territory have involved some form of Congressional participation, either through approval through legislation or joint resolution. But a significant number of actions were completed without Congressional approval:

(1) American acquisition of Horseshoe Reef was by executive agreement only.

(2) 1879 U. S., British, and German condominium for administration of the Samoan Islands.

(3) Agreement for extension of American sovereignty over the Jolo archipelago approved by President McKinley in 1899.

(4) 1907 Agreement with Britain to allow British North Borneo Company to administer certain islands between the Philippines and Borneo, approved by the President.

(5) Agreement extending American sovereignty over the Sulu Archipelago under President Wilson in 1915.

(b) Settlement of International Claims: Action by the President in referring the claims of Canada to damages resulting from the sinking of the I'm Alone by an American cutter in 1929. (The Smuggling Conventions of 1924 provided for referral to arbitration, but provisions re U. S. participation required Senate approval. Nevertheless, President Hoover acted alone). When the arbitral tribunal rendered a verdict adverse to the U. S., Congress did not raise constitutional objections, but promptly appropriated funds to pay damages.

(c) Adherence to International Organizations: As a matter of practical expediency, the executive agreement has almost always been the procedure utilized for effecting American adherence to international organizations. For example:

(1) International Labor Organization membership was effected through joint resolution and executive agreement, thereby joining the important organ of the League of Nations and submitting the U. S. to compulsory jurisdiction of the Permanent Court of International Justice for certain matters.

(2) Pan-American Union membership has never been authorized by treaty or joint resolution, yet Congress has continued to appropriate funds for the U. S. share of expenses. It is noted that Congress does maintain "purse string" powers however, to withold funds for matters of which it disagrees or disapproves. In connection with the Pan-American Union, it is stated that:

> Numerous international compacts have been negotiated at the conferences convened by the Pan-American Union, some placing heavy obligations on the U. S. Many of the important agreements, such as the 1929 General Treaty of Inter-American Arbitration and the Act of Habana of 1940, providing for joint provisional administration of European possessions in the Americas in the event of an attempted change of sovereignty, have been treated by the Presidents as treaties and referred to the Senate for approval. Other compacts of equal importance--such as the 1938 Declaration of Lima providing for consultation 'in case the peace, security or territorial integrity of any American Republic is. . .threatened', the 1939 Act of Panama(establishing a 300 mile neutrality zone). . .have been treated as simple executive agreements. . . .(McDougal and Lans, at 272).

(d) International Commercial Agreements: Most examples cited by the authors deal with "most favored nation" clauses and agreements, copywrite and patent protections, and commodity pools. Executive agreements dealing with these matters have generally been under the aegis of some form of Congressional legislation or treaty. But, in one area, fishing rights, interchangeability is evident:

> An instructive example of interchangeability is provided by the arrangements governing American fishing rights off the Canadian and Newfoundland coasts. From the mid 1880's to 1911, these rights were regulated by executive agreements; thereafter control was pursuant to the terms of the Treaty of Washington. (McDougal & Lans at 273)

Although the foregoing examples of interchangeability are not directly in point, they may provide some illustrations of the authority and ability of the executive, either alone or in conjunction with Congress,

to conclude agreements dealing with institution of certain aspects of a new ocean regime arrived at in Santiago.

7. The judicial interpretations concerning the powers of the President to conclude executive agreements under his own powers which may be domestically binding were fairly completely covered in the memorandum of 2 May 1973. Nevertheless, perhaps further comment is in order. The judicial lodestones for "presidential executive agreements" (i.e. those concluded under the aegis of the president's powers alone) continue to be the decisions of U. S. v. Belmont, 301 U. S. 324 (1937) and U. S. v. Pink, 315 U. S. 203 (1942). However, these decisions are not isolated from the development of the concepts contained therein by the Supreme Court. Rather, it is believed that they are the "capstones" of a long process of interpretation in which the overall supremacy of the executive in the conclusion of international agreements is revealed. Thus, in Tucker v. Alexandroff, 183 U. S. 424 (1902) a Presidential executive agreement allowing Russian troops to cross U. S. territory was upheld as binding on all state and local officials. And in Monaco v. Mississippi, 292 U. S. 313 (1934), the Supreme Court stated that: "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found appropriate, through treaty, agreement of arbitration, or otherwise." (at 331) (However, for an opposing view distinguishing these cases, see Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L.R. 1, 45-46 (1972).

As for the Belmont and Pink cases, it has been argued that those cases are limited to agreements made in connection with recognition of foreign governments only. In response to this argument, however, it is submitted that:

> Whether one concludes, on a level of low abstraction, that the decisions in the Pink and Belmont cases must be confined to agreements connected with the recognition of another government, or even to agreements made between the United States and Russia or made by men named Roosevelt and Litvinov, or, on a level of a higher abstraction, that these decisions can be extended to all agreements made by competent constitutional authorities with any government on any appropriate subject matter, depends not upon logic but upon policy. No principle of policy has yet been suggested for making the constitutional validity and legal effect of an international agreement made by appropriate officers of this government dependent upon its being accompanied by simultaneous formal recognition of the other government. The Supreme Court itself cast its opinions in terms of the broader principle applicable to all agreements made by competent constitutional authorities with any government on appropriate subject matter.. . .When an agreement has been negotiated by the President within the scope of his own independent powers, the Belmont and Pink cases indicate that it is as readily enforceable as a treaty. Any further legislation required is enforceable under Congressional power under the necessary and proper clause. (McDougal and Lans, at.313-314)

Additionally, it has been stated concerning the power of the Executive to conclude agreements that:

> . . .In pronouncing, or rather in refusing to pronounce, on the limitations of the Executive's treaty-making power the Courts have resorted to such criteria as 'all proper subjects of negotiation between our Government and the governments of other nations', or a function 'bread enough to cover all subjects that properly pertain to our foreign relations'; insistence on matters of international concern but 'not a power to be exercised, it may be assumed, with respect to matters that have no relation to international matters' while conceding that there are matters of intermingled international and local concern. . . .

> . . .In upholding the constitutional validity of executive agreements, the Supreme Court has also based its reasoning on the concept of 'political matters', a concept just as difficult to define as 'inherent powers' and equally broad. The Court has in fact refused to rule on issues involving political questions (Luther v. Borden, 7 How. 1 (1849) and Mississippi v. Johnson, 4 Wall. 475 (1867)) and by regarding the conduct of foreign affairs as a political matter has in effect broadened the basis of executive agreements (Holloway, at 305).

The conclusion from the above-cited authorities appears to be that there is some form of "inherent powers" or "political realm" incorporated into the general grant of executive authority to the President, which, through the process of interaction with the governments of other countries, and with the Congress, and with such interpretations as the Supreme Court has rendered, particularly in Belmont and Pink, has grown to such proportions that it can be argued that such power extends to all matters properly the subject of an international agreement. The difficultly in dealing with this power is that it is a product of practice and custom, primarily, and it is incapable of definite basis in any particular phrase or clause of the Constitution or in any court decision. Nevertheless, it is believed that this power does exist, that it is valid grounds for the myriad of agreements and commitments made by our Presidents over the years, and that such agreements do override conflicting state laws, as determined in the Belmont and Pink cases. Furthermore, in view of the interchangeability between such agreements and treaties, particularly those dealing with acquisition of territory, commercial arrangements, and international organizations, a plausible argument can be made that the Executive commands the

Constitutional authority to conclude an interim agreement dealing with a new ocean regime pending ratification with the advice and consent of the Senate. Actually, a good argument could be made that the President could conclude the entire ocean regime agreement under presidential executive agreement, but this would obviously be unnecessary and unwise, as more formal procedures will be called for. Nevertheless, it is believed that adequate authority exists to enable the executive to bind the United States, both domestically and internationally, to an interim law of the sea ocean regime pending ratification with advice and consent of the Senate.

8. The above conclusion leaves one unanswered question: Does the presidential executive agreement concluded for an interim ocean regime prevail over previous or subsequent Congressional legislation? This question calls for another query also: If not, then how can the executive ensure that Congress will not override such an interim agreement? In connection with the relation between a presidential-executive agreement and Congressional legislation, it has been submitted that:

> It has long been established that the President may modify a previously ratified treaty by an executive agreement with the obligee nation if the agreement is within his constitutional powers. A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation. . . Moreover, if the subject of the agreement is a matter within the President's special constitutional competence--related, for example, to the recognition of foreign governments--a realistic application of the separation of powers doctrine might. . .appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power. An analogous situation is the Supreme Court's decision in Meyers v. U. S., where President Coolidge maintained that a statute limiting his powers to remove postmasters constituted an invasion of executive power (McDougal and Lans, at 317).

And, as mentioned in the earlier memorandum:

> . . .The only criterion of validity except violation of individual rights guaranteed by the Constitution, would seem to be, in the opinion of commentators, whether the President is able to implement the agreement in domestic law and whether he can mobilize sufficient popular support (e.g. the Polaris Sales Agreement of 6 April 1963, involved important matters of policy as well as domestic legislation). The last consideration applies to even Senate--consented treaties, in the sense that once the President has popular support and the Senate has been consulted, ratification becomes a matter of mere formality (citing the Nuclear Test Ban Treaty of 15 August 1963 which was 'finalized' on the date of its signature in strict conformance with Article 2, clause 2). (Holloway, at 361).

In this connection, perhaps the most important consideration is set forth by McDougal and Lans:

> A wise President will of course ordinarily seek to avoid conflict with the Congress by seeking legislative support for his actions; but this is a question of statesmanship and not of constitutional authority. . . .

Thus, although McDougal and Lans submit that it is possible for a presidential-executive agreement concluded within the scope of the delegated powers to rise above conflicting Congressional legislation, both previously and subsequently enacted, it is believed that this would be in fact elevating a presidential-executive agreement above the position occupied by formal treaties (which can be overruled by subsequent legislation), and that this interpretation goes a bit far in stretching the powers of the executive. (For an argument against the entire McDougal-Lans theme, as well as in favor of reverting to the strict Constitutional procedures, see Berger, The Presidential Monopoly of Foreign Relations supra. p. 9). Rather, the most important consideration appears to this writer to be the necessity of

bringing the Senate into the negotiating and preparations for the Law of the Sea Conference, and ensuring that full Senatorial participation in those deliberations is a reality. This writer has been impressed by the fact that in no treaty or executive agreement in which the Senate has been asked to participate and did so has there been any conflict between the executive and Congress over executive agreements and treaties concluded (see quote from Holloway, supra.p. 13). On the other hand, the most famous rejection of the efforts of personal diplomacy was the rejection of the Versailles Treaty negotiated by President Wilson, in which he completely excluded Senatorial participation. Evidently, the primary reason for the rejection of the treaty provisions concerning the League of Nations and the International Court of Justice was precisely because Wilson had so excluded the Senate from the treaty-making process. It would therefore appear, in the present situation, that the executive could guarantee that his interim agreement would stand if he ensured that adequate representation of the Senate was included in the Santiago delegation and that these Senators are fully informed and incorporated into the decision-making process. This would also alleviate the necessity for enabling legislation to allow such an interim agreement to be signed and to be self-executing (although, as mentioned previously, this does not appear necessary), as well as eliminating any requirement for Senatorial or Congressional approval of an interim agreement after it has been signed. It would, furthermore, probably

guarantee that Congress would supply any implementing legislation needed to put an interim regime into effect should such legislation be required subsequent to signature by the executive. Consequently, this writer concludes that inclusion of the Senate in the "treaty-making" process would be the most efficient and productive method of ensuring a viable and Constitutionally sound (practically speaking) interim agreement which would be self-executing.

9. A further comment on the practical aspects of obtaining a Constitutionally binding interim agreement without the participation of the Senate might be in order. In his letter, Mr. Oxman mentioned the possibility that the interim agreement might come under authority of the executive to implement that portion of Article 2 of the Convention on the High Seas requiring the States to assure "reasonable regard" to the interests of other States in their exercise of the freedom of the high seas. In order to support such an argument, it is believed that some authorization would have to be supplied by Congress in consenting to the Convention (actually mean Senate, here). The Restatement validates presidential-executive agreements concluded "in pursuance of an authorization contained in a prior treaty", and the language concerning "reasonable regard" particularly in view of the fact that the Convention is nothing more than a codification of international law, does not appear to be any authorization to the executive to conclude agreements which may actually drastically change the freedoms listed in that Convention (i.e. modify the Convention provisions itself). Although the executive may take actions to assure reasonable regard on an international basis (note earlier discussion giving international effect

to agreements concluded by the executive, even if ultra vires), the same problem of domestic effect arises again with regard to Constitutionality and enforcement, and it is suggested that an affirmative grant of authorization from the Senate is required, or at least stronger language allowing an inference of authority, before this particular claim can be made. Nevertheless, since the Convention on the High Seas (as well as the other three Conventions concluded at Geneva in 1958) are codifications of international law, and this includes "reasonable regard" it is the opinion of this writer that such language cannot amount to an affirmative grant of power to the executive to conclude agreements whtah may drastically change or affect the very principles codified in that document.

10. Finally, it is possible that somewhere in the annals of Congressional legislation there may be a grant of authority to the President toallow him to conclude presidential-executive agreements on law of the sea matters without the participation of the Senate. This would require an exhaustive review of all legislation that enables the President to act beyond the limits of national jurisdiction with regard to ocean affairs. Such a review is considered beyond the scope of this research, but this writer has examined the Outer Continental Shelf Lands Act, and has found, in section 1333 thereof, some authorization to the President which might form the basis for an argument that the President may conclude executive agreements concerning the delimitation of these lands. Section 1333, in dealing with the extent to which state law may apply on the outer continental shelf lands, authorizes the President to determine "such projected lines extending seaward and defining such area".

This language could support an argument that Congress, in authorizing the President to determine the limits of state jurisdiction or competence to prescribe their laws on the outer continental lands, impliedly authorized him to enter into international agreements delimiting these areas in which state jurisdiction shall apply. The argument would continue that it was necessary to authorize the President to do this, because only he is competent to enter into agreements necessary to limit the physical boundaries of state jurisdiction on the outer continental shelf (The Secretary of the Interior is not authorized to enter into international agreements). Finally, since the agreement delimiting the state jurisdiction on outer continental shelf lands includes a comprehensive scheme for a new ocean regime, requiring immediate implementation, the President was competent under the Constitution (because of the Congressional authorization) to conclude such a self-executing agreement, at least until the Senate has had the opportunity to render its advice and consent.

The legislative history of this particular section is not very productive, but it should be noted that originally the Secretary of the Interior was authorized to so delimit the areas under state jurisdiction. No report of change is contained in the Conference Committee report, yet the President is authorized in the bill finally enacted (43 U.S.C. section 1333). Although it could be argued that the limitation of state jurisdiction gives the President power only with regard to the states, it appears to this writer that such authorization would have to include authority to

take some international action or form international agreements in order to stabilize the areas where he determines that the state law shall have competence to prescribe. It is admitted that this writer does not have access to the full legislative history and debates on the Outer Continental Shelf Lands Act, but it is submitted that this is the type of authorization that could possibly be used to support a presidential-executive agreement implementing an interim self-executing regime for the oceans.