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- Who's in Charge

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Congressional-Executive Tensions in Managing the Arms Control Agenda—Who's in Charge?

Kevin C. Kennedy*

I. Introduction

The subject of national security presents extremely delicate and thorny issues. Governmental discussions of national security issues too often degenerate into heated, partisan shouting matches not only between members of Congress but also between Congress and the White House. The unfortunate result of this discord has been an arms control and disarmament process that moves haltingly, to the extent that it moves at all. How can this process be advanced? One necessary condition is a President committed to arms control and disarmament. An equally important prerequisite is a close partnership between Congress and the President in fashioning an arms control agenda, negotiating arms control agreements, and implementing concluded agreements. To that end this Article proposes adoption of a "fast-track" arms control procedure—a process borrowed from international trade legislation first enacted by Congress in 1974.1 In the fast-track procedure, Congress authorizes the President to conduct trade negotiations with one or more U.S. trading partners, to reach agreement within a fixed period of time, and to report the results of those negotiations to Congress within that time period. Congress then has a limited time period (typically ninety days) to approve or reject the entire trade agreement package without amendment.2 This procedure has been used successfully in recent bilateral trade negotiations with Canada and Israel, and in multilateral trade negotiations in Geneva.3 Adoption of this approach for the arms control process will potentially speed negotiations by protecting the President from being undermined by small but powerful factions within Congress. By forcing Congress to consider an arms control agreement as a package, the fast-track procedure will prevent

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2 Id.

members of Congress from offering amendments that could force renegotiation of the entire agreement.

An alternative approach that this Article will also discuss, which assumes a President deeply committed to arms control, is use of the sole executive agreement to conclude arms control and disarmament accords, thereby avoiding potential congressional rejection of agreements. This Article considers the narrow legal issue of whether the President has the constitutional power to conclude bilateral and multilateral arms control agreements as sole executive agreements, that is, with neither the advice and consent of the Senate nor approval of the full Congress. Although the question is a close one, this Article concludes that absent a congressional directive to the contrary, the President does possess such authority, but he is divested of such authority if Congress has directed him to present arms control agreements to it for its approval. Furthermore, this Article concludes that Congress may directly restrict the President’s use of that power for arms control negotiations and agreements. This conclusion is reached largely from a study of congressional oversight in constitutional practice over the past thirty years, as well as from the text of the Constitution—principally, the congressional power to raise armies, appropriate funds, and declare war.4

Turning from law to politics and the broader perspective of policy, assuming that neither congressional approval nor Senate advice and consent could be constitutionally required before the President entered into an arms control agreement binding upon the United States, it could be asked whether it would be prudent for the President nevertheless to exercise such power without seeking congressional approval. A corollary question would be whether there would be any political wisdom in using the sole executive agreement as the legal vehicle for concluding arms control agreements or whether a sole executive arms control agreement would poison the well of bipartisanship. A further issue is whether stable and strategically significant arms control agreements are possible if they do not receive a congressional imprimatur. As these questions suggest, there are, even if not mandated by constitutional practice or the text of the Constitution, compelling policy reasons for presenting arms control agreements to Congress for its approval.

Nevertheless, the forces behind the development, testing, and deployment of defense systems are highly dynamic. The negotiation of agreements limiting and banning these weapon systems is comparably complex and dynamic; agreements are frequently linked so that progress in one area of arms control (e.g., limiting strategic nuclear weapons) hinges upon consensus in another area (e.g., banning the deployment of space-based missile defense systems). In this milieu

of rapid technological change and linkage, sole executive agreements might be a preferable method for reaching arms control accords. First, because of the lightning pace at which nuclear weapons delivery system technologies are developed and deployed, they often overtake the sometimes plodding and rancorous Senate advice and consent process.\(^5\) Second, sole executive agreements give the President a degree of flexibility in both the negotiation and compliance phases of the agreement that is absent in the article II treaty process. For example, in responding to questions of compliance with an arms control accord, the executive branch’s options in dealing with whether the construction of the Krasnoyarsk radar station in the Soviet Union was a material breach of the ABM Treaty were circumscribed by the Senate having given its advice and consent to that agreement, thus tying the White House’s hands in the way it would address the issue.\(^6\) The ABM Treaty reinterpretation controversy\(^7\) is another example of a Senate-executive branch imbroglio that probably would have been avoided had that agreement been an executive agreement rather than an article II treaty.\(^8\)

Although the sole executive agreement as an arms control vehicle might afford the President greater freedom of action and room for maneuver, many would contend that it is fortunate his authority to interpret such vitally important international agreements has been circumscribed by congressional participation in the approval process. Regardless of this issue, it is clear that Congress has not been a mere spectator in the arms control arena. The SALT I and SALT II experiences, in which Congress formulated negotiating policy in one instance and sent advisers to the negotiations themselves in another, bear witness to the influence Congress has had on the progress and pace of arms control agreements.\(^9\) Whether the text of the Constitution permits such congressional activism, it is nevertheless a political fact of life for the President. Even if the President has the constitutional authority to conclude arms control agreements through the sole executive agreement, to act on that authority could strain relations with Congress to the breaking point, given the keen interest Congress has shown in arms control.\(^10\)


Adoption of the fast-track approach is an alternative to the sole executive agreement that would include Congress in the arms control process. Before examining the fast-track mechanism, this Article first reviews the origins and uses of the sole executive agreement in the conduct of U.S. foreign relations and then considers the question of whether the sole executive agreement can be used to conclude arms control agreements.

II. International Agreements and the Law of the United States

The Restatement (Third) of the Foreign Relations Law of the United States identifies four types of international agreements that the President may conclude:

1. The President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty;
2. The President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution;
3. The President may make an international agreement as authorized by treaty of the United States;
4. The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.

Thus, besides the article II "treaty" that becomes law with the advice and consent of two-thirds of the Senate, three other categories of international agreement are found in the law of the United States: congressional-executive agreements (category (2) above), executive agreements pursuant to treaty (category (3) above), and sole executive agreements (category (4) above). In U.S. foreign relations practice, many more executive agreements (mostly the congressional-executive variety) have been concluded than article II treaties. As of 1983, the United States was party to 906 treaties and 6,571 executive agreements.

Never sharp, the line between when an international agreement must be concluded by treaty and when it can be reached through one of the other three constitutional forms has blurred over the
decades. The Restatement concludes that "[s]ince any agreement concluded as a Congressional-Executive agreement could also be concluded as a treaty . . . , either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance." However, in connection with sole executive agreements, the Restatement adds that "[t]he validity of [congressional] restrictions on Presidential powers, and of attempts to control and limit sole executive agreements generally, has not been authoritatively determined . . . . Their status in relation to earlier Congressional legislation has not been authoritatively determined." Professor Louis Henkin concedes that "[n]o one has doubted that the President has the power to make some 'sole' executive agreements," but precisely where to draw the line as to those agreements which he may make wholly on his own authority and those which must be submitted to the Senate for its advice and consent is not clear.

Some commentators argue that certain international agreements can only be made as treaties pursuant to article II, section 2. Other authorities have suggested just the opposite—that the President possesses the independent constitutional power to conclude an international agreement on any subject touching upon foreign relations with another country. This position is based upon the inherent foreign affairs power of the President and the authority of United States v. Belmont, in which the Supreme Court upheld the constitutionality of the Litvinov Agreement. The difficulty with this "anything international goes" position, Professor Henkin counters, is that it proves too much; if the President is in fact vested with such sweeping authority, then the article II check of the Senate is eliminated. Despite Professor Henkin's misgivings, it is impossible to state before the fact whether a particular subject can be concluded as a treaty only or whether the executive agreement option is also available. The Constitution is textually too vague as to which of the various

16 Restatement, supra note 11, § 303 comment e.
17 Id. § 303 comment j.
18 L. Henkin, Foreign Affairs and the Constitution 177 (1972).
19 See id. at 179.
20 See Restatement, supra note 11, § 303 Reporters' Note 8 (citing Borchard, Shall the Executive Agreement Replace the Treaty?, 53 Yale L.J. 664 (1944); Borchard, Treaties and Executive Agreements—A Reply, 54 Yale L.J. 616 (1945)).
21 See U.S. Const. art. II, § 2.
24 L. Henkin, supra note 18, at 179.
methods of concluding an international agreement is the constitutionally permissible one.

Among those commentators who argue for a strong Senate check on presidential power to conclude international agreements is Professor Borchard, who observed that "[t]he Constitution refers only to treaties, . . . and says nothing about Presidential executive agreements." Consequently,

[a]greements benefiting the United States or agreements settling issues without obligating the country, especially if of minor importance, rarely evoke challenge. It is only agreements of a more important character, involving future commitments, that encroach upon the treaty-making power of the Senate. If a substantial opinion in the Senate demands submission of an agreement for approval as a treaty, no President should resolve the doubt in his favor and defy the Senate and the Constitution.26

But even Professor Borchard, who expressed his views before the advent of the nuclear age, conceded the existence of presidential power to conclude international agreements on the President's sole authority. "We all know," he wrote, "that [the President] has wide authority as a diplomatic officer and Commander-in-Chief to make certain agreements on his own responsibility with foreign powers."27

Professor Borchard's view that the President is without constitutional power to conclude international agreements on his sole authority has been rejected by others within the academic community.28 Relying on judicial decisions and 150 years of governmental practice, Professors McDougal and Lans found ample support for the constitutionality of sole executive agreements:

The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate. The same decisive authorities have likewise made agreements negotiated by the President, on his own responsibility and within the scope of his own constitutional powers, appropriate instruments for handling many important aspects of our foreign relations. Initial choice of the procedure to be followed for securing validation of any particular intergovernmental agreement lies with the President since it is constitutional practice unquestioned since Washington's day that the President alone has the power to propose or dispose in the actual conduct of negotiations with other governments.29

26 Id. at 674.
28 RESTATEMENT, supra note 11, § 303 Reporters' Note 8 (citing L. Henkin, supra note 18, at 173-76; McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 1, 54 YALE L.J. 181 (1945)).
Professors McDougal and Lans noted that no legal distinction exists in international law between a Senate-ratified treaty and a sole executive agreement. Moreover, they added, from a domestic constitutional law perspective it is “fantastic” to assume that the Constitution is a static document to be interpreted from a Framers' intent point of view—an analysis that could cause the literal-minded reader to conclude that the treaty clause of article II, section 2 is the only constitutionally permissible method for concluding any international agreement.

It is questionable whether the Senate’s article II check has any relevance to agreements limiting weapons of mass destruction unknown to and unanticipated by the Framers. Such weapons are sui generis. They render moot Congress’s power to declare war, given the short response time available to the Commander-in-Chief to launch a retaliatory strike. The first use of such weapons against the United States and its military assets would leave the executive branch with no time for deliberation, least of all consultation with Congress to seek from it a declaration of war.

McDougal and Lans pointed out that the Constitution gives the President power to conclude international agreements on “his own power . . . as the Executive, the Commander-in-Chief of the Army and Navy, and the sole organ of the government in the conduct of international negotiations.” As Commander-in-Chief, the President has the power “to make agreements with foreign nations to protect the military security of the United States, both in time of war and of peace.” Included among those peacetime agreements have been arms limitation agreements; the most famous is the 1817 Rush-Bagot Agreement with Great Britain limiting naval armaments on the Great Lakes, the precursor to establishment of the longest demilitarized border in the world.

In addition to the powers derived from the Commander-in-Chief clause, article II, section 3 charges the President with the duty to “take care that the laws be faithfully executed,” and among the many laws of the United States to be faithfully executed is international law. Many legal scholars argue that the possession or use of

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30 Id. at 195-96.
31 Id. at 214-15. To the same effect is Wallace McClure’s argument that, regardless of the Founding Fathers’ intentions, the practice of concluding international agreements through the device of the executive agreement has become a fixed part of the constitutional landscape. W. McClure, supra note 23, at 190.
32 McDougal & Lans, supra note 28, at 244-45 (footnote omitted).
33 Id. at 246-47 (footnote omitted).
34 See infra note 47 and accompanying text.
35 The Paquete Habana, 175 U.S. 677, 700 (1900); Restatement, supra note 11, § 131. See also E. Corwin, The President 224-25 (1984); Charney, Judicial Deference in Foreign Relations, 83 Am. J. Int’l L. 805, 808 (1989) (stating that international law for the judiciary is as much “real” law as domestic law is).
nuclear weapons violates international law. If so, then the President would not only have the power but the responsibility to dismantle the U.S. nuclear arsenal through a bilateral or multilateral arms control executive agreement.

Turning to constitutional practice to bolster their argument, Professors McDougal and Lans contended that the text of the Constitution dealing with foreign relations has been modified by usage. For example, contrary to the intentions of the Framers, the Senate plays little or no role in most treaty negotiations. The President has the power to terminate treaties unilaterally without the consent of the Senate. Finally, McDougal and Lans concluded that no line of demarcation can be drawn on the basis of logic between what is a proper subject matter for a treaty, on the one hand, and an executive agreement, on the other. Rather, it is policy considerations, not a close reading of the Constitution, that guide resort to one or the other method of concluding an international agreement.

Wallace McClure draws a similar conclusion based on constitutional practice:

[T]here would seem to be no more doubt of the constitutional validity of one method [of reaching an international agreement] than of the other. Accordingly, since no division or limitation of the subject matter of international acts is laid down, there is, prima facie, no reason to deny the existence of constitutional authorization for the use of executive agreements relating to whatever subjects may be dealt with by the treaty-making power.

McClure adds that the executive agreement is in fact the norm rather than the exception, and that Senate advice and consent is a departure from that norm.

Sole executive agreements have been concluded by the President under his constitutional authority as Commander-in-Chief, his express power to receive ambassadors, and his foreign affairs power. With one notable exception—the Litvinov Agreement by which President Roosevelt recognized the government of the Soviet Union—sole executive agreements have mainly involved the armed

36 For essays on the legality of nuclear weapons under international law, see generally E. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW (1990); N. SINGH & E. McWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW (1989); NUCLEAR WEAPONS AND INTERNATIONAL LAW (I. Pogany ed. 1987); NUCLEAR WEAPONS AND LAW (A. Miller & M. Feinrider eds. 1984).
37 McDougal & Lans, supra note 28, at 304.
38 Id. at 305-06; Goldwater v. Carter, 444 U.S. 997 (1979) (Brennan, J., dissenting).
39 Id. at 305.
41 W. MCCLURE, supra note 23, at 32.
42 Id. at 259.
44 See S. Doc. No. 16, supra note 15, at 530.
forces of the United States, thereby providing little opportunity for litigation challenging such agreements in U.S. courts. Indeed, most commentators identify the first sole executive agreement as the Rush-Bagot Agreement in 1817 between the United States and Great Britain which demilitarized the Great Lakes. The Louisiana Purchase and the annexation of Texas were also achieved through the sole executive agreement. The agreements concluded at Potsdam and Yalta likewise were by executive agreement. While resort to the formal treaty process enjoyed a brief resurgence with multinational defense agreements concluded in the early post-war years, the executive agreement soon replaced the treaty in this respect. The only rebuff either house of Congress was capable of mustering was a sense of the Senate passed in 1969.

If the President has the constitutional power to conclude an arms control agreement on his sole authority—as the foregoing commentators suggest he does—the question then is whether he may do so in the face of an express congressional directive that all such agreements be submitted to the Senate or both houses of Congress for approval. It is this question that the next part of this Article addresses.

III. The Sole Executive Agreement and Arms Control

The question of whether the President has the power to conclude sole executive agreements on arms control issues is more than academic. Thirty years ago Congress passed the Arms Control and

45 Restatement, supra note 11, § 303 Reporters' Note 11.
46 Because the Litvinov Agreement included the assignment to the United States of private claims belonging to the Soviet Union, private parties challenged the constitutionality of the agreement. See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
47 Rush-Bagot Agreement, 8 Stat. 231, T.S. No. 110 1/2 (1817). Professor Henkin suggests that the Rush-Bagot Agreement may have been a congressional-executive agreement because Congress two years earlier had authorized the President to sell or lay up all the armed vessels on the Great Lakes. L. Henkin, supra note 18, at 179 n.22. See also W. McClure, supra note 23, at 31.
48 See R. Blanchard, Documentary History of the Cession of Louisiana to the United States 17, 25, 27, 30 (1903); Garrison, First Stage of the Movement for the Annexation of Texas, 10 Am. Hist. Rev. 72-96 (1904).
49 S. Doc. No. 16, supra note 15, at 531. For additional examples of sole executive agreements, see id. at 529-31; L. Henkin, supra note 18, at 179-80.
50 S. Doc. No. 16, supra note 15, at 531.
Whereas accurate definition of the term 'national commitment' in recent years has become obscured: Now, therefore, be it
Resolved, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.
Id. at 1.
Disarmament Act, a law designed to guarantee continuing congressional direction and input to the executive branch in formulating and implementing arms control and disarmament policy. The core of the Act consists of institutional provisions which establish within the executive branch the Arms Control and Disarmament Agency. The Agency is responsible for dealing with the daunting but transcendent problem of reducing and controlling weapons of all kinds. In order to entrench itself in this process, Congress enacted section 33 of the Act which provides in part:

[N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

In referring to the proviso in section 33 that all arms control agreements be submitted to one or both houses of Congress for approval, the House Conference Report to the Arms Control Act notes that the proviso "does not interfere in any way with the President's authority to control the size of U.S. Armed Forces under existing law." The legislative history of the Arms Control Act noted in at least two places that a congressional imprimatur is necessary before the President may commit the United States to any formal arms control regime. In connection with any arms control verification regime, the Report of the House Foreign Affairs Committee to the Arms Control Act notes:

The definition of disarmament contained in the bill includes both limited measures, frequently referred to as arms control measures, and more comprehensive arms reductions. In either case, the action would be taken under an international agreement. . . . The committee believes that arms reduction agreements must provide for adequate verification so that each party may know that all other parties are living up to the agreement. . . . [T]here is no authority to commit the United States to any such control system unless the action is taken pursuant to an international agreement which was ratified by the Senate or otherwise authorized or approved by Congress, although as is now the case, preparations for carrying out such an agreement could be made before it was ratified, authorized, or approved.

57 Id. at 2925.
59 Id. In this connection, the two verification agreements signed at Jackson Hole,
When the Arms Control and Disarmament Act was amended in 1963, the Senate introduced an amendment to section 33 which would limit the required congressional approval of the reduction of U.S. armed forces or armaments to "the constitutional processes of the United States."\(^{60}\) This proposal—echoing language found in the Connally Resolution passed by the Senate in 1943\(^{61}\)—was not adopted, leaving the original language of section 33 unamended.\(^{62}\) The report of the House Committee on Foreign Affairs explained that "[i]t is the purpose of the language now in the law, which is retained by the committee amendment, that any action obligating the United States to disarm, reduce, or limit our Armed Forces or armaments, shall have congressional approval either in the form of a treaty ratified by the Senate or, in the case of an obligation other than a treaty, by a majority vote of the House and Senate."\(^{63}\)

The plain language and legislative history of section 33 strongly suggest that Congress intended that either one or both Houses approve any arms control agreement concluded by the executive branch. Section 33 seems to contemplate arms control agreements that are concluded either as article II treaties or as congressional-

Wyoming, on September 23, 1989, by Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze raise an interesting question of compliance with this congressional directive since neither one was approved by Congress. (For the text of these agreements, see 19 ARMS CONTROL TODAY, No. 8, Oct. 1989, at 23-25.) One of those agreements is a memorandum of understanding concerning verification and data exchange on chemical weapons, under the terms of which the Soviet Union and the United States agreed to a two-phase data exchange and on-site verification of their respective chemical weapons capabilities. The second agreement reached at Jackson Hole dealt with principles of implementing trial verification procedures pending the conclusion of a treaty on the reduction and limitation of strategic offensive arms and ultimately to be included in such treaty. Both agreements entered into force upon signature.

The House Foreign Affairs Committee also stated that the same congressional approval process was required in connection with agreements designed to strengthen international organizations:

[Steps to strengthen international organizations would not come within the definition unless taken pursuant to an international disarmament agreement, which would have to be ratified by the Senate or otherwise authorized or approved by the Congress. The definition [of disarmament] . . . would not permit steps to strengthen international organizations for the maintenance of peace pursuant to agreement without authorization or approval of that agreement in some manner by the Congress.


The Senate expressed similar sentiments nearly 40 years earlier when it passed the Connally Resolution, which provided that any treaty designed to produce international cooperation receive approval of two-thirds of the Senate. S. Res. No. 192, 89 Cong. Rec. 9329 (Nov. 5, 1943).


executive agreements. Section 33 apparently does not allow for the possibility of any arms control agreement being reached that is a sole executive agreement. The clearest statement of congressional intent as to the meaning of section 33 is found in the subsequent legislative history of the 88th Congress, not in the legislative history of the 87th Congress, which originally enacted section 33. However, the Supreme Court has warned against using the views of a later Congress to definitively establish the meaning of an earlier enactment. The Court has stated that such views may nevertheless be persuasive, if not definitive, but "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."

At one time it might have been questionable whether the literal language of section 33 providing that any arms control agreement be concluded "pursuant to the treaty making power of the President under the Constitution" contemplated sole executive agreements as well as article II treaties. The Supreme Court has on at least one occasion construed the term "treaty," as contained within an act of Congress, to include executive agreements as well as article II treaties. Nevertheless, despite the legal arguments on statutory construction that could be made to broaden the scope of section 33's proviso to include sole executive agreements, in Weinberger v. Rossi, the Court stated in dictum that the reference in section 33 to "the treaty making power of the President under the Constitution" explicitly refers to article II treaties.

If the Supreme Court's interpretation of section 33 is correct, the question is presented whether section 33's restriction on the methods of concluding arms control agreements, with its exclusion of sole executive agreements as one of the approved methods, is constitutional.

IV. The Constitutionality of Section 33 of the Arms Control Act

Addressing whether section 33 of the Arms Control and Dis-
armament Act is constitutional, the Restatement hedges: "It is arguable that the Act does not purport to bar commitments which the President may have power to make under his own Constitutional authority." The Restatement does not state that the Act could not bar such commitments, nor does the Restatement state that to the extent that the Act does it is unconstitutional. Arguably, the Restatement could not make this further conclusion because Congress unquestionably has a constitutional role to play in any agreements touching the core of the U.S. armed forces. Congress clearly believes this is true with respect to nuclear arms control. While Congress historically may have played no role in most treaty negotiation processes, the joint resolution of Congress on September 30, 1972, approving the SALT I accord, directed the Executive branch in its future strategic weapons negotiations with the Soviet Union to seek equivalency in strategic nuclear force deployments, to prevent the Soviet Union from developing a first-strike capability, and to provide for treaty withdrawal if doing so was in the supreme national interests of the United States. These congressional policies guided and influenced the SALT II negotiation process. In 1976 the Senate passed a resolution reiterating that the only acceptable SALT II treaty would be one based on U.S.-Soviet strategic force equivalence. In 1977 Congress involved itself in the strategic nuclear arms negotiation process in an unprecedented fashion by sending its own delegation to Geneva to participate in the SALT II negotiations.

A partial review of activities within both the House and the

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73 Restatement, supra note 11, § 303 Reporters' Note 8.
74 Id.
75 U.S. Const. art. I, § 8, cls. 11-16.
77 Id.
78 T. Wolfe, supra note 9, at 45.
80 See T. Wolfe, supra note 9, at 46-47.
Senate\(^2\) during just the last term of the Reagan administration reflects their active interest in U.S. military and disarmament policy. On the legislative front, in 1985 and 1988 Congress added special reporting requirements to the Arms Control and Disarmament Act\(^3\) that directed the President to submit three annual reports to Congress addressing the following issues: (1) adherence of the United


States and other nations to obligations undertaken in arms control agreements;\textsuperscript{84} (2) compliance of the Soviet Union with its arms control commitments;\textsuperscript{85} and (3) U.S. arms control strategy.\textsuperscript{86} In addressing this last issue, the President is to include: (a) a description of the nature and sequence of the future arms control efforts of the United States; (b) a net assessment of the current effects of arms control agreements on the military balance with the Soviet Union; (c) a net assessment of the effect that proposed arms control agreements with the Soviet Union would likely have on U.S. force plans; (d) an assessment of the effect that proposed treaty subceilings and asymmetries would have on the military balance; and (e) a statement of the strategy the United States will use to verify noncompliance with proposed arms control treaties with the Soviet Union.\textsuperscript{87}

The 1988 National Defense Authorization Act\textsuperscript{88} contains several senses of Congress relating to arms control and national security issues. Among them are the following: a sense of Congress that any START treaty should not include any provision resulting in a large asymmetric reduction in any leg of the triad;\textsuperscript{89} a sense of Congress that the Congress, in exercising its constitutional authority to raise and support the Armed Forces, has a role to play in arms control and defense policy, but the Congress should not interfere with the constitutional authority of the President to negotiate and implement treaties;\textsuperscript{90} and a sense of Congress that the President should propose an early date to conduct the overdue five-year review of the ABM Treaty.\textsuperscript{91} In the House Conference Report to the 1988 Defense Authorization Act\textsuperscript{92} the conferees expressed their views on limiting the deployment of certain strategic weapons:

The conferees believe that maintaining interim restraint in strategic offensive force levels is not only prudent in light of current budget realities, but also consistent with the recent progress in the START negotiations and the continuing Soviet practice of retiring older ICBMs and SLBMs prior to the end of their normal service life. Assuming that progress continues to be made in START and that the Soviet Union continues early retirements of ICBMs and SLBMs, it would be the intent of the conferees to take such actions as may be required to maintain U.S. and Soviet interim restraint, including the option of foregoing the overhaul of additional Poseidon-class submarines nearing the end of their normal service life.\textsuperscript{93}

\textsuperscript{84} 22 U.S.C. § 2592.
\textsuperscript{85} Id. § 2592a.
\textsuperscript{86} Id. § 2592b.
\textsuperscript{87} Id. § 2592b(a).
\textsuperscript{89} Id. § 902.
\textsuperscript{90} Id. § 903.
\textsuperscript{91} Id. § 904.
\textsuperscript{93} Id.
Against this legislative backdrop, if the President has the inherent power as Commander-in-Chief to conclude an arms control agreement through a sole executive agreement, it must be seriously questioned whether he can still do so in the face of an act of Congress requiring congressional approval of all arms control agreements, coupled with thirty years of active congressional involvement in the negotiation process and oversight of the compliance record as reflected in the previously mentioned reports, resolutions, and enactments. It is fundamental that presidential agreements cannot supersede an act of Congress, since the President has no constitutional power to repeal federal law. Nevertheless, the fundamental inquiry is whether arms control is an area reserved exclusively to the President in which he may conclude an international agreement that is beyond the reach of any congressional regulation ex ante. Justice Robert Jackson in the Steel Seizure Case\textsuperscript{94} proposed that:

[w]hen 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 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.\textsuperscript{95}

Even though section 33 is purely a procedural limitation on the President's power, arguably it limits his authority in an area over which the Congress exercises concurrent power, given the congressional power to declare war and to raise and support an army.\textsuperscript{96} But any limitation on presidential authority premised on the Steel Seizure Case must be tempered by the realization that that opinion dealt with an essentially domestic matter couched in terms of an international crisis, the Korean War.\textsuperscript{97} Does Congress have the constitutional authority to define both its and the President's powers to direct the armed forces?

The restrictive view holds that, where constitutional powers are concurrent, "Congress may occupy the field by prior legislation,"\textsuperscript{98} but section 303, comment i, of the Restatement states that the question remains an open one:

Congress has not enacted restrictions on sole executive agreements

\textsuperscript{94} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In that case, American steel mills and their employees were unable to reach a collective bargaining agreement. \textit{Id.} at 582. After government efforts at mediation failed, the employees' union gave notice of its intention to strike. \textit{Id.} at 583. Due to U.S. involvement in the Korean War and the importance of steel to the American war effort, President Truman issued an executive order directing the Secretary of Commerce to take possession of these steel mills in order to keep them operating. \textit{Id.} The Supreme Court held that this seizure was unconstitutional. \textit{Id.} at 589.

\textsuperscript{95} \textit{Id.} at 637-38 (concurring opinion).

\textsuperscript{96} U.S. CONST. art. I, § 8, cls. 11-12.

\textsuperscript{97} See supra note 94.

\textsuperscript{98} Mathews, supra note 23, at 381.
generally, but some statutory restrictions on Presidential authority would forbid some sole executive agreements. For example, the War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548, prohibits the President from making agreements that commit the United States to introduce armed forces into hostilities or into situations where involvement in hostilities is likely, or to increase or redeploy United States combat forces abroad. See also the Arms Control and Disarmament Act .... The validity of such restrictions on Presidential powers, and of attempts to control and limit executive agreements generally, has not been authoritatively determined and may differ according to the character of the restriction and the circumstances of its application.99

Several alternatives exist by which Congress could control the President’s exercise of his power to conclude arms control agreements. If the President were tempted to conclude an arms control agreement through the sole executive agreement, the question then is what, if anything, Congress could do about it.

The article II, section 2 check of the Senate is not the only congressional rein on the Executive in the foreign affairs field. Among the many constitutional checks Congress retains is the seldom invoked, yet formidable, impeachment and removal power. Article II, section 4 provides: “The President ... shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” Whether the phrase “other high crimes and misdemeanors” includes acts other than indictable criminal offenses, such as maladministration, remains an open question. In its analysis and interpretation of the Constitution, the Congressional Research Service of the Library of Congress states that “a respectable case can be made for either view. Practice over the years, however, insofar as the Senate deems itself bound by the actions of previous Senates, would appear to limit the grounds of conviction to indictable criminal offenses for all officers with the possible exception of judges.”100 During the impeachment proceedings against President Andrew Johnson, who was impeached on the ground that he had violated the “Tenure of Office” Act, both views were espoused.101 Representative Butler contended that an impeachable high crime or misdemeanor includes an act that is highly prejudicial to the public interest but is not necessarily an indictable criminal offense in and of itself,102 while former Justice Benjamin Curtis argued that only grave offenses made criminal by statute at the time the acts were committed are included.103 Of course, the idea that the President can be impeached and removed from office for maladministra-

99 Restatement, supra note 11, § 303 comment i.
100 S. Doc. No. 16, supra note 15, at 606.
102 Id. at 607.
103 Id.
tion short of commission of an indictable offense suggests a parliamentary form of responsible government in which the Prime Minister resigns upon a vote of no confidence within the Parliament. Given the unsettled nature of the question, only a very bold or very rash President would flirt with the possibility of inviting impeachment proceedings against him for concluding a sole executive arms control agreement despite a clear congressional expression to the contrary based upon one of the generally recognized powers of Congress.

A second constitutional check on the power of the President to conclude sole executive international agreements is congressional control over appropriations and any associated legislation that may be necessary to implement the agreement. The power of the purse may be used to curtail the President’s exercise of his power as Commander-in-Chief. If the President reaches an arms control accord which requires the expenditure of funds for its execution, Congress can frustrate that agreement by refusing to appropriate the necessary funds. (That fact, of course, has no direct bearing on the legality of such agreements, but only on the soundness of concluding them without also seeking congressional approval).

Third, Congress could abolish or limit the size of the army and navy, if it so desired, by refusing or failing to appropriate funds for their maintenance. By the same token, as Commander-in-Chief, the President arguably has the power to commit the armed forces of the United States and to terminate a defense treaty without prior congressional approval, a power that could certainly implicate the

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105 It is practically inconceivable that the Supreme Court would invalidate such an agreement, since the Court generally considers conflicts between Congress and the President over the foreign affairs power a non-justiciable political question. See Baker v. Carr, 369 U.S. 186, 211 & n.31 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1809); C. Rossiter & R. Longaker, The Supreme Court and the Commander in Chief 145 (1976). This especially holds true in areas drawing upon military judgment. See id. at 145 n.14. See generally Charney, Judicial Deference in Foreign Relations, 83 Am. J. Int’l L. 805 (1989); Glennon, Foreign Affairs and the Political Question Doctrine, 83 Am. J. Int’l L. 814 (1989). But see Franck, Rethinking War Powers: By Law or By “Thaumaturgic Invocation”? , 83 Am. J. Int’l L. 766, 773-75 (1989). Professor Franck suggests that presidential use of military power should be checked by the federal judiciary and that Congress should assist. Id. at 773. “To this end,” Professor Franck writes, “the legislation [restricting the President’s use of U.S. armed forces], in addition to spelling out clear, applicable standards, should specifically authorize the courts to umpire, and create the procedural requirements for a ‘case or controversy’ between Congress and President.” Id. at 774.

106 See Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), aff’d, 165 U.S. 553 (1897) (“Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have military force Congress cannot take away from the President the supreme command.”).

107 Id.

108 See Goldwater v. Carter, 444 U.S. 996 (1979) (an order vacating and remanding the Court’s grant of certiorari).
deployment of U.S. armed forces. Thus, Congress may limit the military resources at the disposal of the President, and may refuse to pass implementing legislation to carry into effect an executive agreement.

However, to conclude from these powers that Congress may tie the hands of the President in advance from concluding arms reduction agreements arguably strips the President of his power to conduct foreign affairs in the most sensitive of all areas, the national security of the United States. Congress does not have the power to reverse a construction of the Constitution by legislation and thereby in effect amend it.\(^{109}\) If section 33 falls into this category, then it clearly is unconstitutional. On the other hand, the President cannot bind Congress in an area of concurrent power, and once Congress has legislated, the President is oath bound to "faithfully execute" that law.\(^{110}\) How can this paradox be resolved? One commentator has suggested that in times of crisis, the President should enjoy a reciprocal power in those areas where power is shared with Congress.\(^{111}\) The exigencies created by nuclear arsenals with their swift and deadly delivery systems demand that the President, as Commander-in-Chief, spokesperson for the United States in foreign affairs, and executor of the laws of the United States, be able to undertake prompt action in the interests of national survival without being unnecessarily shackled by Congress in that effort. Indeed, in a more broad sense, Wallace McClure has argued that "the two-thirds rule governing the Senate’s approval of treaties is not only undemocratic but also, because of its capacity to produce stalemate in time of crisis, a peril to the national welfare."\(^{112}\) The danger is not the risk of having something improper done by the President, but rather it is the risk of preventing him from accomplishing something critical to national security. The failure of the Bricker Amendment in the early 1950s, which would have restricted the power of the President to conclude executive agreements, is some evidence that many within Congress recognized the need for flexibility within the presidency for conducting foreign affairs. The difficulty with this approach is its potential for inviting arbitrary exercise of unfettered power by the President during a pretextual "national emergency." Moreover, the President could have vetoed section 33, which purportedly ties his hands. It is questionable whether a sitting President’s failure or refusal to veto this legislation should inure to the eternal detriment of his successors.

This question would be more intriguing had Congress been

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\(^{109}\) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\(^{110}\) U.S. CONST. art. II, § 3.

\(^{111}\) Goldwater, 444 U.S. at 999 (Powell, J., concurring).

\(^{112}\) W. McClure, supra note 23, at 32.
merely a spectator in the arms control field over the past three decades, effectively abandoning it to the President. The plain fact, however, is that it has not. To the contrary, over the past fifteen years Congress has practically micromanaged U.S. arms control policy and strategy.\footnote{113 See supra notes 81-82.} It has not given the President broad, unfettered grants of discretionary power to act in this field.\footnote{114 See, e.g., 22 U.S.C. §§ 2592-2592b (1988).} It has not acquiesced in any practice of concluding arms control agreements through the sole executive agreement device.\footnote{115 Compare Dames & Moore v. Regan, 453 U.S. 654 (1981).} In short, given the unbroken congressional practice of steering U.S. arms control policy—a practice known by the President and never seriously challenged by him—this past practice should be treated as a gloss on the powers vested in Congress to declare war and to raise and support an army.\footnote{116 Compare id. at 686 (The President had authority to suspend outstanding claims against Iran because "a systematic unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power.' " (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952))). But see Raven-Hansen, Nuclear War Powers, 83 AM. J. INT’L L. 786 (1989), where the author concludes that "Congress has been on notice of presidential claims to nuclear war powers, and of our first-use policy in particular, for so long and with so many opportunities to disapprove during at least the annual defense appropriations cycle, that it must be deemed to have acquiesced by now." Id. at 791 (footnotes omitted).}

If Congress can constitutionally require submission of all arms control agreements to it for its approval, those agreements could be either presented to the Senate for its advice and consent (thus seeking treatment as an article II, section 2 treaty), or they could be presented to the full Congress, thereby becoming congressional-executive agreements. Section 33 of the Arms Control and Disarmament Act gives the President this option.\footnote{117 Arms Control and Disarmament Act, Pub. L. No. 87-297, 75 Stat. 631, § 33 (1961) (codified at 22 U.S.C. § 2551 (1988)).} The option he should choose is addressed in the next part of this Article.

V. Submission of Arms Control Agreements for Full Congressional Approval

Of the four methods for concluding international agreements, the congressional-executive agreement is currently preferred for at least two reasons.\footnote{118 See Treaties and Other International Agreements: The Role of the United States Senate, S. REP. No. 205, 98th Cong., 2d Sess. 38 (1984).} First, from the President’s standpoint, it avoids the one-third-plus-one veto of the Senate.\footnote{119 For a discussion of the fate of the SALT II Treaty in the Senate, see S. TALBOTT, ENDGAME: THE INSIDE STORY OF SALT II 285-86 (1979).} From the standpoint of the House of Representatives, the congressional-executive agreement puts the House into the decision-loop of international agree-

\begin{itemize}
\item \footnote{113 See supra notes 81-82.}
\item \footnote{114 See, e.g., 22 U.S.C. §§ 2592-2592b (1988).}
\item \footnote{115 Compare Dames & Moore v. Regan, 453 U.S. 654 (1981).}
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\item \footnote{118 See Treaties and Other International Agreements: The Role of the United States Senate, S. REP. No. 205, 98th Cong., 2d Sess. 38 (1984).}
\item \footnote{119 For a discussion of the fate of the SALT II Treaty in the Senate, see S. TALBOTT, ENDGAME: THE INSIDE STORY OF SALT II 285-86 (1979).}
The slow, albeit deliberate, treaty-making process should be rejected as the method of choice for concluding arms control agreements. The need to quickly conclude arms control agreements compels resort to more expeditious approval methods. Moreover, even if the Senate does not give its advice and consent, an arms control agreement may nevertheless be observed by the executive branch as if it had formal treaty status.

The SALT experience is instructive on two counts. First, although the Senate never gave its consent to ratification of the SALT II treaty, both the Carter and Reagan administrations conducted themselves as though it were a binding obligation of the United States. The same is true of the SALT I treaty that expired in 1977. The unratified SALT II treaty was a de facto, if not de jure, sole executive agreement, adhered to in most material respects even by the Reagan administration. Second, the SALT II experience sadly demonstrates how a one-third minority in the Senate can thwart an arms control agreement widely viewed as being in the best interests of the United States. Even Ronald Reagan, who when campaigning for his first term labeled SALT II as being “fatally flawed,” adhered to its provisions during his first term as President and only exceeded SALT II limits marginally thereafter in November 1986 (a decision of symbolic rather than strategic importance).

If policy considerations, rather than a literal reading of the text of the Constitution, provide the answer to the question of whether an international agreement may be concluded through some method other than the article II treaty process, these events shed some light on this question. Although the SALT II debacle with the Senate may have been episodic, the lesson to Presidents is clear: avoid the Senate’s article II, section 2 one-third-plus-one veto. Fortunately, section 33 of the Arms Control and Disarmament Act gives the President the option of presenting arms control agreements to the full Congress for approval. As the foregoing has shown, the House of Representatives has had a very sharp interest in the arms control process; it has been far from a passive observer. In addition, enlisting the House in the approval process, which would simultaneously eliminate the one-third Senate treaty veto, would make the entire arms control process more democratic.

120 L. Henkin, supra note 18, at 175-76.
121 See L. Margolis, Executive Agreements and Presidential Power in Foreign Policy 96 (1986).
122 See McDougal & Lans, supra note 28, at 321.
123 See Keeny, Congress—The Last Best Hope for SALT II, 16 Arms Control Today, No. 9, Dec. 1986 at 1; Bumpers, Chafee & Leahy, supra note 10, at 3-6.
125 See Arms Control Ass’n, Arms Control and National Security 57 (1989).
126 See supra note 81.
Nevertheless, in order to avoid a repeat of the SALT II fiasco in the future, a close partnership must be developed between the Hill and the White House. One way of building that kind of close, working relationship is to use the “fast-track” congressional approval process that has been used successfully for the past fifteen years in the negotiation, conclusion, and approval of bilateral and multilateral trade agreements between the United States and its foreign trading partners.

VI. The “Fast-Track” Trade Agreement Approval Process

During the past sixty years, beginning with the disastrous Smoot-Hawley Tariff Act of 1930, Congress and the President have wrestled over which branch would assume primary responsibility for the management of U.S. international trade policy and negotiations. This inter-branch rivalry peaked in 1965 with the conclusion of the U.S.-Canada Automotive Products Agreement—the product of secret negotiations conducted by the executive branch and presented to Congress for its approval after the conclusion of the negotiations. Unchastened by the congressional outrage that followed the Auto Pact negotiations, U.S. trade negotiators during the Kennedy Round of multilateral trade negotiations used the President’s sole executive agreement authority to conclude the Antidumping Code without prior congressional approval.

In an attempt to reestablish its constitutional prerogatives in the international trade field, Congress refused for the next eight years to delegate negotiating authority to the President, thereby disabling his attempts to enter into meaningful trade negotiations. Absent genuine assurances from the President that Congress would enact implementing legislation following the conclusion of such trade agreements, the President’s credibility in negotiations with trading partners was severely undercut.

With the advent of the Tokyo Round of multilateral trade negotiations in 1974, Congress realized that the United States had to send to the bargaining table in Geneva negotiators who would be perceived as having genuine bargaining authority for the United States.

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130 Koh, supra note 128, at 203.
131 See id. at 203 n.34.
132 Id. at 204.
133 Id.
134 Id. at 204 & n.39.
Consequently, Congress recanted in part by enacting the Trade Act of 1974 under which Congress gave the President an initial five-year authorization (extended through 1993 and expanded under the Omnibus Trade and Competitiveness Act of 1988) to conclude trade agreements to harmonize, reduce, or eliminate nontariff barriers and distortions to international trade in goods. This authorization was expanded to cover trade in services and direct foreign investment under the 1988 Omnibus Trade Act. Congress thus delegated to the President broad authority to negotiate nontariff barrier trade agreements, but this authority was subject to strict notification and consultation requirements in advance of entering into such agreements. The inducement for complying with these requirements was the creation of an innovative and expedited “fast-track” congressional approval process of all such trade agreements; there would be no bottling up in committee, no amend-

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139 See Koh, supra note 128, at 205.

Section 102 of the [1974] Trade Act is unique in the history of congressional delegations of trade negotiating authority to the President to negotiate trade agreements with foreign countries providing for the harmonization, reduction, and elimination of nontariff barriers and other distortions of international trade, subject to procedures for the approval and implementation of such agreements by the Congress.

The special procedures for consideration of legislation necessary or appropriate to approve and implement trade agreements on nontariff barriers to trade negotiated by the President under the authority of section 102 of the [1974] Trade Act include:

(1) Congressional monitoring and advice during the course of the negotiations (section 161 of the Trade Act);

(2) consultations with the Committee on Finance and with other committees of the Senate which have jurisdiction over legislation involving matters which would be affected by the trade agreements being negotiated, including all matters related to the implementation of trade agreements such as the desirability and feasibility of the proposed implementations (section 102 of the Trade Act);

(3) a 90-calendar-day prior notice to the Congress before the agreements are entered into by the President (section 102 of the Trade Act); and

(4) submission of the agreements to the Congress with a draft of an implementing bill and a statement of any administrative action proposed to implement such agreements, an explanation of how the draft bill and proposed administrative action change or affect existing law, and a statement explaining how the agreements benefit U.S. commerce and why the bill and the administrative action is required or appropriate to carry out the agreements (section 102 of the Trade Act).

Special legislative procedures are established under sections 151 and
ments to the agreements, and no filibusters. This experiment in congressional-executive cooperation proved to be a great success, with Congress approving in thirty-four legislative days all nine multilateral agreements negotiated by the President during the Tokyo Round. In the words of the Senate Finance Committee in its report on the Trade Agreements Act of 1979:

The Trade Act [fast-track] procedures are a unique Constitutional experiment. They provide a structure for cooperation between the legislative and executive branches of the Government during a complex international negotiation. The Congress adopted the Trade Act procedures as a means to avoid conflicts between the Congress and the President such as the dispute [over the Antidumping Code] which occurred after the Kennedy Round. The Committee believes the Trade Act experiment in coordination is a success. It expects this coordination to continue.

Although this constitutional experiment was a success as measured by the number of agreements approved by Congress under the fast-track procedure, it came at a considerable price to the executive branch by substantially curtailing the President’s discretionary negotiating authority. For example, Congress gave the President specific negotiation objectives and imposed prior consultation requirements with both congressional and private sector advisory committees. Section 161(b)(1) of the 1974 Trade Act required that five members of the House and five members of the Senate be accredited

152 of the Trade Act of 1974 for consideration of the implementing package submitted under section 102. These procedures are set forth as part of the Rules of the Senate:

(1) Implementing bills pertaining to all trade agreements submitted under section 102 must contain a provision approving the statement of proposed administrative action, and provisions appealing or amending existing law or providing new statutory authority that are necessary or appropriate to implement the agreements;

(2) Implementing bills must be introduced (by request) by the Majority Leader and Minority Leader, or their designees, and referred to the appropriate committee or committees;

(3) Implementing bills will be automatically discharged from committees after 45 working days, if not reported prior to that time, and a vote of final passage must be taken on or before the 15th working day after such discharge or after the bill is reported by the committee:

(4) A motion to proceed to consideration of an implementing bill is highly privilege and not debatable; no motion to recommit the bill or to reconsider the vote by which the bill is agreed or disagreed to is in order; and

(5) Debate must be limited to 20 hours, equally divided between those favoring and those opposing the bill, and a motion to further limit debate is not debatable.


142 Id. § 2191(f)(1), (g)(1).
143 Id. § 2191(f)(2), (g)(2).
144 See Koh, supra note 128, at 205 & n.43.
147 Id. §§ 2211(b)(1), 2155 (1988).
as official advisors to the U.S. negotiating delegations. These congressional control mechanisms were reenacted in the Trade Agreements Act of 1979 and tightened in the Trade and Tariff Act of 1984.

In the Trade and Tariff Act of 1984, Congress again considered the question of how best to forge a congressional-executive partnership that would give the President sufficient latitude to negotiate trade agreements, but would also repose in Congress adequate supervision of that process. Against the backdrop of the then recently concluded free trade agreement with Israel, Congress enacted title IV of the 1984 Trade and Tariff Act, which modified the fast-track procedure by adding a sixty-day notification requirement of intent to enter into free trade negotiations with any country other than Israel. Under this new provision, if the President failed to give the House Ways and Means Committee and the Senate Finance Committee at least sixty days notice of his intent to enter into bilateral free trade negotiations, any free trade agreement subsequently reached would not receive congressional consideration under the fast-track approval process. As observed by Professor Harold Koh, this new consultation provision strengthened Congress's hand in mold-

First, the sixty-day prenotice committee consultation period secured the involvement of the two committees months before negotiations began, and allowed them to extract concessions from the President as a condition of letting negotiations proceed. Second, the Administration's awareness that any negotiated agreement must ultimately return to those same committees for subsequent approval promoted continuing consultation as the agreement evolved. Third, either

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148 19 U.S.C. § 2211(a)(1) (1988). As reported by the Senate Finance Committee in this connection:

From the beginning of the substantive negotiations in the [Tokyo Round] ..., committee members and staff made periodic trips to Geneva and to various capitals [sic] to monitor the negotiations. ... Senators and staff attended multilateral and bilateral negotiating sessions, met with officials of the GATT, and consulted with the head of the United States delegation and key members of his staff.

S. REP. No. 249, 96th Cong., 1st Sess. 6 (1979).


154 19 U.S.C. § 2112(b)(4)(A)(ii). As noted by Professor Koh, nothing in the language of the 1984 Act requires the President to engage in the sixty-day committee consultation period before negotiations begin. However, the Reagan Administration chose to construe the provision cautiously, notifying the committees of its intent to negotiate the Canada FTA [Free Trade Agreement] 60 legislative days before the date it intended to initiate formal negotiations.

Koh, supra note 128, at 210 n.61 (emphasis in original).
House retained the option to vote down a fully negotiated agreement after it had been discharged from committee.\textsuperscript{155}

Moreover, if either committee disapproved of such negotiations, any agreement package subsequently submitted to Congress for its approval would not receive expedited consideration.\textsuperscript{156} The U.S.-Canada free trade negotiations, for example, barely escaped a disapproval vote by the Senate Finance Committee, which divided evenly on the motion to disapprove.\textsuperscript{157}

Congress continues to micromanage the international trade agenda by identifying the principal U.S. trade-negotiating objectives which the executive branch is to pursue. For example, in the Omnibus Trade and Competitiveness Act of 1988,\textsuperscript{158} Congress identified no less than sixteen negotiating objectives—\textsuperscript{159} including dispute settlement,\textsuperscript{160} trade and monetary coordination,\textsuperscript{161} agriculture,\textsuperscript{162} trade in services,\textsuperscript{163} intellectual property,\textsuperscript{164} direct foreign investment,\textsuperscript{165} worker rights,\textsuperscript{166} and access to high technology—\textsuperscript{167} and conditioned approval of any trade agreement upon its meeting those objectives.\textsuperscript{168}

Under this current fast-track approval procedure,\textsuperscript{169} the President is required to give sixty-day advance notice of negotiations and thereafter consult with the House Ways and Means Committee and the Senate Finance Committee before entering into any trade agreement.\textsuperscript{170} The trade agreement will enter into force upon compliance with the following procedure. First, at least ninety days before entering into such a trade agreement, the President must notify both houses of Congress of his intention to enter into such an agreement.\textsuperscript{171} Second, after entering into the trade agreement, the President must transmit a copy of the agreement together with a draft

\footnotesize{\textsuperscript{155} Id.  \\
\textsuperscript{156} Id.  \\
\textsuperscript{157} See id. at 211.  \\
\textsuperscript{159} 19 U.S.C. § 2901(b) (1988).  \\
\textsuperscript{160} Id. § 2901(b)(1).  \\
\textsuperscript{161} Id. § 2901(b)(6).  \\
\textsuperscript{162} Id. § 2901(b)(7).  \\
\textsuperscript{163} Id. § 2901(b)(9).  \\
\textsuperscript{164} Id. § 2901(b)(10).  \\
\textsuperscript{165} Id. § 2901(b)(11).  \\
\textsuperscript{166} Id. § 2901(b)(14).  \\
\textsuperscript{167} Id. § 2901(b)(15).  \\
\textsuperscript{168} Id. § 2902(b)(2), (c)(3)(A).  \\
\textsuperscript{169} Id. §§ 2902-2903.  \\
\textsuperscript{170} Id. § 2902(c)(3)(C), (d). If the President fails to consult, or if either Committee votes disapproval of the negotiations, then any subsequent trade agreement and implementing bill submitted to Congress will not receive fast-track consideration. Id. § 2903(c)(2). Such a disapproval resolution is as a practical matter the death knell of any trade negotiation.  \\
\textsuperscript{171} Id. § 2112(e)(1).}
implementing bill, a statement of administrative action, and a statement of reasons why the agreement serves the best interests of U.S. commerce.\textsuperscript{172} Third, the implementing bill is introduced in both Houses and referred to the appropriate committees.\textsuperscript{173} If those committees do not report the bill out within forty-five legislative days after its introduction, then the committee is automatically discharged from further consideration of the bill.\textsuperscript{174} A vote on final passage must take place within fifteen legislative days after the bill is reported out of the committees.\textsuperscript{175} Floor debate in the House and Senate is limited to twenty hours for each house.\textsuperscript{176} Finally, and most importantly, no amendment may be made to an implementing bill.\textsuperscript{177}

While these procedures break no new ground, one innovation was introduced in the Omnibus Trade Act to serve as a further check on the President. This innovation is a "reverse" fast-track provision\textsuperscript{178} under which Congress may decline to give fast-track consideration to an implementing bill submitted under the fast-track procedure if both Houses pass a procedural disapproval resolution within sixty days after submission of the bill.\textsuperscript{179} The resolving clause of such procedural disapproval resolution must state the following:

That the President has failed or refused to consult with Congress on trade negotiations and trade agreements in accordance with the provisions of the Omnibus Trade and Competitiveness Act of 1988, and, therefore, the provisions of section 151 of the Trade Act of 1974 shall not apply to any implementing bill submitted with respect to any trade agreement entered into under section 1102(b) or (c) of such Act of 1988 . . . .\textsuperscript{180}

This provision may be at odds with the goal of fostering a collaborative and coordinated effort between Congress and the President in the international trade field. It is arguable whether Congress needed to be heavy-handed in order to ensure that the President would understand and share Congress's vision of international trade negotiations as a joint legislative-executive effort. By first setting the negotiating agenda and thereafter requiring the President to consult with two congressional committees before, during, and after the negotiations as conditions precedent to invoking the fast-track approval procedure, Congress undoubtedly had all the leverage it needed. In the fifteen-year history of the use of the fast-track procedure, no evidence exists that Congress was circumvented in trade

\textsuperscript{172} \textit{Id.} § 2903(a)(1)(B).
\textsuperscript{173} \textit{Id.} § 2191(c).
\textsuperscript{174} \textit{Id.} § 2191(e)(1) & (3).
\textsuperscript{175} \textit{Id.} § 2191(e)(1).
\textsuperscript{176} \textit{Id.} § 2191(f)(2) & (g)(2).
\textsuperscript{177} \textit{Id.} § 2191(d).
\textsuperscript{178} \textit{Id.} § 2903(c).
\textsuperscript{180} 19 U.S.C. § 2903(c)(1)(E).
negotiations. No mention is made in the House Conference Report to the 1988 Omnibus Act why this provision was considered necessary.

VII. A Fast-Track Arms Control Procedure—Conclusion

As reflected by the many committee reports and hearings on arms control issues, the arms control reporting requirements added to the Arms Control and Disarmament Act, and more recently the express directives to the President in the 1988 Defense Authorization Act to pursue specific objectives in arms control negotiations with the Soviet Union, it is clear that Congress has taken an active interest in the progress of the arms control process. Nevertheless, even with the renewed interest and more active role Congress has played in the arms control field, the arms control process as a whole has floundered and is at a standstill. Exemplified best by the INF Treaty, progress has been reactive, halting, and is at best of symbolic, rather than strategic, importance. Eugene Rostow blames what he considers to be the inherent limitations of Congress to set a foreign policy agenda, subject as it is to short-term, parochial interests and an inability to act quickly and secretly. Professor Lori Damrosch attributes this state of affairs more to congressional lassitude than institutional inability:

The Framers of the Constitution doubtless contemplated that the President and the Congress would be partners in foreign policy decisions that could lead to war. Two hundred years later, the forms of the partnership have changed, but the concept of congressional involvement has not. The main difference is that Congress has opted to be the silent partner. It has deliberately decided to be involved remotely, partially, through a select few of its members who may offer advice but have few means to change a presidential decision.

The arms control process clearly needs to be rationalized and better coordinated, but the question remains as to which branch of government should assume the lead. In the author’s view, based on the many statutory directions to the President in the arms control field, coupled with extensive committee oversight of arms control negotiations, treaty compliance, and weapon development and deployment, Congress has not abdicated to the President and, to the contrary, has taken a greater leadership role in arms control than the

executive branch in the last decade. To increase the pace and efficiency of the arms control process, Congress should use the fast-track trade agreement approval process as its blueprint. The following steps should be taken.

First, building on what it has already done in the reporting requirements of the Arms Control and Disarmament Act\footnote{Pub. L. No. 87-297, 75 Stat. 631 (1961) (codified at 22 U.S.C. §§ 2576-2579 (1988)).} and in the 1988 Defense Authorization Act,\footnote{National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987).} Congress should set a clear arms control agenda identifying specific objectives the President should pursue in negotiations, such as the range of force levels within each leg of the triad, weapons systems to be limited or banned, and verification regimes. Congress would give the President an initial authorization period for conducting fast-track negotiations. Three years would be an ideal authorization period for several reasons. The fourth year of a first-term President’s office is full of re-election distractions. If fast-track negotiations are put on hold until after the election, momentum will be lost. If the incumbent is not re-elected, the negotiations may have been a complete waste of time. If the incumbent is a lame duck, the Soviets may stall the procedures in the hopes of getting a “better deal” from the new administration. By setting the fast-track authorization period for three years, both the U.S. and Soviet negotiators will know that there is little advantage in stalling, and that stalling will only cause the benefits of fast-track congressional approval to be lost.

Second, the President would indicate his intent to commence negotiations, would agree to follow Congress’s agenda in arms control negotiations with the Soviet Union, and would agree to consult with relevant committees during the negotiations, in exchange for which any agreement reached would receive fast-track consideration from Congress, following the same timetable used in the fast-track trade agreement legislation. The question here is which committees should the President be required to notify and consult. Several candidate committees in both Houses immediately suggest themselves as having the appropriate jurisdiction: in the House—the Armed Services Committee, the Foreign Affairs Committee, and the Intelligence Committee; in the Senate—the Armed Services Committee, the Foreign Relations Committee, and the Intelligence Committee. The same question arose, of course, when Congress created the fast-track process for international trade agreements. Although Congress finally settled on the House Ways and Means Committee and the Senate Finance Committee as the two committees that would initially disapprove any fast-track trade negotiations and with which the
President would regularly consult during the course of the negotiations, in the author's view other committees arguably had an equally legitimate jurisdictional claim, such as the House Banking, Finance and Urban Affairs Committee, the House Foreign Affairs Committee, and the Senate Foreign Relations Committee. If Congress was able to agree to just two committees—one from each house—in the international trade field, the same should be true in the arms control field.

Finally, once negotiations are concluded and an agreement reached, it would be presented to Congress, together with any necessary implementing legislation, for its approval or rejection without amendment under time restrictions comparable to those contained in the fast-track trade legislation. The "no amendment" feature of the fast-track approval procedure is a critical element of the entire fast-track approval package. It would enhance the credibility of U.S. negotiators in the eyes of their Soviet counterparts, and it would act as an incentive on both sides of the bargaining table to rapidly conclude major arms control agreements within the fast-track authorization period.

Congress should build on the momentum created over the past fifteen years and seize the initiative by forging a congressional-executive partnership in arms control. A precedent has been set in the international trade field that serves as a model for creating this partnership. It should be given serious consideration.

188 See supra note 140.