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MISSILE LIMITATION: BY TREATY OR OTHERWISE?

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INTRODUCTION

With the opening of the Strategic Arms Limitation Talks (SALT), a fleeting opportunity to halt the "mad momentum" of the missile race is finally at hand. For over a decade arms control negotiators have been trying to find a way to end this competition.[1] During the first several years of discussions, missile proposals were part of comprehensive package plans requiring agreement on a broad range of other weapons before the stockpiling of missiles could be stopped.[2] Wide differences existed between the Americans and the Soviets over inspection, the rates of reduction of various weapons on each side, and the institutional arrangements for keeping the peace as arms were reduced.[3]

In 1964, American negotiators decided to separate strategic nuclear delivery vehicles from the other weapons of the package plans in hopes that a simplified goal could produce agreement more easily.[4] Their proposal was for a "freeze" on the numbers and characteristics of the long-range missiles and aircraft held by each side.[5] The verification system was to be less onerous

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1. In 1957, the United States first suggested that nuclear disarmament should be achieved through regulation of the means of delivery, on the ground that, "in contradistinction to the monitoring of nuclear weapons, the monitoring of complete weapon systems . . . is still feasible." France, however, carried the idea forward by proposing to start disarmament by eliminating nuclear delivery vehicles. The Soviets were at first reluctant to deal with missiles at an early stage because they expected to have an advantage. In 1960, however, they adopted the French idea. B. BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 395, 473, 475, 545-46 (1961).

2. *See, e.g.*, The 1960 and 1962 United States plans for general and complete disarmament, U.S. ARMS CONTROL AND DISARMAMENT AGENCY, 1960 DOCUMENTS ON DISARMAMENT 71 [vols. 1960 *et seq.* are hereinafter cited as DOCUMENTS ON DISARMAMENT]; 1962 DOCUMENTS ON DISARMAMENT 354-55.

3. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, SECOND ANNUAL REPORT 9-12 (1963).

4. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, FOURTH ANNUAL REPORT 4-5 (1965).

5. 1964 DOCUMENTS ON DISARMAMENT 8, 20-21.

because it would focus on missile production, the institutional requirements were much reduced, and the arguments over the rate of reduction were to be postponed by negotiating a simple "freeze" agreement in the first instance.[6]

This proposal, and its later modifications, were all rejected by the Soviet Union, probably for two basic reasons. First, the proposal required that inspectors enter the Soviet Union to check on whether its factories were producing missiles. Soviet political leaders found such inspection intolerable. Second, the Soviets had fewer intercontinental missiles than we had, and they did not want to enter negotiations which might reveal that fact to the world or freeze them into a position of inferiority.

By late 1966, an end to these two obstacles was in sight. Intelligence had improved to the point where long-range detection devices could determine with reasonable accuracy the number of fixed intercontinental missiles stationed on the ground.[7] Therefore, if the arms control measure were changed to limit the deployment of these missiles rather than their production, it could be verified without on-site inspection in the Soviet Union. At the same time, the growth of the Soviet stockpile was such that a period of rough American-Soviet parity in numbers of land-based intercontinental ballistic missiles seemed fast approaching.[8] There were, of course, other kinds of nuclear delivery vehicles and other ways of measuring strategic nuclear strength. For example, the United States was thought to have superiority in numbers of deliverable nuclear warheads[9] while the Soviet Union was thought to have superiority in total deliverable nuclear megatonnage.[10] Nonetheless a nuclear exchange between the two would produce about 100 million dead on both sides no matter which attacked first.[11] Because each side had more than enough strength to knock out the other even after suffering a first strike,[12] questions of exact equality were of little relevance. We had become "scorpions in a bottle, able to sting each other only at the price of death."[13]

Private discussions in late 1966 and early 1967 produced an announce-

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6. *Id.*

7. *Hearings on the Strategic and Foreign Policy Implications of ABM Systems Before the Subcomm. on International Organization and Disarmament Affairs of the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. 113 (1969); Stone, *Can the Communists Deceive Us?*, in ABM 199 (A. Chayes & J. Weisner eds. Signet ed. 1969).

8. *Hearings on Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons Before the Senate Comm. on Armed Services*, 91st Cong., 1st Sess. 68 (1969); *Hearings on the Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 174; INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE, 1969-70, 1-2, 5-6, 55 (1969); Brown, *Security Through Limitations*, 47 FOREIGN AFFAIRS 422, 427-28 (1969).

9. *Hearings on the Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 297, table opposite 300.

10. *Id.* at 174, 196.

11. Defense Posture Statement of Secretary of Defense McNamara, The Fiscal Year 1969-73, Defense Program and the 1969 Defense Budget, Jan. 22, 1968, 61-65 (1968).

12. Address by Secretary of State Rogers, N.Y. Times, Nov. 14, 1969, at 1, col. 4.

13. The metaphor was originally J. Robert Oppenheimer's. The quotation, however, is from Bundy, *To Cap the Volcano*, 48 FOREIGN AFFAIRS 1, 10 (1969).

ment in March of 1967 by President Johnson that Chairman Kosygin had confirmed the willingness of the Soviet Union to enter bilateral talks "to discuss means of limiting the arms race in offensive and defense (*sic*) nuclear missiles."[14] It was two and a half years, however, before the talks began. Completion of the Non-Proliferation Treaty, and apparent Soviet caution, delayed the setting of a date for talks until August of 1968. At that point, the planned announcement of date and place was canceled by the United States after Soviet troops invaded Czechoslovakia.[15] Then, reconsideration by the new Nixon Administration and further hesitation by the Soviet Union delayed things still further. Finally, on November 17, 1969, preliminary talks began in Helsinki.[16] These produced agreement to begin substantive SALT negotiations on April 16, 1970 in Vienna.

The missile race continues unabated, however, and with it, developments in technology which threaten to re-erect the two obstacles which stood in the way of realistic negotiations earlier: the need for on-site inspection and the fear of inferiority, perhaps even of vulnerability.

Without on-site inspection, long-range detection devices may soon be unable to verify compliance with "standstill" agreements freezing certain new weapons both sides now plan to deploy. For example, a missile armed with the newly developed "Multiple Independently-Targeted Reentry Vehicles" (MIRV's), looks from a distance like a missile armed with one reentry vehicle. If both countries install MIRV's, each will have difficulty, without on-site inspection, knowing how many deliverable warheads the other has.[17] Whether a missile system is a defensive anti-ballistic missile (ABM) system, and whether, if so, it is effective, are likewise difficult to determine at great distances. Deployment of ABM systems, therefore, further complicates the problem of verification.[18] New intercontinental missiles which can be fired from railroad flatcars or truck trailers (rather than massive concrete and steel launching pads) can be hidden from view in large warehouses. If these are deployed, inspectors may also be needed.[19] Thus, the new weapons are likely to raise the inspection problem all over again.

The development of new weapons may also cause each side to doubt whether it still has sufficient missile strength to deter the other's first strike.[20]

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14. *Hearings on the Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 4.

15. *Id.*

16. N.Y. Times, Nov. 18, 1969, § 1, at 1, col. 1.

17. Foster, *Prospects for Arms Control*, 47 FOREIGN AFFAIRS 413, 415 (1969); Brown, *supra* note 8, at 422, 429; *Hearings on the Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 652. Brown suggests that a ceiling on numbers and sizes of missiles could impose some limits on MIRV's even without on-site inspection. Brown, *supra* note 8, at 429.

18. Brown, *supra* note 8, at 431; *Hearings on the Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 648-649, 660.

19. *See* Foster, *supra* note 17, at 415; *cf.* Brown, *supra* note 8, at 430.

20. Secretary of Defense Laird expressed concern that the Soviet Union through

Neither will have an accurate means of knowing how many warheads the other side has. Just as we might interpret the growing Soviet intercontinental missile strength as aimed at our second-strike capability, they could interpret our desire to increase our reentry vehicles by geometric proportions through MIRV's as a threat to their second-strike capability, and our planned thin ABM as a defense against those few Soviet missiles that might survive our first strike.[21] If either side seriously believes that its second-strike capability might be jeopardized, it may well redouble its efforts to deploy more missiles rather than talking seriously at the negotiating table. If one side suspects that the other is trying to take every advantage of the latest technology in order to freeze the first into a position of inferiority, further delay is probable. If both insist upon negotiating from a position of superiority, the talks are not likely to get far.[22]

Assuming, however, that both sides exercise some restraint, the negotiators will continue to be plagued by the problem of advancing technology. They may find it possible to halt deployment of new missiles, but they can not stop political change or the advancement of science. Almost inevitably, a specific limitation on particular kinds of missiles will have to be revised in the future to prevent evasion by new kinds.[23] Almost inevitably, the negotiating problem will be so complex that a first agreement will be able to deal with only part of it.[24] Almost inevitably, what the parties first agree to live with will be changed over time by such developments as mounting Chinese stockpiles, increasing tension or conflict over the Middle East or other unforeseen crises. Almost inevitably, new information about one side's plans will prompt the other to change its own.

The missile race cannot be ended with one bold stroke of the negotiator's pen on a single comprehensive and lasting treaty. I foresee instead a continuing negotiation, a continuing exchange of information on weapon plans and a continuing series of agreements.[25] This article suggests possible struc-

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deployment of more ICBM's, MIRV's and ABM's, could achieve by the mid 1970's "a sufficient capability, in a surprise attack, to reduce our surviving strategic offensive forces below that critical minimum level required for assured destruction." *Hearings on Intelligence and the ABM Before the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. ix (1969). Senator Fulbright replied by asking whether the Soviets, looking at our new weapons developments, could "assume that we are not intent on being able to pose the same threat to them that the Administration says they could pose to us?" *Id.* at viii. *See* Rathjens, *The Dynamics of the Arms Race*, 220 SCIENTIFIC AMERICAN, April, 1969, at 15, 20-22.

21. *See, e.g.*, York, *Military Technology and National Security*, 221 SCIENTIFIC AMERICAN, Aug., 1969, at 17, 29; *and* Rathjens, *supra* note 20, at 20-22.

22. For excellent analyses of these negotiating problems see Bundy, *supra* note 13, at 8-9, 16-18; Rathjens, *supra* note 20, at 23-25.

23. *Cf.* Brown, *supra* note 8, at 431-32.

24. N.Y. Times, April 22, 1969, at 1, col. 6; *see* Brown, *supra* note 8, at 428-32.

25. In his November 13, 1969 speech to retired Foreign Service Officers, Secretary of State Rogers said that one of the basic objectives of the SALT negotiations was to reduce the risk of nuclear war "through a *dialogue about issues arising from the strategic situation.*" He added:

> Talks need not necessarily call for an explicit agreement at any particular stage. . . . Whether we can slow down, stop or eventually throw the arms race into

tures for such a dialogue, given the division of power over the conduct of foreign policy between the Executive and the Congress.

I. The Problem—To Provide Executive Flexibility With Congressional Participation

Most members of Congress probably assume that any missile agreement will be expressed in the form of a formal treaty to be submitted to the Senate for approval, a treaty which deals with all aspects of the problem and which can only be changed with the consent of the Senate.[26] But, if what I have said already is correct, a number of agreements may be necessary, and they may need frequent revision.[27] To require formal Senate consent to each agreement and to each revision as if each were a separate treaty makes very little sense in view of the Senate's many other responsibilities.

1963, a vintage year for arms control, illustrates the strain which too many important treaties could put upon the Senate's procedures. The Senate gave expedited treatment that year to the Test Ban Treaty, a modest measure in comparison to a limit on the number of deployed American and Soviet strategic missiles. Yet the advice and consent process occupied most of the Senate's time for about two months.[28] Because Senate action was still required on appropriations and other legislation that year, President Kennedy decided that a prohibition on "bombs in orbit" should not be in treaty form.[29] As a consequence, the ban on stationing nuclear weapons in space was not presented as a treaty until 1967.

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reverse remains to be seen. It also remains to be seen whether this be by a formal treaty or treaties, by a series of agreements, by parallel action, or by a convergence of viewpoints resulting from a better understanding of respective positions.

What counts at this point is that a *dialogue is beginning about the management of the strategic relations of the two superpowers* on a better, safer cheaper basis than uncontrolled acquisition of still more weapons.

N.Y. Times, Nov. 14, 1969, § 1, at 8, col. 1 (emphasis added).

26. During the *Hearings on Strategic and Foreign Policy Implications of ABM Systems, supra* note 7, at 177, Secretary of Defense Laird spoke of a possible future agreement on missile limitation as being in treaty form. *See also* Brown, *supra* note 8, at 422, 431-32. In his November 10, 1969 press conference, Secretary of State Rogers said:

I think that if we have an agreement, a very comprehensive agreement, we are thinking in terms of the treaty, yes. And I think that that is the most likely outcome, assuming we reach an agreement.

On the other hand, I wouldn't want to be frozen in that position, because it's possible that we would want to have some kind of an agreement of a limited nature, that would require a treaty.

But in any event, I want to make it clear that if we did something other than by way of treaty, we would keep Congress constantly advised and consult with them and be sure that it met with their approval . . . .

In other words, I think the chances are that the agreement would be in treaty form; but I wouldn't want to necessarily be frozen in that position.

61 Dep't State Bull. 393 (1969).

27. *See* N.Y. Times, *supra* note 25.

28. President Kennedy's speech concerning the test ban treaty was delivered on July 26, 1963, the day after the treaty had been initiated and released by the three signatory governments (reported in 49 Dep't State Bull. 234 (1963)). The final Senate vote on ratification took place September 24, 1963, 109 Cong. Rec. 17832 (1963).

29. *See* text at notes 105 to 110 *infra*.

Not only is two months sometimes too long to wait for approval of a treaty dealing with rapidly changing conditions, but the Senate simply cannot devote very many two-month periods in any year to missile agreements. Moreover, even if a single, comprehensive treaty could be negotiated, its submission to the Senate could run the risk of a damaging defeat—a defeat of the kind suffered in the Senate by the Covenant of the League of Nations. A better method would be informal, interim agreements of narrow scope which would not need formal approval by the Senate but which could be followed by a treaty.

In addition, after almost eight years of worrying about Congressional support for arms control measures, I believe that in carrying out an effective plan of arms control the necessary cooperation between the Executive and the Senate could be improved. Sometimes the Executive does not take the Senate sufficiently into its confidence until the negotiations are so advanced that changes are difficult. On the other hand, the Senate's division of responsibility for arms control is not the best structure for close cooperation with the Executive during negotiations. The Foreign Relations Committee has responsibility for treaties,[30] including those on arms control. The Armed Services Committee and the Senate members of the Joint Committee on Atomic Energy also claim a legitimate interest.[31] At the same time, because theirs is not the sole committee with responsibility, many Senators on these committees feel no real responsibility to advise themselves sufficiently to pass informed judgment on an arms control problem. As a consequence, there is no one committee which, if properly involved in the negotiations and satisfied with their progress, could really give any assurance that a two-thirds vote of the Senate could be obtained on an important arms control agreement. The Executive therefore, has less to gain from close consultation than might otherwise be the case.

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30. The Senate resolution giving the Senate Committee on Foreign Relations its jurisdiction provides for a committee

> to consist of 15 Senators, to which committee shall be referred all proposed legislation messages, memorials, and other matters relating to the following subjects: (1) Relations of the U.S. with foreign nations generally, (2) Treaties. . . .

1969 CONG. STAFF DIRECTORY 126.

31. The charge to the Joint Committee on Atomic Energy provides for a committee of 18 members which shall

> make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy . . . . The Department of Defense shall keep the Joint Committtee fully and currently informed with respect to all matters within the Department of Defense relating to the development, utilization or application of atomic energy . . . .

1969 CONG. STAFF DIRECTORY 163.

The Senate Committee on Armed Services is to consist of 18 Senators and is responsible for the following:

> 1. Common defense generally. . . . 6. Size and composition of the Army, Navy and Air Force. . . . 11. Strategic and critical materials necessary for the common defense. 12. Aeronautical and space activities peculiar to or primarily associated with the development of weapons systems or military operations.

1969 CONG. STAFF DIRECTORY 121-22.

The framers of the Constitution probably anticipated that the Senate would participate actively from the beginning of treaty negotiations. They appear to have assumed that the Senate would normally act as an "executive council," advising the President and his negotiators on the positions they should take during the negotiations.[32] This method of procedure was tried during George Washington's administration and abandoned when it foundered on tension and disagreement between the President and the Senate.[33] It has not been tried again.[34]

The amount of consultation concerning ongoing treaty negotiations between the Senate and the executive branch has varied considerably since Washington's time depending upon the current state of relations between the executive branch and the Senate and upon the subject matter of the treaty. In some cases, the Foreign Relations Committee, other committees having responsibility for the area covered by the treaty, and the Senate leadership have been consulted before negotiations were begun; in some cases they have not.[35] Later, when agreement becomes close, consultation is, of course, more common.

During arms control negotiations, consultation has generally been more than routine. Perhaps because of the Senate's failure to ratify the League of Nations Covenant, President Harding sent Senators Lodge and Underwood as delegates to the 1921 conference on the Limitation of Armaments and added Senator Root as well to the delegation to the 1922 Naval Limitation Conference.[36] In recent years, members of both House and Senate have served as advisors to American delegations to the Geneva Disarmament Conference.[37] However, their other duties in Washington and the slow pace of negotiations have resulted in their appearance at the conference for a day or two at most,

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32. E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 84-85 (1917); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 207 (1944).

33. CORWIN, *supra* note 32, at 85-88.

34. E. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 34-35 (1944); S. B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 68-76 (2d ed. 1916).

35. *E.g.*, President Polk submitted the proposed Oregon treaty to the Senate for its advice; President Buchanan asked the Senate if it would approve a treaty under which the interpretation of a clause in the earlier Oregon treaty defining the northwestern water boundary would be submitted to arbitration; President Lincoln sent the Senate a draft of a proposed convention which would guarantee the payment of claims against Mexico. For the background of these and other formal consultations between the executive and the Senate see CRANDALL, *supra* note 34, at 68-72 *and* H. C. LODGE, *Treaty-Making Powers of the Senate*, in A FIGHTING FRIGATE AND OTHER ESSAYS 233-54 (1907). Formal consultation—generally by executive message and Senate resolution—has been used only infrequently. Informal consultation by the executive with members of the Senate and with the Senate Committee on Foreign Relations has been more frequent. (See the statement by Senator Bacon, "I know in my own experience it was the frequent practice of Secretary Hay . . . to seek to have conferences with Senators to know what they thought of such and such a proposition." 40 CONG. REC. 2129 (1906). *See* Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 250, 371 (1922); McDougal & Lans, *supra* note 32, at 208; C. HULL, MEMOIRS OF CORDELL HULL 1657-70 (1948).

36. Q. WRIGHT, *supra* note 35, at 251 n. 76; 2 P. JESSUP, ELIHU ROOT 447 (1938).

37. *See, e.g.*, 115 CONG. REC. S3553 (daily ed. April 3, 1969).

perhaps once or twice a year. As a consequence, the more meaningful consultations have taken place in Washington. During the lengthy negotiations before conclusion of the Test Ban and Non-Proliferation Treaties, for example, informal consultations and formal hearings with the Joint Committee on Atomic Energy were frequent.[38] Committee members took an active interest, committee staff became experts, and the Committee directly influenced the American position, sometimes holding the Executive Branch back from agreements which the Committee thought unwise. The Foreign Relations Committee and its Disarmament Subcommittee were also active, many members urging the negotiators forward toward agreement.[39] A subcommittee of the Armed Services Committee also held hearings, but most of its members were, at best, lukewarm toward successful conclusion of the negotiations.[40] After hearings or informal consultations with members or staff of these committees and often with the Senate leadership, the Executive Branch would draft instructions to the negotiators. It would sometimes revise its position in light of the consultations, and sometimes go ahead with the position it had tentatively prepared before the consultations.

During the course of both the Test Ban and Non-Proliferation Treaty negotiations, two crucial issues arose on which large numbers of Senators took a position on the negotiations. The Dodd-Humphrey resolution expressed wide bipartisan support for a treaty banning nuclear tests everywhere but underground at a time when our test ban negotiators were still attempting to gain Soviet agreement to a ban on all tests, including those underground. Before this resolution, the differences over the number and nature of inspections necessary to monitor underground tests had made agreement impossible.[41] The eventual Test Ban Treaty contained no ban on underground tests and therefore no inspection provisions. Similarly, negotiation of a Non-Proliferation Treaty was at a standstill for several years in large part because

38. *See, e.g.*, Statement of William Foster, Director of the United States Arms Control and Disarmament Agency, in *Hearings on Developments in Technical Capabilities for Detecting and Identifying Nuclear Weapons Tests Before the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. 435 (1963); Statement of William Foster, in *Hearings on S. Res. 179 Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess. 32 (1966); Statement of Dean Rusk, in *Hearings on S. Res. 179, id.* at 3.

39. A good example of Senatorial advice during the executive planning stage is the 1962 consideration by the Senate Foreign Relations Committee of four alternative negotiating positions under consideration by the executive for the renewed Geneva disarmament negotiations. *See Hearings On the Renewed Geneva Disarmament Negotiations Before a Subcomm. of the Senate Comm. on Foreign Relations*, 87th Cong., 2d Sess. (1962).

40. *See, e.g., Hearings on the Military Aspects and Implications of Nuclear Test Ban Proposals Before the Preparedness Investigating Subcomm. of the Senate Comm. on Armed Services*, 88th Cong., 1st Sess. (1963); *Hearings on Arms Control and Disarmament Before the Preparedness Investigating Subcomm. of the Senate Comm. on Armed Services*, 87th Cong., 2d Sess. (1962); *Hearings on Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons Before the Senate Comm. on Armed Services*, 91st Cong., 1st Sess. (1969).

41. S. Res. 148, 88th Cong. 1st Sess., 109 CONG. REC. 9415 (1963). The resolution was sponsored by 34 senators but never brought to a vote.

of our attempt to create, with some of our allies, a Multilateral Force (MLF) having nuclear weapons. It was during hearings before the Joint Committee on Atomic Energy, that the hostility of key members of that Committee to the MLF became publicly clear.[42] Soon after the Senate overwhelmingly adopted the Pastore Resolution urging conclusion of such a Non-Proliferation treaty,[43] serious negotiations began.

It is my belief that both resolutions helped the executive branch choose between conflicting goals and reassured the Soviets that a two-thirds vote of the Senate could probably be obtained. When these two treaties were finally negotiated and submitted to the Senate, the earlier resolutions may well have been of some help in producing such a vote. Probably of much greater importance, however, were the detailed knowledge and dedicated support of key Senators such as Fulbright of Foreign Relations and Pastore of Atomic Energy. This knowledge and support were, of course, the result of the many consultations and hearings going back over a number of years.

Some procedure of this sort will be necessary for the present missile talks. Given our constitutional division of powers and the need for continuing broad public support for arms control, congressional cooperation will be necessary for successful conclusion of binding agreements. Moreover, such agreements will probably require frequent changes. Under the Test Ban Treaty, pressures for change—largely in connection with the venting of radioactive debris from underground shots—have been accommodated entirely by interpretation of its terms.[44] The Non-Proliferation Treaty permits flexibility in the narrowly defined safeguards area through further negotiations not subject to Senate approval. These are ways to accommodate change, and may be useful precedent for future missile agreements,[45] but they should be accompanied by improved procedures for Congressional liaison, perhaps including the designation of one select Senate Committee with primary responsibility to follow the negotiations. These and other methods of providing, at the same time, both executive flexibility and congressional participation are the subject of more extensive discussion in the pages that follow.

II. Permissible Forms of Agreement for a Missile Limitation

There can be little doubt that missile limitation is one of the "proper subjects of negotiation between our government and the governments of other nations . . ." which may be dealt with in a treaty.[46] Disarmament is clearly

42. *See* Bunn, *The Nuclear Non-Proliferation Treaty*, 1968 Wis. L. Rev. 766, 769-770.
43. S. Res. 179, 89th Cong., 2d Sess., 112 Cong. Rec. 10802 (1966). The vote was 84 to 0.
44. *See* A. Chayes, T. Ehrlich, & A. Lowenfeld, International Legal Process 1022-41 (1969).
45. *See* text accompanying notes 220-225 *infra*.
46. The quotation is from Geofroy v. Riggs, 133 U.S. 258, 266 (1890); *cf.* Senate

a matter of international concern and has been at least since Isaiah.[47] Arms control has been the subject of treaties to which the United States was a party from the 1817 Rush-Bagot Agreement which limited naval ships on the Great Lakes,[48] to the 1922 Naval Armament Treaty which limited the number of battleships and aircraft carriers of major sea powers,[49] to the 1968 Non-Proliferation Treaty which limits the spread of nuclear weapons to additional countries.[50]

A treaty is not only a proper form for a missile limitation, but it has become the expected form for a final, lasting arms control agreement.[51] Other forms are, however, available, and they should be considered.

A. *Executive Agreement Not Authorized or Approved by Congress*

In addition to treaties, binding international agreements may be made by executive agreement.[52] An executive agreement may be negotiated pursuant to prior statutory authorization of Congress. It may be entered into pursuant to the terms of a treaty approved earlier by the Senate or subject to the later approval of both houses of Congress by joint resolution. Or, it may be made without any basis in congressional action.

The last of these—the most often criticized form of executive agree-

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COMM. ON THE JUDICIARY, CONSTITUTIONAL AMENDMENT RELATIVE TO TREATIES AND EXECUTIVE AGREEMENTS, S. REP. No. 412, 83d Cong., 1st Sess. (1953).

The view that a treaty may only deal with matters of "international concern" has authoritative support; *see, e.g.*, 23 PROC. AM. SOC'Y INT'L L. 194-96 (1929) (statement of Charles Evans Hughes → Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 907 (1959).

For excellent discussions of the exercise of treaty-making power in the arms control field, *see* L. HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 27-29 (1958); D. ARONOWITZ, LEGAL ASPECTS OF ARMS CONTROL VERIFICATION IN THE UNITED STATES, 12-17 (1965); → Fisher, *Arms Control and Disarmament in International Law*, 50 VA. L. REV. 1200, 1202-1203 (1964).

47. They shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more.
Isaiah 2:4.

48. Agreement with Great Britain, April 28, 1817, 8 Stat. 231 (1846), T.S. No. 110½. This agreement was entered into by an exchange of notes but was later treated as a treaty for constitutional purposes and sent to the Senate for its advice and consent.

49. Treaty on Limitation of Naval Armament, February 6, 1922, 43 Stat. 1655 (1925), T.S. No. 671, 25 L.N.T.S. 202.

50. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature*, July 1, 1968, 59 DEP'T STATE BULL. 9 (1968).

51. Almost all important formal international agreements concerning arms control or disarmament (other than armistice agreements) to which the United States has been a party have been in treaty form. Examples are cited in notes 48 and 50 *supra* and notes 110, 131, 172 and 208 *infra*. *See also* note 26 *supra*.

52. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 119, 120, 121, 142, 143, 144 (1965). *Compa* → McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 534 (1945), *and* W. MC CLURE, INTERNATIONAL EXECUTIVE AGREEMENTS DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 1-15 (1941), *w* → Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (194 → Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945), *and* 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 509A (2d rev. ed. 1945).

ment—is one which the President makes by virtue of his authority as Commander-in-Chief and as possessor of the government's "executive power." The federal courts have not considered many executive agreements which have no basis in congressional action, but they have upheld several important ones and have given them the same effect as if they had been treaties.[53] The question therefore arises whether a missile limitation agreement could be in this form. An argument can be made that the President's authority as Commander-in-Chief and chief executive would permit him to direct the Secretary of Defense not to add any more strategic missiles to our arsenal. Therefore, the argument runs, he could agree with another country not to do so, and he would not have to submit the agreement to Congress for approval. This argument, however, denigrates the constitutional power of Congress to provide for the common defense, to raise and support an army, and to raise and maintain a navy, as well as the power of the Senate to advise and consent to treaties.[54]

Furthermore, the Arms Control and Disarmament Act of 1961 prohibits the Executive from taking action under any law to "obligate the United States to disarm or to reduce or to limit the . . . 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."[55] Thus, any missile limitation not authorized by Congress or approved by the Senate which *obligates* the United States

53. United States v. Pink, 315 U.S. 203 (1941) (Presidential power to determine policy on the effect to be given to Soviet nationalization decrees incident to the recognition of the Soviet government by the U.S.); Russia v. National City Bank, 69 F.2d 44 (2d Cir. 1934) (Presidential power to agree to the adjustment of claims as part of his executive prerogative to recognize foreign governments). *See* Tucker v. Alexandroff, 183 U.S. 424 (1901) (Presidential power to admit foreign troops into U.S. as Commander-in-Chief). *Cf.* Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (Presidential power over overseas air transportation routes and business of American nationals abroad as Commander-in-Chief and as the nation's principal actor in foreign affairs).

An interesting precedent which never got to the courts was President Roosevelt's trade with Britain of destroyers for bases which took place before our entry into World War II but after British entry. Agreement of September 2, 1940, 54 Stat. 2406 (1941), E.A.S. No. 181. While no statute explicitly authorized this trade, an existing statutory provision was relied upon by the Attorney General in his opinion upholding it. 39 OP. ATT'Y GEN. 484.

54. U.S. CONST. art. II, § 2, cl. 2, provides that the President shall have power, "by and with the Advice and Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur." The Constitution divides power to deal with arms and arms control between the President and the Congress in this as well as other clauses. The President is the Commander-in-Chief of the Army and the Navy (art. II, § 2, cl. 1) but Congress has the authority to raise and support an army, raise and maintain a navy, provide for the common defense, and declare war. (Art. I, § 8, cls. 1, 11, 12, 13.) The "executive power" is vested in the President (art. II, § 1, cl. 1), who appoints United States ambassadors and receives those from other countries (art. II, § 2, cl. 2; art. II, § 3). But the Senate must confirm our ambassadors and Congress has authority to regulate commerce with foreign nations and to define and punish offenses against the law of nations. Art. I, § 8, cls. 3, 10. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

55. 22 U.S.C. § 2573 (1964).

to reduce or limit armaments is barred by this statute, assuming its constitutionality. Moreover, the President would have a fight on his hands if he agreed to reduce or limit missiles without seeking further congressional approval at some point. After the lengthy controversy resulting in the recent Fulbright Resolution against "national commitments" without congressional sanction,[56] the senatorial criticism of secret "commitments" to Laos and Thailand,[57] and the divisive debate over the ABM,[58] this would seem unwise.

The only modern arms control obligation in executive agreement form, other than armistice agreements, is the "Hot Line," and it does not obligate the United States to reduce or limit any arms.[59] Finally, no major missile reduction or limitation is likely to receive the continuing support of public opinion—which it needs to be lasting—if it ignores Congress altogether. Thus, for reasons as much political as constitutional, it would be unwise to seek, as the preferred framework for obligations reducing or limiting missiles, an executive agreement which is not to be approved by the Senate or Congress and not to be succeeded by a treaty.

B. *Executive Agreement Approved by Resolution or Authorized by Statute*

Another form for an arms control measure is an executive agreement subject to later approval by Congress or negotiated pursuant to the express provisions of a statute.[60] A joint House-Senate resolution approving an already-negotiated agreement has been used occasionally to approve such things as an American agreement to become a member of an international organization.[61] An advantage from the Executive's point of view is that only a majority vote is required in the Senate and the House. On the other hand, opponents of a missile agreement could argue that the Executive had chosen to seek a joint resolution in order to avoid the need to secure a two-thirds vote in the Senate.

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56. S. Res. 85, 91st Cong., 1st Sess. (1969). While the resolution by its terms deals only with commitments involving the use of the armed forces or financial resources of the United States, Senatorial hostility toward other executive agreements without basis in Congressional action was clear in the debate. *See, e.g.*, 115 CONG. REC. S6878-912 (daily ed. June 20, 1969), 115 CONG. REC. S1749-54 (daily ed. June 25, 1969).

57. *E.g.*, 115 CONG. REC. S10663-64 (daily ed. Sept. 16, 1969), 115 CONG. REC. S10732-42 (daily ed. Sept. 17, 1969); N.Y. Times, Oct. 29, 1969, § 1, at 1, col. 6.

58. The debate over the ABM occupied a surprising amount of the Senate's time during 1969. *See, e.g.*, 115 CONG. REC. S1362-80 (daily ed. Feb. 4, 1969), S3634-36 (daily ed. April 14, 1969), S9253-83 (daily ed. Aug. 6, 1969). The final vote came on September 18, 1969. 115 CONG. REC. S10888 (daily ed. Sept. 18, 1969).

59. Memorandum of Understanding with the U.S.S.R. Regarding the Establishment of a Direct Communications Link, June 20, 1963, [1963] 1 U.S.T. 825, T.I.A.S. No. 5362. S➡ Fisher, *Arms Control and Disarmament in International Law*, 50 VA. L. REV. 1200, 1203 (1964).

60. *See* STATE DEP'T, 11 FOREIGN AFFAIRS MANUAL 722 (1969); D. ARONOWITZ, *supra* note 46, at 16.

61. *See, e.g.*, the Joint Resolution of June 19, 1934 (authorizing the United States to join the International Labor Organization), 48 Stat. 1182 (1934); the Joint Resolution of March 28, 1944 (authorizing American participation in the United Nations Relief and Rehabilitation Administration, 58 Stat. 122 (1945); the Joint Resolution of July 7, 1898 (approving the annexation of Hawaii), 30 Stat. 750 (1899); the Joint Resolution of February 20, 1929, (approving the Samoan cessions of 1900 and 1904), 45 Stat. 1253 (1929).

They might attempt to arouse senatorial ire against the participation of the House in what Senators probably would think should be a treaty. Without advance congressional authorization to use this form, any voting advantage of the joint resolution might well be dissipated by such criticism.

This problem could be avoided by prior statutory authorization for the negotiation of the agreement. International postal agreements have been negotiated pursuant to statute since 1874,[62] and reciprocal trade agreements since 1934.[63] The 1934 Reciprocal Trade Agreements Act contained specific limits on executive discretion, such as a prohibition against cutting any tariff more than 50 per cent.[64] As the years went by, and the Act was renewed, Congress increased the tariff-cutting authority of the Executive, but added other limitations on the negotiating power of the Executive.[65] The 1962 Trade Expansion Act, which authorized the Kennedy Round of tariff negotiations, made innovations in providing expressly for congressional members of the American delegation, but it also contained many explicit restraints upon the negotiators.[66]

Reciprocal trade agreements are a useful precedent for congressional authorization for future executive negotiations. But there is not now enough experience with missile talks to know what kinds of limits should be imposed in advance by Congress. I find it almost inconceivable that Congress would authorize the Executive to enter into a missile limitation agreement not subject to later congressional review unless severe statutory restrictions were imposed on executive discretion beforehand. Without more knowledge of the kind of agreement which might be possible, Congress would probably hold the negotiators under such tight reins as to prevent serious talks from getting started. But the procedure is worth considering for the future. Perhaps the negotiation of agreements requiring a "standstill" in missile deployment by the United States and the Soviet Union would give enough experience to provide the basis for congressional authorization of future negotiation of reductions in missile strength.

Other relevant examples of executive agreements authorized by statute are the "agreements for cooperation" with other nations in the atomic energy field. These are based upon the Atomic Energy Act of 1954 and its 1958

62. 17 Stat. 304 (1872), as amended, 74 Stat. 581 (1960). *See* Cotzhausen v. Nazro, 107 U.S. 215 (1882) (postal treaty is the law of the land). *Cf.* Four Packages of Cut Diamonds v. United States, 256 F. 305 (2d Cir. 1919) (postal agreements are not treaties, because not made by and with the consent of the Senate; nor are they laws, because they are not enacted by Congress; they are, rather, administrative regulations made by authority of Congress, having the force of law).

63. Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351 (1964). In B. Altman & Co. v. United States, 244 U.S. 583, 601 (1912), the Supreme Court upheld and agreement negotiated by the President pursuant to the Tariff Act of 1897.

64. 48 Stat. 943, 944 (1934).

65. *See* Metzger, *United States Foreign Trade: Past, Present and Future*, 6 VILL. L. REV. 503, 508, 509 (1961); S. METZGER, TRADE AGREEMENTS AND THE KENNEDY ROUND 11-18 (1964).

66. 19 U.S.C. § 1873 (1964); 19 U.S.C. §§ 1841-46 (1964); W. Roth, Future United States Foreign Trade Policy, Report to the President Submitted by the Special Representative for Trade Negotiations (1969); S. METZGER, *supra* note 65, at 39-86.

amendments.[67] The 1954 Act authorized the negotiation of agreements for the distribution abroad of uranium and other nuclear materials as well as specified information on nuclear processing and reactors, all of which were to be used for peaceful nuclear programs under prescribed conditions.[68] These conditions are much tighter than those imposed by Congress under the first Reciprocal Trade Agreements Act in 1934.

The 1958 Atomic Energy Act Amendments authorized the negotiation of agreements for the transfer to our NATO allies of non-nuclear parts of atomic weapons systems which would not contribute to their atomic weapons capability, the transfer of certain other equipment and material for military application, and the transfer of classified information of the kind necessary, for example, for the development of defense plans and the training of military personnel.[69] The purpose of these agreements was to improve our allies' state of training and readiness to participate in their defense against attack by nuclear weapons, or to use such weapons themselves if authorized by the President to do so after the outbreak of war in Europe. The 1958 Amendments also authorized the executive to provide both classified information on atomic weapons and non-nuclear parts of atomic weapons to allies (at that time only Britain) which had made substantial progress in the development of atomic weapons.[70] The restrictions upon executive discretion in the 1958 Amendments were even tighter than those in the 1954 Act.

Both the 1954 Act and the 1958 amendments contained a substitute for the Constitutional procedure of advice and consent to treaties, a substitute not utilized to review trade negotiations. This is the requirement that the agreement itself be submitted to Congress for a specified waiting period before it can go into effect. In the case of agreements for cooperation for peaceful purposes authorized by the 1954 Act, the submission is actually to the Joint Committee on Atomic Energy, the designated watchdog over the executive in atomic energy matters.[71] In this case, the waiting period is thirty days. For the more sensitive agreements for cooperation for military purposes authorized by the 1958 amendments, the submission is to the Congress itself, and the waiting period is sixty days.[72]

Legislative opportunities to "veto" executive action through procedures such as this have been criticized as an invasion of executive prerogatives by the legislature.[73] But none of the many agreements for cooperation negotiated

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67. 42 U.S.C. § 2011 *et seq.* (1964).
68. §§ 54, 64, 82, 91, 144(a), 42 U.S.C. §§ 2074, 2094, 2112, 2121, 2164(a) (1964).
69. §§ 91(c), 144(b), 42 U.S.C. §§ 2121(c), 2164(b) (1964).
70. §§ 91(c), 144(c), 42 U.S.C. §§ 2121(c), 2164(c) (1964).
71. § 123(c), 42 U.S.C. § 2153(c) (1964).
72. § 123(d), 42 U.S.C. § 2153(d) (1964).
73. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 236-37, 238-44 (1964); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

under the 1954 Act or the 1958 amendments has ever been rejected by Congress.[74] The procedure is tight; both executive and legislature have defined roles; and the Joint Committee has been diligent as a watchdog of the system, yet effective as a defender of its products. The precedent is therefore a useful one for arms control.

For the moment, however, the lack of executive experience with missile talks probably precludes enactment of detailed legislation such as the Atomic Energy or Trade Agreements Acts to authorize the negotiations. At some future time, such legislation can be considered. A key to its success, as in the case of the Atomic Energy Act, will no doubt be the designation of a diligent watchdog committee which has the confidence of other members of Congress. This may present jurisdictional problems since the Foreign Relations Committee claims treaties, the Armed Services Committee claims military affairs, and the Joint Committee on Atomic Energy claims atomic energy matters. The Test Ban Treaty was, however, considered by the members of all three committees sitting together,[75] and a Disarmament Subcommittee composed of members of all three once existed.[76] So the problem is not insuperable.

C. *Executive Agreement Authorized by Treaty*

A third form of executive agreement which has seen frequent service is that which is expressly authorized by treaty. This form has, for example, been used for some of the important "status of forces" agreements with our allies. These agreements establish who has jurisdiction over American servicemen charged with law violation abroad. Some of these agreements are treaties;[77] others are executive agreements authorized by treaty.[78] Both have the same international legal effect.[79]

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74. The Joint Committee took issue with a provision of the first agreement for cooperation but approved it on the understanding that changes would be made in the future. Green, *The Joint Committee on Atomic Energy: A Model for Legislative Reform?*, 32 GEO. WASH. L. REV. 932, 939 n.30 (1964). The negotiators usually are aware of Joint Committee objections long before the agreement is submitted, and they take care of the objections one way or another. Usually differences between the Committee and the Executive Branch on national security matters are reconciled before formal action is taken. *See* H. GREEN & A. ROSENTHAL, GOVERNMENT OF THE ATOM 194-97 (1963).

75. *Hearings on Executive M Before the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess. 1 (1963).

76. S. Res. 93, 84th Cong., 1st Sess., 101 CONG. REC. 11347 (1955); S. Res. 185, 84th Cong., 2d Sess., 102 CONG. REC. 634 (1956).

77. *E.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

78. Security Treaty with Japan, September 8, 1951, art. III [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491, 136 U.N.T.S. 211, authorized the making of administrative agreements between the two governments concerning "The conditions which shall govern the disposition of armed forces of the United States . . . in and about Japan . . . ." Under this authorization, the United States and Japan signed an Administrative Agreement on February 28, 1952, which went into effect on the same day as the Security Treaty (April 28, 1952). [1952] 3 U.S.T. 3341, T.I.A.S. No. 2492.

A few status of forces agreements have no approval or authorization by Congress. *E.g.*, the Memorandum of Understanding Relating to Criminal Jurisdiction over Members

The executive agreement authorized by treaty avoids the problem of a premature congressional enactment based on inadequate negotiating experience. Presumably the negotiation of the treaty will provide sufficient information on future negotiating possibilities to give general guidelines for later executive agreements to be made pursuant to the treaty. By seeking a treaty, the more traditional form of arms control agreement, the executive would avoid the criticism which often accompanies executive agreements without basis in congressional action. Tradition is usually an important consideration in the executive's choice between the treaty and other forms of international agreement.[80] Probably the treaty is the best goal to pursue for a lasting international obligation reducing or limiting missiles. The flexibility for executive action which can be provided within a treaty's framework is therefore discussed in some detail in a later section.

III. The First Step: Executive Action Pending Treaty Negotiation and Entry into Force

While a treaty like the one described above may be the best form for the arms limitation agreement, the ideal often suffers when exposed to the practical. Such a treaty may take a good deal of time both to negotiate and to bring into force after negotiation through constitutional ratification procedures. Negotiation of the treaty may indeed turn out to be impossible. We must, therefore, consider other forms of agreement which can serve either in the interim or as a substitute should the treaty negotiations fail.

A. *Executive Agreement*

After negotiating a treaty, states often enter into agreements to govern their relationship in the area dealt with by the treaty pending is ratification and entry into force. On signature of the 1936 Naval Armament Treaty, for example, the parties agreed that if the treaty had not entered into force by January 1, 1937, they would nevertheless observe one of its important obligations until it did, unless entry took longer than six months from that date.[81]

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of the United States Forces with Libya, February 24, 1955, [1956] 2 U.S.T. 2051, T.I.A.S. No. 3107, 271 U.N.T.S. 431. This agreement was made pursuant to an agreement (not a treaty) between the parties made September 9, 1954.

79. Restatement (Second) of Foreign Relations Law of the United States, comment *a* to § 119 (1965).

80. *See* Memorandum of the Assistant Legal Adviser for Treaty Affairs, Standards Followed in Determining Whether an International Agreement Should be Concluded as a Treaty, Nov. 30, 1969 (State Dep't Files).

81. Protocol of Signature to Treaty on the Limitation of Naval Armament, March 25, 1936, 50 Stat. 1363, 1395 (1937), T.S. No. 919, 184 L.N.T.S. 115, 141. Even in the absence of such an agreement, a rule of international law has developed that, once having signed a treaty, a state should refrain from any act which would defeat the object of the treaty until it has made a decision not to adhere. This rule will be codified upon the entry into force of the recently negotiated Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969). Article 5 of this treaty provides:

A state is obliged to refrain from acts which would defeat the object and purpose

This agreement was to be effective as an executive agreement if the Senate did not act by January 1. Similarly, when the treaty creating the International Atomic Energy Agency (IAEA) was signed, the negotiating parties signed an annex providing for a Preparatory Commission which would lay the groundwork for the Agency and remain in existence until the treaty came into force.[82] The annex was submitted to the Senate with the treaty even though it went into force as an executive agreement on the date of signature. Its purpose was to provide for what should be done while the Senate and other parliaments were considering the treaty. A like agreement produced a Provisional International Civil Aviation Organization which operated for two years before the treaty creating the International Civil Aviation Organization became effective.[83]

Executive agreements without benefit of any congressional sanction are thus frequently used to cover the period between negotiation of a treaty and its entry into force. There are, in addition, a number of precedents for executive agreements to cover the earlier period between the beginning of negotiations and their successful conclusion. For example, certain features of an 1871 fisheries agreement which had been formally terminated by Congress were continued in force by the executive pending negotiation of a new treaty in order not to lose the benefits of the old agreement during the then current fishing season.[84]

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of a treaty when: (a) it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty; (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

After signature to a treaty freezing deployment of strategic missiles, this rule would presumably preclude a short-term arms race to deploy more such missiles in order to change the *status quo* between the time of signature and the time of ratification.

82. Preparatory Commission, Annex 1 to International Atomic Energy Agency (IAEA) Statute, *opened for signature* Oct. 26, 1956, [1957] 1 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3. In the unsuccessful 1958-61 negotiations to produce a ban on nuclear weapon tests in all environments, underground as well as elsewhere, the Soviet Union, the United Kingdom and the United States agreed on the text of a treaty annex to create a Preparatory Commission on the day the treaty was to be signed. Like the IAEA Preparatory Commission Annex, this agreement was part of the treaty to be submitted to the Senate. Yet the Commission was to begin work before the Senate acted and before the treaty came into force. Consequently the annex would have been an executive agreement from the time it came into force until ratification of the treaty. 43 DEP'T STATE BULL. 496-97 (1960), 1960 DOCUMENTS ON DISARMAMENT 386. This agreement was drafted even before Congress enacted the Arms Control and Disarmament Act which authorizes the Director of the new Arms Control and Disarmament Agency to "formulate plans and make preparations for the establishment, operation and funding of inspection and control systems . . ." § 34(c), 22 U.S.C. § 2574(c) (1964).

83. A. PEASLEE, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS 989 (rev. ed. 1961). An "Interim Commission" was created by executive agreement to assume the functions of several older international organizations dealing with health while the Constitution of the World Health Organization was being ratified. *Id.* at 1878. An agreement with Santo Domingo dealing with the administration of customs houses was observed by the executive branch for over two years before the Senate finally approved it and thereby made it a treaty. T. ROOSEVELT, AUTOBIOGRAPHY 524-25 (1913). For the Senatorial debate on this agreement, *see* 40 CONG. REC. 1423-31 (1906).

84. MCCLURE, *supra* note 52, at 77-78. Other examples of executive agreements made as temporary or provisional arrangements may be found in J. MOORE, A DIGEST OF

Armistice agreements, usually of the highest importance to the United States, typically enter into force immediately upon signature by the Executive and are not submitted to the Senate.[85] These agreements may not only terminate hostilities but also lay down political conditions for the belligerents, establish obligations controlling armed forces and armaments and even adumbrate the terms of the final peace treaty.[86] For example, the agreement signed by the Secretary of State on behalf of President McKinley suspending hostilities in the Spanish-American War provided that Spain should relinquish her claim to sovereignty over Cuba, cede Puerto Rico and an island in the Ladrones to the United States and allow the United States to occupy the city, bay and harbor of Manila, pending the final disposition of the Philippines at the peace conference.[87] The armistice of 1918 not only determined military conditions for ending the fighting, but embodied President Wilson's famous "Fourteen Points."[88] The armistice agreements signed with the German satellites after World War II contained provisions for such things as human rights, restitution of property, reparations and boundary adjustments, all of which influenced the pattern of the final peace treaties.[89]

Few would suggest that the Executive lacks power to make armistice agreements and that hostilities should continue pending negotiation of a treaty and approval by the Senate. At the time it is negotiated, an armistice is assumed to be a temporary agreement which will be followed by a definitive treaty of peace to be submitted to the Senate.[90] In some instances, however, as in Korea, no treaty ever is concluded. The armistice agreement then continues in force so long as it is observed, even though it was intended only as a temporary executive agreement.[91] The President's broad authority to negotiate armistice agreements is based upon his powers as Commander-in-Chief and Chief Executive.[92] These are the same Constitutional powers which could

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INTERNATIONAL LAW 213-18 (1906); J. FOSTER, THE PRACTICE OF DIPLOMACY 324-25 (1906); CRANDALL, *supra* note 34, at 102-08, 111-14.

85. C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 232 (1920).

86. *Id.* at 232-34.

87. Protocol of Agreement with Spain, Embodying the Terms of a Basis for the Establishment of Peace Between the Two Countries, Aug. 12, 1898, 30 Stat. 1742 (1899), [1898] FOREIGN REL. U.S. 828 (1901).

88. Armistice with Germany, November 11, 1918, S. Doc. 147, 66th Cong., 1st Sess. (1919); 2 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 9 (1969).

89. Armistice with Bulgaria, October 28, 1944, 58 Stat. 1498 (1945), E.A.S. No. 437; Armistice with Finland, September 19, 1944, 145 BRITISH AND FOREIGN STATE PAPERS, 513 (1953); Armistice with Hungary, January 20, 1945, 59 Stat. 1321 (1946), E.A.S. No. 456; Armistice with Italy, September 3, 1943, 61 Stat. 2740 (1948), T.I.A.S. No. 1604; Armistice with Rumania, September 12, 1944, 59 Stat. 1712 (1946), E.A.S. No. 490.

90. BERDAHL, *supra* note 85; E. BENTON, THE DIPLOMACY OF THE SPANISH-AMERICAN WAR 227 (1906).

91. BLUMENSON, THE KOREAN ARMISTICE AGREEMENT Annex 11, pt. 2, at H-1 (Report Prepared by Historical Evaluation and Research Organization for U.S. Arms Control and Disarmament Agency, mimeographed, 1964). See the remarks of Secretary of State Dulles to the effect that the armistice agreement had been thought of as only a temporary agreement, inadequate for a long period. 33 DEP'T STATE BULL. 298-99 (1955).

92. *See* note 54 *supra*.

provide the basis for an interim executive agreement halting the strategic missile race pending negotiation of a treaty.[93]

B. *Conscious Parallelism*

Interim arms agreements may be informal as well as formal. Countries have restricted the deployment and testing of new weapons by executive action subject to parallel restraint by other countries but without formal agreement to do so. Examples of conscious parallelism include informal agreements relating to nuclear testing, "bombs in orbit," military spending and fissionable material. The examples are discussed below.

1. *Moratorium on nuclear tests—1958-61.* During the period of public debate over a test ban treaty but before negotiations began, the Supreme Soviet ordered all nuclear tests ended in the Soviet Union, reserving its freedom of action if other powers continued testing.[94] The United States was in the midst of a test series and did not then respond. On August 22, 1958, however, after an international conference of experts had agreed to a report on the detection of nuclear tests,[95] President Eisenhower proposed prompt conclusion of a treaty and offered to withhold further American testing for a period of one year from the beginning of negotiations, if the United Kingdom and the Soviet Union would do so.[96] The Soviet Union did not then reply. The last United States test was on October 31, 1958 but the Soviet Union set off nuclear explosions on November 1 and 3.[97] President Eisenhower promptly announced that the United States was thereby relieved "from any obligation under its offer to suspend nuclear weapons tests."[98] He said, however, he would continue the test suspension for the time being and hoped the Soviet Union would also suspend.[99] So far as the United States could determine, the Soviet Union did not conduct a test after this announcement for a period of almost three years.[100] During 1959, there were statements by

93. An interim executive agreement of this kind, although constitutional, might nonetheless constitute an "obligation" to "reduce or limit" armaments which Congress has said should be in the form of a treaty or of an agreement specifically authorized by legislation. However, so long as the executive continues its pursuit of a treaty, Congress is not likely to stand on this statute as preventing practical interim executive agreements. For a discussion of this provision of the Arms Control and Disarmament Act, *see* text accompanying notes 123-127 *infra.*

94. Decree of the Supreme Soviet Concerning the Discontinuance of Soviet Atomic and Hydrogen Weapons Tests, March 31, 1958, in U.S. DEPT. OF STATE, HISTORICAL OFFICE, 1945-1959 DOCUMENTS ON DISARMAMENT 978 (1960) [hereafter cited as 1945-1959 DOCUMENTS ON DISARMAMENT].

95. Report of the Conference of Experts to Study the Possibility of Detecting Violations of a Possible Agreement on the Suspension of Nuclear Tests, August 21, 1958, in 1945-59 DOCUMENTS ON DISARMAMENT 1090 (1960).

96. Statement by President Eisenhower, August 22, 1958, in 1945-59 DOCUMENTS ON DISARMAMENT 1111 (1960).

97. Department of State Press Release, Aug. 26, 1959, in 1945-59 DOCUMENTS ON DISARMAMENT 1439 (1960).

98. Statement of President Eisenhower, November 7, 1958, in 1945-59 DOCUMENTS ON DISARMAMENT 1221 (1960).

99. *Id.*

100. Department of State Press Release 615, Aug. 26, 1959, *supra* note 97; *Hearings on Exec. M, supra* note 75, at 311, 983.

the United States that, while it regarded itself free to test, it would not do so without first making an announcement to that effect.[101] There were also statements by the Soviet Union that it would not be the first to resume testing.[102] While, on August 30, 1961, the Soviets did resume before we did, they did so after a number of French tests.[103]

In 1963, after both sides had conducted further atmospheric tests and new test ban negotiations in Moscow had been scheduled, President Kennedy announced that "the United States does not propose to conduct nuclear tests in the atmosphere so long as other states do not do so. . . . Such a declaration is not a substitute for a formal binding treaty, but I hope it will help us achieve one."[104] This second test ban moratorium continued for several months—until it was replaced by the Test Ban Treaty.

At no time during either moratorium was there any legal obligation on either side to refrain from testing. From an American constitutional point of view, two presidents had exercised their powers as Commander-in-Chief to order a suspension of tests, but neither had entered into an executive agreement to refrain from doing so. Both had stated that their goal was negotiation of a binding treaty.

2. *Parallel statements of intention on "bombs in orbit"—1963-67.* During 1962, there were public statements by spokesmen for the United States disclosing that thermonuclear weapons could be placed in orbit around the earth subject to reentry on command over target.[105] These statements declared that the United States had no intention of so deploying its nuclear weapons unless the Soviet Union did so, and suggested that the Soviet Union refrain from doing so. During the same year there were private discussions with Soviet representatives on the subject. In 1963, Foreign Minister Gromyko responded by proposing an "agreement with the United States Government to ban the placing into orbit of objects with nuclear weapons on board."[106] President Kennedy's affirmative reply came the next day.[107]

The Kennedy and Gromyko statements were made in September of 1963

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101. *Id;* Statement by President Eisenhower, December 29, 1959, in 1945-59 DOCUMENTS ON DISARMAMENT 1590 (1960).

102. *E.g.*, Statement by the Soviet Government Regarding Continued Suspension of Nuclear Weapon Tests, August 28, 1959, in 1945-59 DOCUMENTS ON DISARMAMENT 1440 (1960).

103. Statement by the Soviet Government on the Resumption of Nuclear Weapons Tests, August 30, 1961, in 1961 DOCUMENTS ON DISARMAMENT 337.

104. Address by President Kennedy at American University, June 10, 1963, 1963 DOCUMENTS ON DISARMAMENT 215, 220-21.

105. Statement of Deputy Secretary of Defense Roswell Gilpatric, September 5, 1962 in 108 CONG. REC. S7007 (daily ed. Sept. 21, 1962); Statement of U.S. Delegate to the U.N. Albert Gore, December 3, 1962, 1962 DOCUMENTS ON DISARMAMENT 1119, 1122.

106. Address by Foreign Minister Gromyko, U.N. General Assembly, September 19, 1963, in 1963 DOCUMENTS ON DISARMAMENT 509, 523.

107. Address by President Kennedy, U.N. General Assembly, September 20, 1963, in 1963 DOCUMENTS ON DISARMAMENT 525, 528.

toward the end of a two-month period of Senate consideration and national debate on the Test Ban Treaty. President Kennedy had made clear to his subordinates his desire not to submit another arms control treaty to the Senate that year because of the time, effort and commitments expended to secure a favorable vote on the Test Ban Treaty. Consequently, American and Soviet negotiators agreed upon statements which each side would make to the General Assembly renouncing any "intention of placing in orbit around the earth any weapons of mass destruction, of installing such weapons on celestial bodies, or of stationing such weapons in outer space in any other manner."[108] They also agreed upon the text of a resolution which was then adopted by acclamation by the General Assembly. It welcomed the expressions of intention and called upon all states to refrain from the proscribed conduct.[109]

The net result was a moratorium on "bombs in orbit" until 1967 when the Outer Space Treaty was finally concluded.[110] The Treaty constitutes an international obligation to refrain from the conduct which had been renounced in the General Assembly in 1963. By preventing placement of nuclear weapons in space between 1963 and 1967, the President exercised his executive and Commander-in-Chief powers, but did not obligate the United States.

3. *Parallel military budget reduction—1963-64.* In an interview December 31, 1963, Premier Khrushchev said:

> The Supreme Soviet of the USSR has already decided to reduce our military appropriations under the 1964 budget. It would be a good thing if other states acted in a similar way. I am convinced that the peoples of the world would whole-heartily [sic] approve such a policy—I would call it a policy of reciprocal example—in the matter of reducing of the armaments race.[111]

Three days later Secretary of State Rusk announced that there were indications that "the two sides will not be pressing their defense budgets upward into new levels of competition during this next year."[112] President Johnson, in his State of the Union Message, made clear that the U.S. defense budget would be reduced for the fiscal year beginning the following July; in his January message to the Geneva Disarmament Conference, he said that the atmosphere for disarmament negotiations had been brightened by "recent

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108. Statement by U.S. Representative Adlai Stevenson, October 16, 1963, 1963 DOCUMENTS ON DISARMAMENT 535, 537. A similar declaration of intention was made by a Soviet representative. 18 U.N. GAOR 18 (1963).

109. G.A. Res. 1884, 18 U.N. GAOR Supp. 15, at 13, U.N. Doc. A/5515 (1963), 1963 DOCUMENTS ON DISARMAMENT 538.

110. Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, January 27, 1967, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347.

111. Interview with U.S.S.R. Premier Khrushchev, December 31, 1963, 1963 DOCUMENTS ON DISARMAMENT 652-53.

112. News Conference Remarks by Secretary of State Rusk, January 2, 1964, 50 DEP'T STATE BULL. 81-82 (1964).

Soviet and American announcements of reductions on military spending . . . ."[113]

These announcements were, of course, preceded by private American-Soviet talks. No commitment was made by either side, but each decided that its own interests would be served by parallel announcements of budget cuts. The escalation of the Viet Nam war in late 1964 and in 1965 required supplemental appropriations which increased our military budget for the fiscal year in question. The Soviets believed we had gone back on our word, but in fact there was no obligation.

In a situation where changing events and problems of verification made a commitment unwise even for a year, the parallel action technique was used instead. Had events turned in another direction, the technique might have been repeated and a significant reduction in military expenditures produced over a period of time. No treaty dealing with military expenditures was then being negotiated, but a budget freeze or reduction might have restrained both sides from escalating the nuclear arms race pending negotiation of an agreement applying more directly to nuclear weapons or their carriers.

4. *Parallel announcement of cutbacks of fissionable material production—1964.* The United States has repeatedly advocated a treaty in which some or all of the nuclear powers, particularly the United States and the Soviet Union, would cut off the production of fissionable material for use in nuclear weapons.[114] Negotiation of such a treaty has never begun because the Soviet Union rejected all such proposals.[115] By 1964, however, President Johnson decided we were producing more weapons-grade fissionable material than we needed. "Even in the absence of agreement," he said in his State of the Union Message, "we must not stockpile arms beyond our needs or seek an excess of military power that could be provocative as well as wasteful."[116] He therefore announced a cutback in production of enriched uranium and plutonium, and called on other nuclear powers to do the same. Two weeks later, in a message to the Geneva Disarmament Conference, he proposed that this process be continued by an inspected, plant-by-plant shutdown in the Soviet Union and the United States, leading to a verified agreement to halt all production of fissionable materials for nuclear weapons.[117]

On April 20 and 21, 1964, after consultations among their representatives, President Johnson, Prime Minister Douglas-Home and Premier Kru-

113. State of the Union Address by President Johnson, January 8, 1964, H.R. Doc. No. 251, 88th Cong., 2d Sess. 5 (1964), in 1964 DOCUMENTS ON DISARMAMENT 4.

114. *See, e.g.*, Letter of President Eisenhower to Premier Bulganin, March 1, 1956, 34 DEP'T STATE BULL. 514; B. BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 317, 318, 328, 356, 361-63 (1961); UNITED NATIONS, THE UNITED NATIONS AND DISARMAMENT, 1945-1965, at 128-129 (U.N. Pub. 67.1.8 (1967).

115. The historical account is set forth in the two texts cited in the preceding footnote.

116. State of the Union Address, January 8, 1964, *supra* note 113.

117. Message to the Eighteen Nation Disarmament Committee, January 21, 1964, in 1964 DOCUMENTS ON DISARMAMENT 7-8.

shchev made parallel announcements that they were reducing production or planned production of fissionable material for use in nuclear weapons.[118] Doubt was later expressed by Senator Jackson, chairman of two Senate subcommittees having nuclear weapon responsibilities, whether the Soviet Union was in fact reducing its production.[119] Moreover, the Soviet Union continued adamantly to oppose a verified halt in the production of fissionable materials for weapon purposes.[120] When later cutbacks in American production were announced, no attempt was made to secure parallel Soviet limitations on production.

The President's power to order a cutback was reflected in provisions of the Atomic Energy Act authorizing him to set the amount of fissionable material to be produced.[121] And President Johnson's announcements of production cutbacks were premised upon American needs—with or without any corresponding reduction by the Soviet Union.[122] By announcing a cutback at the same time as did the heads of government of the Soviet Union and the United Kingdom he did not enter into any international obligation. Yet, if the simultaneous announcements had led to successful negotiation of a treaty cutting off production of fissionable materials for making nuclear weapons, they would have been very useful steps toward a restriction on the growth of nuclear stockpiles.

5. *The legality of parallel actions.* None of the parallel actions on nuclear testing, bombs in orbit, military budgets or fissionable material violated the prohibition of the Arms Control and Disarmament Act on executive action "that will *obligate* 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."[123] None of them did so, first, because none constituted an *obligation* of the United States, and second, because they did not "reduce or . . . limit . . . armaments of the United States."[124] The test ban moratorium limited the testing of nuclear

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118. Address by President Johnson before the Associated Press, April 20, 1964, in 1964 DOCUMENTS ON DISARMAMENT 165; Statement of Premier Khrushchev, April 20, 1964, in 1964 DOCUMENTS ON DISARMAMENT 166; Statement by Prime Minister Douglas-Home to the House of Commons, April 21, 1964, 693 PARL. DEB., H.C. (5th ser.) Cols. 1097-1098 (1964), 1964 DOCUMENTS ON DISARMAMENT 171.

119. Address by Senator Jackson to World Affairs Council of Seattle, November 23, 1965.

120. Statement of Soviet Representative Tsarapkin to the Eighteen Nation Disarmament Committee, August 13, 1964, in 1964 DOCUMENTS ON DISARMAMENT 339, 339-41; Fourth Annual Report of the U.S. Arms Control and Disarmament Agency, January 21, 1965, *id.* at 534, 540.

121. 68 Stat. 928 (1954), 42 U.S.C. § 2061(b) (1964).

122. *See* State of the Union Address, *supra* note 113; Address Before the Associated Press, *supra* note 118.

123. *See* note 55 *supra*. The moratorium on nuclear testing terminated shortly before the Arms Control and Disarmament Act went into effect, but would not have violated that act if the Act had been in effect.

124. *Id.* As to "reduce . . . armaments" means to reduce them in number, so to "limit . . . armaments" means, at a minimum, to limit them in number. This seems to be

weapons, not the weapons themselves. The outer space declarations of intention restricted deployment of nuclear weapons, but not the size of the stockpile. The budget announcements reduced military expenditures, but not necessarily armaments. The fissionable material cutbacks dealt with the "ammunition" for nuclear weapons, but not the weapons themselves. None of these four parallel actions thus constituted an "obligation" to "reduce or limit" armaments.

Nor did any of the four parallel actions contravene the Constitution. Each was based on power the President can exercise alone as the Executive and Commander-in-Chief.[125] In any event, each of them could have been described at the time as a step designed to lead toward negotiation of a treaty which would ultimately be submitted to the Senate. Two of the four were, in fact, succeeded by such treaties.

President Nixon has announced that the executive branch is considering a "moratorium" on the testing of multiple independently-targeted reentry vehicles (MIRV's) as a measure which might come out of the missile talks.[126] A moratorium on further testing or deployment of particular missiles by parallel executive restraints pending negotiation of a treaty is amply supported by the foregoing precedents and well within President Nixon's power.[127] Moreover, following the example of the preparatory commission created by executive agreement pending the effectiveness of a treaty,[128] an organization to implement the moratorium could also be established by executive action.[129]

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the simplest and most direct meaning to give the language. It also describes a limitation of a kind made by the Rush-Bagot Agreement and the Naval Limitation Treaties. *See* notes 48-49 *supra*. It is consistent with one of the Act's definitions which sets off the word "limitation" from the word "control" as well as from the words "reduction" and "elimination." Arms Control and Disarmament Act, § 3(a), 22 U.S.C. § 2252 (1964).

125. For the constitutional provisions, *see* note 54 *supra*.

126. The President's News Conference of June 19, 1969, 5 PRESIDENTIAL DOCUMENTS 881 (1969). Senator Brooke and 41 other Senators have sponsored a resolution calling for a joint U.S.—USSR suspension of MIRV flight tests. S. Res. 211, 91st Cong., 1st Sess. (1969). *See Hearings on Strategic and Foreign Policy Implications of ABM Systems*, *supra* note 7, at 645 *et seq.*

127. Parallel action to destroy existing armaments, however, is a closer question. The President may have constitutional and statutory power to begin reducing existing weapon stockpiles upon the representation of the Soviet Union that it will do the same—pending negotiation of a treaty and particularly if there is no obligation upon the United States to do so. However, it is difficult to believe a President would go very far in this direction without a real commitment from the Soviet Union. Presumably such a commitment would only be made if we had given one in return. Thus, the arrangement might well border on an international obligation which would raise questions under both the Arms Control and Disarmament Act and the Constitution. *Cf.* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

128. *See* notes 82-83 *supra*.

129. President Roosevelt and Prime Minister Mackenzie King of Canada set up a Permanent Joint Board on Defense to "consider in the broad sense the defense of the north half of the Western Hemisphere." The Ogdensburg Agreement, August 18, 1940, 3 DEP'T STATE BULL. 154 (1940). This Board coordinated defense policies for North America during the war and was continued to peacetime, again by executive action. The 1947 announcement doing so, noted that "no treaty, executive agreement or contractual

For the reasons already indicated, technological developments, unforeseen political problems and new information on the other side's plans will probably prompt repeated requests for changes in the specific limitations of the moratorium. Furthermore, one of the basic objectives of the talks is to reduce the risk of nuclear war "through a dialogue about issues arising from the strategic situation."[130] Moreover, the experience with the four parallel actions described above might have been better had there been a forum for everyday exchange of information and negotiation concerning the moratorium.

Assuming, then, that a moratorium can provide necessary interim restraint pending negotiation and entry into force of a treaty, let us look at the ways in which a modern treaty could provide later flexibility for change short of formal amendment of, or withdrawal from, the treaty.

IV. The Second Step: A Treaty Permitting Change by Executive Action Without Treaty Amendment or Withdrawal

The United Nations Charter and the Test Ban Treaty are examples of two quite different methods of accommodating future developments. Both provide for formal treaty amendment by future agreement which must be submitted to the Senate for its advice and consent.[131] But the Charter goes still further. It gives the Security Council "primary responsibility for the maintenance of international peace and security" in a changing world,[132] and requires members to accept the Council's decisions.[133] The General Assembly has a more limited but nevertheless important role in implementing the Charter in light of new circumstances.[134] Either organ may pass resolutions significantly affecting future conduct of states in particular circumstances.[135]

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obligation has been entered into" by the two countries as the result of the Board's work, but that it had "led to the building up of a pattern of close defense cooperation." Joint Announcement of Defense, February 12, 1967, 16 Dep't State Bull. 361. During the hearings on the "national commitments" resolution, the State Department listed these agreements under the heading "U.S. Defense Commitments and Assurances . . . Provisions of Official Declarations." *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 52, 61 (1967). Later, during the debate on the resolution, Senator Church introduced a list of "executive agreements" which included these announcements. He said that the Foreign Relations Committee believed that these agreements should have been made by treaty. 115 Cong. Rec. S6891, 6895, 6899 (daily ed. June 20, 1969). Canada and the United States both joined the North Atlantic Treaty in 1949, and much of their current defense cooperation is pursuant to that treaty.

130. Address of Secretary of State Rogers, *supra* note 25.

131. U.N. Charter arts. 108 & 109; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, art. 11, [1963] 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (1963).

132. U.N. Charter art. *and* chs. VI & VII.

133. *Id.*, art. 25. This provision is infrequently relied upon due, primarily, to the lack of available means for enforcement.

134. *Id.*, arts. 10-14.

135. *See generally* D. Bowett, The Law of International Institutions 30-37, 42-50 (1963). For discussions of the General Assembly's powers to make decisions affecting states, *see, e.g.*, Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151, 163-66.

In the case of the Test Ban Treaty, however, no international organization was created to oversee operation of its provisions. After possibilities for interpretation have been exhausted, the only safety valve it contains, aside from the article on treaty amendment, is language permitting a party to withdraw whenever "it decides that extraordinary events, related to the subject matter of this Treaty" (e.g., atmospheric testing by a non-party) have "jeopardized the supreme interests of its country."[136]

These two treaties illustrate two extremes in the range of flexible provisions which can be found in modern treaties to which we are party—treaties which affect our national interests in important ways. It is my view that the Test Ban's provisions are inadequate to meet the needs of missile agreements which will probably need frequent review and revision. On the other hand, the Charter's provision for multilateral decision-making organs are inappropriate for essentially bilateral missile agreements. Most multilateral organizations seem poor precedents for an American-Soviet arrangement to provide flexibility in an agreement to halt future missile deployment. Neither country is likely to admit other countries into the strategic decision-making process. Neither is likely to trust its security to third party mediation or settlement, whether the third parties are international staff or other countries. How could they, without providing the third party with much of the technical, classified information upon which each will act in making its own decisions? Consequently, most precedents involving international legislation within specialized agencies seem inapposite.[137] An examination must be made of other methods for accommodating change within the framework of a treaty affecting important United States interests without either amending the treaty or withdrawing from it.

Both the U.N. Charter and the Test Ban Treaty were in the best tradition of cooperation between the executive branch and the Senate. Both resulted from negotiations in which Senators were involved through advance consultations, hearings, and participation as advisers or members of the American delegation. The Senate could and should devote as much time and attention to one, all-inclusive strategic arms treaty if one could be negotiated. But assuming there are a number of lesser agreements, and that even these will need continuing revision, the manner of congressional participation appropriate for the U.N. Charter and the Test Ban Treaty may not be appropriate for missile agreements. Experience under other treaties should, therefore, be examined.

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136. Treaty Banning Nuclear Tests, *supra* note 131, art. IV.

137. For a description of this international practice, *see* D. BOWETT, *supra* note 135, at 120-25. The extensive power given by treaty to some international agencies (*e.g.*, ICAO, WHO, WMO and IAEA) to enact specialized rules and regulations binding on member states is illustrated in L. SOHN & D. PARTAN, LEGAL PROBLEMS OF INTERNATIONAL ADMINISTRATION 654-762 (mimeographed materials, Jan. 1968).

A. *Rush-Bagot Agreement of 1817*

The Rush-Bagot Agreement limits naval armament on the Great Lakes and was the first disarmament treaty entered into by the United States.[138] It continues to stand for the principle of Great Lakes disarmament even if the wars, economic growth, and technological development of a century and a half have made its specific restrictions on naval armament obsolete. Lacking any provision for change except for a six-month withdrawal clause, it demonstrates clearly the need for flexibility in such an agreement. Without the executive discretion assumed by the foreign offices of Canada and the United States, the Treaty would now be a dead letter rather than a symbol of international friendship and successful arms control.

The basic provisions of the Agreement were:

(1) The Great Lakes naval force on each side should be confined to four ships, one each on two lakes, and two for the others.
(2) None of these should weigh more than 100 tons or be armed with more than "one eighteen pound cannon."
(3) No other vessels of war should be "there built or armed."[139]

None of these provisions now remains in force in the terms in which it was written. Executive agreements have modified and modernized their content. Any Great Lakes naval vessel of either side can be stationed on any of the Lakes and all limit has been removed on the number of vessels used for training,[140] provided that each side notify the other of the functions, disposition and armament of all training vessels. The 100 ton restriction—designed not for steel but wooden hulls—has been removed.[141] The eighteen-pound limit for guns has been transformed into a more modern four-inch limit.[142] Both countries are now able to build and arm war vessels on the Great Lakes, provided full information is exchanged, the armament is incapable of immediate use and the vessels are promptly removed from the Great Lakes after completion.[143]

These executive agreements came out of the close cooperation of two world wars, but they were preceded by a history of relations between the two countries which was not so amicable. The Rush-Bagot Agreement itself followed the War of 1812 with Britain. Both the United States and Britain were anxious to avoid the economic strain and the risk of collision of a large naval force on the Great Lakes.[144] They dismantled their Great Lakes war

138. Agreement with Great Britain, April 28, 1817, *supra* note 48.
139. *Id.*
140. Agreement with Canada, June 10, 1939, 61 Stat. 4069, 4074 (1948), T.I.A.S. No. 1836, 149 U.N.T.S. 334, 344; Agreement with Canada, December 6, 1946, 61 Stat. 4069, 4082, 4083 (1948), T.I.A.S. No. 1836, 149 U.N.T.S. 3, 4, 6.
141. Agreement with Canada, June 10, 1939, *supra* note 140.
142. *Id.*
143. *Id.;* Agreement with Canada, November 2, 1940, 61 Stat. 4069, 4077 (1948), T.I.A.S. No. 1836, 149 U.N.T.S. 350, 354.
144. During the negotiations leading to the Treaty of Ghent (1814), one of the

vessels and, for approximately twenty years following ratification, closely adhered to the terms of the Agreement.[145] This state of affairs lasted only until the late 1830's and the Canadian Rebellion.[146] During the rebellion, the British government seized and burned an American ship which had been rented to the rebels as a supply ship.[147] Both countries began making preparations for war.[148] By 1841, the British had two steam frigates in the Great Lakes.[149] They removed these in 1843 after protest from the Americans, who in the meantime had begun work on their own warship, the 685-ton, 2-gun ship, the *Michigan*,[150] which remained on the lakes until the early 1920's.

A great deal of informal negotiation went on between the diplomats on both sides. Each side informed the other when it increased its naval forces for purposes of "self-defense," as the British did during the Canadian Rebellion and the United States did during the Civil War.[151] Actions which appeared to endanger the security of the other nation drew sharp protests.[152] In 1864, the United States went so far as to give notice of its intention to terminate the agreement after six months so that shipyards might be built on Great Lakes shores as a defense measure against Confederate raids from Canada.[153] The notice of termination was withdrawn within the six-month period, as the course of the war changed, and the Secretary of State instructed our ambassador in Great Britain to tell the British that the United States wanted the Rush-Bagot Agreement to remain in force and "hoped" the British would not arm vessels in excess of the agreed force.[154] Although the notice of termination had been the subject of a House resolution, there is no indication that the withdrawal of the notice was ever referred back to the House or Senate for its approval. Throughout the life of the Agreement, the negotiation of terms and modifications has been primarily the work of the Executive,[155] although some of the impetus for negotiation may have been

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demands of the British Commissioners was that the American government agree not to maintain any fortification on the shores of the Great Lakes nor to construct any armed vessel upon the Lakes. 1 W. MANNING, DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES: CANADIAN RELATIONS, 1784-1860, at 633-34 (1943). The United States proposed an arrangement for the limitation of naval forces on the Great Lakes in 1816. *Id.* at 235, 247.

145. Eayrs, *Arms Control on the Great Lakes*, 2 DISARMAMENT AND ARMS CONTROL, 374-75 (1964); H.R. Doc. No. 471, 56th Cong., 1st Sess. 18 (1900).

146. Eayrs, *supra* note 145, at 375; H.R. Doc. No. 471, *supra* note 145, at 19-21.

147. Eayrs, *supra* note 145, at 375.

148. By statute passed in 1841, Congress authorized, for "the construction or armament of such armed steamers or other vessels for defense on the Northwestern Lakes, as the President may think most proper and as may be authorized by the existing stipulations between this country and the British Government, one hundred thousand dollars." 5 Stat. 460 (1846).

149. Eayrs, *supra* note 145, at 377.

150. *Id.*; H.R. Doc. No. 471, *supra* note 145, at 24.

151. D. PIPER, THE INTERNATIONAL LAW OF THE GREAT LAKES 106-11 (1967).

152. 1 MANNING, *supra* note 144, at 157-58, 888-89.

153. PIPER, *supra* note 151, at 106.

154. Eayrs, *supra* note 145, at 377-78.

155. *See* the comments of the Secretary of State in the report to the House in H.R. Doc. No. 471, *supra* note 145:

[Immediately after the signing of the Rush-Bagot Agreement] the Secretary of

made necessary by congressional concern. In the 1890's, when there was renewed pressure on the Congress to allow naval shipbuilding on the Great Lakes, the United States attempted to negotiate an exception to the Agreement permitting shipbuilding. The Canadian Government refused to agree to such a modification at that time.[156] However, the common needs of the two world wars produced such agreement later.[157] Indeed, by 1942, the two governments had agreed that the new ships built on the Lakes could be tested on the Lakes so that they would be ready for combat as soon as they reached the sea.[158]

During the period of great concern about the Navy's shipbuilding budget in the early 1920's, Canada and the United States met to discuss amendment of the Agreement to make it conform more closely to modern conditions. One of the provisions that both sides wished to include in the new treaty was a clause making the numerical limit on ships subject to executive agreement.[159] This clearly resulted from the lengthy history of changing naval requirements on the Great Lakes. However, although drafts were prepared and exchanged, no final action was ever taken.

The lesson which both foreign offices had learned from the Rush-Bagot experience by the 1920's is still instructive today. A provision permitting changes in specific terms by executive agreement, perhaps reserving for treaty

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> the Navy instructed the several naval commanders on Lake Erie and the upper lakes . . . to confine the force in actual or occasional service within the limits defined in the arrangement . . . . [T]he executive orders of the Secretary of the Navy sufficed for full compliance with its terms for a year after its adoption. The existing legislation gave to the Secretary of the Navy ample discretion as to force to be employed on the lakes . . . . [D]uring the first fifty years of national legislation, *the number, character and distribution of the naval vessels of the United States on the Great Lakes and Lake Champlain was left by Congress to the discretion of the President, within the limits of appropriations actually made.*

Id. at 14, 17, 18 (emphasis added).

156. Eayrs, *supra* note 145, at 378-79.

157. Agreement with Canada, June 10, 1939, *supra* note 140; Agreement with Canada, November 2, 1940, *supra* note 143.

158. Agreement with Canada, November 2, 1940, *supra* note 143; Agreement with Canada, March 9, 1942, 61 Stat. 4069, 4080-81 (1947), T.I.A.S. No. 1836, 149 U.N.T.S. 356, 358.

159. The Canadian draft provision read:

> Such vessels [either armed or unarmed, which have been designed, built or used for naval purposes] may be maintained on the waters designated in Article 1 by either High Contracting Party as may be necessary for revenue and police duties. The numbers, specifications and armaments of such vessels shall be agreed upon from time to time between the Canadian and American Governments.

Letter from the British Ambassador to the Secretary of State enclosing Draft Treaty for the Limitation of Naval Armaments on the Great Lakes, [1923] 1 FOREIGN REL. U.S. 487, 488 (1938).

The American draft provision:

> Naval vessels or merchant ships converted to naval use may be maintained for training purposes only in the waters designated in Article 1, provided the vessels so maintained shall never be used for hostile purposes on the Great Lakes—even in time of war. The number, specification and armament of such vessels shall be the subject of agreement from time to time between the American and Canadian Governments.

Letter from the Secretary of State to the British Ambassador, enclosing American Draft of Treaty for the Limitation of Naval Armaments on the Great Lakes, [1923] 1 FOREIGN REL. U.S. 490, 493 (1938).

amendment any modification which might alter the purpose of the agreement, would have sanctioned what actually happened and produced a workable, realistic treaty.

B. *Boundary Commissions*

The deficiency of Rush-Bagot—the lack of any provision for change short of amendment or withdrawal—is not present in the treaties governing settlement of disputes about our national boundaries. Yet territory is often as important a national interest as military security and territorial disputes have been a leading cause of wars. From the point of view of Senator Fulbright and the Senate Foreign Relations Committee, "the transfer of territory," like the sending of American troops abroad, is a matter of "really great importance that required the most serious thought" and therefore should clearly be dealt with by treaty.[160] How responsibility for boundary changes is divided between the legislative and executive branches, therefore, seems instructive for the drafting of future arms control agreements.

Senator Fulbright is of course correct in thinking that our boundaries with Canada and Mexico are largely established by treaty.[161] But the everyday problems which arise under these treaties are dealt with by the executive branch alone; only major differences such as the recent Chamizal settlement with Mexico are submitted to Congress for formal approval.[162] On our

160. Statement of Senator Fulbright, Chairman of the Senate Foreign Relations Committee, during the debate on the "National Commitments" Resolution, 115 CONG. REC. S6901-02 (daily ed. June 20, 1969). For other references to this debate *see* notes 56, 129 *supra*.

161. Treaty of Peace with Great Britain, September 3, 1783, 8 Stat. 80 (1846), T.S. No. 104; Treaty of Amity, Commerce and Navigation with Great Britain, November 19, 1794, 8 Stat. 116 (1846), T.S. No. 105; Treaty of Peace with Great Britain, December 24, 1814, 8 Stat. 218 (1846), T.S. No. 109; Convention with Great Britain, October 20, 1818, 8 Stat. 248 (1846), T.S. No. 112; Treaty with Great Britain, August 9, 1842, 8 Stat. 572 (1846), T.S. No. 119; Treaty with Great Britain, June 15, 1846, 9 Stat. 869 (1862), T.S. No. 120; Protocol of Cession of Horseshoe Reef with Great Britain, December 9, 1850, 18 Stat. (2) 325 (1875); Declaration Adopting Maps of Boundary, February 24, 1870, T.S. No. 129, 1 Malloy 658; Protocol with Great Britain, March 10, 1873, 18 Stat. (2) 369 (1875), T.S. No. 135; Convention with Great Britain, January 24, 1903, 32 Stat. 1961 (1903), T.S. No. 419; Exchange of Notes with Great Britain Accepting Report of Commissioners, March 25, 1905, T.S. No. 476, 1 Malloy 796; Convention with Great Britain, April 21, 1906, 34 Stat. 2948 (1907), T.S. No. 452; Treaty with Great Britain, April 11, 1908, 35 Stat. 2003 (1909), T.S. No. 497; Treaty with Great Britain, January 11, 1909, 36 Stat. 2448 (1911), T.S. No. 548; Treaty with Great Britain, May 21, 1910, 36 Stat. 2477 (1911), T.S. No. 551; Treaty with Great Britain, February 24, 1925, 44 Stat. 2102 (1927), T.S. No. 720, 43 L.N.T.S. 239.

Treaty with Mexico, February 2, 1848, 9 Stat. 922 (1851), T.S. No. 207; Treaty with Mexico, December 30, 1853, 10 Stat. 1031 (1855), T.S. No. 208; Convention with Mexico, July 29, 1882, 22 Stat. 986 (1883), T.S. No. 220; Convention with Mexico, November 12, 1884, 24 Stat. 1011 (1887), T.S. No. 226; Convention with Mexico, March 1, 1889, 26 Stat. 1512 (1891), T.S. No. 232; Convention with Mexico, March 20 and November 14, 1905, 35 Stat. 1863 (1909), T.S. No. 461; Convention with Mexico, February 1, 1933, 48 Stat. 1621 (1934), T.S. No. 864; Convention with Mexico, August 29, 1963, [1964] 1 U.S.T. 21, T.I.A.S. No. 5515, 505 U.N.T.S. 185.

162. For background and history of Chamizal dispute, *see* 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 411-17 (1940); 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 680-93 (1964).

Canadian border, the recurrent problems of consequence are water diversion, pollution and obstruction. On the Mexican border, the meandering Rio Grande continues to create territorial changes. In both cases, boundary commissions composed of members from each side reach agreements and thereby make decisions which can become binding on their governments without submission to the Senate.

1. *Canadian Border.* A 1909 treaty gives three American and three Canadian Commissioners compulsory jurisdiction over all cases involving the use, obstruction or diversion of boundary waters.[163] Except where the two governments conclude a special agreement, which could of course be submitted to the Senate, the International Joint Commission approves or disapproves all applications which either government may forward to it concerning use, obstruction or diversion.[164] Decisions on these applications are made by majority vote and bind the two governments. In certain other cases, the Commission makes recommendations which are not binding.[165] And, on matters of such importance as the building of the St. Lawrence Seaway, lengthy congressional consideration is of course required.[166]

2. *Mexican Border.* For more than 60 years, the American Commissioner of the International Boundary and Water Commission, United States and Mexico, has had authority to negotiate and settle differences in the application of treaties concerning the location of the shifting boundary line formed by the Rio Grande and the Colorado Rivers.[167] Under an 1889 treaty with Mexico, joint decisions of the United States and Mexican Commissioners are submitted to their two governments for a one month waiting period.[168] If there is no objection by either within that period, the decision on the boundary is binding on both governments.[169] One month is sufficient time for consultation with interested members of Congress by the officers of the Executive Branch who must make the decision. But it is not usually adequate for formal advice and consent by the Senate. Later treaties, legislation and practice make clear that unusual decisions involving large areas and populations must be submitted to Congress, but everyday matters involving smaller areas and popula-

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163. Treaty with Canada, January 11, 1909, 36 Stat. 2448, 2449-54 (1911), T.S. No. 548. *See* Griffin, *A History of the Canadian-United States Boundary Waters Treaty of 1909*, 37 U. DET. L.J. 76 (1959).

164. Treaty with Canada, *supra* note 163.

165. *Id.*, art. 9.

166. The Wiley-Dondero bill creating the St. Lawrence Seaway Development Corporation was introduced in both houses in January, 1953. 99 CONG. REC. 318, 513 (1953). The joint resolution was approved by the Senate on Jan. 20, 1954, 100 CONG. REC. 525 (1954), and by the House on May 6, 1954, 100 CONG. REC. 6158-60 (1954). *See generally* W. R. WILLOUGHBY, THE ST. LAWRENCE WATERWAY: A STUDY IN POLITICS AND DIPLOMACY (1961). *See also* Power Authority v. FPC, 247 F.2d 538 (D.C. Cir. 1957), *judgment vacated for mootness*, 355 U.S. 64 (1957).

167. Convention with Mexico, March 1, 1889, 26 Stat. 1512 (1891), T.S. No. 232.

168. *Id.* art. VIII, at 1516.

169. *Id.*

tions need not be.[170] And the practice of executive agreement by the Boundary Commissioners subject to a 30-day waiting period in Washington has been extended to other matters, including the division of irrigation waters between Mexico and the United States pursuant to treaty.[171]

C. *Naval Limitation Treaties*

Between the two world wars, three important treaties limiting naval ships and armaments were negotiated: the first in 1922, the second in 1930, and the third in 1936.[172] The 1922 treaty dealt with battleships and aircraft carriers. It established a 5:5:3 ratio for these ships for the United States, the United Kingdom and Japan. The 1930 treaty limited the building of smaller vessels, such as cruisers, destroyers and submarines. The 1936 treaty attempted to regulate only the size and armaments of naval vessels. It did not deal with the number of ships each country could have because Japan, desiring parity in battleships and carriers with America and Britain, walked out of the conference when they would not accede to her demands. Because of the "gathering storm" of war, however, the 1936 treaty was short lived.[173]

None of the three treaties created an international organization to implement its terms. The treaties did, however, contain successively more elaborate provisions for dealing with changed circumstances. While all incorporated formal treaty amendment articles, the later treaties went considerably beyond such provisions.

The 1922 treaty called for a conference to be held in 1930 to consider "what changes, if any, in the treaty may be necessary" in view of "possible technical and scientific developments."[174] If any of the parties believed, before

170. *See, e.g.*, Banco Convention of March 20, 1905, 35 Stat. 1863 (1909), T.S. No. 461. This limits the Commission's authority to certain areas under 250 hectares and 200 people, *id.* art. II, at 1866. The larger Chamizal area in El Paso was referred to the Commission before this treaty was adopted, but the Commissioners were unable to agree. By the Convention of June 24, 1910 with Mexico, 36 Stat. 2481 (1911), T.S. No. 555, the dispute was submitted to arbitration, but the United States refused to accept the arbitral award. In 1963, a new treaty was finally adopted ending the long dispute. Convention with Mexico, August 29, 1963, [1964] 1 U.S.T. 21, T.I.A.S. No. 5515, 505 U.N.T.S. 185. *See* State Dep't press release, July 18, 1963, in 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 682 (1964).

171. Treaty with Mexico, February 3, 1944, 59 Stat. 1219 (1946), T.S. No. 994, 3 U.N.T.S. 313. *See* Memorandum of the International Boundary and Water Commission, United States and Mexico: United States Section of the Commission at El Paso, Texas, Outline of Jurisdiction and Functions of the International Boundary and Water Commission, United States and Mexico, in 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 703-14 (1964).

172. Treaty for the Limitation of Naval Armament, February 6, 1922, 43 Stat. 1655 (1925), T.S. No. 671, 25 L.N.T.S. 202; Treaty on Limitation and Reduction of Naval Armament, April 22, 1930, 46 Stat. 2858 (1931), T.S. No. 830, 112 L.N.T.S. 65; Treaty on Limitation of Naval Armament, March 25, 1936, 50 Stat. 1363 (1937), T.S. No. 919, 184 L.N.T.S. 115.

173. W. CHURCHILL, THE GATHERING STORM (1948). *Cf.* Churchill's comments on the effect on British defense measures of the treaties for the limitation of naval armament, *id.* at 13-14, 94, 111, 159-63. For a brief history and description of the 1936 treaty, *see* S. REP. ON EXEC. F, 74th Cong., 2d Sess. 18-26, 80 CONG. REC. 7390 (1936).

174. Treaty, February 6, 1922, *supra* note 172, at art. 21.

then, that "the requirements of [its] . . . national security . . . in respect of naval defense are . . . materially affected by any change of circumstances,"[175] it could call for a conference of the parties. In either of these conferences, change was to be accommodated by amending the treaty which, of course, required ratification by each government in accordance with its own constitutional processes. Finally, if any party became "engaged in a war which in its opinion affects the naval defense of its national security" it could "suspend for the period of hostilities" most of its obligations upon notice to the other parties.[176] In that event, the other parties were to "consult together with a view to agreement as to what temporary modifications, if any, should be made in the Treaty as between themselves."[177] If no agreement were reached, any of the other parties could suspend its obligations for the period of hostilities.[178] Temporary modification of the treaty would presumably have required submission to the Senate, but suspension would not.[179]

The 1930 Treaty was an amendment to the 1922 Treaty and it continued in effect the relatively traditional provisions for change in the earlier treaty. Additional language was necessary, however, because France and Italy had declined to accept limitations on their cruisers, destroyers and submarines. Britain, Japan and the United States therefore agreed that if the "requirements of national security" of any of them in respect of cruisers, destroyers, or submarines was "materially affected by new construction by any power other than" the three, any of the three could notify the others of the "increase required to be made in its tonnages" of cruisers, destroyers or submarines.[180] Without further agreement, without amending the treaty, and without submitting any amendment to its parliament for approval, the notifying power could make the increase it had specified. The other two would then be permitted to make proportionate increases, provided each of them notified the other.[181]

A provision of the 1930 Treaty called for a conference in 1935 to frame a new treaty.[182] Although both the 1922 Treaty and the 1930 Treaty were scheduled to expire at the end of 1936, the conference was not convened until March of 1936.[183] After the Japanese walked out, Britain, France and the United States drafted a new treaty imposing restrictions on the size and

175. *Id.*
176. *Id.*, art. 22.
177. *Id.*
178. *Id.*
179. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 163(1)(a) (1965).
180. Treaty, April 22, 1930, *supra* note 172, art. 21.
181. *Id.*
182. *Id.*, art. 23.
183. R. O. O'CONNOR, THE QUEST FOR DISARMAMENT, in *Study Riposte*. Annex 11, pt. 1, at A-149, A-160-61 (Report prepared by Historical Evaluation and Research Organization for U.S. Arms Control & Disarmament Agency, mimeographed 1964); Treaty, Feb. 6, 1922, *supra* note 163, art. 23; Treaty, April 22, 1930, *supra* note 172, art. 23.

armaments of their battleships, aircraft carriers, lighter surface vessels, and submarines.[184] More significant for our purposes, they agreed to elaborate provisions for the exchange of information on their annual programs for naval construction and acquisition.[185] Throughout the year, notification was to be given of changes in these programs, of various specifications of the vessels to be built, of the dates when keels were laid down, of modifications during construction, and of major over-hauling of older vessels.[186] No vessels within prescribed categories were to be laid down, otherwise acquired or modified in important respects until four months after notification.[187] The provisions appear designed to permit each party to check his intelligence estimates against the declared plans of another party, and to respond to the other's plans by trying to talk him out of it, or by changing his own plans. A fairly continuous exchange of information was required, and a great deal of informal negotiation was possible.[188]

The 1936 Treaty contained authorization somewhat similar to that of the 1930 Treaty to depart from the limits prescribed in the Treaty or in the party's declared annual program if non-parties built vessels not in compliance with the treaty, or if the party felt its "national security" to be "materially affected by any change of circumstances" other than those provided for in the Treaty.[189] As under the comparable provisions of the 1930 Treaty, a departure could be made without amending the Treaty. Such departure was more difficult, however, because of a three month waiting period and a requirement that the parties "consult together and endeavor to reach an agreement with a view to reducing to a minimum the extent of the departures which may be made."[190] Finally, the 1936 Treaty included an article permit-

184. Treaty, March 25, 1936, *supra* note 172, Part II.
185. *Id.*, arts. 11-21.
186. *Id.*
187. *Id.*, arts. 12, 13, 14 & 16.
188. Indications are that such informal negotiating and exchange of information did take place. Admiral Leahy mentioned the agreement to exchange information regarding building programs "as is now being exchanged under the London Treaty of 1936 among the United States, the British Commonwealth of Nations, and France" in testimony during *Hearings on H.R. 9218 Before the House Comm. on Naval Affairs*, 75th Cong., 3d Sess. 1941 (1938). William T. Stone wrote of consultations which were taking place in London following the Panay incident, looking toward the joint invocation of the "escalator" clause of the 1936 naval treaty and the exchange of information regarding the distribution of forces in the Pacific. W. STONE, 1 REFERENCE SHELF 62 (1938). Cordell Hull said of the provision for the advance exchange of information that it was "one of the most important developments of the conference," and "[i]t was important in that it brought the navies of the United States, Britain and France more closely together in knowledge of one another's plans, in cooperation and confidence." C. HULL, THE MEMOIRS OF CORDELL HULL 453-54 (1948).
It appears that information on the completion and acquisition of ships under the 1922 and 1930 treaties was also exchanged according to the provisions of those treaties. *See* correspondence in [1936] 1 FOREIGN REL. U.S. 132-36 (1953) *and* in [1937] 1 FOREIGN REL. U.S. 623-24 (1954).
189. Treaty, March 25, 1936, *supra* note 172, arts. 25 and 26.
190. *Id.*, art. 25(3).

ting suspension in the event of war, an article which was exercised by Britain on the very day in 1939 that she declared war on Germany.[191] The other parties soon followed Britain's suit.[192]

These provisions, according to the American negotiator, were designed to give the agreement sufficient "flexibility" so that it could change to meet the needs of the times.[193] Although they met the needs of war time by permitting immediate suspension, they were not in effect long enough during peacetime to demonstrate their flexibility in such circumstances.

One of the significant precedents for a missile limitation in the 1936 Treaty is the information-exchange requirement giving each party details on the declared annual program of the others and providing a waiting period before new starts were made. During the delay the other parties could respond by negotiating to eliminate or reduce the new starts, and, at the same time, by planning the changes in their own programs which might be necessary if the new starts went ahead on schedule. If negotiation successfully prevented the new start, a formal treaty amendment reflecting that agreement could be negotiated, assuming of course that a moratorium existed until it was ratified. Or, since the departures were from the annual program and not from the Treaty, the parties could simply accept notices from each other of changes in their declared programs.

Another useful precedent from the 1936 arrangement is the authority to change one's annual program in response to the construction by non-signing parties of ships covered by the Treaty. Again, the notice requirement and waiting period afforded opportunity for negotiation within the framework of the treaty to eliminate or reduce new starts without any requirement for formal treaty amendment.

D. *Antarctic Treaty*

The 1959 Antarctic Treaty, which also permits change with or without treaty amendment, proclaims that Antarctica "shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of

191. *Id.*, art. 24. The State Department's treaty files reveal that Britain gave notice, pursuant to article 24, of suspension of all the obligations of the treaty as far as she was concerned on September 3, 1939, the day she declared war. India, Australia, New Zealand, France, Canada, the United States and Italy followed in that order with notices of intent to suspend. The United States was not then at war. When a party at war suspended, article 24 permitted parties not at war to suspend after consulting other remaining parties if the consultations produced no agreement on another course.

192. *See* note 191 *supra*.

193. Statement of Norman Davis, in *Hearings on a Treaty for the Limitation of Naval Armament and the Exchange of Information Concerning Naval Construction, Before the Senate Comm. on Foreign Relations*, 74th Cong., 2d Sess. 33 (1936).

weapons."[194] In addition, nuclear explosions are explicitly prohibited in Antarctica.[195]

The Treaty did not create any international organization to implement these terms. It did, however, authorize executive agreement to carry out their purposes. Representatives of the 12 original parties meet periodically to consult and recommend to their Government "*measures in furtherance of the principles and objectives of the treaty*, including measures regarding: (a) use of Antarctica for peaceful purposes only. . . ."[196] These recommendations become effective as an international agreement when approved by each of the governments entitled to participate in the meeting.[197] An American representative ordinarily goes to such a conference with instructions from the State Department worked out with other agencies. Depending upon the importance of the matter, he consults with appropriate members or committees of Congress before departing. During and after the meeting, he reports to the State Department what the agreed recommendations are. The State Department then places the recommendations before officials of other interested government agencies, including members or committees of Congress, before giving its approval. The executive can then bind the United States to these recommendations without further action by Congress.

At the first consultative meeting, the Antarctic representatives made recommendations to implement a number of the Treaty's provisions, including the Treaty's requirement for prior notice by any party of "any military personnel or equipment intended to be introduced by it into Antarctica . . . ."[198] The recommendation specified the time and manner for furnishing the information and stated that it should include "names, types, numbers, descriptions and armaments of ships, aircraft and other vehicles, introduced, or to be introduced into Antarctica, and information on military equipment, if any, and its location in Antarctica; . . . the number of personnel who are members of the military services . . . ; the number and types of armaments possessed by personnel . . . ."[199] These recommendations became effective as an agreement nine months after the meeting without submission to the Senate.[200]

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194. The Antarctic Treaty, December 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. *See* DEPARTMENT OF STATE, SPECIAL REPORT ON UNITED STATES POLICY AND INTERNATIONAL COOPERATION IN ANTARCTICA, H.R. Doc. No. 358, 88th Cong., 2d Sess. (1964); H. TAUBENFELD, A TREATY FOR ANTARCTICA (International Conciliation Series No. 531, 1961).

195. Antarctic Treaty, *supra* note 194, art. V.

196. *Id.*, art. IX (emphasis added). The original twelve are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom and the United States. Countries joining the treaty after the original twelve may participate while conducting substantial scientific research in Antarctica. *Id.*, art. IX.

197. *Id.*

198. *Id.*, art. VII(5)(c).

199. Recommendations of the First Antarctic Treaty Consultative Meeting, July 24, 1961, [1962] 2 U.S.T. 1349, T.I.A.S. No. 5094.

200. *Id.* The two subsequent consultative meetings have also produced agreements by the same procedure. *See* Recommendations of the Second Antarctic Treaty Consultative

While arms in the Antarctic seem unlikely at the moment to jeopardize our security, the Soviet Union has claims there, and missiles based there could threaten our South American allies as well as ourselves. Consequently, implementation of the Treaty's prohibition on military installation is of some consequence to us. In addition, the Treaty is one of the handful of arms control agreements to which both the United States and the Soviet Union are parties.[201] The Antarctic Treaty's provisions for change are, therefore, relevant precedents.

E. *Control of Nuclear Materials Used for Peaceful Purposes in Non-Nuclear Countries*

To control nuclear materials in use by other countries, Congress has worked out new institutional arrangements which give the executive branch considerable leeway in negotiating arrangements. While traditional treaty procedures are not used, executive branch discretion is exercised under the close scrutiny of an alert watchdog committee, the Joint Committee on Atomic Energy.[202]

1. *American-made Fissionable Material.* American cooperation with other countries in the peaceful uses of atomic energy derives largely from President Eisenhower's 1953 "Atoms for Peace" proposal to the United Nations.[203] He announced that the United States would assist other countries in their development of nuclear energy, provided they gave adequate assurance that this assistance would not be misused for military purposes. Implementing legislation was enacted in 1954.[204] It authorized the U.S. Atomic Energy Commission to distribute nuclear materials to other nations pursuant to international agreements containing guaranties that the material would not be used for atomic weapons or any other military purpose.[205] Such agreements are submitted first to the President for approval, and then to the Joint Committee on Atomic Energy, where they must lie for 30 days while the Congress is in session.[206] Unless the Congress takes steps to disapprove an agreement during the thirty-day period, no further Congressional action is required.

Meeting, July 28, 1962, [1963] 1 U.S.T. 99, T.I.A.S. No. 5274; Recommendations of Third Antarctic Consultative Meeting, June 2-13, 1964, [1966] 1 U.S.T. 991, T.I.A.S. No. 6058. Inspections by the United States have produced no evidence of violation by other countries of the arms control provisions of the treaty. *See, e.g.*, Report of the United States Observers on Inspection of Antarctic Stations, 1963-1964 Austral Summer Season, in H.R. Doc. 358, Annex III, *supra* note 194.

201. Others are the IAEA Statute *infra* note 208; Memorandum of Understanding with the U.S.S.R. Regarding the Establishment of a Direct Communications Link, *supra* note 59; Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *supra* note 131; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, *supra* note 110; *and* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 50.

202. *See, e.g.*, Atomic Energy Act of 1946, §§ 4(b), 5(a)(3), 5(d), 6(b), 10(a)-(b), 60 Stat. 755-75 (1964).

203. 8 GAOR 450, U.N. Doc. A/PV. 470 (1953).

204. Atomic Energy Act of 1954, §§ 54, 64, 123, 42 U.S.C. §§ 2074, 2094, 2153 (1964).

205. *Id.*

206. *Id.*, § 123, 42 U.S.C. § 2153(B)-(C).

The first agreements for cooperation which the United States entered into with other countries contained detailed language describing the safeguards which would be imposed, and provided for inspection by American nuclear experts.[207] Later, two important international atomic energy organizations were created, one regional (Euratom), and one world-wide (International Atomic Energy Agency).[208] Since 1962, the responsibility for safeguarding nuclear materials from the United States in the reactors of other countries has been gradually transferred to these two agencies—with the support of Congress.[209]

At the present time, the United States relies upon the IAEA's Safeguards System to police the agreements by which we transfer uranium to most countries other than the Euratom Six.[210] Yet the IAEA regulations creating this system were not submitted to the Congress or any of its committees for formal approval.

This reliance upon the IAEA came about through the following arrangements which the Congress helped to create:

The 1957 International Atomic Energy Agency Statute, a treaty to which the Senate gave its consent, authorizes the Agency to "establish and administer safeguards designed to ensure that special fissionable and other materials . . . are not used in such a way as to further any military purpose . . . ."[211] The statute also contains certain standards or specifications for these safeguards.[212] The regulations creating the IAEA Safeguards System were worked out under the direction of the Board because the Statute gives it the major power for running the Agency.[213] The Board is so structured that the United States, with help from its friends and allies, can usually wield a veto on important issues.[214]

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207. *E.g.*, Agreement for Cooperation Concerning Civil Uses of Atomic Energy with Italy, July 28, 1955, [1955] 2 U.S.T. 2647, T.I.A.S. No. 3312. *See* Address by AEC Chairman Seaborg, Grinnell College, Jan. 30, 1969, 60 DEP'T STATE BULL. 199, 202-203 (1969); Letter of AEC Chairman Seaborg to Senator Cooper, Sept. 11, 1968, in *Hearings on Executive H Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess., pt. 1, at 491, 492 (1969).

208. Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 298 U.N.T.S. 167; International Atomic Energy Agency (IAEA) Statute, *supra* note 82.

209. *See* Address of AEC Chairman Seaborg, *supra* note 207, at 202-203; Testimony of AEC Chairman Seaborg, in *Hearings on Executive H Before the Senate Comm. on Foreign Relations*, 90 Cong., 1st Sess., pt. 1, at 99 (1968); Letter of Assistant Secretary of State Macomber to Senator Cooper, Sept. 5, 1968, in *Hearings on Exec. H*, pt. 2, *supra* note 207, at 485, 488 (1969).

210. *See, e.g.*, Agreement Between the International Atomic Energy Agency, Argentina, and the United States, December 2, 1964, [1966] 1 U.S.T. 583, T.I.A.S. No. 6004.

211. IAEA Statute, art. III A.5., *supra* note 82.

212. *Id.*, art. XII.

213. IAEA Statute, *supra* note 82, art. VI.F; Letter of AEC Chairman Seaborg to Senator Cooper, September 11, 1968, *supra* note 207, at 496; Testimony of AEC Chairman Seaborg, in *Hearings on Exec. H*, pt. 1, *supra* note 207, at 122-123.

214. A majority of the Board can call for a two-thirds vote on important questions. IAEA Statute, *supra* note 82, art. VI.E. *See also* Letter of AEC Chairman Seaborg to Senator Cooper, September 11, 1968, *supra* note 207, at 491, 496 (1969). Important

The regulations creating the IAEA's Safeguards System were drafted initially by the IAEA's international staff and later drastically revised by the Board of Governors.[215] They were largely the product of lengthy negotiations between nations and not majority voting by the Board. In these negotiations, the United States and, to a lesser extent, the Soviet Union played important roles. Their common interest in effective safeguards to prevent the emergence of new nuclear powers is obvious. On the whole, they have worked fairly well together in the IAEA in recent years.

Congressional participation did not stop with the Senate's vote approving the IAEA Statute. An IAEA Participation Act requires that the American representative, who among other things, sits on the IAEA's Board, shall be appointed with the advice and consent of the Senate and shall take positions based upon instructions from Washington.[216] The first head of the IAEA itself was former Chairman of the Joint Committee, Congressman Sterling Cole.[217] Congressional advisers, usually members of the Joint Committee, attend some of its meetings every year. The Atomic Energy Commission, which has a close relationship to the Joint Committee, supplies experts to the IAEA and to American delegations to IAEA meetings.[218] Instructions from Washington to the American representative are frequently discussed with the Joint Committee before they are transmitted. The AEC has a major role in developing and implementing U.S. policy in this area. It is required by law to keep the Joint Committee "fully and currently informed."[219] Finally, as indicated above, the individual agreements providing for transfer of American nuclear materials to other countries must lay before the Joint Committee for 30 days. If the Congress becomes dissatisfied with the safeguards the IAEA provides, it can require a gradual shift back to inspections by U.S. nationals as particular agreements of cooperation between the United States and other countries come up for renewal. Congress could not in this fashion require the IAEA to change its standards for IAEA safeguard agreements, but it could

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questions on approving or amending the safeguards system would probably be subject to the two-thirds vote. Testimony of AEC Chairman Seaborg, in *Hearings on Exec. H*, pt. 1, *supra* note 207, at 123.

Thirteen of the twenty-five board members must be advanced in atomic energy technology, including the production of source material and the provision of technical assistance. The twelve others are elected in large measure on a geographical basis. IAEA Statute, *supra* note 208, art. VI.A. In general, the membership tends to come from more developed countries. And, of the 25 members on the 1967-68 Board, 14 are from countries which are signatories of collective security treaties to which the United States is also party. *See Hearings on Exec. H*, pt. 1, *supra* note 209, at 122 (1968). An enlargement of the IAEA board is currently under discussion.

215. *See* Szasz, *Legal and Administrative Problems Arising from the Implementation of International Atomic Energy Safeguards*, in 4 LAW AND ADMINISTRATION 116, 121-22 (Series X, Progress in Nuclear Energy, 1966); Szasz, *The Law of International Atomic Energy Safeguards*, 1 REVUE BELGE DE DROIT INTERNATIONAL 196, 202 (1967).

216. 22 U.S.C. § 2021(a).

217. *See* Letter of Secretary of State Rusk, *infra* note 225, at 310.

218. *Id.*

219. Atomic Energy Act of 1954, § 202, 42 U.S.C. § 2252 (1964).

require American inspectors and higher American standards as the price for American assistance.

2. *Foreign-made Fissionable Material.* The Non-Proliferation Treaty will extend the obligation to accept IAEA-supervised safeguards to nuclear materials which have not been supplied by the United States. In consenting to its inspection article, the Senate refrained from interfering with the present practice of executive discretion, under congressional scrutiny, to accommodate future inspection developments.[220]

The inspection article required the application of international safeguards on all nuclear material employed in the peaceful nuclear activities of non-nuclear parties.[221] The safeguards are to be those "set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system."[222] These safeguards are intended to verify the Treaty's prohibition on the manufacture of nuclear weapons by non-nuclear states.[223]

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220. *Hearings on Exec. H*, pt. 1, *supra* note 207, at 10, 100-02, 164-65, pt. 2, 502-03; 115 CONG. REC. S2673 (daily ed. March 11, 1969) *and* 115 CONG. REC. S2725 (daily ed. March 12, 1969) (debate on the treaty on the non-proliferation of nuclear weapons).

221. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 50, art. III. The text of article III is as follows:

> 1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principle nuclear facility or is outside any such facility. The safeguards required by this article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.
>
> 2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article.
>
> 3. The safeguards required by this article shall be implemented in a manner designed to comply with article IV of this Treaty, and to avoid hampering the economic or technological development of the parties or international co-operation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this article and the principle of safeguarding set forth in the preamble.
>
> 4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations.

222. *Id.*

223. *See* Bunn, *The Nuclear Non-Proliferation Treaty*, 1968 WIS. L. REV. 766, 773.

This inspection clause has been criticized as an "agreement to agree" which the Senate should not approve without first reviewing the inspection agreements which individual countries were going to negotiate with the IAEA.[224] The United States, however, was not to be a party to agreements not involving its materials or equipment, the non-nuclear countries had no obligation to negotiate the inspection agreements until the Treaty went into force, and the Treaty could not go into force until the Senate gave its consent.[225] The Senate decided to rely upon the executive branch, and the watchful eye of the Joint Committee, to see that effective safeguards were ultimately required in the negotiations. The Joint Committee will have all the means for working its will described above—except that the safeguards agreements between the IAEA and other countries covering material not supplied by the United States will not be submitted to the Joint Committee since we will not be party to them.

The IAEA and Non-Proliferation treaties are instructive in showing the extent to which the Senate is prepared to permit the executive branch to negotiate important changes within the framework of a treaty to meet future security needs without repeatedly submitting treaty amendments, provided that a committee in which the Senate has confidence is overseeing the negotiations. For our purposes, the participation of a multilateral international organization, the IAEA, is probably not the key. An international organization is not what the Senate relies upon and it is not likely to be used for a missile limitation agreement, at least not at the beginning. The relevance of the experience is to show how a treaty giving broad guidelines may result in delegation to the Executive of negotiating power not subject to formal Senate consent, at least where a watchdog committee has been designated to oversee the negotiations and where it does so, effectively.

F. *Mutual Defense Alliances*

The executive branch has exercised a great deal of independent authority under our collective defense treaties, which involve forty-two countries.[226]

224. *See, e.g.*, 114 CONG. REC. H325-26 (daily ed. Jan. 24, 1968); S. EXEC. REP. No. 91-1, 91st Cong., 1st Sess. 13, 19 (1969); Bunn, *supra* note 223, at 781-82.

225. The text of article III, *supra* note 221, makes clear that the agreements are to be between the IAEA and the non-nuclear countries. It also provides the obligation for the latter to negotiate and conclude the agreements. Article IX of the treaty provides that the treaty will enter into force when the United States together with the Soviet Union, the United Kingdom and 40 other States ratify the treaty. It became clear during Senate consideration of the treaty that Senate consent was probably a prerequisite even to be the beginning of preliminary negotiations between Euratom and IAEA for a safeguard agreement for the non-nuclear Euratom countries. *See* Letter from Secretary of State Rusk to Senator Fulbright, January 17, 1969. in *Hearings on Exec. H.*, pt. 2, *supra* note 207, at 307-08.

226. Inter-American Treaty of Reciprocal Assistance, *opened for signature*, Sept. 2, 1947, 62 Stat. 1681 (1949), T.I.A.S. No. 1838, 21 U.N.T.S. 77 (20 countries in addition to the U.S.: Mexico, Cuba (excluded from participation in the Inter-American system but still a party), Haiti, Dominican Republic, Honduras, Guatemala, El Salvador, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Ecuador, Peru, Brazil, Bolivia, Paraguay, Chile, Argentina, Uruguay); North Atlantic Treaty, April 4, 1949, 63 Stat.

It has even entered into what the Senate Foreign Relations Committee seems to regard as a military alliance with Spain without submitting any treaty to the Senate.[227] Executive promises without Congressional sanction to assist a foreign country by use of the American armed forces or finances have run into frequent Senatorial criticism, culminating recently in the adoption of the Fulbright "National Commitments" resolution.[228] Putting such promises aside, however, arrangements amounting to effective obligations have taken place within the framework of treaty alliances as the result of executive action without clear and explicit Congressional sanction, yet with general Congressional support. NATO is the most important case in point.

In NATO, the growth of executive discretion has been directly related to the growth of an institution, the North Atlantic Council. The basis for this institution is Article 9 of the North Atlantic Treaty which establishes a "council" of the parties "to consider matters concerning the implementation of this Treaty."[229] This rudimentary provision was given little further elaboration in the Treaty.[230] According to the 1949 report on the Treaty by the Senate

2241 (1950), T.I.A.S. No. 1964, 34 U.N.T.S. 243 (14 countries in addition to the U.S.: Canada, Iceland, Norway, United Kingdom, Netherlands, Denmark, Belgium, Luxembourg, Portugal, France, Italy, Greece, Turkey, Federal Republic of Germany); Security Treaty between Australia, New Zealand, and the United States (ANZUS), September 1, 1951, [1952] 3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83; Philippine Mutual Defense Treaty, August 30, 1951, [1952] 3 U.S.T. 3947, T.I.A.S. No. 2529, 177 U.N.T.S. 133; Korean Mutual Defense Treaty, October 1, 1953, [1954] 3 U.S.T. 2368, T.I.A.S. No. 3097; 238 U.N.T.S. 199; Southeast Asia Collective Defense Treaty, September 8, 1954, [1955] 3 U.S.T. 81, T.I.A.S. No. 3170; 209 U.N.T.S. 28 (7 countries in addition to U.S.: France, United Kingdom, New Zealand, Australia, Philippines, Thailand, Pakistan); Republic of China Mutual Defense Treaty, December 2, 1954, [1955] 1 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213; Japanese Treaty of Mutual Cooperation & Security, January 19, 1960, [1960] 2 U.S.T. 1632, T.I.A.S. No. 4509, 373 U.N.T.S. 186.

227. Defense Agreement with Spain, September 26, 1953, [1953] 2 U.S.T. 1895, T.I.A.S. No. 2850, 207 U.N.T.S. 83; Joint Declaration Concerning the Renewal of the Defense Agreement of September 26, 1963, September 26, 1963, [1963] 2 U.S.T. 1406, T.I.A.S. No. 5437, 492 U.N.T.S. 346; Memorandum given by General Wheeler to Spanish military authorities in November 1968, 115 CONG. REC. S6831 (daily ed. June 19, 1969); Agreement with Spain, June 20, 1969, 61 DEP'T STATE BULL. 15 (1969).

228. S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. S7153 (daily ed. June 25, 1969). *See* text at note 56 *supra*.

229. North Atlantic Treaty, April 4, 1949, 63 Stat. 2241 (1950), T.I.A.S. No. 1964, 34 U.N.T.S. 243.

230. The complete text of article 9 is as follows:

> The Parties hereby establish a council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The council shall be so organized as to be able to meet promptly at any time. The council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defense committee which shall recommend measures for the implementation of Articles 3 and 5.

Article 3 provides:

> In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

Article 5 provides in part:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, in such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by

Foreign Relations Committee, this was so because it was "preferable that the specific organization may be evolved in the light of need and experience."[231]

When it gave its consent to Article 9, the Senate may not have foreseen the extent of the institutional evolution which was to follow.[232] But the North Atlantic Treaty was as much a creature of the Senate as it was of the executive branch.[233] It has received strong, bipartisan support in the Senate ever since.[234] It has even acquired an auxiliary organization of legislators from NATO countries who confer once each year.[235]

After the invasion of South Korea in 1950, the United States and other NATO members agreed to the then revolutionary idea of an integrated North Atlantic international military command during time of peace.[236] The North Atlantic Council decided to draw on the forces of its members to increase NATO's military strength, and to place the forces under unified command in Europe.[237] It requested President Truman to designate General Eisenhower to serve as the Supreme Commander.[238]

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taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

231. In this report the Committee quoted Article 9 and said:

> While some machinery is clearly necessary for the effective implementation of the treaty, it would be inadvisable to attempt to elaborate this machinery in detail in the treaty. On the contrary, it is preferable that the machinery be described only in broad outline in order that the specific organization may be evolved in the light of need and experience. The committee urges that the organization set up be as simple as possible . . .
>
> Since the Council is given authority only "to consider matters concerning the implementation" of the treaty, its powers are *purely advisory with respect to governmental action.* Its purpose is *to make recommendations* to the governments and to assist them in reaching coordinated decisions. It should be emphasized, however, that the responsibility for making decisions lies in the respective governments rather than in the council. Since the council will have only advisory powers, no voting procedure is needed or contemplated. No party will have a veto, nor can it be coerced into taking a decision against its own judgment.

S. EXEC. REP. No. 8, 81st Cong., 1st Sess. (1949), 95 CONG. REC. 9816, 9821 (emphasis added).

232. *Compare* the views of the Senate Foreign Relations Committee in 1949, *supra* note 224, *with* the institution as it exists today as described in an excellent article by Professor Eric Stein and a French colleague, Dominique Carreau. See Stein & Carreau, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization*, 62 AM. J. INT'L L. 577 (1968).

233. S. EXEC. REP. No. 8, *supra* note 231; W. FOX & A. FOX, NATO AND THE RANGE OF AMERICAN CHOICE 244 (1967). The 1948 Vandenberg Resolution recommended the "development of regional and other collective arrangements for individual and collective self-defense" and the association of the United States "by constitutional process" with such arrangements. S. Res. 239, 80th Cong., 2d Sess. (1948). For a description of the basis for the resolution—Soviet vetoes which rendered the U.N. Security Council ineffective—*see* S. REP. No. 1361, 80th Cong., 2d Sess. (1948).

234. *See, e.g.*, FOX & FOX, *supra* note 233, at 246.

235. Formerly called the NATO Parlimentarian's Conference, this organization is now called the North Atlantic Assembly. It recently proposed establishment of a more recognized relationship with the North Atlantic Council. *See* SUBCOMM. ON NATIONAL SECURITY AND INTERNATIONAL OPERATIONS OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, THE ATLANTIC ALLIANCE UNFINISHED BUSINESS 14 (Staff Study, 1967).

236. Stein & Carreau, *supra* note 232, at 577, 588; FOX & FOX, *supra* note 233, at 13-25.

237. Stein & Carreau, *supra* note 232, at 588-89.

238. *Id.*

With the prospect of several more divisions of American troops being sent to Europe while a war was being fought in Korea, the Senate injected itself into the decision-making process. It disagreed with Secretary of State Acheson's claim that the President had constitutional authority as Commander-in-Chief to send U.S. forces to Europe and that "this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."[239] By resolution, it approved President Truman's order sending General Eisenhower to Europe as Supreme Allied Commander and it approved his plans to send more divisions.[240] But it expressed the "sense of the Senate" that Congressional approval was necessary before deploying American troops to Europe pursuant to the North Atlantic Treaty, and that no more troops should be so deployed without further approval.[241]

Except for troop deployment abroad, however, Congress has been relatively content to let executive branch discretion and NATO decision-making machinery grow—gradually but effectively. After General Eisenhower became Supreme Allied Commander, the North Atlantic Council transformed itself into a permanent body which met regularly.[242] The legal status of the staff, of the permanent representatives to the Council, of the NATO military forces and of the NATO headquarters were regularized by a series of international agreements.[243] As part of the arrangements for bringing Germany into NATO, all forces of NATO members on the continent, with a few exceptions, were placed under the Supreme Allied Commander by resolution of the Council.[244] In large measure as the result of implementation of the North Atlantic Treaty by this and later Council resolutions (none of which were submitted to the Senate for its consent),[245] NATO "has evolved into . . . an international organization which . . . has acquired a marked influence over national forces and defense policies in the Atlantic area . . . and has become a center of decision-making which, although still essentially subject to the principle of

239. *Hearings on S. Con. Res. 8 before Senate Comm. on Foreign Relations and Armed Services*, 82d Cong., 1st Sess. 92-93 (1951). Secretary of Defense McNamara took a similar view of the President's power to re-deploy American troops during the recent controversy over the Mansfield Resolution to reduce American troops in Europe. *Hearings on S. Res. 49 and 83 before Combined Subcomm. of Senate Comm. on Foreign Relations and Armed Services*, 90th Cong., 1st Sess. 41 (1967).

240. S. Res. 99, 82d Cong., 1st Sess. (1951).

241. *Id.*

242. Stein & Carreau, *supra* note 232, at 589.

243. Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Sept. 20, 1951, [1954] 1 U.S.T. 1087, T.I.A.S. No. 2992, 200 U.N.T.S. 3; Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, August 28, 1952, [1954] 1 U.S.T. 870, T.I.A.S. No. 2978, 200 U.N.T.S. 67; Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, [1953] 2 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. All of these agreements were submitted to the Senate.

244. *See* Par. 4, Resolution to Implement Sec. IV of the Final Act of the London Conference of October 3, 1954, in STATE DEP'T, AMERICAN FOREIGN POLICY, 1950-1955, BASIC DOCUMENTS 1481-83.

245. Stein & Carreau, *supra* note 232, at 588-97, 605-14.

unanimity, is nevertheless capable of influencing the allocation of resources in a vital sector through informal and formal procedures in the collegiate bodies, and through the working of its hierarchic military organs."[246]

There are three areas of interest in which this is probably true. In the first, the military infrastructure built up to support the Treaty, the arrangements have evolved to the point where an excellent argument can be made that France violated multilateral international obligations created in large measure by resolutions of the Council when she "withdrew" from the organization without withdrawing from the Treaty.[247]

Second, within the broad outlines of the Treaty and the 1951 Senate resolution authorizing deployment of United States forces under NATO command, specific annual obligations are made by the executive branch through NATO with respect to the size of our troop commitment, and with respect to national force levels. NATO has devised an annual review procedure for prodding its members toward meeting their treaty obligation to "maintain and develop their individual and collective capacity to resist armed attack."[248] As this procedure now works, a NATO committee recommends certain "force goals" to NATO members; they submit "country plans" which are analyzed by NATO military authorities and international staff; and the differences between the "country plans" and the "force goals" are negotiated out at various levels ending with the defense ministers of each country.[249] Ultimately a five-year plan is adopted for each country with the understanding that it is "firmly committed" to only the first year.[250] "Never before in peace or war have members of an Alliance agreed to exchange systematically such detailed and precise information on the military, economic and financial programmes and to submit these programmes to the examination and criticism of their partners."[251]

Third, executive branch participation in NATO may to some degree limit our freedom of action with respect to our strategic nuclear deterrent. A 1962 NATO communique—which the State Department regards as a "defense commitment or assurance"[252]—reports that our representative to a Council of Ministers meeting gave "firm assurances that [United States] strategic forces will continue to provide defense against threats to the Alliance beyond the capability of NATO-committed forces to deal with."[253] And in 1966, a

246. *Id.* at 638.
247. *Id.*
248. Stein & Carreau, *supra* note 232, at 589. North Atlantic Treaty, *supra* note 229, Art. 3. A description of the early Annual Review procedure appears in NATO INFORMATION SERVICE, NATO FACTS ABOUT THE NORTH ATLANTIC TREATY ORGANIZATION 105-106 (1965). *See also Hearings on S. Res. 49 and 83, supra* note 239, at 20-21.
249. NATO INFORMATION SERVICE, NATO FACTS AND FIGURES 70-71 (Brussels 1969). *See also* Stein & Carreau, *supra* note 232, at 592.
250. NATO FACTS AND FIGURES, *supra* note 249, at 70-71.
251. *Id.* at 70.
252. *See Hearings on S. Res. 151, supra* note 129, at 63.
253. STATE DEP'T, AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS, 1962, at 543-44.

"nuclear planning group was established to make the first international study of nuclear deterrence and plan for the management of the Western deterrent."[254] Partly as a result of the work of this committee, during the ministers' meeting in December 1967, the North Atlantic Council "adopted" Secretary McNamara's revised strategic concept of a "flexible and balanced range of appropriate responses, conventional and nuclear."[255]

No NATO decision of this kind which we did not support would, of course, bind us to take any action.[256] This is particularly true in the case of an armed attack when "each" member is to take action "individually and in concert" with others as "it deems necessary."[257] But much has been accomplished by consulting in the Council and acting in concert thereafter.

> [E]ven if one takes the view that the NATO Council . . . is nothing more than a conference of member states and has no power to make authoritative decisions, there can be no question . . . that certain resolutions agreed upon unanimously by the national representatives in the Council would constitute *international agreements* creating international obligations for the member states.[258]

There are also many times when a "consensus" is achieved which may not impose an international obligation on us but which nevertheless guides our future action.[259]

The North Atlantic Treaty experience is instructive in showing how a forum designed essentially for consultation and negotiation can evolve into an organization providing the basis for a good deal of executive branch discretion to negotiate agreements affecting major national interests, agreements which lie within the broad outlines of a treaty but which go beyond the treaty and are not submitted to the Senate for its consent. This could probably not have happened but for strong Congressional support for the North Atlantic Treaty, executive branch briefing of key committees and members of Congress, congressional participation in some NATO affairs (including visits to European installations) and the watchful eye of the Joint Committee on the nuclear arrangements.

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254. Rostow, *Concert and Conciliation: The Next Stage of the Atlantic Alliance*, 57 DEP'T STATE BULL. 422, 428 (1967). *See* Stein & Carreau, *supra* note 232, at 629.

255. NAC Communique for Minister's Meeting of Dec. 12-14, 1967, 58 DEP'T STATE BULL. 49, 50 (1968).

256. *See* Stein & Carreau, *supra* note 232, at 605-12, for an excellent analysis of the legal effect of resolutions of the Council.

257. North Atlantic Treaty, *supra* note 229, at Art. V.

258. *See* Stein & Carreau, *supra* note 232, at 613.

259. The pressure for unanimity is often effective when a large majority has been achieved. The Secretary General may attempt to achieve a consensus to which no one will object by summarizing a meeting in a way to account for as many of the important views expressed as possible. Secretary General Brosio has been particularly skillful in doing so. Unless a national representative then objects to the summary of the meeting of the Council, a decision is assumed to have been taken along the lines of the summary. *Cf.* THE ATLANTIC ALLIANCE UNFINISHED BUSINESS, *supra* note 235, at 12.

Conclusion

When dealing with weapons, closer cooperation with the Soviets than with our NATO allies is not to be expected. To assume that an American-Soviet council to limit missiles could quickly acquire the power to create obligations that is now possessed by the North Atlantic Council is unrealistic. But the kind of cooperation and congressional support which exist in NATO should be our goal if SALT agreements are to achieve the flexibility necessary for stability in a changing world.

A broad exchange of information on national military programs is essential as a check on the intelligence estimates which will form the initial basis for negotiating positions. Precedent for this exists not only under the North Atlantic Treaty, but also under the Naval Limitation Treaties and the Rush-Bagot Agreement. Executive authority to negotiate modifications of missile limitations within guidelines established by Congress or the Senate finds similar precedent in the atomic energy agreements, the Antarctic Treaty, and the later Naval Treaties—as well as in NATO.

For constitutional and political reasons, the best framework for lasting agreement is probably a treaty—as soon as one can be negotiated. In the interim, however, an executive agreement or a moratorium can halt further escalation of the missile race. To implement and revise such a measure, and to provide a continuing forum for strategic dialogue, a preparatory commission can be established.

Appointing congressional advisers to the American delegation will help keep Congress involved, but it will not substitute for the creation of a single committee with Senators from the Foreign Relations Committee, the Armed Services Committee and the Joint Committee on Atomic Energy. If the Senate reposes its confidence in a diligent, responsible and discreet committee, that committee should receive the same kind of information and opportunity to influence the SALT negotiations which the Joint Committee now has in atomic energy activities. The joint participation contemplated by the Constitution and required to sustain wide public support for the negotiations, clearly justifies the greater effort necessary on both sides.