

REPORT NO. 1 OF THE SECTION OF
INTERNATIONAL LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association is opposed in principle to, and questions the wisdom of, enactment by the Congress of any legislation which would purport to provide for a Congressional veto by resolution of either or both of the Houses of executive agreements entered into by the President; and

Be It Further Resolved, That the American Bar Association is in favor of adding to the "Case Act" (1 U.S.C. 112b) the following two paragraphs:

"1. As used herein the phrase 'international agreement,' means any arrangement or understanding, written or oral, that purports to commit the United States to an obligation to follow a course of action requiring subsequent Congressional authorization or approval of the expenditure of funds not yet authorized and appropriated or that purports to create, change or define substantive contractual obligations under international law.

"2. The Congress may disregard any international agreement required to be transmitted to it pursuant to 1 U.S.C. 112b, as amended, the text of which is not received within the prescribed sixty day period."; and

Be It Further Resolved, That the American Bar Association is in favor of adoption by the Congress of a concurrent resolution along the following lines:

"It is the sense of the Congress that

"1. the Executive Branch before entering into any significant international agreement should consult with the appropriate Congressional leaders and committees.

"2. no commitment requiring implementation by subsequent Congressional action, to use the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, should be binding upon the United States unless made (a) under or pursuant to a statute or treaty or (b) by the President (i) as Commander in Chief in the waging of a war lawfully declared or (ii) pursuant to his Constitutional powers to meet an immediate national emergency after having consulted with the appropriate Congressional leaders and committees.

*The recommendation was approved. See page 236.

been intensively studying S. bills to develop Section rec- for Congressional commit-

1. Committee on Legal Ser- monitoring the development or the Legal Services Corpo- been submitting testimony to 1 when invited to do so.

of Children Committee is for a study of the desirabil- ends within the juvenile jus-

n committees are undertak- number of areas, including: attorney's fees in public in- the educational problems of and physically handicapped; vacy posed by criminal jus- the problems of aliens; the SAT and bar examinations; 1 of the grand jury system; igious institutions; human ot approved by the United ons in the Legal Services t; employment discrimina- of past treatment for mental its abuses by federal agen- developments in anti- awns; non-criminal alterna- offenders; and citizenship e Americans.

ROLE KAMIN BELLOWS
Chairperson

"3. the Executive Branch of the government is requested, in order to avoid any misunderstanding on the subject, to inform the governments of all countries with which the United States engages in negotiations of the contents of this resolution and of Section 112b, as amended, or Title 1 of the United States Code" and

Be It Further Resolved, That the President of the American Bar Association or his designee is hereby authorized to communicate the foregoing resolutions of the Association to the Secretary of State and to appropriate committees of the Congress before which he or his designee is authorized to appear.

REPORT

As is known there has been dissatisfaction in both Houses of the Congress over commitments made by the Executive branch of the Government without proper consultation with members of the Legislative branch and at times without informing them of the existence of the commitment until long after it was made.

To assure that the Congress would at least be informed a statute, known as the Case Act, was adopted in 1972¹, making mandatory the transmission of the text of certain executive agreements within sixty days after their entry into force. On occasion questions have arisen as to which agreements must be sent to the Congress, and therefore a definition of the commitments covered is in

¹The Case Act now reads as follows:

"§112b. United States international agreements; transmission to Congress

"The Secretary of State shall transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicably after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

The amendments proposed would follow the above text. The new name of the House Committee—"International Relations Committee" should, of course, be substituted.

order. The definition proposed has been worked out in consultation with lawyers with wide experience in both the Legislative and Executive branches.² Its effect will be to enlarge the number of international arrangements or understandings that must be transmitted including a text of any oral agreement that creates, changes or defines substantive contractual obligations under international law.

It also has become apparent that the governments of foreign countries should be put on notice that the Congress is under no obligation to give effect to promises made without its knowledge. Certain members of the Congress were particularly incensed when they learned for the first time long after the event that a Presidential letter had been sent while the Paris Peace Accords were under negotiation promising that the United States would use force against North Vietnam if it violated those agreements. To make sure that such secret commitments do not bind the Congress even morally, it is proposed that the Case Act be amended to provide that the Congress may disregard any international agreement entered into by the Executive the text of which is not transmitted when required by the Case Act.

While these amendments should prevent continuance of some practices to which certain members of the Congress have taken exception there is strong sentiment in favor of more drastic action, notably the enactment of legislation establishing a procedure for abrogation of executive agreements by resolution of both, or even only one, of the Houses of the Congress within sixty days of their transmission to the Congress.

²The office of the Legal Adviser of the State Department, has, however, taken the position that definitions are necessarily so broad as not to be helpful in particular cases.

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One can share the goal of the bills introduced to provide for such a legislative veto without agreeing that the remedy proposed is felicitous. Indeed the Section of International Law has voted unanimously against enactment of legislation that would purport to provide for such a Congressional veto. In the view of many lawyers the constitutionality of such a measure is at best doubtful and all must agree that to suspend for sixty days the binding effect of every executive agreement could seriously cripple the day-to-day conduct of our foreign affairs. It is fundamental international, as well as domestic, law that one party cannot hold another to a bargain while reserving the right to avoid it.

In defense of the establishment of procedures for abrogation by Congressional veto of executive agreements it has been asked how else can the Congress act to restore Executive branch accountability to the Legislative branch in the area of international agreements.

The answer is that there are available a variety of procedures or practices to determine whether a particular international commitment may constitutionally be made other than by or pursuant to, a statute or treaty.

The resolution recommended in no way is to be interpreted to express opposition to utilization of existing procedures or the establishment of new ones within the framework of the Constitution. The Congress can, and has, by legislation set the limits of authority to make agreements in specified areas outside the unquestioned sole competence of the Executive. Such statutes having been enacted with Executive approval, or over a Presidential veto, have a force of law which the courts will undoubtedly sustain. Furthermore some are of the view that there are probably instances in which the courts without a statute could be brought to decide upon the binding effect of an executive commitment challenged on the ground that under the Constitution it should be reached by, or pursuant to, a statute or treaty rather than by a sole executive agreement. (*Cf. Kennedy v. Sampson*, 511 F.2d 430 (1974).) And the way is always open to the Congress by consultation to bring about agreement between the Executive and Legislative branches. The Congress is not without the power to condition action desired by the Executive upon compliance with practices desired by it.³

³A noteworthy instance is a proper use of the power to make or withhold appropriations.

The second and third resolutions discussed below themselves promote procedures to bring about appropriate participation by the Congress in the making of the international commitments of concern to it.

It is doubted that the Congress can be persuaded to defeat all of the bills providing for Congressional veto without substituting other remedies to assure participation by the appropriate leaders and committees in the process of deciding what commitments of our human and financial resources are to be given to other nations. An appropriate remedy it is believed would be to adopt a resolution designed to put the governments of other countries on notice of the commitments that in the view of the Congress can be made binding on the United States by the Executive only with participation by the Legislative branch.

A concurrent resolution is proposed (as a statute is not necessary) the object being to put others on notice of the legislators' views of their constitutional rights. For this Presidential approval is neither necessary nor appropriate.

The text of the proposed resolution follows closely that of a Senate Resolution adopted in 1969 by a vote of 70 to 16 (115 *Cong. Record* 17245) and a State Department Circular on procedures to be followed in making international agreements (No. 175).

The text of the Senate Resolution is as follows:

"Whereas accurate definition of the term 'national commitment' in recent years has become obscured: Now, therefore, be it

"Resolved, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment."

Pertinent provisions of the State Department Circular (11 FAM 700) are as follows:

"723.1. Conduct of Negotiations. The office or officer responsible for any negotiations must ensure: . . .

"e. That with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement. Where the proposal for any especially important treaty or other international agreement is contemplated, the Office of the Assistant Secretary for Congressional Relations will be informed as early as possible by the office responsible for the subject;"

Statesmen familiar with the parliamentary system of government or one party systems may not be aware that our Executive branch cannot commit the Congress to implement by legislation or appropriations undertak-

ings not authorized by statute or treaty. To lessen the risk of misunderstanding the draft of concurrent resolution proposed requests the Executive branch to inform the governments of foreign countries with which it negotiates agreements of the contents of the concurrent resolution and of the Case Act as amended.

The resolutions proposed for adoption by the House of Delegates of the American Bar Association end with the usual authorization for the President of the Association or his designee to send copies of the resolutions to the Secretary of State and to make known their contents to appropriate committees of the Congress.

These resolutions were overwhelmingly approved by the Council of the Section of International Law at its mid-winter meeting on December 5-7, 1975.

RICHARD P. BROWN, JR.
Chairman