The Law

Treaty Negotiation: A Presidential Monopoly?

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In "The Law" section of the March 2007 issue, I analyzed misconceptions by Justice George Sutherland in his decision in United States v. Curtiss-Wright (1936)*, where he described the president as "sole organ" in foreign affairs. This article examines his erroneous statements about the president's authority to negotiate treaties. Sutherland stated that the president makes treaties with the advice and consent of the Senate "but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." That statement was false when written, false when Sutherland served earlier as a U.S. senator from Utah, and false in contemporary times, especially in light of fast-track procedures that bring both chambers of Congress closer to the negotiation process for trade agreements.*

United States v. Curtiss-Wright (1936) involved a dispute over legislation passed by Congress two years earlier authorizing the president to impose an arms embargo in a region in South America. The issue was whether Congress had delegated too much of its legislative power to the president. In 1935, the Supreme Court had struck down two delegations of power to the president involving domestic policy.[1] The question presented in *Curtiss-Wright* was a narrow one: could Congress delegate greater discretion to the president in foreign affairs? Writing for a 7-1 Court, Justice George Sutherland decided that it could. Justice James C. McReynolds dissented, stating his opinion that the district court reached the right conclusion by striking down the delegation as excessive. Justice Harlan Fiske Stone did not take part in the consideration or decision of the case.

1. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

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Judicial Misconceptions

In upholding the delegation of legislative authority, Justice Sutherland spoke about "the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs." He said the two classes of powers "are different, both in respect of their origins and their nature."[2] Congressional legislation, to be made effective in the international field, "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[3] In this passage, Sutherland not only sustains the delegation but recognizes a field of independent presidential power that cannot be restricted by Congress. The problems with his constitutional analysis and historical understanding are treated in an earlier article (Fisher 2007b). Many scholars have pointed out the deficiencies of Justice Sutherland's "sole organ" doctrine, his recognition of "inherent" and "extra-constitutional" powers for the president, and his account of the flow of sovereignty and external affairs to the United States (Brownell 2000; Goebel 1938; Levitan 1946; Lofgren 1973; Patterson 1944; Quarles 1944; Ramsey 2000; Simones 1996; Van Tyne 1907).

This article examines the errors of Justice Sutherland with regard to the president's constitutional authority to negotiate treaties. Not only did Sutherland attempt to show that the federal power over external affairs was distinctly different in origin and character from that over internal affairs, "but participation in the exercise of the power is significantly limited." In the field of external affairs, he said, the Constitution required the president to share with the Senate the *treaty-making* power, "but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[4] In making this assertion, Sutherland ignored his own experiences and writings as a U.S. senator from Utah and demonstrated no grasp of how often presidents in the past had shared treaty negotiation with members of Congress, both senators and representatives.

Constitutional Theory

The Constitution provides little guidance on how treaties are to be negotiated. Article II, section 2, empowers the president, "by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Article I, section 10, prohibits states from entering into any treaty, alliance, or confederation. That section also prohibits a state, without the consent of Congress, from entering into "any Agreement or Compact" with a foreign power. The supremacy clause in Article VI defines treaties, along with the Constitution and statutes, as "the supreme Law of the Land."

Otherwise, the Constitution is silent about many elements of the treaty-making power. It says nothing about the president's authority to negotiate treaties, the process of

2. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315 (1936).
3. Ibid., 320.
4. Ibid., 319.

terminating a treaty, or the allocation of authority to interpret and reinterpret a treaty. Nothing is said about the role of the House of Representatives, which not only provides funds to implement most treaties but must be alert to treaties that may encroach upon its prerogatives over tariffs and foreign commerce. Alexander Hamilton, who promoted strong executive powers, did not see an exclusive presidential role in negotiating treaties. In Federalist no. 75, he said that the power of making treaties "will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them" (Wright 2002, 476).

Some studies conclude that trade legislation enacted by Congress, beginning in 1974 with the fast-track procedure, "usurp[s] the constitutional authority of the President to negotiate international treaties" (Wright 2004, 980). The authority cited for that position: "See U.S. Const. art. II, § 2, cl. 2." (ibid., note 9). However, nothing in Article II of the Constitution says anything about treaty negotiation. Some presidents have treated treaty negotiation as an exclusive executive power; others have included lawmakers (of both houses). The last section of this article examines the fast-track process.

The constitutional scholar Edward S. Corwin called the process of drafting and negotiating a treaty a "presidential monopoly." The phrase appeared in his 1952 annotated Constitution and remains in that work today, as continuously updated by the Congressional Research Service.[5] In a much earlier work, published in 1917, Corwin developed a strong presidency model. The title page of *The President's Control of Foreign Relations* carries this quotation from Thomas Jefferson: "The transaction of business with foreign nations is executive altogether" (Corwin 1917). On page 2, Corwin acknowledges that the powers of foreign relations "are shared by three branches of the national government: Congress, the President, and the Senate." He carefully lays out the relevant powers specified in Articles I, II, and VI. He notes that many issues are not addressed by the constitutional text, including abrogation of treaties, recognition of new governments, and international agreements that fall short of treaties (ibid., 4).

Yet by page 5, Corwin's position is clear: "The gaps above alluded to in the constitutional delegation of powers to the national Government, affecting foreign relations, have been filled in by the theory that the control of foreign relations is in its nature an executive function and one, therefore, which belongs to the President in the absence of specific constitutional provision to the contrary." A key word here is *nature*. The Framers looked closely at the writings of John Locke, William Blackstone, and Montesquieu, who strongly sided with the view that foreign relations was in its nature executive, but proceeded to repudiate those theories and allocate important foreign relations powers to Congress (Fisher 2004a, 1-16). Jefferson's remark about the transaction of business with foreign nations being "Executive altogether" was quite limited when read in context (ibid., 20-22). As noted by Louis Henkin, the Framers "turned their backs on Locke and Montesquieu, on British and European practice" (Henkin 1989, 409).

5. Congressional Research Service, Library of Congress, The Constitution of the United States: Analysis and Interpretation, S. Doc. no. 108-17, 108th Cong., 2d sess. (2004), 492. This document originated in 1952 as a Corwin product, including the language "Negotiation, a Presidential Monopoly," which is retained in the 2004 edition. See also Corwin (1957, 211-12).

Corwin cautioned that, in realizing the disadvantages that Congress labors under in asserting its viewpoint in foreign relations, "we must not forget either the disadvantages of the President's position." The president must discharge his functions "ordinarily through the agencies provided by Congress," depends on appropriations granted by Congress, and is under a constitutional obligation to "take care that the laws be faithfully executed." Even so, the "actual necessities of the case have more and more centred [sic] the initiative in directing our foreign policy in the hands of the President," even if the president is not yet "an autocrat in this field" (Corwin 1917, 6). In 1950, Corwin would rebuke the historians Henry Steele Commager and Arthur M. Schlesinger, Jr. for promoting a "high-flying prerogative" theory to justify President Harry Truman's war in Korea (Fisher 2004a, 102-04). Corwin himself had taken a long step in the direction of presidential prerogatives in 1917.

Corwin does not use the term "sole organ" that appears in Justice Sutherland's *Curtiss-Wright* opinion, but he comes close with this sentence: "The President is the organ of diplomatic intercourse of the Government of the United States, first, because of his powers in connection with the reception and dispatch of diplomatic agents and with treaty making; secondly, because of the tradition of executive power adherent to his office" (Corwin 1917, 33). Moreover, Corwin looked for guidance to British monarchical prerogatives to imply an exclusive role for the president: "A dependable British authority points out that the making of treaties and all matters affecting the foreign relations of Great Britain fall to the royal prerogative, that until late years treaties were not brought before Parliament until after ratification, and that the initiative of the foreign policy of the Kingdom belongs to the executive exclusively" (ibid.). Of course, those British prerogatives had been thoroughly jettisoned by the Framers. Corwin cites a lengthy passage where Locke describes the exclusive executive role over the federative power (ibid., 34-35). That doctrine, too, the Framers squarely rejected.

Corwin advanced toward a presidential monopoly in treaty negotiation by relying on the all-important If: "But if the President is the organ of diplomatic intercourse with other states, two things follow: first that this power is presumptively his alone, even though the powers of other organs may frequently produce like results; second, that his discretion in its discharge is not legally subject to any other organ of government, albeit it may clash with a like discretion in such organ in the discharge of its own constitutional functions" (ibid., 35-36). A confusing passage, but he piggybacks on similar language from a document issued by the Senate Foreign Relations Committee in 1897: "If any given power belongs to the executive branch of the Government, presumptively it does not belong to the legislative branch" (ibid., 36). Another indiscriminate If. What if a given power does *not* belong to the executive branch? That same Senate document contains this phrase: "The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties" (Corwin 1957, 189).

As to treaty negotiation, Corwin points to the effort of President George Washington in 1789 to meet with senators to discuss the negotiation of a treaty with southern Indians. As Corwin says, "this method of proceeding went badly and was presently abandoned" (Corwin 1917, 85). This episode is often misinterpreted to conclude that, in the future, Washington and other presidents excluded the Senate in treaty

negotiations. Washington, however, continued to seek the advice of senators, but he did so through written communications rather than personal visits (Fisher 2007a, 223). Corwin acknowledged that presidents "not infrequently sought the advice of the Senate as to the expediency of negotiating a particular treaty and sometimes as to its very terms" (Corwin 1917, 88). He offered some examples of presidents including senators in the treaty-negotiation process (ibid., 88-89). Yet somehow, for some reason, he would later describe treaty negotiation as a "presidential monopoly." He comes close to that position in the concluding pages of the book, where he includes among the powers of the president in foreign relations "the practically complete and exclusive discretion in the negotiation of more formal treaties, and in their final ratification" (ibid., 206).

Constitutional Practice

It is surprising that, in acknowledging Senate participation in the negotiation of treaties, Corwin offered only one example: President James K. Polk in 1846 (Corwin 1917, 88-89). Corwin's works are rich in presidential messages, floor debate, congressional documents, and political practice. It would have been an easy matter for him to explain how other presidents invited senators (and members of the House of Representatives) to become part of the treaty-negotiation process. Several examples will be provided here.

Justice Sutherland was familiar with the Senate's role in negotiation of treaties. He knew from his own experience as a U.S. senator and as a member of the Senate Foreign Relations Committee that treaty negotiation had never been a presidential monopoly. There was no basis for his claim in *Curtiss-Wright* that the president "alone negotiates" and that into "the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[6] In his book, published in 1919, he recognized that senators did in fact participate in the negotiation phase and that presidents had often acceded to this "practical construction" (Sutherland 1919, 123). Presidents frequently consulted the Senate "before initiating negotiations, or completing negotiations already undertaken, with a view to obtaining advice in advance. Thus the right and authority of the Senate to participate in the making of treaties at any stage of the process, has been again and again recognized and acted upon by the Executive" (ibid.).

Sutherland also understood that President Washington's unhappy visit to the Senate in 1789 to obtain consent for an Indian treaty did not end legislative involvement in the negotiation of treaties: "While the practice of consulting the Senate in person was not followed by succeeding Presidents, there, nevertheless, have been frequent instances of such consultation by message and by other less formal means" (ibid., 124). It was not "an unusual circumstance" for the secretary of state to request a confidential meeting with the Senate Committee on Foreign Relations "respecting the attitude of the Senate upon some contemplated treaty, or respecting the precise terms which will meet with their approval and support, and with the probable approval and support of the Senate" (ibid.).

6. *United States v. Curtiss-Wright Corp.*, 299 U.S. at 319.

It is remarkable that someone with the practical experience of Sutherland, well versed in the practices of executive officials and the Senate Foreign Relations Committee, could write such erroneous passages in *Curtiss-Wright* about treaty negotiation.

The treaty-making process is not divided into two stages that are exclusive and sequential: negotiation by the president followed by Senate consideration. The president "makes" treaties, "by and with the Advice and Consent of the Senate." The phrase "advice and consent" implies that the Senate will have an opportunity to shape the content of a treaty. If it had been the intent of the Framers to limit the Senate to voting yes or no to a treaty prepared exclusively by the president, the word "advice" is superfluous and the phrase could have been reduced to a simple "consent."

There is little evidence that anyone in 1787 regarded the negotiation of treaties as exclusively presidential. It is true that John Jay in Federalist no. 64 wrote that the negotiation of treaties sometimes requires "perfect *secrecy* and immediate *dispatch*," justifying certain executive initiatives (Wright 2002, 422, emphasis in original). In general, however, Jay said about treaties that the president "must, in forming them, act by the advice and consent of the Senate" (ibid.). James Madison told his colleagues at the Virginia ratifying convention that "the object of treaties is the regulation of intercourse with foreign nations, and is external" (Elliot 1836, 3: 514). The regulation of intercourse with foreign governments dovetails so closely with the duties of Congress, especially over foreign commerce, that it is untenable to argue that the president could exclusively draft treaties over tariffs and trade barriers without any legislative involvement.

That conclusion is strengthened by the communications from President Washington to the Senate. When he discussed the treaty process, he referred to presidential ideas as "propositions" put to the Senate for its consideration (Fitzpatrick 1937, 30: 378). His choice of language suggests that treaty proposals were just that: proposals that could be changed and improved by senators. When he sent a message to the Senate on August 21, 1789, stating his desire to meet with senators in the Senate Chamber, it was "to advise with them on the terms of the treaty *to be negotiated*" with the southern Indians (Annals of Congress 1789, 1: 67, emphasis added). He met with senators the following day and put to them a series of questions, requesting advice on the instructions to be given to the commissioners selected to negotiate the treaty (ibid., 69-71). The experience was not good for either side and Washington never returned to the Senate to negotiate in person. However, he and other presidents included members of both the Senate and the House in treaty negotiation.

In 1792, President Washington had to contend with the odious practice of giving "tributes" (bribes) to the Barbary nations. He knew the Senate would approve payments to Algiers to recover captives, but the Senate did not want to include the House of Representatives in such considerations. Instead of asking for an appropriation, which would require House action, the Senate suggested that Washington "take the money from the treasury, or open a loan for it" (Bergh 1903, 1: 305). The Senate thought that "to consult the Representatives on one occasion, would give them a handle always to claim it, and would let them into a participation of the power of making treaties, which the Constitution had given exclusively to the President and Senate" (ibid., 306).

Thomas Jefferson, as secretary of state, counseled Washington not to take the Senate's advice. Would a treaty, stipulating a sum for Algiers and approved by the Senate,

"be good under the Constitution, and obligatory on the Representatives to furnish the money?" Jefferson thought it would, but worried that the House might refuse to grant the funds. He thought it might be "incautious" for Washington to commit himself "by a ratification with a foreign nation, where he might be left in the lurch in the execution" (ibid.). Jefferson advised Washington that, whenever action by both houses of Congress was necessary to carry a treaty into effect, "it would be prudent to consult" with both houses in advance, "if the occasion admitted." Jefferson also said the administration was "in the habit of consulting the Senate previously, when the occasion permitted, because their subsequent ratification would be necessary." For that same reason, it was appropriate to consult the House in advance "where they were to be called on afterwards, and especially in the case of money, as they held the purse strings, and would be jealous of them" (ibid., 307). Washington followed Jefferson's advice and sought support from the House. Whatever secret papers and confidential letters the Senate received from the administration regarding the Algerine Treaty, so did the House (Fisher 2004b, 30-33).

Experiences after Washington

President Andrew Jackson understood the value of seeking the advice of senators on how best to pursue treaty negotiations. On May 6, 1830, he submitted to the Senate "propositions" for a treaty with the Choctaw Indians. He indicated the amendments he thought necessary, but invited the Senate's views: "Not being tenacious though, on the subject, I will most cheerfully adopt any modifications which, on a frank interchange of opinions my Constitutional advisors may suggest and which I shall be satisfied are reconcilable with my official duties" (Journal of the Senate 1887, 4: 98). Similar to Washington, Jackson asked the opinions of the Senate on a series of questions. The Senate's response, he said, "will have a salutary effect in a future negotiation, if one should be deemed proper." Obtaining the Senate's views on future negotiations "would enable the President to act much more effectively in the exercise of his particular functions. There is also the best reason to believe that measures in this respect emanating from the *united counsel* of the treaty-making power would be more satisfactory to the American people and to the Indians" (ibid., 99, emphasis added).

Several weeks later the Senate Committee on Indian Affairs gave its response, recommending that President Jackson should withhold his sanction to the treaty until the full sense of the Choctaw nation "could be fairly taken" (ibid., 111). The committee concluded that the proposed treaty terms were "so unreasonable" that the United States should not agree to them even if the Choctaw nation agreed to the terms unanimously (ibid.). It seemed inadvisable to the committee to decide further details on the treaty "in advance of any negotiation," because any specifications might be self-defeating in eventually reaching an acceptable treaty (ibid., 112).

In 1846, President Polk sought the Senate's advice on negotiating a treaty with regard to the Oregon question. He presented a "proposal" in advance, not the final treaty language (Richardson 1897, 5: 2299). Referring to earlier periods, when "the opinion and advice of the Senate were often taken in advance upon important questions of our

foreign policy," it seemed to him "eminently wise" to consult with the Senate upon "pending negotiations." He regarded the Senate as a "branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration the President secures harmony of action between that body and himself" (ibid.). In subsequent years, senators have been asked to approve the appointment of treaty negotiators and even to advise on their negotiating instructions (Franck and Weisband 1979, 136). A survey of historical practice reveals that, far from being a presidential monopoly, the negotiation of treaties is often shared with the Senate to build legislative understanding and support (Haynes 1938, 2: 576-602).

Presidents could at any time exclude the Senate in the negotiation phase, but the results were discouraging. The Senate could reject a treaty "that had been carefully and painstakingly negotiated, to the embarrassment of the President and the dismay of the other government" (Henkin 1989, 411). The Senate could add a multitude of reservations, amendments, understandings, and other conditions, forcing the administration to renegotiate the treaty (ibid.). Learning from this experience, presidents chose to "determine the terms to which the Senate will consent" by consulting senators and their staff during the negotiation stage (ibid.).

President William McKinley, in September 1898, appointed three senators to a commission for the purpose of negotiating a treaty with Spain. President Warren Harding appointed Senators Henry Cabot Lodge and Oscar Underwood to be delegates to the Conference on the Limitation of Armaments in 1921 and 1922. The work of that conference produced four treaties. President Herbert Hoover appointed two senators to the London Naval Arms Limitation Conference in 1930 (Congressional Research Service 2001, 109).

If the president wanted to exclude senators and proceed on his own, come what may, of course he could. A famous and instructive example is President Woodrow Wilson and the Versailles Treaty. He fervently believed that the president should not consult the Senate and treat it as an equal partner. From his academic setting at Princeton University, he advised presidents to negotiate treaties on their own and drop the finished product in the Senate's lap as a fait accompli. Under this theory, legislative acquiescence would be compelled by getting the country "into such scrapes, so pledged in the view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State" (Wilson 1885, 233-34). Similar views appear in a later work (Wilson 1908, 77-78).

These calculations—or miscalculations—proved far too clever, as Wilson later learned after submitting the Versailles Treaty. By failing to include prominent senators at an early point, he failed to build a legislative base for understanding and support. Other presidents who attempted to commit the nation unilaterally to international agreements also discovered that the Senate has ample resources to retaliate by tacking on amendments, shelving treaties, and rejecting them outright (Franck and Weisband 1979, 136-37). Wilson's theory of plenary presidential power in negotiating treaties has been decisively refuted by scholars (Black 1931; Dewhurst 1921; Webb 1970). Aware of the

need to build political support, other presidents have included members of the House and the Senate in U.S. delegations that negotiate treaties.

A model of cooperation between president and Congress appears in the legislative history of the UN Charter. The details of this treaty were hammered out at a conference in San Francisco in 1945. Half of the eight members of the U.S. delegation came from Congress: Senators Thomas Connally (D-TX) and Arthur H. Vandenburg (R-MI) and Representatives Sol Bloom (D-NY) and Charles A. Eaton (R-NJ). John Foster Dulles, later to be secretary of state under President Dwight Eisenhower, told the Senate Foreign Relations Committee in 1945 that in the past he had "some doubts as to the wisdom of Senators participating in the negotiation of treaties." Because of his experience at the San Francisco conference, those doubts "were dispelled" (U.S. Congress 1945, 644). He failed to note that the legislative participants included not only two senators but two members of the House as well.

During negotiations on the North Atlantic Treaty, ranking members of the Senate Foreign Relations Committee consulted closely with the State Department. The committee as a whole helped formulate the terms of the treaty. Dean Acheson, who entertained inflated notions of executive prerogatives during his tenure as secretary of state, testified in 1971 that the treaty process was formally divided into negotiation and ratification, but "anybody with any sense would consult with certainly some of the members of the ratifying body before he got himself out on the very end from which he could be sawed off." He recalled that, during negotiations on the NATO treaty, Senators Connally and Vandenburg were with him "all the time" and Senator Walter George actually wrote one of the treaty provisions (U.S. Congress 1971, 262-64; see also Heindel, Kalijarvi, and Wilcox 1949).

The substantial overlap between domestic and foreign matters creates the need to include congressional leaders in the negotiation of international agreements and to establish machinery to permit more effective integration of congressional interests (Manning 1977). Members of Congress attend international conferences and serve as delegates to the North Atlantic Assembly, the Interparliamentary Union, and other interparliamentary groups and are appointed as U.S. representatives to the UN General Assembly. The volatile politics of the Panama Canal Treaty prompted Senate Majority Leader Robert Byrd, Minority Leader Howard Baker, and several other key senators to visit Panama and negotiate changes in the treaty with General Omar Torrijo and Panamanian officials. These rescue missions might have been averted had President Jimmy Carter reached out earlier for Senate advice (Crabb and Holt 1980; Spanier and Nogee 1981). The Carter administration consulted with at least seventy senators during the final phase of the negotiations on the Panama Canal Treaty (Destler 1978-1979, 50). During negotiations on arms control agreements, members of Congress participated either as advisors or observers. In 1977 and 1978, twenty-six senators served in Geneva as official advisors to the SALT II negotiating team (Destler 1981).

Private groups are also active in the negotiation of international agreements. Advisory committees, consisting of representatives from the private sector, serve on dozens of panels in the foreign affairs field. Their functions include assisting in the preparation of international negotiations and advising the State Department on positions

to take at conferences (U.S. Congress 1975, 4). State governments, in their search for export trade and foreign investment, maintain direct contact with both private and government officials of foreign countries. This activity is encouraged by the Commerce Department and American embassies and consulates (Maier 1976). An article in the *New York Times* on June 3, 2000, discussed the willingness of Cuba to negotiate with American companies that had property confiscated when Fidel Castro took power. The United States and Cuba do not have diplomatic relations, opening the door to contacts with the private sector (Kahn 2000, A4).

Fast-Track Procedures

The notion that the president is the exclusive negotiator of treaties and international agreements has been challenged even more in recent decades by trade legislation that gives Congress a much closer role in the negotiation process. Because it involves trade, both houses of Congress are involved, not just the Senate. Article I, section 8 of the Constitution vests in both houses the authority to regulate foreign commerce. In delegating some of that authority to the president, Congress is in a position to establish mechanisms and procedures to protect legislative interests.

In 1974, Congress offered the president a fast-track legislative procedure for implementing trade agreements with other nations. Under this system, the president's implementing bill is automatically introduced in Congress, committees must act within a specified number of days, Congress must complete floor action within a limited time, and amendments to the bill are prohibited either in committee or on the floor. Through this expedited procedure, leaders of foreign governments (often with parliamentary systems that vest strong powers in the executive) are assured that the trade pact will be given quick consideration (up or down) by Congress. The bill will not be left on the shelf to experience a lingering death.

In obtaining these procedural benefits, presidents recognize that key members of Congress must be closely involved in the negotiations that shape the implementing bill. Otherwise, the chances are high that all the work that goes into drafting the bill may be for naught when Congress votes it down. When the fact-track procedure was developed in 1974 as part of the Trade Reform Act, the Senate Finance Committee set forth negotiating objectives: "The overall negotiating objective of the United States under the bill would be to obtain more open and equitable market access for U.S. exports of goods and services and to harmonize, reduce and eliminate barriers to international trade" (U.S. Congress 1974, 22). Other negotiating objectives were identified (ibid., 22-23).

In addition, private advisory bodies "would advise the negotiators on how the goal can best be accomplished" (ibid., 23). In authorizing the president to enter into trade agreements, the committee said it was "essential, however, that the Congress and the various segments of our economy which are likely to be importantly affected by trade negotiations, be fully involved in the negotiating process" (ibid., 69). Public pressures built in the 1990s to include environmental and labor issues as part of negotiating objectives (Tiefer 1998). When Congress reauthorized the fast-track procedures in 2002,

it required that environmental and labor issues be given the same consideration as other negotiating objectives (Shapiro and Brainard 2003, 28).

To provide for "careful and continuous" congressional oversight of these negotiations, and to encourage successful enactment of negotiated agreements, Congress provided for the selection of congressional delegates, "accredited as official advisors, to these negotiations" (U.S. Congress 1974, 113). Each chamber of Congress would select five members from the House Ways and Means Committee and the Senate Finance Committee to serve as official advisors to the U.S. delegation, to have "full access to such information as they may require. They may attend such conferences, meetings and negotiating sessions as is appropriate" (ibid.). Because lawmakers are busy with other legislative tasks, staff members of the two committees are designated to have "full access to the information provided to the official Congressional advisors" (ibid.). House advisors have also come from other committees, such as Energy and Commerce (Koh 1992, 153, n.24).

In 1991, after President George H. W. Bush asked Congress to extend the fast-track procedure for a trade pact with Mexico, U.S. Trade Representative Carla A. Hills told the Senate Finance Committee that the fast track "is a genuine partnership between the two branches." Because Congress retained the power to defeat an implementing bill, Hills emphasized that Congress "has a full role throughout the entire process in formulating the negotiating objectives in close consultations as the negotiations proceed" (U.S. Congress 1991, 9). President Bush gave Congress his "personal commitment to close bipartisan cooperation in the negotiations and beyond" (*Public Papers of the Presidents* 1991, I: 450).

Although the fast-track procedure prohibits amendments in committee or on the floor, Congress developed informal mechanisms to urge changes in what would become the final implementing bill. It became the practice of the administration to send up a draft implementing bill. Congress could then conduct "mock hearings" and "mock mark-ups" to examine the bill and recommend deletions or modifications. These legislative steps have also been referred to as "nonhearings" and "nonmarkups" (Koh 1992, 160; Destler 1997, 10-13). After congressional responses were returned to the administration, executive officials had a choice. They could make modifications in the draft, forcing them to return to other nations and renegotiate, or ignore legislative suggestions and proceed with its draft bill, unchanged, at risk of losing everything. Fast track requires Congress to act within a prescribed time period, but action does not have to be positive. Passage of an implementing bill needs action by both houses of Congress. If one chamber votes no, that is the end of it. The administration must therefore take seriously the requested changes that emerge from mock hearings and mock mark-ups.

Congress developed another mechanism in 1984 to influence executive action. It required the president to notify two "gatekeeping" committees (House Ways and Means and Senate Finance) and to consult with those committees sixty legislative days in advance before giving the statutorily required ninety-day notice of his intent to sign an agreement. It was during that ninety-day period that Congress engaged in the fast-track process. With the sixty-day advance notice, the committees gained new leverage. If neither objected, the president could move ahead with the implementing bill and be

assured of fast-track benefits. If either committee objected, the president could make changes in the draft bill or else take his chances by submitting the bill under regular legislative procedures (Koh 1992, 149). The capacity of either committee to disapprove put a premium on the administration's good-faith efforts to keep the gatekeeping committees fully informed and engaged in the process. The purpose was to assure that during the negotiations conducted by the administration "neither the negotiators nor the Congress would be surprised by the end results. The negotiators had a reasonably clear idea of what they could and could not do in the context of domestic politics" (Cassidy 1981, 278-79).

During congressional debates in 2007 over extending fast-track authority to the president, some lawmakers expressed dissatisfaction with the role assigned to Congress. Representative Janice Schakowsky objected that the fast-track procedure "removes congressional authority, as set out in the Constitution, 'to regulate commerce with foreign nations' " (U.S. Congress 2007, H6631). She said that Congress "should be able to decide with whom we negotiate trade agreements and what goes into those agreements" (ibid.). Her views may reflect the fact that she was not on Ways and Means and was only a midlevel member of Energy and Commerce (number 19 out of 31 Democrats). The fast-track procedure, by prohibiting amendments, reduces the leverage usually available to lawmakers. Senior members of the two tax committees will be more centrally involved in negotiating and shaping the implementing bill eventually submitted by the administration.

On May 10, 2007, in a letter to U.S. Trade Representative Susan C. Schwab, two ranking Democrats on the House Ways and Means Committee stated their position on a Free Trade Agreement (FTA) for Peru and Panama and directed that their terms "must be incorporated into the Colombia FTA." The two lawmakers were Charles B. Rangel, chairman of the committee, and Sander M. Levin, chairman of the Subcommittee on Trade. They pointed to "systemic, persistent violence against trade unionists and other human rights defenders, the related problem of impunity, and the role of the paramilitaries in perpetuating these crimes." They closed by saying they were working to "assess concrete proposals" and indicated their plans to visit Colombia "for first hand observations" (Rangel 2007).

The administration is at liberty to ignore their concerns and plunge ahead with what executive officials decide is best. There is high risk in offending senior members of the committee with jurisdiction over an implementing bill. Especially is that so when the concerns expressed by leading House Democrats are shared by leaders among House Republicans, Senate Republicans, and Senate Democrats. Efforts in recent years to strengthen the fast-track procedure include steps to require "meaningful congressional input into negotiations" (Shapiro and Brainard 2003, 43).

Conclusions

Administrations continue to insist that the negotiation of treaties is a quintessential presidential power and may not be exercised by any other party. For example, on December 12, 1989, President George H. W. Bush signed a bill authorizing the Compact

of Free Association between the United States and Palau. He objected to a provision that directed the president to negotiate an agreement to facilitate implementation of an anti-drug plan for Palau. He said that under the Constitution "the power to conduct negotiations with foreign nations is vested in the President. In keeping with past practice, I will interpret this provision as advisory in nature. The intent of the proposed plan is in keeping with our own national anti-drug abuse strategy. The Administration is committed to facilitating the implementation of such a plan for Palau" (Bush 1989, 1941).

There is a good deal of face saving and posturing here: Bush insisting on exclusive prerogatives while at the same time agreeing to press ahead in the direction that Congress had provided by statute. Unless they like injuring themselves, presidents cannot operate purely on theoretical powers they claim to have over the negotiation phase. If they want to accomplish something and pass legislation, they must take into consideration what Congress enacts into law and what senior lawmakers propose and recommend, particularly lawmakers from committees of jurisdiction.

If they wish, presidents may keep the negotiation of treaties a purely executive matter, controlling each detail of the treaty and then springing it on the Senate for its approval. To proceed in this fashion invites major costs for the presidency. By taking the Senate (and the House) into his confidence, a president may obtain important information to guide the drafting of the treaty. Such consultation is not constitutionally compelled; it is merely intelligent. Nothing in the Constitution prohibits the president and his advisors from adopting constructive procedures and attitudes. The ultimate objective of the treaty process is to enter into foreign commitments capable of being sustained over a long period. That purpose is furthered when the president develops a consensus between the branches and seeks advice throughout the process of negotiating and making a treaty.

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