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Cover Page Footnote

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THE TIES THAT BIND: U.S. FOREIGN POLICY COMMITMENTS AND THE CONSTITUTIONALITY OF ENTRENCHING EXECUTIVE AGREEMENTS

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I. INTRODUCTION

Of late, Professors Eric Posner and Adrian Vermeule have made a controversial argument in support of the constitutionality of legislative entrenchment[1] — the ability of legislatures to bind their successors in ways that make entrenched legislation unusually difficult or impossible to repeal.[2] This iconoclastic view[3] has, in turn, generated a spirited response on the part of Posner and Vermeule's opponents.[4] With few exceptions, however, the

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1. Statutory entrenchment is, of course, different from constitutional entrenchment. The latter is discussed with respect to constitutional amendments in 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2 (3d ed. 2000). *See also* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 389-90 (2003) (contending "that the Constitution prohibits legislative entrenchment but does allow constitutional entrenchment"). Perhaps one of the oldest forms of constitutional entrenchment is contained in the Biblical command to neither add to, nor subtract from, the written law, which has defined the permissible limits of interpretation for future generations of the Jewish people for thousands of years:

> לא תספו על הדבר אשר אנכי מצוה אתכם ולא תגרעו ממנו
> לשמור את מצות ה' אלקיכם אשר אנכי מצוה אתכם׃ (דב דברים)

> ("Ye shall not add unto the word which I command you, neither shall ye diminish from it, that ye may keep the commandments of the Lord your G[-]d which I command you.")

Deuteronomy 4:2., *available at* http://www.mechon-mamre.org/p/pt/pt0504.htm (last visited Oct. 15, 2004). Alterations to the original Hebrew text made in keeping with traditional respect for the holiness of the text and G-d's name.

2. In a nutshell, their argument is that

> the rule barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors, subject to any independent constitutional limits in force. The rule has no deep justification in constitutional text and structure, political norms of representation and deliberation, efficiency, or any other source. There just is no rationale to be found . . . . Entrenchment is no more objectionable in terms of constitutional, political, or economic theory than are sunset clauses, conditional legislation and delegation, the creation, modification, and abolition of administrative agencies, or any of the myriad of other policy instruments that legislatures use to shape the legal and institutional environment of future legislation.

Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002).

3. As Posner and Vermeule's critics hasten to illustrate (and as Posner and Vermeule themselves concede), the mainstream consensus has long been that entrenchment is unconstitutional. *Id.* at 1665 ("the academic literature takes the rule as given").

4. *See, e.g.*, McGinnis & Rappaport, *supra* note 1 (adopting an intermediate position excluding some entrenchments but permitting others when the same super-majority required for repeal is also required for entrenchment, making the process "symmetric"); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1777 (2003) (critiquing the position of Posner and Vermeule "both as a matter of constitutional law and as a matter of desirable policy" and defending the traditional anti-entrenchment position); Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231, 232 (2003) (faulting Posner and Vermeule for

discussion has focused largely upon legislative entrenchment.[5] The purpose of this paper is, therefore, to both broaden and narrow the scope of the debate: in the first instance, to expand upon the hitherto limited focus of discourse by examining potential claims of a right of "executive entrenchment"; in the second, to focus upon executive entrenchment in the specific realm of foreign relations law.

The subject of executive entrenchment in foreign relations arises in the context of executive agreements — presidential foreign policy commitments[6] that, while sometimes less formal than treaties, create legally binding international obligations upon the U.S. government.[7] The relevant legal question is whether such agreements may be used by presidents to "entrench" certain foreign policy commitments in ways that bind future policy-makers — either members of Congress or the executive.

Entrenchment by executive agreement poses sharp dilemmas of both policy and law. On the one hand, these agreements serve the negotiating strategy of a particular administration, saving the time and unwanted publicity of more formal treaty ratification.[8] The agreements may also convince friends and foes of the seriousness and durability of American commitments.[9] On the other hand, executive agreements may be unaccommodating of "changed circumstances" in international relations and domestic policy,

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"refusing to take a position on judicial enforcement of entrenched statutes"; incorrectly "claim[ing] that entrenchment is not materially different from other legislative actions that affect the future"; and "ignor[ing] the impact . . . entrenchment . . . would have on other forms of commitment currently available to legislatures").

5. When executive entrenchment is mentioned at all in the debate, it is often in passing. *Cf.* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003) (discussing entrenchment by executive agencies).

6. These come in two forms: "sole" executive agreements reached without congressional authorization and legislative-executive agreements (what Professor Louis Henkin calls "congressional-executive agreements") that do entail congressional authorization. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 215-24 (2d ed. 1996).

7. Although the source of domestic constitutionality may be in question, the international legal obligation is assuredly not. *Compare* HENKIN, *supra* note 6, at 215 (observing that "[t]he authority to make such agreements and their permissible scope, and their status as law, continue to be debated") *with* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 8 U.N.T.S. 332, 333 (including within the scope of the treaty "an international agreement concluded between States in written form and governed by international law").

8. "Entrenchment enables a government to make a credible commitment that it will not hold up a person (or firm or institution or country) from whom it seeks certain actions, and thus entrenchment makes it easier and cheaper for the government to control its relations with other entities." Posner & Vermeule, *supra* note 2, at 1671.

9. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 390-91 (1987) (citing, among the benefits of entrenched provisions, that "[t]hey instill the confidence of other nations seeking to enter into long-term international agreements").

unduly hampering the flexibility of an administration that neither sought nor signed the agreement in question. More to the point, executive agreements pose a danger of subverting the normal constitutional processes required for treaty ratification.[10]

How can we know whether a president's effort at entrenchment by executive agreement oversteps the latitude customarily afforded such agreements? Intuitively, entrenchment would likely be unconstitutional when it seeks to arrogate to the executive powers held concurrently by Congress. But such "inter-branch" entrenchment is distinguishable from the more challenging case of what I call "intra-branch" entrenchment, where the executive attempts to bind future administrations within the same branch of government. For reasons both practical and legal, I argue, intra-branch entrenchment will (and should) rarely prevent the revision or repeal of a foreign commitment in need of amendment.

This argument is developed in three parts. Part II places entrenchment of executive agreements within the context of the contemporary entrenchment debate. Part III presents a timely case study, the recent exchange of letters between Israeli Prime Minister Ariel Sharon and U.S. President George W. Bush pursuant to the Israeli plan for "unilateral disengagement" from Judea, Samaria, and the Gaza Strip. Part IV considers the constitutionality of entrenchment by executive agreement through analysis of the text of the Constitution itself. Secondary sources such as custom, case law, and Framers' intent, are used in order to more clearly define the constitutional limits of executive agreements.

II. ENTRENCHMENT

As applied to legislatures, entrenchment poses what Posner and Vermeule call "an intertemporal choice-of-law problem."[11] To paraphrase, the problem occurs when a legislature seeks to reverse a binding law adopted by its predecessors, forcing the courts to choose between the earlier entrenched provision and the later contradictory one.[12] In the first instance, the courts choose neither. This is because, as Posner and Vermeule correctly note, the

10. The preceding issues conflate legal and so-called "functional" elements that are in fact distinct. As will become clear, however, the legal and functional aspects of executive agreements are closely connected, if not inseparable.

11. Posner & Vermeule, *supra* note 2, at 1668.

12. *See* Eule, *supra* note 9, at 397 (posing the question "should a court recognize the validity of the earlier or the later statute?" and discussing the Roman law principle of *lex posterior derogat legi priori*).

intertemporal choice is only squarely posed once a "reconciliation" of the seemingly contradictory statutes proves impossible.[13]

But what if reconciliation *is* impossible? In that case, and assuming the earlier legislature's intention to entrench is unclear, Posner and Vermeule are willing to apply the "last-in-time" rule. Professor Michael Glennon concurs: "The courts simply assume, quite reasonably, that Congress probably intended the latter."[14] But in the instance of a prior legislature's explicit intent to supercede a later contradictory statute, Posner, Vermeule, and Glennon see no wrong in the first legislature making their intertemporal choice controlling. After all, the presumption that the legislature intended the later provision to prevail "is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail, the object being, again, simply to give effect to the will of Congress."[15]

One notable example of Congress influencing later legislation through the passage of an earlier statute can be found in the War Powers Resolution.[16] In section 1547 of that resolution, Congress constrained its successors by stating that authorization by the introduction of armed forces into hostilities could not be inferred from any *past or future* law, as long as that law is not "intended to constitute specific statutory authorization."[17] Of course, as Glennon

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13. Posner & Vermeule, *supra* note 2, at 1668. The same rule has been applied to instances of seemingly conflicting domestic statutory and international legal obligations. *See, e.g.,* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (supporting the view "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

14. *Applying the War Powers Resolution to the War on Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. 54-68 (2002) [hereinafter *War Powers Hearing*] (testimony of Professor Michael J. Glennon), *available at* http://judiciary.senate.gov (last visited Apr. 25, 2004); *see also infra* Appendix A.; War Powers Resolution, 50 U.S.C. §§1541-1548 (1973).

15. *Id.* Curiously, Posner, Vermeule, and Glennon reach the same conclusion from different starting points. For Glennon, the earlier-in-time statute can prevail because "the so-called 'last-in-time doctrine' is not mandated or created by the Constitution. The doctrine is simply a canon of construction." *Id.* For Posner and Vermeule, in contrast, "the last-in-time rule . . . is a rule of constitutional law rather than an interpretive canon." Posner & Vermeule, *supra* note 2, at 1668.

16. War Powers Resolution, 50 U.S.C. §1547 (1973). This section is referred to as section 8 within the field due to its designation in the public laws.

> Authority to introduce United States Armed Forces into hostilities or into situations where in involvement in hostilities is clearly indicated by the circumstances shall not be inferred — (1) from any provision of law (whether or not in effect before November 7, 1973), . . . unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization. . . .

Id. §1547(a).

17. *Id.*

has noted, repeal of this section of the War Powers Resolution is still possible.[18] For this reason, section 1547 is typical of what I call "weak" entrenchment as opposed to "strong" entrenchment.[19] While weak entrenchment unquestionably constrains the freedom of successor bodies, unlike strong entrenchment, it does not irrevocably bind them.[20]

In its power to influence the options of its successors, the legislature is not alone. Stare decisis, it will be recalled, is in some sense the judiciary's mechanism for answering its own "intertemporal choice of law problem."[21] Like section 1547 of the War Powers Resolution, the doctrine of stare decisis constrains judicial discretion, contributing an element of stability to the system.[22] Similarly, the executive is capable of entrenchment of its own. In the waning days of an administration the issuance of pardons, dedication of national lands and monuments, and even the choice of number plates for the presidential limousine, carry diverse implications felt long after a president has vacated the Oval Office.[23] Thus, despite what some view as a general prohibition on entrenchment at all levels of government,[24] it is clear that all three

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18. "Any time Congress wishes to repeal section 8(a)(1) it can do so . . . using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) thus did not in this sense 'bind' later Congresses . . . ." *War Powers Hearing, supra* note 14. (50 U.S.C. §1547 is sometimes referred to as "section 8," as it was designated in the public laws. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).) For a contrasting view presumably questioning the ability of Congress to constrain the action of future legislatures even in this "weak" manner see PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 241 (2002), arguing that "[o]ne Congress of course cannot bind a subsequent Congress — statutes later in time always trump earlier inconsistent acts. Accordingly it seems doubtful that the 1974 Congress can limit the ability of subsequent Congresses to authorize military force in whatever ways they may then see fit to chose [sic]."

19. Note that my distinction bears some resemblance to that which Roberts and Chemerinsky attribute to Professor Julian N. Eule. *See* Roberts & Chemerinsky, *supra* note 4, at 1778 (citing Eule's categories of "absolute," "transitory," "conditional," and "procedural" entrenchment); Eule, *supra* note 9, at 384-85.

20. The "strength" of entrenchment might also be reflected in the political context of its adoption. Thus, weak entrenchment might also refer to entrenchment in the face of uncertain future policy preferences, whereas its stronger incarnation might stem from a deliberate effort to enshrine policy that would likely be met with future opposition. This possibility is raised by Mendelson, *supra* note 5, at 564.

21. Posner and Vermeule note that "[m]any political institutions are celebrated for their effect on the stability of government: Constitutionalism, stare decisis, representative government, and so forth are said to make government more predictable, and this makes it easier for individuals to arrange their affairs." Posner & Vermeule, *supra* note 2, at 1672.

22. For multiple benefits of entrenchment see Posner & Vermeule, *supra* note 2, at 1670-72, for a listing of, inter alia, government commitment, agenda control, and predictability.

23. Mendelson, *supra* note 5, at 559-61.

24. "[T]he principle that one legislative body may not bind its successors is common to all levels of our government and applies to any democratically elected law-making body." Roberts & Chemerinsky, *supra* note 4, at 1779.

branches engage in actions — whether intermittently or as a common practice — that affect their successors on a spectrum of influence ranging from "weak" to "strong."

The preceding examples are primarily of a domestic focus, but the executive may theoretically also entrench his administration's foreign policy commitments by embedding them in an executive agreement concluded with a foreign government. A recent example of such an exchange (although not, I argue, one of entrenchment) is presented in the next section.

III. A CASE STUDY: BUSH, SHARON, AND ISRAELI "UNILATERAL DISENGAGEMENT"

On December 18, 2003, Israeli Prime Minister Ariel Sharon announced plans for Israel's unilateral "disengagement" from the Palestinians.[25] This step would be taken, as the disengagement plan later stated, because "Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a bilateral peace process."[26] As a corollary to the plan, Sharon sought certain diplomatic and security guarantees from President Bush.[27]

The form the American commitments would take was, not surprisingly, the source of some speculation in the Israeli press. One editorialist wrote that "Bush is supposedly going to promise the borders and identity of the Jewish state to include the large settlement blocs in the West Bank and keep the Palestinian refugees away from the gates of Israel."[28] The writer noted that "[n]ot since the Balfour Declaration has there been a document that has raised so many expectations as the one President George Bush is supposed to give Prime Minister Ariel Sharon."[29] In his desire for

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25. Sharon stated that "if in a few months the Palestinians still continue to disregard their part in implementing the Roadmap then Israel will initiate the unilateral security step of disengagement from the Palestinians." Israeli Prime Minister Ariel Sharon, Address at the Fourth Herzliya Conference (Dec. 18, 2003), *available at* http://www.mfa.gov.il (last visited Oct. 13, 2004).

26. Press Release, Prime Minister's Office, State of Israel, The Disengagement Plan — General Outline, section 1 (Apr. 18, 2004) [hereinafter Disengagement Plan] (attached as Appendix D.), *available at* http://www.mfa.gov.il (last visited Oct. 13, 2004).

27. *Id.*

28. Aluf Benn, *Balfour to Bush, Vietnam to Israel*, HA'ARETZ, Apr. 8, 2004, *available at* http://www.haaretzdaily.com (last visited Oct. 13, 2004).

29. *Id.* The Balfour Declaration, articulated in a letter from Foreign Secretary Arthur James Balfour to the Jewish leader Lord Rothschild, conveyed the position of the British Government that it

> view[ed] with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-

an American legal commitment Sharon was not alone, said the writer, but merely continuing "a tradition of many years — the desire for some kind of international 'charter' for Jewish settlement in the country has been embedded in Zionism since the days of Herzl."[30] Given this historical desire for international legitimacy, coupled with the gravity of the topic of territorial concessions for Israelis, a presidential seal of approval for his plan was viewed by Sharon with great importance.[31]

Of course, the significance of the supposed American commitment from the Israeli perspective begged the question of its enforceability or legal "bindingness." But on this essential issue the Israeli editorialist adopted a skeptical tone, recalling an earlier seeming commitment by a U.S. administration to a foreign government that subsequently "evaporated" when judged to be no longer in the American interest.[32] Could Bush's committment to Sharon be merely a repeat of former President Richard Nixon's guarantees to South Vietnamese President Nguyen Van Thieu?[33]

> Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Letter from Arthur James Balfour, British Foreign Secretary, to Lord Rothschild, Leader of British Jewish Community (Nov. 2, 1917), *available at* http://www.yale.edu/lawweb/avalon/mideast/balfour.htm (last visited Oct. 13, 2004). The significance of the pronouncement is discussed in ALAN DERSHOWITZ, THE CASE FOR ISRAEL 32-38 (2003).

30. Benn, *supra* note 28.

31. This is also the sense one gains from the disengagement agreement itself, which devotes a section to "U.S. obligations as part of the disengagement plan" and notes that "[t]he exchange of letters between President Bush and the Prime Minister, as well as the letter by the Chief of the Prime Minister's Bureau to the U.S. National Security Adviser, are . . . an integral part of it." Disengagement Plan, *supra* note 26.

32. Benn, *supra* note 28.

33. The author wrote:

> [T]he U.S. abandoned its closest ally in Asia, South Vietnam, where so many tens of thousands of American Servicemen died fighting for its independence.
>
> Presidents Nixon and Ford backed up the abandonment in a series of secret messages to the [P]resident of South Vietnam Nguyen Van Thieu, in which they reiterated over and over economic and military aid and assistance "to achieve our common goals" and spoke of vehement responses to violations of the peace agreement by the Communists of North Vietnam.
>
> Thieu kept the 31 presidential documents in a secret case in his presidential palace in Saigon and regarded them as guaranteeing the survival of his country and his continued rule over it. He showed some of the letters to his subordinates, as an expression of the American empire's support and the graciousness of its leaders.
>
> But at the moment of truth, when the North embarked on its final campaign to take over the South, all the promises evaporated. America was fed up with Vietnam, and did not want to risk its prestige any longer in the Asian jungles.

Id.

Despite the obvious dissimilarities in the analogy,[34] the writer could not "ignore the historical lesson: political promises are meant to solve urgent political problems and are . . . only good for the moment they are made. Don't regard them as a 'political insurance policy' as Dov Weisglass [sic], the [P]rime [M]inister's lawyer and [B]ureau [C]hief has referred to the anticipated Bush letter."[35] Moreover, with an American presidential election only months away, the writer noted, future administrations might not feel bound by Bush's commitments.[36]

Who is to be believed? Should Israelis follow the cautious realism of the editorialist, or the assurances of the Prime Minister's lawyer, Mr. Weissglas? As a matter of American constitutional law, would the Bush letter indeed constitute a reliable "insurance policy" for the State of Israel, or would it be subject to unilateral revision or disposal at the whim of succeeding U.S. administrations (or even the Bush Administration itself) at a later date? Finally, is there some way for the Bush Administration to allay Israeli concerns of a repetition of the broken "promise" to South Vietnamese President Thieu by "entrenching" its commitment in a way that prevents easy repeal?

Before taking up these issues, it is worth considering more closely the nature of the alleged American commitment to Israel in light of the language of the actual letters that were eventually exchanged between Bush and Sharon on April 14, 2004.[37] What one finds from this examination, is that the talk about American commitments prior to the letter exchange now seems almost anti-climactic in retrospect. Indeed, the much anticipated Bush "commitments" are hard to discern from the American letter at all.[38] While Bush's letter seeks to "reassure" Sharon of "several points" — language that seems to fall short of a binding legal commitment — the elements of reassurance are all stated in notably hortatory and aspirational terms.[39] The closest the U.S. comes to making a full-

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34. The writer noted, inter alia, that "Israel has never asked America to fight for it and die for it." *Id.*

35. *Id.*

36. "It is doubtful that a Democratic administration would honor the Bush letter." *Id.*

37. Press Release, Prime Minister's Office, State of Israel, Exchange of Letters Between Prime Minister Sharon and President Bush (Apr. 14, 2004), *available at* http://www.mfa.gov.il (last visited Oct. 15, 2004).

38. Letter from George W. Bush, President of the United States of America, to Ariel Sharon, Prime Minister of the State of Israel (Apr. 14, 2004) [hereinafter Bush Letter]; Letter from Ariel Sharon, Prime Minister of the State of Israel, to George W. Bush, President of the United States of America (Apr. 14, 2004) [hereinafter Sharon Letter]. The full texts of the letters are attached to this article as Appendix A and Appendix B, respectively, and are also on file at the website of the Israeli Ministry of Foreign Affairs, *at* http://www.mfa.gov.il.

39. For instance, referring to the so-called "Road map" plan, Bush's letter states that "[t]he

fledged commitment of any sort is in the Bush letter's comment that "[t]he United States reiterates its steadfast commitment to Israel's security, including secure, defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats."[40] However, no actionable policy is attached to this reiterated commitment.[41] Similarly, the comment that "Israel will retain its right to defend itself against terrorism"[42] does not amount to an American commitment to come to Israel's defense but is, rather, merely an acknowledgement of a right that Israel enjoys antecedently to its relationship with the U.S.[43] Finally, even the two most eagerly anticipated aspects of the Bush letter noted by the Israeli editorialist — settlement of Palestinian refugees in a future Palestinian state rather than in Israel; another regarding the recognition of Israeli communities in the areas of Judea and Samaria — seem to state no more than an American perspective on the issue that might well be subject to future modification and that requires no policy action on the part of the United States.[44]

In contrast to the formless and noncommittal language of the Bush letter, the weightier responsibilities, ironically, seem to have

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United States will do its utmost to prevent any attempt by anyone to impose any other plan." Bush Letter, *supra* note 38.

40. *Id.*

41. I am reminded of a comment in a State Department airgram dispatched to American diplomatic outposts following the passage of the Case Act (discussed *infra* Part IV.E). The airgram proposed five separate criteria for defining an international agreement. In its discussion of "specificity," the airgram noted that "[i]nternational agreements require a certain precision and specificity setting forth the legally binding undertakings of the parties. Many international diplomatic undertakings are couched in legal terms, but are unenforceable promises because there are no objective criteria for determining enforceability of such undertakings." State Department Airgram to all Diplomatic Posts Concerning Criteria for Deciding What Constitutes an International Agreement, Dept. of State (Mar. 9, 1976) [hereinafter State Department Airgram], *reprinted in* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS 462 (2d ed. 1993) [hereinafter FRANCK & GLENNON]. Although written nearly two decades prior to the Bush-Sharon exchange, I can hardly think of a more timely insight than the caution to judge alleged commitments on their enforceability and not on legalese.

42. Bush Letter, *supra* note 38.

43. *See* U.N. CHARTER art. 51 (affirming the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"), *available at* http://www.un.org/aboutun/charter (last visited Oct. 15, 2004).

44. That said, as Avi Davis has pointed out to me, Bush's recognition of Israeli towns and villages ("settlements") in the areas of Judea and Samaria (the "West Bank") is certainly a departure from the policy of previous American administrations. My point, however, is that such policy commitments are not necessarily of legal significance. *See* Bush Letter, *supra* note 38 ("In light of new realities on the ground, including already existing major Israeli population[] centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949. . . ."). See my discussion, *infra* Part IV.B.4, regarding political versus legal considerations of executive agreements.

been undertaken by Sharon. Thus, for example, Sharon's letter states:

> [W]e are fully aware of the responsibilities facing the State of Israel. These include limitations on the growth of settlements; removal of unauthorized outposts; and steps to increase, to the extent permitted by security needs, freedom of movement for Palestinians not engaged in terrorism. Under separate cover we are sending to you a full description of the steps the State of Israel is taking to meet all its responsibilities.[45]

The importance of Sharon's acceptance of such responsibilities is suggested by the Bush letter's pointed reference to them.[46] Meanwhile, other references to responsibilities in the Bush letter refer to those of the "parties" to the conflict, and never to the responsibilities of the United States itself.[47]

In short, the speculation surrounding the Bush-Sharon letters raised more interesting hypothetical questions concerning executive agreement commitments than has been borne out by the actual exchange. And while the Bush commitments may well be of great political significance, this is a separate issue from their legal significance.[48] On that score, my own reading suggests that the American letter fails to create legally binding American commitments to Israel, despite the representations of the Sharon government.[49] Nevertheless, the task of answering the original

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45. Sharon Letter, *supra* note 38. The "separate cover" presumably refers to the letter from Dov Weissglas to Dr. Condoleeza Rice of April 18, 2004. *See* Letter from Dov Weissglas, Chief of the Prime Minister's Bureau, State of Israel, to Dr. Condoleeza Rice, National Security Advisor, United States of America (Apr. 18, 2004). The full text of the letter is attached to this article as Appendix C and is also on file at the website of the Israel Ministry of Foreign Affairs, *at* http://www.mfa.gov.il.

46. Bush's letter to Sharon states: "I know that, as you state in your letter, you are aware that certain responsibilities face the State of Israel." Bush Letter, *supra* note 38.

47. For instance: "[T]he United States believes that all states in the region have special responsibilities." *Id.*

48. This is suggested to me, in part, by Avi Davis' insight. *See supra* note 44.

49. Disengagement Plan, *supra* note 26 (listing "U.S. obligations as part of the disengagement plan"). Even assuming there is some American commitment arising from the Bush letter, this commitment will disappear if the Israeli government does not adopt Sharon's disengagement plan, upon which the supposed commitments are conditioned. *See id.* ("[T]hese understandings with the United States will only be valid if the disengagement plan is approved by Israel."); *see also* Mazal Mualem et al., *Olmert Slams Likud Ministers Who Pay Lip Service to Pullout*, HA'ARETZ, Apr. 22, 2004, *available at* http:// www.haaretzdaily.com (last visited Oct. 15, 2004) (quoting Sharon admonishing Knesset members that "[w]hoever is opposed to the plan gives up all these achievements we've made . . . [and] will carry the responsibility of cancelling all the U.S. commitments"). In this sense the executive agreement

hypothetical questions remains. It is to that subject that I now turn.

IV. THE CONSTITUTIONALITY OF ENTRENCHING EXECUTIVE AGREEMENTS

In determining the constitutionality of entrenching executive agreements, I have adopted the interpretive approach advanced by Professor Glennon for answering similar questions in foreign relations law.[50] That methodology begins with the text of the Constitution itself. However, in the absence of a textual provision articulating a "clear" or "plain" meaning, interpretive refuge is to be found in a series of secondary sources including custom, case law, and Framers' intent.[51] These are each examined in turn in an effort to define the constitutional limits of executive agreements in general and entrenchment of those agreements in particular.

A. Constitutional Text

A natural place to begin the inquiry into the constitutionality of entrenching executive agreements is with the text of the U.S. Constitution itself. Alas, nowhere in that document can any reference to executive agreements be found.[52] There is, however, mention of other types of contracts which are referred to, variously, as "agreements" and "compacts."[53] Some have inferred from the use of these different terms the Framers' recognition that treaties were not the only type of contract available for formalizing international

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amounts to something like a non-self-executing treaty. The same argument has been made regarding American executive agreements. *See* HENKIN, *supra* note 6, at 226 (rejecting the view that, while "[executive] agreements, like treaties, are internationally binding, unlike treaties they are never self-executing and cannot be effective as domestic law unless implemented by Congress").

50. In seeking out a sort of "doctrine of sources" analogous to that of Article 38 of the Statute of the International Court of Justice, Glennon establishes a hierarchy of what he calls "primary," "secondary," and "tertiary sources" useful for determining constitutionality in separation of powers disputes. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 52-70 (1990).

51. Needless to say, how one chooses to order these sources is, to some extent, to admit to one's constitutional politics. In the language of the late Professor John Hart Ely, "interpretivists" are inclined to situate the Framers' intent at a higher point along the hierarchy than do "non-interpretivists." JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980). I have not dealt with so-called "functional considerations" separately for reasons of space constraints and because I think these issues are largely revealed through the discussion of custom, case law, and intent.

52. "The Constitution does not expressly confer authority to make international agreements other than treaties, but such agreements, varying widely in formality and in importance, have been common from our early history." HENKIN, *supra* note 6, at 215.

53. *See, e.g.*, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . .").

obligations.[54] The implication is that something like executive agreements must surely have been contemplated by the Framers.

Although I find this textual explanation questionable (for reasons described in detail in Part IV.D),[55] it is in some sense also irrelevant.[56] This is because the constitutionality of executive agreements, within certain constraints, is beyond doubt. This we shall shortly see from an analysis of custom, which extends to the early days of the republic and continues to this day.

B. Custom

In light of a body of what may well be "many thousands"[57] of executive agreements concluded over the course of American history, this section can, at best, highlight only a few salient aspects of the custom and its relevance for the question of entrenchment. My focus is upon three relatively recent examples of agreements that provide important lessons for determining the constitutional limits of entrenching executive agreements.

1. The Destroyers-for-Bases Deal

In the early years of the Second World War, the United States concluded an executive agreement with Great Britain over the provision of aged American destroyer ships in exchange for basing rights in Great Britain. In a letter to President Roosevelt, then Attorney General Robert H. Jackson argued that the choice of executive agreement over treaty stood on firm constitutional

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54. *See* FRANCK & GLENNON, *supra* note 41, at 411-12 (citing MARJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 193-216 (1970) (discussing the distinction)); GLENNON, *supra* note 50, at 178 (discussing Bodenheimer's view that the Framers' considered treaties to have greater significance).

55. Equally plausible, in my mind, is that the use of different terminology stemmed simply from either a desire for variation or from the verbosity common in formal prose at the time of the writing of the Constitution. (This is not, of course, to suggest that the Framers' words were not chosen carefully.) Consider, for instance, the provision limiting the right of states to impose "Imposts or Duties" on imports and exports (U.S. CONST. art. I, § 10, cl. 2) alongside the provision that "No Tax or Duty" is to be imposed on state exports (U.S. CONST. art. I, § 9, cl. 5) and the reference to "Taxes, Duties, Imposts and Excises" (U.S. CONST. art. I, § 8, cl. 1). From this are we to infer (a) that the Framers intended "taxes," "imposts," "duties," and "excises" all to be distinguishable categories and (b) that such distinctions are to be given interpretive weight? A more likely explanation is that the terms were used synonymously to alter the repetitiousness of constant reference to what all understood to mean, simply, "taxes." *See also* discussion *infra* Part IV.D.1.

56. In another important sense it is not. For instance, if one accepts the idea that the Framers did not view "agreements," "compacts," and "treaties," as significantly different, the constitutional limits they conceived for treaties should logically apply with as much force to the other types of agreements. This argument is discussed further *infra* Part IV.D.1.

57. HENKIN, *supra* note 6, at 215 (referring to international agreements generally, other than treaties, that have been made without Senate approval).

ground.[58] Jackson highlighted, inter alia, the following arguments: (1) a formal treaty would result in delay; (2) the executive agreement would "undertake[] no defense of the possessions of any country"; and (3) the acquisitions the executive proposed to accept were "without express or implied promises on the part of the United States to be performed in the future."[59]

At the time, Professor Edwin Borchard criticized Jackson's view on the ground that the agreement was "so portentous in its facts and implications, it may be suggested that the transaction be regularized so far as and as soon as possible by act or resolution of Congress."[60] Borchard said that "it has been the usual practice, aside from executive agreements on minor matters or under Congressional authority, to submit important matters to Congress or the Senate for approval."[61] This was so "particularly involving the question of war and peace, [which] shall not be concluded by Executive authority alone."[62] The concern, said Borchard, was that "[t]he treaty-making power could easily be circumvented if it were to become customary to make important matters affecting the fate of the country the subject of executive agreements."[63]

2. *Suez and the Dulles-Eban Letter*[64]

By the conclusion of the Suez War of 1956, Gamal Abdel Nasser had been defeated, his nationalization of the Suez Canal reversed, and the previous Egyptian lock on the Straits of Tiran opened to Israeli shipping.[65] In the aftermath, American Secretary of State John Foster Dulles delivered a memorandum to Israel's Ambassador to the United Nations, Abba Eban, making the Israelis several guarantees. According to Eban's recollection,[66] the Americans promised Israel that its withdrawals would be met with the support of the United States in maintaining Israel's right of access to the Straits of Tiran and that, in the event of Egypt's repeat

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58. 39 Op. Att'y Gen. 484 (1940), *reprinted in* FRANCK & GLENNON, *supra* note 41, at 449. The agreements exchanged between the American and British governments are available in the supplement to volume 34 of the *American Journal of International Law*, 34 AM. J. INT'L L. 183-86 (Supp. IV 1940).

59. *See* FRANCK & GLENNON, *supra* note 41, at 449-51.

60. Edwin Borchard, *Editorial Comment: The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 690 (1940), *reprinted in* FRANCK & GLENNON, *supra* note 41, at 454-57.

61. Borchard, *supra* note 60, at 691.

62. *Id.*

63. *Id.* at 692.

64. I wish to thank Eric Nelson for drawing my attention to this case.

65. ABBA EBAN, PERSONAL WITNESS: ISRAEL THROUGH MY EYES 260-85, (1992).

66. *Id.* at 280.

of the earlier blockade,[67] Israel would be entitled to invoke its inherent right of self-defense in accordance with Article 51 of the United Nations Charter.[68] These commitments were subsequently affirmed in a letter from President Eisenhower to Israeli Prime Minister David Ben-Gurion. According to Eban, "Ben-Gurion attached overriding importance to the Eisenhower signature. He would not in any conditions try to reassure the Israeli public on the basis of a Dulles signature."[69]

While this letter carried obvious political value for the Ben-Gurion government both at home[70] and abroad,[71] it is notable that Eban made no mention of its legal significance. Admittedly, Eban's silence on the legal question might be due to his primary professional interest, namely, the diplomatic and political aspects of the exchange. What is fairly certain, however, is that, had legal concerns been an important part of Israeli decision making, and if they had featured prominently in his discussions with his American counterparts, the issue would surely have played a more prominent role in Eban's retelling of the episode.[72]

3. The Sinai Assurances

Following the Yom Kippur War of 1973, Israel and Egypt began negotiations that would culminate in a peace agreement by the end of the decade.[73] Prior to reaching the agreement, the United States made a number of security guarantees (both military and

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67. The subject arose again the following decade when Egyptian President Gamal Abdel Nasser announced the closing of the Strait of Tiran to Israeli-flagged ships and the ships of other nations carrying strategic cargo to Israel. Carl F. Salans, *Gulf of Aqaba and Strait of Tiran: Troubled Waters, in* THE ARAB-ISRAELI CONFLICT: READINGS AND DOCUMENTS 185 (John N. Moore ed., 1977). It was partly in response to this development that Israel launched its preemptive strike against the Egyptian air force. *See* EBAN, *supra* note 65, at 280.

68. *Id.* Interestingly, this recognition of Israel's right of self-defense presages the similar recognition in the recent letter of President Bush to Prime Minister Sharon in which the United States notes Israel's inherent right to respond in self-defense against terrorist attacks. *See* Bush Letter, *supra* note 38. This recognition must be more political than legal, for as I have argued above, the U.S. can neither enhance nor diminish a right that is in any case inherent.

69. EBAN, *supra* note 65, at 284.

70. The letter from Eisenhower must have played some role in helping "Ben-Gurion [to] convince[] his domestic opinion that the fight had not been in vain; that concrete results had ensued from it . . . ." *Id.*

71. One of the American commitments promised Eban by Dulles was that "the U.S. would mobilize all the maritime nations to follow its lead in . . . the United Nations." *Id.* at 282.

72. For the United States, recognition of the Straits of Tiran as international waters fit into a well-established legal policy. *See* Salans, *supra* note 67, at 185. Whether other legal concerns were contemplated by the U.S. at the time is a question that would require further research.

73. *See* Camp David Accords, Sept. 17, 1978, Egypt-Isr., 17 I.L.M. 1466, *available at* http://www.yale.edu/lawweb/avalon/mideast/campdav.htm (last visited Oct. 15, 2004).

economic) that were essential to Israel and, without which, the Camp David agreement might never have been reached.[74] The U.S. assurances to Israel were detailed in a memorandum exchanged by American Secretary of State Henry Kissinger, and Israeli Deputy Prime Minister and Minister of Foreign Affairs Yigal Allon.[75]

The memorandum expressed a U.S. commitment "on an on-going and long-term[] basis to Israel's military equipment and other defense requirements, to its energy requirements, [and] to its economic needs."[76] While this forward-looking commitment has stood the test of now more than two decades, it is questionable whether it is legally binding. For instance, the memorandum states that the United States "will make every effort to be fully responsive, within the limits of its resources and Congressional authorization and appropriation" in order to fulfill the commitment.[77] As a subsequent report of the Senate Foreign Relations Committee made clear, these and other aspects of the agreement were "written in such broad and general terms that any attempt to determine the specific nature and scope of the United States commitments under such agreement is, in most instances, totally impracticable."[78] As a result, the committee report noted that "[b]ecause of [its] vagueness and numerous uncertainties . . . it is difficult to predict the ultimate impact of the agreement."[79]

Importantly, the memorandum noted in its final paragraph that "entry into effect [of the Egypt-Israel Agreement] shall not take place before approval by the United States Congress of the United States role in connection with the surveillance and observation functions described in the Agreement and its Annex."[80] As the committee report implies at various points, the requirement of Congressional approval in that one instance only makes more remarkable the fact that it was not required for other aspects of the

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74. *Memoranda of Agreement Between the United States and Israel (Sinai Accords): Hearings Before the Senate Foreign Relations Committee*, 94th Cong., 1st Sess. 265-69 app. (1975) [hereinafter *Sinai Memorandum*], *reprinted in* FRANCK & GLENNON, *supra* note 41, at 470.

75. *Id.* at 471.

76. *Id.*

77. *Id.* Contrast the questionable strength of this commitment with the U.S. guarantee that it "will promptly make oil available for purchase by Israel" if Israel is unable to do so itself. *Id.* This, again, is different from the later weaker comment that the United States "will make every effort to help Israel" to transport such oil, again, if Israel is unable to do so itself. *Id.*

78. SENATE FOREIGN RELATIONS COMMITTEE MEMORANDUM OF LAW ON CHOICE OF INSTRUMENTS FOR SINAI ACCORDS (1980), *reprinted in* FRANCK & GLENNON, *supra* note 41, at 475, 475-76.

79. *Id.* at 478.

80. *Sinai Memorandum*, *supra* note 74, at 473.

agreement despite their seeming importance in matters relating to the U.S. provision of defense and economic support.[81]

In a separate memorandum exchanged between Kissinger and Allon relating to the Geneva peace conference, the United States committed itself to no recognition of, or negotiation with, the Palestine Liberation Organization (PLO) prior to the PLO's recognition of Israel's right to exist and its acceptance of Security Council Resolutions 242 and 338.[82] While such a commitment was likely constitutional inasmuch as it related to the executive's plenary recognition power,[83] it is doubtful whether this commitment on the part of the Ford Administration could have constitutionally bound future administrations.[84]

4. Some Lessons from Custom

The preceding examples offer several important lessons. First, from the Jackson-Borchard debate it appears that the importance of the subject plays a significant role in determining the appropriate instrument for an agreement. Jackson sought to distinguish the destroyer-for-bases deal on the grounds that it would not amount to an American commitment to come to Great Britain's defense, nor involve an American commitment of any kind requiring future action. Borchard, in contrast, felt that the importance of the deal required treaty ratification.

Second, as the Dulles-Eban exchange demonstrates, political exigencies can have a powerful impact upon executive agreements. This reality carries important implications when legally binding commitments are not clearly articulated. In those instances, political considerations may eclipse legal ones, with the resulting legal ambiguity leaving uncertain the nature of U.S. commitments to its negotiating partners.

The same could be said of the Sinai assurance contained in the memorandum from Kissinger to Allon. As the Senate Foreign Relations Committee report noted, seeming commitments need to be articulated in ways that make them actionable in order for them

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81. *Id.* at 471, 473.

82. Memorandum of Agreement Between the Governments of Israel and the United States: Geneva Peace Conference, October 9, 1975, 14 I.L.M. 1469, *reprinted in* FRANCK & GLENNON, *supra* note 41, at 474 [hereinafter Geneva Conference Memorandum].

83. See discussion of United States v. Belmont, 301 U.S. 324 (1937), *infra* Part IV.C.2.

84. Professor Glennon's view is that it could not. GLENNON, *supra* note 50, at 165. This is based on a report of the Senate Foreign Relations Committee which said that "[a] President may voluntarily commit himself not to enter into certain negotiations, but he cannot circumscribe the discretion of his successors to do so, just as they may not be limited in doing so by treaty or by law." *Id.* at 164-65 (quoting Exec. Rep. No. 95-12 at 10 (1978) (Panama Canal Treaties)).

to be legally meaningful. Indeed, as noted above in Part III, this is a critical point at issue in the recent exchange of letters between Bush and Sharon.[85]

Finally, by virtue of its plenary negotiating power the Ford Administration was able to make a credible commitment to Israel of not negotiating or recognizing the PLO. It is unclear, however, that the Ford Administration's plenary power could have trumped the same power of future administrations.

C. Case Law

Case law applicable to the constitutionality of entrenchment of executive agreements can be grouped in two broad categories: (1) general cases that have established important principles of constitutional law bearing upon separation of powers disputes; and (2) specific cases relating to the narrower subset of executive entrenchment of foreign policy commitments.[86] Each of these categories of case law is discussed below.

1. General Separation of Powers — the Steel Seizure Legacy

Although my discussion of generally applicable case law is necessarily limited by constraints of space, there is little doubt as to the most important separation of powers case decided by the U.S. Supreme Court: *Youngstown Sheet & Tube Co. v. Sawyer,*[87] or the so-called "*Steel Seizure Case.*" Time and again, the conceptual framework articulated in Justice Jackson's concurring opinion has been the benchmark by which the constitutionality of executive action is measured.

Jackson's "tripartite analysis" of the zones of executive power envisioned three theoretical ambits in which executive power could be exercised. In the first case, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[88] In the second case, "in absence of either a congressional grant or denial of authority, [the President] can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[89]

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85. *See supra* note 38 and accompanying text.

86. My selection of cases for review has been influenced largely by those presented in FRANCK & GLENNON, *supra* note 41, at 405-47.

87. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

88. *Id.* at 635 (Jackson, J., concurring).

89. *Id.* at 637.

Finally, in the third instance, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[90] As some of the more specific cases will make clear, the particular "zone" in which the executive acts when concluding an executive agreement is important for determining its constitutionality.

2. Specific Executive Agreement Cases

Although there is, as far as I can tell, no case law directly bearing upon the issue of entrenchment of executive agreements, it is nevertheless possible to gain insight into the issue through several indirectly related cases. One group of executive agreement cases involves inter-branch conflicts between the executive and the legislature. In *Weinberger v. Rossi*,[91] for example, an executive agreement with the Philippines permitted favored employment of Filipinos at American military sites in conflict with a subsequent federal anti-discrimination statute.[92] That statute forbade discrimination in employment at military bases *except* if it was permitted by treaty.[93] Justice Rehnquist, writing for the majority, construed "treaty" broadly to include the executive agreement in question.[94] This construction was based on the legislative record, which, he stated, left unclear Congress' intent to limit the treaty provision solely to traditional "Article II treaties."[95] In the absence of a clear congressional intent to violate the executive agreement, Rehnquist found no inter-branch conflict, and upheld the agreement.[96]

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90. *Id.*

91. Weinberger v. Rossi, 456 U.S. 25 (1982).

92. *Id.* at 27. Rehnquist found support for this argument in the *Charming Betsy* rule requiring a finding of explicit congressional intent to bring the United States into conflict with an international commitment. *Id.* at 32; *see also* Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804). It makes far more sense when viewed from the perspective of Congress' own institutional interests that that body did *not* intend the word "treaty" to include executive agreements in the statute in question. By permitting only traditional treaties to override the non-discrimination provision of the statute, Congress would have assured itself the right of rebuttal (through advice and consent) to an executive effort to violate the statute. A sole executive agreement, in contrast, would permit the executive to violate the statute's non-discrimination provision without reference to Congress.

93. *Rossi*, 456 U.S. at 26.

94. *Id.* at 36.

95. *Id.* at 32-36.

96. *Id.* See also the later opinion of Judge Palmieri in United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988): "Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence."

A similar executive-legislative conflict arose from an executive agreement in *Consumers Union, Inc. v. Kissinger*.[97] At issue was whether the executive had violated the foreign commerce clause of the Constitution (Art. 1, Sec. 8, Cl. 3) as well as the Trade Expansion Act of 1962 through his agreements with foreign steel exporters on voluntary export reductions.[98] The circuit court found no violation, basing its holding partly on its conclusion that the agreements were conceived as a short term solution to a temporary problem, did "not purport to be enforceable," and were of an "essentially precatory nature."[99]

A second category of cases involves the settlement of claims between governments through executive agreement, occasionally resulting in a denial of the competing claims of private nationals. In *Dames & Moore v. Regan*,[100] for example, the Court considered whether an executive agreement reached between President Carter and the Iranian government to settle conflicting claims by arbitration could, in effect, trump a prior judgment awarded the petitioner against the government of Iran.[101] In holding for the petitioner, Rehnquist based this finding in part on "the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[102] Rehnquist viewed as important the fact that "Congress has not disapproved of the action taken here[,]" noting that it "ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement."[103] From this, Rehnquist concluded that the Court was "clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority."[104]

Rehnquist went to pains to emphasize that his holding in *Dames & Moore* should be construed narrowly. The opinion explicitly did not aim to establish "that the President possesses plenary power to settle claims, even as against foreign governmental entities."[105] What justified the decision then, wrote Rehnquist, was a finding that "the settlement of claims has been determined to be a necessary incident to the resolution of a major

97. Consumers Union, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).
98. *Id.* at 138.
99. *Id.* at 143.
100. Dames & Moore v. Regan, 453 U.S. 654 (1981).
101. *Id.* at 660.
102. *Id.* at 680.
103. *Id.* at 687.
104. *Id.* at 688. Conspicuously, Rehnquist avoided the question of how the Court would have ruled in light of such congressional opposition. *See id.*
105. *Id.*

foreign policy dispute between our country and another" and Congress' acquiescence in the executive agreement.[106]

In its privileging of an executive agreement over a competing private claim, *Dames & Moore* resembles the earlier case of *United States v. Belmont*.[107] In *Belmont*, an executive agreement had been concluded with the Soviet Union, resulting in a transfer to the U.S. government of private assets previously seized by the Soviet government following nationalization of the assets deposited in an American account.[108] Justice Sutherland, writing for the majority, held that the executive agreement trumped the private claim since it was reached pursuant to the executive's plenary recognition power.[109]

3. Summary of Relevant Case Law

Based upon the preceding analysis, a number of conclusions can be drawn. First, while the lawful limits of executive agreements may be unclearly defined, courts have generally found those agreements to be constitutional. Second, in the event of inter-branch conflict, weight has been attached to Congress' acquiescence. Third, in upholding such agreements, consideration has also been given to their temporariness. Fourth, in settling inter-governmental claims, the interests of the executive have trumped those of private nationals. Fifth, in cases of executive agreements concluded pursuant to the exercise of a clear executive plenary power, the executive agreement has likewise prevailed.[110]

D. Framers' Intent

It is worthwhile referring to the intent of the Framers of the Constitution for further insight into the constitutional bounds of executive entrenchment. The *Federalist Papers*, as always, provide useful indicia of intent. My discussion will focus upon three issues: (1) the Framers' failure to distinguish meaningfully between various synonyms used to describe treaties; (2) their conception of the

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106. *Id.*
107. United States v. Belmont, 301 U.S. 324 (1937).
108. *Id.* at 325-26.
109. *Id.* at 330-32.
110. This fits the intuition

> that the President has sole power to enter into international agreements to carry out plenary powers — to negotiate and conclude cease-fires, recognition, pardons. But where no such power pertains, where the Senate has time to act, and where the agreement is one of unusual importance, arguments for an exclusive presidential prerogative are less persuasive.

GLENNON, *supra* note 50, at 183.

appropriate inter-branch balance of power in treaty making; and (3) their amendment philosophy.

1. The Non-Meaningfulness of Treaty Synonyms

It is not surprising, considering the Constitution's silence on the topic of executive agreements, that the Framers likewise seem to have made little or no mention of them.[111] Nevertheless, as I noted in Part IV.A, some argue that executive agreements — as distinct from generic treaties — were contemplated by the Framers as a distinct category of international agreement. Thus, the argument might continue, absence of the phrase "executive agreement" is attributable not to a failure to distinguish between these and other types of agreements, but perhaps only to the fact that the term was simply unknown to the Framers at the time.

I wish to argue, in contrast, that this silence was not only due to a limitation in vocabulary, but rather because the Framers did not imagine the distinctions in the various terms they employed for "treaties" to be meaningful.[112] To be clear, my argument is not that these terms are without distinctions — just that they are, to borrow the oft-quoted platitude, "distinctions without a difference." Thus, to the extent the Framers' use of "compacts" rather than "treaties" is distinguishable at all, they evidently did not care to dwell upon the distinction at any length, suggesting the meaninglessness of whatever difference they themselves perceived.[113] Prolixity and

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111. I say "seem," because my research of original intent has admittedly not been exhaustive. My conclusions are drawn from selective *Federalist Papers* that I thought would be most likely to deal with the topic, guided by the helpful index provided in THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

112. My view is supported by the argument of Professor David Gray Adler, who writes that "[t]here was apparently no doubt among the Framers and ratifiers that the treatymaking power was omnicompetent in foreign affairs; its authority covered the field." David G. Adler, *Court, Constitution, and Foreign Affairs, in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 27 (David G. Adler & Larry N. George eds., 1996). Similarly, Adler notes:

> The text of the Constitution makes no mention of executive agreements. Moreover, there was no reference to them in the Constitutional Convention or in the state ratifying conventions. The *Federalist Papers* are silent on the subject as well. There is, then, no support in the architecture of the Constitution for the use of executive agreements.

Id.

113. Professor Louis Henkin evidently agrees: "The Framers did not stop to distinguish treaties from other international agreements or commitments." HENKIN, *supra* note 6, at 175. But see Henkin's citation to the same sentence, noting that "[a] distinction between treaties and 'Agreements or Compacts' with foreign states is implied in the limitations imposed on the states." *Id.* n* (citing U.S. CONST. art. 1, § 10). It is unclear to me, however, how art. I, § 10 makes any clearer the "distinction" between treaties and the various other types of international agreements.

verbosity are, after all, two words used interchangeably to refer to substantially the same thing.

It is quite plausible that the use of different terminology in the Constitution stemmed simply from either a desire for variation, or from the wordy style common in formal prose at the time of the writing of the text. Examples of this flowery convention are evident elsewhere in the document. Consider, for instance, the provision limiting the right of states to impose "Imposts or Duties" on imports and exports,[114] the provision that "No Tax or Duty" is to be imposed on state exports,[115] and the reference to "Taxes, Duties, Imposts and Excises."[116] From this are we to infer (a) that the Framers intended "taxes," "imposts," "duties," and "excises" all to be distinguishable categories, and (b) that such distinctions are to be given interpretive weight? I think not. A far more likely explanation is that the terms were used synonymously to alter the repetitiousness of constant reference to what all understood to mean, simply, "taxes."[117]

Outside the text of the Constitution itself, there is evidence to suggest that the Framers may have considered the various terms for treaties to mean largely the same thing. One example can be found in *Federalist No. 69*, where Hamilton seemed to use the words "treaty" and "compact" interchangeably in referring to the power of

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114. U.S. CONST. art. I, § 10, cl. 2.

115. *Id.* § 9, cl. 5.

116. *Id.* § 8, cl. 1.

117. Property law furnishes a telling example of similarly superfluous holdovers of the past. For instance, "[a] deed might contain this all-embracing language: 'By these presents the grantor does give, grant, bargain, sell, remise, demise, release, and convey unto the grantee, and to his heirs and assigns forever, all that parcel of land described as follows.'" JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 611 (5th ed. 2002). Dukeminier and Krier note that David Mellinkoff suggests that the language of "[g]rant, bargain, and sell" is "an archaic form, awaiting only interment. *Grant* is sufficient." *Id.* (citing MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 129, 274 (1992)). PROFESSOR MELLINKOFF EXPLAINS:

> A long habit of coupling synonyms persists in American legal usage, e.g., *authorize and empower, null and void, true and correct.* The habit is compounded of antiquated literary style, the mixture of languages we now call English, the lawyer's gamble on venial repetition against mortal omission, and a misplaced reliance on the precision of what has endured.
>
> The great mass of these coupled synonyms are simply redundancies, furnishing opportunity for argument that something beyond synonomy [sic] was intended. A handful have been so welded by usage as to have the effect, in proper context, of a single word, e.g., *aid and comfort, cease and desist* . . . .

MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 129, 129 (1992). Mellinkoff's list of redundancies in the American legal lexicon of course calls to mind some of the superfluous word pairings cited in the U.S. Constitution, noted above. Of particular interest and relevance to my topic, Mellinkoff includes on his list the phrase "*covenant and agree.*" *Id.* at 130.

the English monarch to conclude agreements with significantly less legislative concurrence than would be the case in the new union.[118]

In another case, Madison wrote in *Federalist No. 43* about the "compact" between the colonial states under the Articles of Confederation. For example, in discussing whether the Articles could be superceded by a subsequent legislative act (namely, the Constitution) without a unanimous vote of the colonial states, Madison wrote that "[a] compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties."[119] This comment could perhaps be understood to mean that the terms "compact" and "treaty" refer, respectively, to types of domestic and international contracts. A compact might, for instance, refer to a foundational or constitutive contract.[120] Madison did not elaborate, however, and I query whether there are grounds for giving the terms differential meaning for interpretive purposes.[121]

In a later paper, *Federalist No. 85*, Hamilton lent some support to the idea that a compact might have been understood by the

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118. Hamilton wrote of "an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction." THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

119. THE FEDERALIST NO. 43, at 279-80 (James Madison) (Clinton Rossiter ed., 1961). Tangentially, it is worth noting that Madison's conception of the independent sovereignty of these states undercuts Justice Sutherland's famous opinion in *United States v. Curtiss-Wright*, 299 U.S. 304, 316 (1936), which claimed that the source of sovereign power derived not from the states "since the states severally never possessed international powers, [and] such powers could not [therefore] have been carved from the mass of state powers but obviously were transmitted to the United States from some other source." Compare this with Hamilton's comment that

> the [treaty-making] power of the federal executive would exceed that of any State executive. But this arises naturally from the exclusive possession by the Union of that part of the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question whether the executives of the several States were not solely invested with that delicate and important prerogative.

THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton leaves his critical question unanswered.

120. There is some suggestion of this in Madison's comment that "the Confederation . . . stands in the solemn form of a compact among the States." THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961). By "Confederation" I presume, based upon context, that Madison was referring to the Articles of Confederation that preceded the adoption of the U.S. Constitution. See, for example, Madison's discussion of a different formulation of what is now art. VI, cl. 1 of the Constitution ("all debts contracted and engagements entered into before the adoption of this Constitution [shall be as] valid against the United States under this Constitution [as] under the Confederation"). THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

121. In the same paper, Madison introduced yet another term for "agreement" in his reference to the Articles as "the federal pact." THE FEDERALIST NO. 43, at 280 (James Madison) (Clinton Rossiter ed., 1961). Here again, there is no further elaboration on the (non)meaningfulness of the distinction between "compact," "treaty," and "pact." *Id.*

Framers as an internal or constitutive document rather than a treaty. For instance, Hamilton wrote of "[t]he compacts which are to embrace thirteen distinct States in a common bond of amity and union."[122] Yet Madison's use of the same term to refer to an agreement "between independent sovereigns"[123] would seem to undermine the distinction between "compact" and "treaty."

Finally, Professor David Gray Adler has cited a paragraph from Hamilton which, if read the way Adler reads it, would seem to put the issue entirely to rest. Hamilton wrote that

> it was understood by *all* to be the intent of the provision to give that power the most ample latitude — render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and *every other species of convention* usual among nations.[124]

From this, in part, Adler deduces — and rightly, I believe — that the treaty-making power was "omnicompetent" in the view of the Framers.[125] In short, treaty-making power covered all manner of agreements without meaningful distinction.

If one accepts the view that the Framers' failure to distinguish meaningfully between different types of international agreements implies no meaningful difference between executive agreements and other forms of international agreement, this of course does not mean that executive agreements are unconstitutional — the preceding discussion of custom and case law demonstrates the consensus on constitutionality. What it may suggest, however, is that the principles that guided the Framers' conception of the constitutional limits on treaty making should be applied analogously to determine the limits for executive agreement making. With that in mind, I would now like to examine the Framers' views on the concurrent treaty-making power.

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122. THE FEDERALIST NO. 85, at 524 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

123. THE FEDERALIST NO. 43, at 280 (James Madison) (Clinton Rossiter ed., 1961).

124. Adler, *supra* note 112, at 27. Although Adler cites the source of the paragraph as Hamilton's *Federalist No. 75*, I have been unable to locate it in that particular paper. Glennon, quoting the same paragraph in *supra* note 50, at 182 cites *Letters of Camillus*, 6A Hamilton, Works 183 (Lodge, ed. 1904). The more important point is Glennon's agreement with Adler's reading of the paragraph, for Glennon cites it as evidence that "Hamilton apparently regarded the advice-and-consent power of the Senate as encompassing every international agreement." GLENNON, *supra* note 50, at 182.

125. Adler, *supra* note 112, at 27.

2. Treaty-Making Power

While the Framers were well aware of the special prerogatives of particular branches in treaty making (as in the executive's broad purview in negotiation), the sum total of plenary and concurrent rights created a balanced scheme of checked powers shared by the legislature and the executive. This is evident from *Federalist No. 75*, where Hamilton cautioned against locating sole treaty-making power exclusively in either the executive or the legislative branch and argued, instead, in favor of cooperation between them.[126]

John Jay saw the intrinsic strengths of the executive (e.g., "secrecy" and "dispatch") as essential to the treaty-making process.[127] Interestingly, however, Jay seems to have distinguished between the value of these strengths early in the treaty-making process and later on. Thus, he wrote that "[t]hose matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation."[128] When viewed over the course of the entirety of the treaty-making process, however (from negotiation to ratification), the executive's plenary negotiating power, combined with the Senate's plenary power of advice and consent, resulted in a wisely overlapping framework of concurrent power. As Jay put it, "the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other."[129]

This balance was seen as preferable to the British model which had entrusted the weight of treaty power to the crown. Hamilton wrote that "there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature."[130] Thus, "[t]he one would

126. THE FEDERALIST NO. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

127. THE FEDERALIST NO. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

128. *Id.* at 393. This leads me to wonder whether executive agreements could, or should, be thought of more appropriately as "treaties in the making." According to this view, executive agreements could be considered draft treaties that would acquire the imprimatur of the law upon Senate advice and consent. This idea is in line with Glennon's suggestion that such agreements be accorded the status of treaties signed, but not yet ratified. *See* GLENNON, *supra* note 50, at 169-75. See also the Vienna Convention on the Law of Treaties, *supra* note 7, art. 18, 8 U.N.T.S. 332, 336, obliging parties "to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty."

129. THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961).

130. THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties."[131]

Although the Senate would enjoy the power of advice and consent, the Framers did not envision an executive entirely bereft of all legislative functions. Thus, in responding to the criticism that treaties, as laws binding upon the nation, should derive their legal obligation from a legislative body, Jay rejected out of hand the suggestion that executive involvement in treaty making would somehow diminish the legality of those treaties.[132] The implication is that presidents do in fact enjoy some modicum of legislative power in the making of treaties and, by logical extension, in executive agreement making as well.

Another criticism leveled against the treaty mechanism that is relevant to the topic of entrenching executive agreements was that treaties should not be deemed the law of the land but only as "acts of assembly, . . . repealable at pleasure."[133] Jay invited these critics to consider that a treaty is just "another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely,* but on us only so long and so far as we may think proper to be bound by it."[134] This was so, he said, because "treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them."[135] This language should, of course, not be understood as a broad endorsement of entrenchment, but rather as Jay's recognition of the need to strike a balance between living up to our commitments and easy repeal of them.

It is also worth remembering that Jay's concern, in my view, was primarily with treaties and not with executive agreements per

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131. *Id.* at 422.

132. See, for example, the source of an excerpt which later appeared in Justice Douglas' opinion in *United States v. Pink*:

> All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial.

THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961); United States v. Pink, 315 U.S. 203, 230 (1942).

133. THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961).

134. *Id.*

135. *Id.*

se. Should a president wish to formalize a "bargain" in the way Jay imagined, the option always remains for a president to do so with legislative consent. This is an issue to which I will return in the conclusion of this paper. For now, I would like to review some salient aspects of the Framers' amendment philosophy in order to further clarify the constitutional bounds of executive entrenchment.

3. Amendment Philosophy

The Framers' amendment philosophy is worth considering in light of the concept of entrenchment which, by definition, either precludes amendment or makes it very difficult.[136] The Framers' views on amendment, as elsewhere, seem to have been a philosophy of the mean — of checked and balanced powers. Again in *Federalist No. 43*, for example, Madison commented approvingly on the power of amendment with the ratification of a supermajority of three-fourths of the states.[137] This was a mechanism, in Madison's view, "stamped with every mark of propriety" because "[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[138]

For Hamilton, the amendment procedure would be the best antidote to the new Constitution's imperfections, unlike those who sought perfection prior to ratification.[139] "How," he wondered, "can perfection spring from such materials?"[140] According to this thinking, an amendment procedure was a requirement of both prudence and humility.[141]

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136. This is, in some sense, like comparing apples and oranges, for the Framers had in mind the concept of *constitutional* amendment which may say little about their notion of *legislative* or *executive* entrenchment. For a discussion of the distinction between constitutional and legislative entrenchment see McGinnis & Rappaport, *supra* note 1. Despite the obvious differences, I believe the Framers' philosophy of the mean inhered in their most fundamental conceptions of constitutional government and therefore remains relevant to executive entrenchment as well.

137. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

138. *Id.*

139. He wrote: "I never expect to see a perfect work from imperfect man." THE FEDERALIST NO. 85, at 523 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

140. *Id.* at 524. Hamilton was referring to "[t]he compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations." *Id.*

141. Also interesting, although slightly tangential to my focus, is Hamilton's response to the argument that advice and consent should be required of two thirds of those *present* rather than two thirds of the entire Senate body. Hamilton wrote that "[i]t has been shown . . . that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority." THE FEDERALIST NO. 75, at 453 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

These comments, I believe, suggest an inherent skepticism for the notion of entrenchment which, in the Hamiltonian view, would wrongly presume the "perfection" of the entrenched provision or policy in question. With entrenchment, as with other issues, the Framers' imparted "a lesson of moderation to all the sincere lovers of the Union."[142]

4. Summary of Intent

The preceding analysis reveals a number of insights. First, as I hope my discussion of the meaninglessness of treaty synonyms has shown, it is highly questionable whether the Framers intended their word choice to suggest meaningful distinctions among international agreements. The practical import of this observation is that the Framers must have intended for the constitutional limits applicable to treaties to apply similarly to all international agreements. Second, on the basis of that argument, I turned to a consideration of what constitutional limits the Framers intended to apply to treaty making. There, it is quite certain, the Framers had in mind a balanced framework that would moderate the excesses of the executive and legislative branches. Overwhelmingly, theirs seems to have been an argument for inter-branch cooperation. Indeed, the same theory of moderation that lies at the heart of the Framers' general conception of constitutional government can be seen in their understanding of amendments and is applicable to my discussion of entrenchment.

E. Establishing Constitutional Criteria for Executive Agreements

The foregoing sections on custom, case law, and intent have each contributed to the effort to establish criteria for the executive's authority to entrench executive agreements. In the last century this project gained impetus with Congress' passage of key legislation. Not coincidentally, that legislation was promulgated in the era of the War Powers Resolution. It was, no doubt, like the War Powers Resolution, a product of the same political culture that had been jaded by the excesses of unfettered executive power.

In 1969, a report of the Senate Foreign Relations Committee proposed a resolution expressing "the sense of the Senate" that U.S. commitments to foreign powers required inter-branch consensus.[143] The version subsequently adopted (what became the National Commitments Resolution) noted "the sense of the Senate that a

142. THE FEDERALIST NO. 85, at 527 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

143. S. REP. NO. 91-129, at 1 (1969), *excerpted in* FRANCK & GLENNON, *supra* note 41, at 458.

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."[144] Although the resolution evidently was not intended to have the power of binding law,[145] it is an instructive example of the Senate's views on the importance of inter-branch cooperation in concluding international agreements.

The Case Act of 1972 built upon the foundation of the National Commitments Resolution in restricting the ability of the executive to conclude international agreements without reference to Congress and established a reporting period within which the executive was required to notify Congress of such agreements.[146] The Case Act, in turn, prompted the U.S. Department of State to distribute an airgram to all diplomatic posts discussing in detail five criteria for determining what should be considered an "international agreement" according to the terms of the Act.[147] The criteria were: (1) the parties' intention to be bound by international law; (2) the significance of the agreement; (3) the specificity of the agreement ("including objective criteria for determining enforceability"); (4) the involvement of two or more parties; and (5) the form of the agreement.[148]

The criteria articulated by Congress and the State Department have established useful guidelines for determining the seriousness of executive agreements worthy of congressional review and have contributed greatly to the presumption in favor of inter-branch cooperation.

V. CONCLUSION

Entrenchment in all branches of government (judicial, legislative, and executive) and in all jurisdictions (domestic and international)[149] is positioned at a critical nexus between the

144. *Id.* at 459.

145. FRANCK & GLENNON, *supra* note 41, at 464.

146. 1 U.S.C.A. §112(b) (1979), *excerpted in* FRANCK & GLENNON, *supra* note 41, at 465-66.

147. State Department Airgram, *supra* note 41.

148. *Id.*

149. A fascinating case of potential international environmental entrenchment can be found in the impulse to preserve threatened species for the enjoyment or benefit or use of future generations. The concept of "intergenerational obligation" arose in the discussion of international environmental law in Professor Michael J. Glennon's class on Public International Law (ILO-L201) at the Fletcher School of Law and Diplomacy (Apr. 27, 2004) (notes on file with author); *see also* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 43 (1990) (noting that the effort to protect the elephant as "a battle to clarify our character, to define what we hold dear, for ourselves and our descendants").

competing theories of legal realism and legal positivism. The tension is highlighted by the comment of Professor Julian Eule that "[n]o law is truly immutable."[150] This statement begs an obvious question: Is the mutability of all law an essentially positivist principle, or a retreat to the pragmatic insight of realism? At one point, Eule seems to align himself with realism in a way that seems akin to a justification of civil disobedience.[151] Elsewhere, however, Eule not only expresses a belief in the impracticality of entrenchment, but evinces an argument, on democratic grounds, that it is proper for it to be this way.[152]

In the case of executive agreements, there are similarly compelling realist and positivist grounds for determining clearly the lawful limits of entrenchment. Realistically, as has been argued in the case of legislative entrenchment, future generations of congressional representatives or presidents are not likely see themselves as bound by the supposed "entrenchment" of executive agreements by an earlier executive.[153]

Positively speaking, the established constitutional consensus seems to be that the president should enjoy no greater power in executive agreement making than he enjoys in treaty making. This is so for at least two compelling reasons. First, it is questionable whether the Framers intended for their different use of treaty terms to confer different legal status upon different types of international agreements. Thus, on the basis of original intent, I believe that executive agreements must be subject to the constitutional limits of treaties.[154] Second, as others have argued persuasively, it makes little sense for the executive to derive even more power from his executive agreement-making power (which he enjoys by custom)

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150. Eule, *supra* note 9, at 384.

151. "When the need becomes compelling, succeeding generations will mold the law to the requirements of their age, even in the absence of the formal power to do so." *Id.* Eule also notes that "[i]n the end, laws that purport to be unalterable ensure no more than that the struggle for change will occur outside the confines of the established legal structure. . . . If the entrenched legislation is threatening or grossly impractical, the inability to repeal it may lead to open defiance, affording dangerous precedent for the nonobservance of other legal arrangements." *Id.* at 384, 387-88.

152. Eule believes that limits on the entrenchment power of legislatures stem, in part, from the value of democratic representation: "The recognition of the people as an external force from which all power originates severed the umbilical connection with the English vision of Parliament as the sovereign . . . . 'We the People,' was not merely flashy prose." *Id.* at 396.

153. One of the criticisms that Roberts and Chemerinsky level against Posner and Vermeule is precisely that the latter "do not seem to recognize the political fact that future legislatures could simply ignore attempts to restrict their freedom of action, and that courts would almost certainly refuse to give such attempts binding force." Roberts & Chemerinsky, *supra* note 4, at 1776.

154. And, there is little doubt as to the power of one Congress to repeal an earlier ratified treaty. *See* Eule, *supra* note 9, at 425 & n.213 (commenting on "Congressional repudiation of treaty obligations").

than from his treaty-making power (an explicitly enumerated concurrent power).[155]

For these two reasons it makes sense that the ready-made body of federal common law developed for treaties should be applied to executive agreements. Consider, for instance, the Supreme Court's holding that, in an irreconcilable conflict between a self-executing treaty and a statute, the last-in-time must control.[156] This doctrine of interpretation should be applied similarly to attempts at entrenchment of executive agreements. Thus, either the Congress (through passage of subsequent legislation making clear the legislature's intent to violate the agreement) or the president (through promulgation of an executive order or agreement having the same effect) could terminate an earlier "entrenched" executive agreement.

Does this mean that presidents are legally powerless to preserve their foreign commitments through agreements that will stand the tests of time? Surely not. Recall that a president who so wished could always opt for a legislative-executive agreement rather than a sole executive agreement. The former approach bears significant benefits. First, inter-branch agreement confers upon the executive greater insurance that the agreement will not be erased by a future unilateral act of either branch. At the same time, the acquiescence of the legislature which Justice Rehnquist found to be of consequence in *Dames & Moore* would be obvious.[157] In effect, this arrangement offers an alternative to both inter- and intra-branch conflict, substituting inter-branch consensus, and keeping the action within the first zone of Justice Jackson's tripartite structure.[158]

What this means is that the executive's ability to entrench foreign commitments should be of the "weak" variety discussed above in Part II. Like section 1547 of the War Powers Resolution[159] and the judicial doctrine of stare decisis, the executive should be able to affect the conduct of future foreign policy, but not in a way that makes his own commitments irreversible. While presidents

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155. *See* FRANCK & GLENNON, *supra* note 41, at 428 ("As for executive agreements that are inconsistent with the Constitution, it would be natural to assume that if treaties cannot abridge constitutional rights, neither can 'pure' executive agreements or executive-congressional agreements.").

156. Eule, *supra* note 9, at 425 n.213 (citing Whitney v. Robertson, 124 U.S. 190 (1888)).

157. Dames & Moore, 453 U.S. at 654.

158. Youngstown Sheet & Tube Co., 343 U.S. at 579. ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") *Id.* at 635.

159. War Powers Resolution, 50 U.S.C. §1547 (1973).

must have the authority to solidify foreign commitments, this power should not extend beyond the limits of their treaty-making power. This argument, like Professor Eule's, is both a prudent recognition of the past's inability to dictate the future, and a normative argument that it should be so.[160]

160. Eule, *supra* note 9.

VI. APPENDICES

Appendix A.

Letter from U.S. President George W. Bush to Prime Minister Ariel Sharon, April 14, 2004[*]

His Excellency Ariel Sharon
Prime Minister of Israel

Dear Mr. Prime Minister,

Thank you for your letter setting out your disengagement plan.

The United States remains hopeful and determined to find a way forward toward a resolution of the Israeli-Palestinian dispute. I remain committed to my June 24, 2002 vision of two states living side by side in peace and security as the key to peace, and to the Roadmap as the route to get there.

We welcome the disengagement plan you have prepared, under which Israel would withdraw certain military installations and all settlements from Gaza, and withdraw certain military installations and settlements in the West Bank. These steps described in the plan will mark real progress toward realizing my June 24, 2002 vision, and make a real contribution towards peace. We also understand that, in this context, Israel believes it is important to bring new opportunities to the Negev and the Galilee. We are hopeful that steps pursuant to this plan, consistent with my vision, will remind all states and parties of their own obligations under the Roadmap.

The United States appreciates the risks such an undertaking represents. I therefore want to reassure you on several points. First, the United States remains committed to my vision and to its implementation as described in the Roadmap. The United States will do its utmost to prevent any attempt by anyone to impose any other plan. Under the Roadmap, Palestinians must undertake an immediate cessation of armed activity and all acts of violence against Israelis anywhere, and all official Palestinian institutions must end incitement against Israel. The Palestinian leadership must act decisively against terror, including sustained, targeted, and effective operations to stop terrorism and dismantle terrorist capabilities and infrastructure. Palestinians must undertake a

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* *Available at* http://www.mfa.gov.il (last visited Oct. 15, 2004). The letter has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

comprehensive and fundamental political reform that includes a strong parliamentary democracy and an empowered prime minister.

Second, there will be no security for Israelis or Palestinians until they and all states, in the region and beyond, join together to fight terrorism and dismantle terrorist organizations. The United States reiterates its steadfast commitment to Israel's security, including secure, defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats.

Third, Israel will retain its right to defend itself against terrorism, including to take actions against terrorist organizations. The United States will lead efforts, working together with Jordan, Egypt, and others in the international community, to build the capacity and will of Palestinian institutions to fight terrorism, dismantle terrorist organizations, and prevent the areas from which Israel has withdrawn from posing a threat that would have to be addressed by any other means. The United States understands that after Israel withdraws from Gaza and/or parts of the West Bank, and pending agreements on other arrangements, existing arrangements regarding control of airspace, territorial waters, and land passages of the West Bank and Gaza will continue.

The United States is strongly committed to Israel's security and well-being as a Jewish state. It seems clear that an agreed, just, fair and realistic framework for a solution to the Palestinian refugee issue as part of any final status agreement will need to be found through the establishment of a Palestinian state, and the settling of Palestinian refugees there, rather than in Israel.

As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with UNSC Resolutions 242 and 338. In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.

I know that, as you state in your letter, you are aware that certain responsibilities face the State of Israel. Among these, your government has stated that the barrier being erected by Israel should be a security rather than political barrier, should be temporary rather than permanent, and therefore not prejudice any final status issues including final borders, and its route should take

into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

As you know, the United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign, and independent, so that the Palestinian people can build their own future in accordance with my vision set forth in June 2002 and with the path set forth in the Roadmap. The United States will join with others in the international community to foster the development of democratic political institutions and new leadership committed to those institutions, the reconstruction of civic institutions, the growth of a free and prosperous economy, and the building of capable security institutions dedicated to maintaining law and order and dismantling terrorist organizations.

A peace settlement negotiated between Israelis and Palestinians would be a great boon not only to those peoples but to the peoples of the entire region. Accordingly, the United States believes that all states in the region have special responsibilities: to support the building of the institutions of a Palestinian state; to fight terrorism, and cut off all forms of assistance to individuals and groups engaged in terrorism; and to begin now to move toward more normal relations with the State of Israel. These actions would be true contributions to building peace in the region.

Mr. Prime Minister, you have described a bold and historic initiative that can make an important contribution to peace. I commend your efforts and your courageous decision which I support. As a close friend and ally, the United States intends to work closely with you to help make it a success.

Sincerely,

George W. Bush

Appendix B.

Letter from Prime Minister Ariel Sharon to U.S. President George W. Bush, April 14, 2004[*]

The Honorable George W. Bush
President of the United States of America
The White House
Washington, D.C.

Dear Mr. President,

The vision that you articulated in your 24 June 2002 address constitutes one of the most significant contributions toward ensuring a bright future for the Middle East. Accordingly, the State of Israel has accepted the Roadmap, as adopted by our government. For the first time, a practical and just formula was presented for the achievement of peace, opening a genuine window of opportunity for progress toward a settlement between Israel and the Palestinians, involving two states living side-by-side in peace and security.

This formula sets forth the correct sequence and principles for the attainment of peace. Its full implementation represents the sole means to make genuine progress. As you have stated, a Palestinian state will never be created by terror, and Palestinians must engage in a sustained fight against the terrorists and dismantle their infrastructure. Moreover, there must be serious efforts to institute true reform and real democracy and liberty, including new leaders not compromised by terror. We are committed to this formula as the only avenue through which an agreement can be reached. We believe that this formula is the only viable one.

The Palestinian Authority under its current leadership has taken no action to meet its responsibilities under the Roadmap. Terror has not ceased, reform of the Palestinian security services has not been undertaken, and real institutional reforms have not taken place. The State of Israel continues to pay the heavy cost of constant terror. Israel must preserve its capability to protect itself and deter its enemies, and we thus retain our right to defend ourselves against terrorism and to take actions against terrorist organizations.

Having reached the conclusion that, for the time being, there exists no Palestinian partner with whom to advance peacefully

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* *Available at* http://www.mfa.gov.il (last visited Oct. 15, 2004). The letter has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

toward a settlement and since the current impasse is unhelpful to the achievement of our shared goals, I have decided to initiate a process of gradual disengagement with the hope of reducing friction between Israelis and Palestinians. The Disengagement Plan is designed to improve security for Israel and stabilize our political and economic situation. It will enable us to deploy our forces more effectively until such time that conditions in the Palestinian Authority allow for the full implementation of the Roadmap to resume.

I attach, for your review, the main principles of the Disengagement Plan. This initiative, which we are not undertaking under the Roadmap, represents an independent Israeli plan, yet is not inconsistent with the Roadmap. According to this plan, the State of Israel intends to relocate military installations and all Israeli villages and towns in the Gaza Strip, as well as other military installations and a small number of villages in Samaria.

In this context, we also plan to accelerate construction of the Security Fence, whose completion is essential in order to ensure the security of the citizens of Israel. The fence is a security rather than political barrier, temporary rather than permanent, and therefore will not prejudice any final status issues including final borders. The route of the Fence, as approved by our Government's decisions, will take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

Upon my return from Washington, I expect to submit this Plan for the approval of the Cabinet and the Knesset, and I firmly believe that it will win such approval.

The Disengagement Plan will create a new and better reality for the State of Israel, enhance its security and economy, and strengthen the fortitude of its people. In this context, I believe it is important to bring new opportunities to the Negev and the Galilee. Additionally, the Plan will entail a series of measures with the inherent potential to improve the lot of the Palestinian Authority, providing that it demonstrates the wisdom to take advantage of this opportunity. The execution of the Disengagement Plan holds the prospect of stimulating positive changes within the Palestinian Authority that might create the necessary conditions for the resumption of direct negotiations.

We view the achievement of a settlement between Israel and the Palestinians as our central focus and are committed to realizing this objective. Progress toward this goal must be anchored exclusively in the Roadmap and we will oppose any other plan.

In this regard, we are fully aware of the responsibilities facing the State of Israel. These include limitations on the growth of settlements; removal of unauthorized outposts; and steps to

increase, to the extent permitted by security needs, freedom of movement for Palestinians not engaged in terrorism. Under separate cover we are sending to you a full description of the steps the State of Israel is taking to meet all its responsibilities.

The government of Israel supports the United States efforts to reform the Palestinian security services to meet their Roadmap obligations to fight terror. Israel also supports the American's efforts, working with the International Community, to promote the reform process, build institutions and improve the economy of the Palestinian Authority and to enhance the welfare of its people, in the hope that a new Palestinian leadership will prove able to fulfill its obligations under the Roadmap.

I want to again express my appreciation for your courageous leadership in the war against global terror, your important initiative to revitalize the Middle East as a more fitting home for its people and, primarily, your personal friendship and profound support for the State of Israel.

Sincerely,

Ariel Sharon

Appendix C.

Letter from Dov Weissglas, Chief of the Prime Minister's Bureau, to U.S. National Security Adviser, Dr. Condoleezza Rice, April 18, 2004[*]

Dr. Condoleezza Rice
National Security Adviser
The White House
Washington, D.C.

Dear Dr. Rice,

On behalf of the Prime Minister of the State of Israel, Mr. Ariel Sharon, I wish to reconfirm the following understanding, which had been reached between us:

1. Restrictions on settlement growth: within the agreed principles of settlement activities, an effort will be made in the next few days to have a better definition of the construction line of settlements in Judea & Samaria. An Israeli team, in conjunction with Ambassador Kurtzer, will review aerial photos of settlements and will jointly define the construction line of each of the settlements.

2. Removal of unauthorized outposts: the Prime Minister and the Minister of Defense, jointly, will prepare a list of unauthorized outposts with indicative dates of their removal; the Israeli Defense forces and/or the Israeli Police will take continuous action to remove those outposts in the targeted dates. The said list will be presented to Ambassador Kurtzer within 30 days.

3. Mobility restrictions in Judea & Samaria: the Minister of Defense will provide Ambassador Kurtzer with a map indicating roadblocks and other transportational barriers posed across Judea & Samaria. A list of barriers already removed and a timetable for further removals will be included in this list. Needless to say, the matter of the existence of transportational barriers fully depends on the current security situation and might be changed accordingly.

4. Legal attachments of Palestinian revenues: the matter is pending in various courts of law in Israel, awaiting judicial decisions. We will urge the State Attorney's office to take any possible legal measure to expedite the rendering of those decisions.

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5. The Government of Israel extends to the Government of the United States the following assurances:

> a. The Israeli government remains committed to the two-state solution — Israel and Palestine living side by side in peace and security — as the key to peace in the Middle East.
>
> b. The Israeli government remains committed to the Roadmap as the only route to achieving the two-state solution.
>
> c. The Israeli government believes that its disengagement plan and related steps on the West Bank concerning settlement growth, unauthorized outposts, and easing of restrictions on the movement of Palestinians not engaged in terror are consistent with the Roadmap and, in many cases, are steps actually called for in certain phases of the Roadmap.
>
> d. The Israeli government believes that further steps by it, even if consistent with the Roadmap, cannot be taken absent the emergence of a Palestinian partner committed to peace, democratic reform, and the fight against terror.
>
> e. Once such a Palestinian partner emerges, the Israeli government will perform its obligations, as called for in the Roadmap, as part of the performance-based plan set out in the Roadmap for reaching a negotiated final status agreement.
>
> f. The Israeli government remains committed to the negotiation between the parties of a final status resolution of all outstanding issues.
>
> g. The Government of Israel supports the United States' efforts to reform the Palestinian security services to meet their Roadmap obligations to fight terror. Israel also supports the American efforts, working with the international community, to promote the reform process, build institutions, and improve the economy of the Palestinian Authority and to enhance the welfare of its people, in the hope

that a new Palestinian leadership will prove able to fulfill its obligations under the Roadmap. The Israeli Government will take all reasonable actions requested by these parties to facilitate these efforts.

h. As the Government of Israel has stated, the barrier being erected by Israel should be a security rather than a political barrier, should be temporary rather than permanent, and therefore not prejudice any final status issues including final borders, and its route should take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

Sincerely,

Dov Weissglas
Chief of the Prime Minister's Bureau

Appendix D.

*The Disengagement Plan — General Outline, April 18, 2004**

1. GENERAL

Israel is committed to the peace process and aspires to reach an agreed resolution of the conflict on the basis of the principle of two states for two peoples, the State of Israel as the state of the Jewish people and a Palestinian state for the Palestinian people, as part of the implementation of President Bush's vision.

Israel is concerned to advance and improve the current situation. Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a bilateral peace process. Accordingly, it has developed a plan of unilateral disengagement, based on the following considerations:

i. The stalemate dictated by the current situation is harmful. In order to break out of this stalemate, Israel is required to initiate moves not dependent on Palestinian cooperation.

ii. The plan will lead to a better security situation, at least in the long term.

iii. The assumption that, in any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel.

iv. The relocation from the Gaza Strip and from Northern Samaria (as delineated on Map) will reduce friction with the Palestinian population, and carries with it the potential for improvement in the Palestinian economy and living conditions.

v. The hope is that the Palestinians will take advantage of the opportunity created by the disengagement in order to break out of the cycle of violence and to reengage in a process of dialogue.

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vi. The process of disengagement will serve to dispel claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.

vii. The process of disengagement is without prejudice to the Israeli-Palestinian agreements. Relevant arrangements shall continue to apply.

When there is evidence from the Palestinian side of its willingness, capability and implementation in practice of the fight against terrorism and the institution of reform as required by the Roadmap, it will be possible to return to the track of negotiation and dialogue.

2. MAIN ELEMENTS

i. Gaza Strip:

1. Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below.

2. Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of Gaza Strip territory which have been evacuated.

1. As a result, there will be no basis for claiming that the Gaza Strip is occupied territory.

ii. West Bank:

1. Israel will evacuate an Area in the Northern Samaria Area (see Map), including 4 villages and all military installations, and will redeploy outside the vacated area.

2. Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the Northern Samaria Area.

3. The move will enable territorial contiguity for Palestinians in the Northern Samaria Area.

4. Israel will improve the transportation infrastructure in the West Bank in order to facilitate the contiguity of Palestinian transportation.

5. The process will facilitate Palestinian economic and commercial activity in the West Bank.

6. The Security fence: Israel will continue to build the security fence, in accordance with the relevant decisions of the government. The route will take into account humanitarian considerations.

3. SECURITY SITUATION FOLLOWING THE DISENGAGEMENT

i. The Gaza Strip:

1. Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.

2. The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.

3. Israel reserves its inherent right of self defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.

ii. The West Bank:

1. Upon completion of the evacuation of the Northern Samaria Area, no permanent Israeli military presence will remain in this area.

2. Israel reserves its inherent right of self defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Northern Samaria Area.

3. In other areas of the West Bank, current security activity will continue. However, as circumstances permit, Israel will consider reducing such activity in Palestinian cities.

4. Israel will work to reduce the number of internal checkpoints throughout the West Bank.

4. MILITARY INSTALLATIONS AND INFRASTRUCTURE IN THE GAZA STRIP AND NORTHERN SAMARIA

In general, these will be dismantled and removed, with the exception of those which Israel decides to leave and transfer to another party.

5. SECURITY ASSISTANCE TO THE PALESTINIANS

Israel agrees that by coordination with it, advice, assistance and training will be provided to the Palestinian security forces for the implementation of their obligations to combat terrorism and maintain public order, by American, British, Egyptian, Jordanian or other experts, as agreed with Israel. No foreign security presence may enter the Gaza Strip or the West Bank without being coordinated with and approved by Israel.

6. THE BORDER AREA BETWEEN THE GAZA STRIP AND EGYPT (PHILADELPHI ROUTE)

Initially, Israel will continue to maintain a military presence along the border between the Gaza Strip and Egypt (Philadelphi route). This presence is an essential security requirement. At certain locations security considerations may require some widening of the area in which the military activity is conducted.

Subsequently, the evacuation of this area will be considered. Evacuation of the area will be dependent, inter alia, on the security situation and the extent of cooperation with Egypt in establishing a reliable alternative arrangement.

If and when conditions permit the evacuation of this area, Israel will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel.

7. ISRAELI TOWNS AND VILLAGES

Israel will strive to leave the immovable property relating to Israeli towns and villages intact. The transfer of Israeli economic activity to Palestinians carries with it the potential for a significant improvement in the Palestinian economy. Israel proposes that an international body be established (along the lines of the AHLC), with the agreement of the United States and Israel, which shall

take possession from Israel of property which remains, and which will estimate the value of all such assets.

Israel reserves the right to request that the economic value of the assets left in the evacuated areas be taken into consideration.

8. CIVIL INFRASTRUCTURE AND ARRANGEMENTS

Infrastructure relating to water, electricity, sewage and telecommunications serving the Palestinians will remain in place. Israel will strive to leave in place the infrastructure relating to water, electricity and sewage currently serving the Israeli towns and villages. In general, Israel will enable the continued supply of electricity, water, gas and petrol to the Palestinians, in accordance with current arrangements. Other existing arrangements, such as those relating to water and the electro-magnetic sphere shall remain in force.

9. ACTIVITY OF INTERNATIONAL ORGANIZATIONS

Israel recognizes the great importance of the continued activity of international humanitarian organizations assisting the Palestinian population. Israel will coordinate with these organizations arrangements to facilitate this activity.

10. ECONOMIC ARRANGEMENTS

In general, the economic arrangements currently in operation between Israel and the Palestinians shall, in the meantime, remain in force. These arrangements include, inter alia:

i. The entry of workers into Israel in accordance with the existing criteria.

ii. The entry and exit of goods between the Gaza Strip, the West Bank, Israel and abroad.

iii. The monetary regime.

iv. Tax and customs envelope arrangements.

v. Postal and telecommunications arrangements.

In the longer term, and in line with Israel's interest in encouraging greater Palestinian economic independence, Israel expects to reduce the number of Palestinian workers entering Israel.

Israel supports the development of sources of employment in the Gaza Strip and in Palestinian areas of the West Bank.

11. EREZ INDUSTRIAL ZONE

The Erez industrial zone, situated in the Gaza Strip, employs some 4000 Palestinian workers. The continued operation of the zone is primarily a clear Palestinian interest. Israel will consider the continued operation of the zone on the current basis, on two conditions:

i. The existence of appropriate security arrangements.

ii. The express recognition of the international community that the continued operation of the zone on the current basis shall not be considered continued Israel control of the area.

Alternatively, the industrial zone shall be transferred to the responsibility of an agreed Palestinian or international entity. Israel will seek to examine, together with Egypt, the possibility of establishing a joint industrial area in the area between the Gaza Strip, Egypt and Israel.

12. INTERNATIONAL PASSAGES

i. The international passage between the Gaza Strip and Egypt

1. The existing arrangements shall continue.

2. Israel is interested in moving the passage to the "three borders" area, approximately two kilometers south of its current location. This would need to be effected in coordination with Egypt. This move would enable the hours of operation of the passage to be extended.

ii. The international passages between the West Bank and Jordan:

The existing arrangements shall continue.

13. EREZ CROSSING POINT

The Israeli part of Erez crossing point will be moved to a location within Israel in a time frame to be determined separately.

14. TIMETABLE

The process of evacuation is planned to be completed by the end of 2005. The stages of evacuation and the detailed timetable will be notified to the United States.

15. CONCLUSION

Israel looks to the international community for widespread support for the disengagement plan. This support is essential in order to bring the Palestinians to implement in practice their obligations to combat terrorism and effect reforms, thus enabling the parties to return to the path of negotiation.

U.S. obligations as part of the disengagement plan

1. On April 14, 2004, the United States, through a presidential letter, made the following commitments:

- Preserving the Government's fundamental principle, according to which no political process with the Palestinians will take place before the dismantling of terror organizations, as requested by the Roadmap.

- American commitment that no political pressure will be exerted on Israel to adopt any political plan, other than the Roadmap, and that there will be no political negotiations with the Palestinians as long as they do not fulfill their commitments under the Roadmap (full cessation of terror, violence and incitement; dismantling terror organizations; leadership change and carrying out comprehensive reforms in the Palestinian Authority).

- Unequivocal American recognition of Israel's right to secure and recognized borders, including defensible borders.

- American recognition of Israel's right to defend itself, by itself, anywhere, and preserve its deterrence power against any threat.

- American recognition in Israel's right to defend itself against terror activities and terror organizations wherever they may be, including in areas from which Israel has withdrawn.

- Unequivocal American stand regarding the refugees, according to which there will be no return of refugees to Israel.

- American stand that there will be no return to the 1967 borders, for two primary considerations: major Israeli population centers and the implementation of the term defensible borders.

- American stand, according to which the major Israeli population centers will be part of Israel, in any event. All the remaining areas in Judea & Samaria will be open for negotiation.

- The United States sets clear conditions for the establishment of a future Palestinian state and declares that the Palestinian state will not be created as long as the terror organizations have not been dismantled, as long as the leadership has not been replaced and no comprehensive reforms have been completed in the Palestinian Authority.

2. President Bush's letter to the Prime Minister and the Prime Minister's letter to President Bush constitute part of the overall disengagement plan, and these understandings with the United States will only be valid if the disengagement plan is approved by Israel. The exchange of letters between President Bush and the Prime Minister, as well as the letter by the Chief of the Prime Minister's Bureau to the U.S. National Security Adviser, are attached to this plan as an integral part of it.

3. According to the Roadmap adopted by the Government of Israel, Israel has undertaken a number of commitments regarding the dismantling of unauthorized outposts, limitations on settlement growth, etc. In the framework of the negotiations with the Americans, all of Israel's past commitments on these issues vis-à-vis the American administration, have been included in the letter by the Chief of the Prime Minister's Bureau to the U.S. National Security Adviser.