

*Issue 1*

# A Constant Tug-of-War: The Role of the Legislative Branch in Negotiations with Foreign Terrorist Organizations

Alyssa Spartz  
*Valparaiso University Law School*

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# A CONSTANT TUG-OF-WAR: THE ROLE OF THE LEGISLATIVE BRANCH IN NEGOTIATIONS WITH FOREIGN TERRORIST ORGANIZATIONS

## I. INTRODUCTION

Unbeknownst to Congress, the President has been in secret negotiations with a foreign terrorist organization (“FTO”) that has been harassing American citizens abroad.<sup>1</sup> The President orders the Secretary of State to contact the FTO leader to offer him precious metals to sustain the local economy. Knowing that she has power under 18 U.S.C. § 2339B(j) (“material support statute”) to release material support to FTOs, the Secretary of State releases the support.<sup>2</sup> A week after this transaction, Senator Jones finds out that the negotiation occurred without the legislative branch’s knowledge. The Senator, being new in Washington, D.C., is angry and a firm believer in checks and balances as prescribed by the Constitution.<sup>3</sup> In an attempt to find out information about the negotiations, the Senator relies on the Case-Zablocki Act, which states that the executive branch must notify the legislative branch about any international agreement.<sup>4</sup> The executive branch replies that the release of material support during negotiations with FTOs does not fall under the Case-Zablocki Act and that the executive branch is the “sole organ” of foreign relations, therefore the Senator cannot receive any information.<sup>5</sup> Unsatisfied, the Senator researches years of cases and statutes to see how the legislative branch lost influence in foreign relations and what can be done to regain power.

As the material support statute is currently written, the legislative branch receives no notice of the executive branch’s release of material

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<sup>1</sup> The following hypothetical is fictional and the work of the author. See 8 U.S.C. § 1189 (a)(1)(A)–(C) (2012) (defining a FTO as an organization that engages in or has the capacity to engage in terrorist activity).

<sup>2</sup> See 18 U.S.C. § 2339B(j) (2012) (authorizing the Secretary of State to release material support to FTOs); 18 U.S.C. § 2339A(b)(1) (2012) (defining material support as anything tangible or intangible that can be given to FTOs in support of their mission).

<sup>3</sup> See generally THE FEDERALIST NO. 51, at 263–67 (James Madison) (Ian Shapiro ed., 2009) (explaining the roles of each branch of the government in influencing the actions of the other branches).

<sup>4</sup> See Case-Zablocki Act of 1972, 1 U.S.C. § 112b (2012) (outlining the steps the executive branch must take to alert the legislative branch to international agreements). The Case-Zablocki Act mandates the notification of the legislative branch anytime the executive branch enters an international agreement. *Id.* § 112b(a); see also *infra* Part II.B (containing an in-depth discussion of the Case-Zablocki Act).

<sup>5</sup> See *infra* Part II.B–C (elaborating on the relationship between the Case-Zablocki Act and the material support statute).

support to FTOs.<sup>6</sup> The Constitution provides limited guidance on how the legislative and executive branches should rely on each other when facing foreign relations problems.<sup>7</sup> The legislative branch retains some control over the actions of the executive branch through appropriations, but the material support statute does not contain any alternate means of influence.<sup>8</sup> To regain power in foreign relations, the legislative branch enacted the Case-Zablocki Act.<sup>9</sup> Including the Case-Zablocki Act in the material support statute provides the legislative branch with a clear role in the release of material support, resolves vagueness in the statute, and ensures a unified and swift response by the government in a crisis.<sup>10</sup> The legislative branch is not always involved in foreign relations, but creating this new provision in the statute allows the executive branch to freely negotiate, while providing a means to hold them responsible for their actions.<sup>11</sup>

This Note suggests that the legislative branch can increase its involvement in negotiating for the release of material support to FTOs by amending the material support statute to include a provision for congressional notification from the Case-Zablocki Act. Part II explores the historical roles of the executive and legislative branches in foreign relations and introduces the Case-Zablocki Act.<sup>12</sup> Next, Part III examines the role of the legislative branch in foreign relations, analyzes the extent the legislative branch can oversee the actions of the executive branch, and proposes a model federal statute amendment, incorporating procedures from the Case-Zablocki Act into the material support statute.<sup>13</sup> Finally, Part IV summarizes and concludes this Note.<sup>14</sup>

## II. BACKGROUND

The foundation of the executive and legislative branches' role in foreign relations, while based in part upon the Constitution, mainly arises

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<sup>6</sup> See 18 U.S.C. § 2339B(j) (giving the executive branch power to release material support).

<sup>7</sup> See *infra* Part II.A (determining the limits of constitutional influence upon the relationship between the executive and legislative branches).

<sup>8</sup> See generally 18 U.S.C. § 2339B(j) (neglecting to include a role for the legislative branch).

<sup>9</sup> See 1 U.S.C. § 112b(a) (guiding the notification of the legislative branch when the executive branch conducts agreements with international entities).

<sup>10</sup> See *infra* Part III.D.1 (combining the material support statute and the Case-Zablocki Act).

<sup>11</sup> See *infra* Part III.B-C (exhibiting the decrease of the legislative branch's role in foreign relations).

<sup>12</sup> See *infra* Part II (providing a background for the relationship between the executive and legislative branches in foreign relations).

<sup>13</sup> See *infra* Part III (analyzing the type of role the legislative branch can have in foreign relations and whether legislative notification should be included when negotiating with FTOs).

<sup>14</sup> See *infra* Part IV (concluding that the legislative branch should be included in the material support statute).

from the inherent, national powers of the United States.<sup>15</sup> The roles of the executive and legislative branches fluctuate depending on the situation facing the nation.<sup>16</sup> The executive branch retains the ability to govern foreign policy and initiate negotiations with FTOs, while the legislative branch has few effective means of oversight.<sup>17</sup>

To determine the role of the legislative branch in negotiations with FTOs, Part II.A describes the increase of the executive branch's role in foreign relations and the subsequent decrease of the legislative branch's role in foreign relations.<sup>18</sup> Next, Part II.B introduces the Case-Zablocki Act and discusses its impact on the legislative branch's role in foreign relations.<sup>19</sup> Finally, Part II.C explains the role of the material support statute in foreign relations.<sup>20</sup>

#### A. *Problems with Checks and Balances in Foreign Relations*

Traditionally, the executive branch is the source of foreign relations power in the United States Government.<sup>21</sup> While the executive branch

<sup>15</sup> See generally U.S. CONST. art. I, § 1 (vesting the legislative branch with the power to legislate); U.S. CONST. art. I, § 8, cl. 18 (defining the legislative branch's power to make necessary laws for each branch to work properly); U.S. CONST. art. II, § 2, cl. 2 (outlining the power of the executive branch in treaty-making and appointments); see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 13 (2007) (finding that the powers of the branches in foreign relations are "inherent" because of the "conception of nationality").

<sup>16</sup> See RAMSEY, *supra* note 15, at 131 (explaining that the foreign relations power vested in other branches of the government provide an important check on the power of the executive).

<sup>17</sup> See 18 U.S.C. § 2339B(j) (2012) (giving power to the Secretary of State to provide material support with no mention of the legislative branch in this portion of the statute). The material support statute states:

No person may be prosecuted under this section in connection with the term "personnel," "training," or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity.

*Id.*; see also U.S. CONST. art. II, § 2, cl. 2 (delegating the power of treaty-making to both branches, but giving broader power to the executive branch).

<sup>18</sup> See *infra* Part II.A (exploring the relationship and balance of powers between the executive and legislative branches in foreign relations).

<sup>19</sup> See *infra* Part II.B (introducing the Case-Zablocki Act).

<sup>20</sup> See *infra* Part II.C (focusing on the evolution of the material support statute).

<sup>21</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring) (referring to the executive branch as the sole representative of the people in foreign relations); David D. Newsom, *The Executive Branch in Foreign Policy*, in *THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY* 93, 93 (Edmund S. Muskie et al. eds., 1986) (identifying the executive branch as the sole power in foreign relations). The Constitution also grants wide foreign policy powers to the executive branch:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

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broadened its power within foreign relations, the legislative branch became marginalized in foreign policy.<sup>22</sup> Part II.A.1 explores the Constitution's prohibition on the legislative branch taking a leadership role in foreign relations, designating the power mostly to the executive branch.<sup>23</sup> Next, Part II.A.2 discusses *United States v. Curtiss-Wright Export Corp.*, where the Supreme Court gave the executive branch power to conduct foreign relations and stated that the legislative branch should cede that power to the executive branch.<sup>24</sup> Finally, Part II.A.3 examines current means of congressional notification in foreign relations and its impact on the executive branch in conducting foreign negotiations.<sup>25</sup>

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and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. Not only did the Constitution grant the executive branch power over treaty-making and diplomatic appointments, but later cases continued to reinforce this notion by granting the executive branch increased power in making foreign policy. *See id.* (granting the executive branch sole power over treaty-making with the Senate's consent); *Youngstown*, 343 U.S. at 633 (Douglas, J., concurring) (noting the strength of the executive branch in foreign relations); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (regulating the field of foreign negotiations and relations to the purview of the executive branch unless statutorily stated otherwise).

<sup>22</sup> *See* Norman J. Ornstein, *The Constitution and the Sharing of Foreign Policy Responsibility*, in *THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY* 35, 64 (Edmund S. Muskie et al. eds., 1986) (pointing out that even after 200 years of history, there is still no concrete framework for legislative input in treaty-making and other foreign policy issues).

<sup>23</sup> *See infra* Part II.A.1 (exploring the limits of the Constitution); *see also* U.S. CONST. art. I, § 1 (vesting legislative power to the Congress); U.S. CONST. art. I, § 8, cl. 18 (permitting Congress to make laws to carry out the duties of each branch of the government). Additionally, a working relationship between the executive and legislative branch depends on the participation of each branch:

[T]he President can communicate and announce policy but must rely on Congress to implement policy legislatively. Congress cannot communicate or announce policies but can pass domestic laws with foreign affairs implications . . . In areas outside its enumerated powers, Congress cannot take the initiative but can legislate in support of foreign affairs goals established by the President.

RAMSEY, *supra* note 15, at 211.

<sup>24</sup> *See infra* Part II.A.2 (demonstrating the lasting effect *Curtiss-Wright* had upon the legislative branch's role in foreign relations).

<sup>25</sup> *See infra* Part II.A.3 (discussing the current ways the legislative branch can influence foreign relations).

### 1. Constitutional Allowances and Limits

The Framers, when drafting the Constitution in 1789, did not provide specific roles for the executive and legislative branches in foreign relations.<sup>26</sup> The original intent of the Constitution was to separate and distinguish the powers of each branch of the government, but the foreign relations power of the executive and legislative branches stemmed from an inherent power.<sup>27</sup> The Constitution granted the executive branch power to make treaties and appoint officials, but remained silent on the executive branch's ability to conduct other foreign affairs, like terminating

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<sup>26</sup> See Ornstein, *supra* note 22, at 35 (overlapping the roles of the executive and legislative branches rather than delegating certain roles to each branch). The powers of the executive branch begin in Article II, section 1 of the United States Constitution, which states “[t]he executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1. Additionally, the treaty-making power shows that foreign relations powers are inherently vested in the entire national government. See generally *Holmes v. Jennison*, 39 U.S. 540, 579 (1840) (holding that the ability to surrender fugitives looking for asylum belongs solely to the Federal Government under the Constitution so that there would not be conflict between the states). “It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments[.]” *Id.* at 575.

<sup>27</sup> See RAMSEY, *supra* note 15, at 13 (basing the “inherent” foreign policy power of the government in the theory of the nation); David Gray Adler, *The Constitution and Presidential Warmaking*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 183, 213 (David Gray Adler & Larry N. George eds., 1996) (placing the power of the executive branch in foreign relations in an “inherent power” that comes from outside of the Constitution). See, e.g., Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 *VAL. U. L. REV.* 385, 388–89 (2007) (expanding upon the Framers’ intent that the executive branch has express and implied powers under the Constitution).

treaties and engaging in executive agreements.<sup>28</sup> The executive branch's ability to conduct these extra-constitutional affairs stemmed from "the presidential responsibility of representing the country in foreign affairs, the authority to receive ambassadors, the role of commander-in-chief of the military, and the obligation to 'take care that the laws be faithfully executed.'"<sup>29</sup> The combination of the Constitution's treaty-making power

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<sup>28</sup> See U.S. CONST. art. II, § 2, cl. 2 (dictating executive powers as treaty-making and appointments); see also U.S. CONST. art. I, § 8, cl. 1-18 (delegating a variety of powers to the legislative branch, but not including treaty-making). The Framers' explicit mention of treaty-making in the Constitution shows that the Framers realized the binding nature and importance of treaties and did not want the federal government to enter into treaties easily or without careful consideration. See Robert J. Spitzer, *The President, Congress, and the Fulcrum of Foreign Policy*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 85, 85-86 (David Gray Adler & Larry N. George eds., 1996) (discussing the importance of treaty-making in Article II of the Constitution and the Founders' opinions upon the powers of the executive branch). Originally, the powers of the executive and legislative branches were meant to be shared when dealing with foreign entities. See *id.* at 86 (explaining that early drafts of the Constitution wanted the executive and legislative branches to consult one another in foreign relations). During the course of the Constitution's drafting, the Framers first intended the legislative branch to have treaty-making power. RAMSEY, *supra* note 15, at 213-14. Some of the delegates determined that Article I gave an appropriate amount of power to the legislative branch to make foreign treaties, and Article II section 2 would be an alternative method. *Id.* However, this potential power shift was not challenged after the ratification of the Constitution, thus the legislative branch was shut out of any direct communications with international governments. *Id.* at 214.

Due to the Constitution's silence on ending treaties and executive agreements, the Supreme Court stepped in to interpret the amount of power the executive branch has in non-enumerated foreign relations issues. See Spitzer, *supra* note 28, at 88, 94-97 (elaborating on the silence of the Constitution regarding ending treaties and executive agreements). For example, *Goldwater v. Carter* examined President Carter's treaty termination with China and while the Supreme Court dismissed the case for nonjusticiability, the case allowed the executive branch to unilaterally extinguish treaties with foreign governments. *Id.* at 88-89; see also *Goldwater v. Carter*, 444 U.S. 996, 1001-02 (1979) (holding that the appellate court's decision was vacated and the case remanded to the district court for dismissal because this case was not ripe for judicial review).

Alexander Hamilton supported the idea of allowing both the legislative and executive branches to be involved in foreign relations decision making outside of the specific enumerated powers of the Constitution. See *THE FEDERALIST* NO. 51, *supra* note 3, at 264 ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."). By giving the federal government the power to govern itself through the inherent balance of powers, the government will be self-sustaining and immune to dictatorship. *Id.*; see also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 302c (1987) (explaining that the executive branch has wide discretion on what types of international agreements could be made).

<sup>29</sup> Spitzer, *supra* note 28, at 95. Executive agreements can range in shape and size, including routine matters and major international agreements. *Id.* Although the Constitution does not specifically discuss executive agreements, this form of agreement between nations is now acceptable and is the normal course of business. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219-20 (1996) (explaining that

and external interpretations of its inherent powers furnished a general foundation for how the executive branch should conduct itself when engaging in foreign negotiations.<sup>30</sup>

The Constitution vaguely included the legislative branch in the field of foreign relations to maintain the check and balance system.<sup>31</sup> Traditionally, the Constitution restricted the legislative branch to domestic matters, but provided avenues for the legislative branch to influence foreign relations.<sup>32</sup> The Constitution allowed the legislative branch “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”<sup>33</sup> Further, the Constitution delegated the authority to manage appropriations to the legislative branch, thus giving the legislative branch the monetary means to check the executive branch’s power.<sup>34</sup> If the executive branch or the legislative branch overstepped the boundaries laid out by the Constitution, the judiciary interpreted the intentions of the Constitution

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executive agreements are important because they allow for a faster government process). While the executive agreements are helpful foreign relations tools, they do not always carry the force of law, and can be superseded by an act of Congress. *Id.* at 228.

<sup>30</sup> See HENKIN, *supra* note 29, at 26–27 (distinguishing the roles of the executive and legislative branches in conducting foreign relations). “The constitutional distribution of foreign relations powers is rooted in the antecedents of the Constitution, and grew out of dissention, vacillation, and compromise at the Constitutional Convention.” *Id.* at 27. The legislative and executive branches constantly jockey for power in foreign relations, and the lack of clarity in the Constitution helps foster this relationship. *Id.* at 29.

<sup>31</sup> See RAMSEY, *supra* note 15, at 64 (maintaining that including checks and balances was important for the fledgling government).

<sup>32</sup> See GORDON SILVERSTEIN, *IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY* 43–44 (1997) (stating that the legislative branch can choose whether to influence foreign policy); Ornstein, *supra* note 22, at 38–39 (showing that the Framers intended the legislative branch to handle foreign policymaking, but as time went on, that power shifted to the executive branch).

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>34</sup> See U.S. CONST. art. I, § 9, cl. 7 (regulating the “power of the purse” to the legislative branch). The inherent power of the legislative branch to legislate comes from Article I section 8, which allows Congress “[t]o regulate Commerce with foreign Nations” and “[t]o make all Laws which shall be necessary and proper.” U.S. CONST. art. I, § 8, cl. 3, 18; *see also* RAMSEY, *supra* note 15, at 197 (describing the constitutional foundation for the legislative branch’s power to legislate). The legislative branch, through these monetary means, can make laws affecting foreign policy without overstepping the separation of powers and decreasing the executive branch’s power. See HENKIN, *supra* note 29, at 65–67 (expanding upon the underlying power granted to the legislative branch by the Constitution through the Foreign Commerce Clause).

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and guided the actions of the respective branches.<sup>35</sup> Restricting executive branch power through appropriations and legislation were important checks on the Constitution's broad grant of foreign relations powers.<sup>36</sup>

Not only did the Constitution govern the role of each branch in foreign relations, but it also limited the reach of the branches into the actions of another.<sup>37</sup> The Framers were especially concerned with the overreach of government and sought to prevent the branches from creating a dictatorship or autocracy.<sup>38</sup> Although the Constitution and subsequent

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<sup>35</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652–53 (1952) (Jackson, J., concurring) (holding that the legislative branch may increase executive branch power in foreign relations when a national emergency makes expediency necessary). See generally Donald L. Robinson, *Presidential Prerogative and the Spirit of American Constitutionalism*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 114, 122 (David Gray Adler & Larry N. George eds., 1996) (restating that the executive branch can act unilaterally in cases of national emergency, but in *Youngstown*, there was no national emergency, thus, the Supreme Court held that the executive branch could not usurp the legislative power of the legislative branch).

<sup>36</sup> See *THE FEDERALIST* NO. 84, at 438 (Alexander Hamilton) (Ian Shapiro ed., 2009) (stating that foreign negotiations will vest in the executive branch, but it must follow the parameters set by the legislative branch); see also *Youngstown*, 343 U.S. at 662 (Clark, J., concurring) (specifying that the executive branch must obey specific procedures given by the legislative branch in crisis situations and that the ability to act is determined by the severity of the situation); *Biodiversity Assoc. v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004) (discussing that the legislative branch may be as specific as it wants in any instructions to the executive branch).

<sup>37</sup> See *THE FEDERALIST* NO. 51, *supra* note 3, at 263 (explaining that the government functions through checks and balances). Hamilton specifically focused on the need for each branch of the government to have its own foundation and identity:

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own[.]

*Id.* The balance of the federal government would use one branch to strengthen another, weaker branch and then vice versa, depending on the situation. See *id.* at 265 (protecting the interests of different factions within the government is essential to a well-balanced government). See generally *THE FEDERALIST* NO. 48, at 251–52 (James Madison) (Ian Shapiro ed., 2009) (agreeing that the branches do share some power, but one does not have a direct influence over the other); SILVERSTEIN, *supra* note 32, at 103 (describing the three branches of the government as entities that “share and compete for power—unable to combine into a tyrannical system, and yet able to work together to accomplish necessary ends”).

<sup>38</sup> See *THE FEDERALIST* NO. 10, at 50–53 (James Madison) (Ian Shapiro ed., 2009) (writing that the purpose of instituting a republic was to ensure meaningful representation of the populace). By ensuring proper representation, the federal government could function as a tool of the people and with that goal as its focus, the government would be less susceptible to corruption or faction. See *id.* (explaining the philosophy of the republic). The federal government was meant to incorporate debate and disagreement, albeit in a steady and formal manner:

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the

interpretations stressed the separation of powers and the importance of checks and balances, these theories have not been manifested in foreign relations.<sup>39</sup> There was a disconnect between ideals regarding the separation and balance of powers exhibited in *The Federalist Papers* and the application of those ideals to the executive and legislative branches in foreign relations.<sup>40</sup> The apparent discontinuity between the theory and application of keeping the legislative and executive branches separate in foreign relations offered an opportunity for interpretation and the expansion or contraction of power in that realm.<sup>41</sup>

The foreign relations power of the executive and legislative branches were not completely determined in the Constitution, and may have

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inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

<sup>39</sup> See *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (noticing that the executive branch powers are not as constitutionally enumerated as the power of the legislative branch). Even if the Framers did not specifically include the power of the executive branch in the Constitution, the powers of territory acquisition, expelling aliens, and ability to make international agreements that are not treaties, are “inherently inseparable” from the theory of nationality. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (emphasizing the expanded role of the executive branch in foreign relations, even though the powers are not specifically enumerated in the Constitution). See generally SILVERSTEIN, *supra* note 32, at 39 (determining that the power to conduct foreign affairs came from outside of the Constitution, but should not be taken any less seriously).

<sup>40</sup> See U.S. CONST. art. I, § 8, cl. 1–18 (delegating powers to the legislative branch, but not including treaty-making); U.S. CONST. art. II, § 2, cl. 2 (dictating the executive powers as treaty-making and appointments); U.S. CONST. art. II, § 3 (stating that the executive branch may give the legislative branch recommendations on how to handle situations); THE FEDERALIST NO. 51, *supra* note 3, at 264 (outlining the importance of the balance of powers: “But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”). At the Constitutional Convention, the Framers argued about the involvement of the legislative branch in foreign relations. See Ornstein, *supra* note 22, at 38 (noting the difficulty to compromise during the Constitutional Convention). Although the Framers intended for the legislative branch to have more influence in foreign policymaking, the worries of acting quickly and maintaining secrecy won over the debate and the legislative branch was only allowed to influence the executive branch through appropriations. See *id.* (giving the executive branch power over the foreign relations decision making). For example, the Framers wrote that “[t]he qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions[.]” THE FEDERALIST NO. 75, at 379 (Alexander Hamilton) (Ian Shapiro ed., 2009).

<sup>41</sup> See THE FEDERALIST NO. 75, *supra* note 40, at 380–81 (opening the debate about the extent of the executive branch’s role in foreign relations); see also *New York Times Co. v. United States*, 403 U.S. 713, 728–29 (1971) (Stewart, J., concurring) (attributing unshared power to the executive branch to conduct foreign affairs, but cautioning the executive branch about the “awesome responsibility” of the task).

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stemmed from extra-constitutional sources.<sup>42</sup> This theory, similar to the Constitution, allocated most of the foreign relations power to the executive branch and left the legislative branch to deal with domestic issues.<sup>43</sup> This interpretation of the constitutional balance of powers created a precedent for the lack of legislative branch involvement in negotiations with FTOs.<sup>44</sup> The Constitution's ambiguity allowed the executive branch to determine foreign policy without legislative branch notification or oversight.<sup>45</sup> The precedent for excluding the legislative branch in foreign relations continued throughout the jurisprudence of the twentieth century, highlighted in the dicta of *United States v. Curtiss-Wright*.<sup>46</sup>

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<sup>42</sup> See Adler, *supra* note 27, at 213 (expanding upon the ideas of inherent power, the effect of the Constitution, and extra-constitutional sources of power and interpretation).

<sup>43</sup> See RAMSEY, *supra* note 15, at 213-14 (relying on the few enumerated powers in the Constitution granted to the executive branch to show that the legislative branch has little recognized role in foreign relations). However, the legislative branch could use the enumerated powers of appropriations and appealing to the judiciary to influence the executive branch in foreign relations. See U.S. CONST. art. I, § 9, cl. 7 (granting appropriations power to the legislative branch).

<sup>44</sup> See *supra* Part II.A (stating the history of constitutional interpretation and its effects on foreign relations).

<sup>45</sup> See U.S. CONST. art. II, § 2, cl. 2 (listing the role of the legislative branch in foreign relations, but only in treaty-making); see also *supra* Part II.A (relating the historical issues in legislative branch involvement in foreign policy).

<sup>46</sup> See *infra* Part II.A.2 (introducing the influence of *Curtiss-Wright* in foreign policy).

2. *United States v. Curtiss-Wright*: Expanding the Executive Branch's Role in Foreign Relations at the Expense of the Legislative Branch

The Constitution's grant of foreign relations power to the executive branch influenced Justice Sutherland's opinion in *Curtiss-Wright*.<sup>47</sup> In *Curtiss-Wright*, the Court determined that the executive branch was the "sole organ" of foreign negotiations.<sup>48</sup> While Justice Sutherland faced critics, this proposition continued the inherent power movement in the United States.<sup>49</sup> By allowing the executive branch to be the "sole organ" in foreign relations, Justice Sutherland closed off any methods for the legislative branch to influence the executive branch in foreign relations.<sup>50</sup>

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<sup>47</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–16 (1936) (showing the relationship between Justice Sutherland's holding and the inherent foreign relations power of the executive branch). The Curtiss-Wright Exportation Company sold weapons to Bolivia without authorization from the government. See *id.* at 311 (expanding upon the reasons the Curtiss-Wright Company sold arms to Bolivia). The legislative branch issued a resolution that forbade companies from selling arms and munitions to countries involved in conflict in South America. *Id.* at 312. By limiting the sale of arms and munitions, the government hoped to enhance the chances of peace in the region. *Id.* President Roosevelt issued an executive order forbidding the sale of armaments to Bolivia and Paraguay. See *id.* at 312–13 (quoting President Roosevelt's executive order); RAMSEY, *supra* note 15, at 14 (describing President Roosevelt's embargo on arms sales to certain countries). This order expanded the reach of the executive branch, directly impacting the decisions of American companies. See *Curtiss-Wright*, 299 U.S. at 312–13 (prohibiting American companies from selling weapons to Bolivia and Paraguay). Justifying President Roosevelt's expansion of executive power, Justice Sutherland wrote that in the "vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation" and the executive branch "is the constitutional representative of the United States with regard to foreign nations." *Id.* at 319. Cf. David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 37–38 (David Gray Adler & Larry N. George eds., 1996) (revealing the executive branch as the "sole organ in foreign affairs," but this is a misnomer because the other branches also influence foreign policy).

<sup>48</sup> See *Curtiss-Wright*, 299 U.S. at 320 (holding that the executive branch's power in foreign relations is not subject to approval by the legislative branch, but the executive branch must still conform to the Constitution).

<sup>49</sup> See Adler, *supra* note 27, at 213 (stating that *Curtiss-Wright* is the authoritative case analyzed when discussing the inherent powers of the executive branch). Adler attributes Justice Sutherland's reliance on inherent powers as a "reading of Anglo-American legal history" instead of groundbreaking legal analysis. *Id.*; see also RAMSEY, *supra* note 15, at 17 (re-emphasizing that Justice Sutherland created his theory based on pre-Constitution historical works and logical arguments regarding the executive branch's power in foreign relations). Justice Sutherland's theory meant that "[t]he Constitution's structure of national powers delegated by the states . . . simply did not apply (and logically could not apply) to foreign affairs." RAMSEY, *supra* note 15, at 16. Although other courts use Justice Sutherland's theory of inherent power, Adler comments that the real power granted to the executive branch to be the "sole arbiter" of foreign relations should be founded in the Constitution and not in external sources. Adler, *supra* note 27, at 214–15.

<sup>50</sup> See *Curtiss-Wright*, 299 U.S. at 319 (determining the exclusion of the legislative branch is due to the inherent powers of the executive branch).

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This case popularized and expanded the notion that the executive branch was the only voice in American foreign policy and that the legislative branch solely dealt with domestic issues.<sup>51</sup>

*Curtiss-Wright* echoed the continuing progress of the executive branch's expansion of power in foreign relations.<sup>52</sup> For example, Justice Sutherland invoked The Act of 1795 to justify the power of the executive branch to make foreign relations decisions with little to no inclusion of the judicial or legislative branches.<sup>53</sup> Many of the statutes passed by the legislative branch, before this case, authorized the executive branch to act

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<sup>51</sup> See Adler, *supra* note 47, at 26 (discussing the effect of *Curtiss-Wright* on the executive and legislative branches); RAMSEY, *supra* note 15, at 14 (stating that Justice Sutherland's theory of inherent executive power is typically invoked and favored by Presidents and members of the executive branch). See also David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 955 (2014) (emphasizing that the origins of the "one-voice doctrine" stem from the Constitution). Today's proponents of the "one-voice doctrine" could be seen as an extension of Justice Sutherland's theory of the executive branch being the "sole organ" of foreign relations. *Id.* at 954-56. The "one-voice doctrine" holds that the United States Government must speak as one to avoid negative repercussions from other countries. *Id.* at 955-56. Having the branches work together is essential for a cohesive government response against terrorism. See *id.* at 954 (addressing the prominence of the "one-voice doctrine" in foreign affairs). While Moore sees some value in the idea of having one branch as the sole voice for American foreign policy, he also acknowledges and addresses the flaws in the system. See *id.* at 979 (introducing the fatal flaws of the "one-voice doctrine").

<sup>52</sup> See *Curtiss-Wright*, 299 U.S. at 322 (condemning the attempt to have the legislative branch lay down a general rule forbidding the executive branch from exerting certain powers). Not only does *Curtiss-Wright* expand the power of the executive branch, but Justice Sutherland advocates for the judiciary's involvement in foreign affairs rather than the legislative branch. See SILVERSTEIN, *supra* note 32, at 37 (establishing that Justice Sutherland wanted a broad interpretation of what the executive branch could do in foreign relations).

<sup>53</sup> See *Curtiss-Wright*, 299 U.S. at 322-25 (highlighting Acts giving the executive branch power to act unilaterally in foreign relations). For example, one of the Acts mentioned by Justice Sutherland stated:

That in cases connected with the security of the commercial interest of the United States, and for public purposes only, the President of the United States be, and hereby is authorized to permit the exportation of arms, cannon and military stores, the law prohibiting the exportation of the same to the contrary notwithstanding.

AN ACT, 1 STAT. 444, 3RD CONG. (2nd Sess.) 1795. Not only did the legislature grant the executive branch wide discretion to restrict the sale of arms to other countries, but the Act of February 9, 1799, made it lawful for the executive branch to allow or prohibit actions with the French Republic as the interest of the United States required. See *Curtiss-Wright*, 299 U.S. at 322-23 (using the Act as an example of unilateral executive power in foreign relations). While the courts play an important role in oversight of the executive and legislative branches, the courts' role in foreign relations is one of deference to the other branches. See *id.* at 322 (regulating the courts' role in foreign relations to deciding matters of law).

unilaterally in foreign relations.<sup>54</sup> Considering the effect of statutes on the executive branch's role in foreign relations, Justice Sutherland held that foreign relations was a job for the entire national government, but the executive branch retained specific power in the realm of international negotiations.<sup>55</sup> The expansion of the executive branch's role in foreign relations in *Curtiss-Wright* followed the foundation laid in the Constitution.<sup>56</sup>

Justice Sutherland advocated for the executive branch to have power over the legislative branch in foreign relations, and by extension, foreign negotiations.<sup>57</sup> The legislative branch may choose to vest or limit power

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<sup>54</sup> See generally *Curtiss-Wright*, 299 U.S. at 324 n.2 (outlining all of the ways statutes have permitted the executive branch to act without legislative input in foreign relations). Some of the Acts listed in the footnote of *Curtiss-Wright* include: Act of December 19, 1806, 2 Stat. 411 (authorizing the executive branch to suspend embargos passed by Congress); Act of April 22, 1808, 2 Stat. 490 (allowing the executive branch to stop embargos if hostilities cease and the United States can claim relative safety); Act of January 7, 1824, 4 Stat. 3 (stating that the executive branch can suspend tonnage charges); Act of June 19, 1886, 24 Stat. 79, 82, 83 (giving the executive branch power to deny entry to vessels belonging to countries offending the United States); Act of March 3, 1887, 24 Stat. 475 (authorizing the executive branch to withhold entry of goods from offending countries); Act of March 23, 1874, 18 Stat. 23 (permitting the executive branch "to suspend an act providing for the exercise of judicial functions by ministers, consuls and other officers of the United States in the Ottoman dominions and Egypt"). *Id.*

<sup>55</sup> See *Curtiss-Wright*, 299 U.S. at 329 (holding that the Court should allow the progress of the legislation and the traditional methods of using the executive branch to further foreign relations to regulate itself). The Court also determined that the history and tradition of the legislative branch ceding some of its power to the executive branch justified the expansion of the executive branch's power in foreign relations. See *id.* at 327–28 (highlighting the history of showing that the executive branch should take the helm in foreign relations).

<sup>56</sup> See *id.* at 329 (finding that this particular expansion of the Constitution's meaning was acceptable and should not be disturbed by the Court). Justice Sutherland wanted the United States to be a world power albeit without giving up the Constitution's original separation of powers. See SILVERSTEIN, *supra* note 32, at 41 (discussing Justice Sutherland's underlying motivation in giving the executive branch the power to determine the course of foreign relations). Justice Sutherland's idea justifying the holding of *Curtiss-Wright* and influencing subsequent legislation and court rulings worked; however, a closer look revealed that Justice Sutherland's reasoning was flawed. See *id.* (showing that a look at the policies of the executive branch veered toward the traditional and the Constitution).

<sup>57</sup> See *Curtiss-Wright*, 299 U.S. at 319–20 (explaining the difference between the power of the legislative branch and the executive branch). Justice Sutherland wrote:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

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to the executive branch through statutes, but Justice Sutherland admonished the legislature to provide the executive branch with broad discretion in foreign negotiations.<sup>58</sup> Justice Sutherland relied upon a long tradition of the legislative branch authorizing executive branch's actions in foreign negotiations to justify increasing the executive branch's power, but left the scope of decision making to the executive branch.<sup>59</sup> *Curtiss-Wright* provided a broad framework for the executive branch in foreign relations, effectively increasing the role of the executive branch in foreign negotiations, while reducing the legislative branch's role.<sup>60</sup> To lessen the influence of *Curtiss-Wright*, thus increasing the legislative branch's foreign

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*Id.* The Constitution specifically balanced power between the three branches of government, but the details and specific jobs in the field of foreign relations were not enumerated and may be implied from extra-constitutional sources. See HENKIN, *supra* note 29, at 22 (elaborating on the Constitution's vagueness on the executive and legislative branches' specific roles in foreign relations).

<sup>58</sup> See *Curtiss-Wright*, 299 U.S. at 320-21 (invoking the words of President Washington to explain the necessity of keeping the power of foreign negotiations in the hands of the executive branch). President Washington explored the ramifications of foreign negotiations:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

1 MESSAGES AND PAPERS OF THE PRES. 194-95 (March 30, 1796) (James D. Richardson ed., 1896). Washington's administration created a strong inference of power in foreign relations around the executive branch. See Ornstein, *supra* note 22, at 45 (outlining President Washington's practice of excluding the legislative branch from treaty making).

<sup>59</sup> See *Curtiss-Wright*, 299 U.S. at 324 (stating that the statutes are full of the legislative branch authorizing the executive branch to act in foreign relations and that the decisions made by the executive branch are afforded wide deference); see also Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 158, 159-60 (David Gray Adler & Larry N. George eds., 1996) (relating Justice Sutherland's broad framework for the executive branch's role in foreign relations to the practical aspects of decision making and leaving the how and why of the decisions up to the discretion of the executive branch).

<sup>60</sup> See Koh, *supra* note 59, at 159-60 (regulating the power to conduct foreign relations to the exclusive purview of the executive branch). While Justice Sutherland's views of executive power have not been universally accepted, the Court's subsequent use and affirmation of the theory of sole executive power in foreign relations continued to invade the field of foreign relations. See Adler, *supra* note 47, at 45 ("There can be little doubt that *Curtiss-Wright* has overwhelmed the foreign relations law of the United States."). See generally HENKIN, *supra* note 29, at 20-21 (discussing the existence of Justice Sutherland's theory in constitutional law, but hinting that there is no exact science to what powers the executive branch retains in foreign relations).

policy role, the legislative branch uses alternative oversight measures such as appropriations and the electorate.<sup>61</sup>

### 3. Current Congressional Oversight Measures in Foreign Relations

Case law and statutes have steadily decreased the power of the legislative branch in foreign relations; however, the legislative branch retained the power of oversight in some areas of foreign relations.<sup>62</sup> The legislative branch exercised oversight in voicing opinions about the executive branch's actions in foreign relations, advising the executive branch on a specific course of action, or conducting strict oversight of the executive branch.<sup>63</sup> This section discusses the ways the legislative branch remains influential in foreign relations, specifically in foreign negotiations where there is little statutory direction.<sup>64</sup>

One way the legislative branch checked the power of the executive branch in foreign relations was by publicly voicing an opinion about the procedure or content of the policy.<sup>65</sup> The legislative branch typically opined about executive branch decision making during on-record proceedings at the Capitol.<sup>66</sup> This forum was not governed by the

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<sup>61</sup> See *infra* Part II.A.3 (describing the methods used by the legislative branch to influence the decisions of the executive branch in foreign relations).

<sup>62</sup> See generally HENKIN, *supra* note 29, at 82 (pointing out that the legislative branch has multiple ways to influence the executive branch); Susan Webb Hammond, *Congress in Foreign Policy*, in THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY 67, 86 (Edmund S. Muskie et al. eds., 1986) (explaining the increase of legislative oversight in foreign relations).

<sup>63</sup> See Hammond, *supra* note 62, at 86–90 (outlining the ways the legislative branch can oversee the executive branch, including legislative veto, reporting requirements, information and consultation, and through legislative staff members). Generally, the legislative branch is limited in the ways it can function in foreign relations. See generally RAMSEY, *supra* note 15, at 200 (providing the legislative branch with limited powers such as legislating, collecting taxes, and regulating commerce).

<sup>64</sup> See *infra* Part II.A.3 (examining the ways the legislative branch can still influence foreign relations without having direct authority to deal with other nations).

<sup>65</sup> See HENKIN, *supra* note 29, at 82 (receiving support from important congressional members should be important to the executive branch and help to maintain a balance of powers regarding foreign relations); see generally Hammond, *supra* note 62, at 90 (defining the legislative branch's role as more outspoken because of the new perspectives brought by various congressional members).

<sup>66</sup> See, e.g., 159 CONG. REC. H7062–63 (daily ed. Nov. 14, 2013) (statement of Rep. Holding) (speaking out against President Obama's quest for a nuclear agreement through negotiations with Iran); Michel Oksenberg, *Congress, Executive-Legislative Relations, and American China Policy*, in THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY 207, 225 (Edmund S. Muskie et al. eds., 1986) (including formal legislative hearings as a means for the legislative branch to influence the executive branch in foreign relations decision making). The ability of the legislative branch to influence the executive branch through hearings should not be taken lightly:

[W]hether in connection with particular legislation, appropriations, appointments, or under undefined and undifferentiated investigative

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Constitution or statute, rather it was an inherent part of the democratic process.<sup>67</sup> Declaring these thoughts on the record might indirectly influence the executive branch, but it was not required to heed the advice or admonitions of the legislative members.<sup>68</sup>

The executive branch does not have to consider the opinions of the legislative branch, but the executive branch must answer to the general populace.<sup>69</sup> The general public's pleasure or displeasure with the legislative or executive branch's actions in a foreign negotiation can influence the shape of foreign policy.<sup>70</sup> According to the United States' democratic ideals, the legislative branch represented the interests of the

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power, Congressional committees and individual members of Congress have opportunities to inquire, cross-examine, expose, criticize, even harass and threaten executive officials engaged in the conduct of foreign policy, and the need to justify to members of Congress is a not insignificant influence on Executive policy.

HENKIN, *supra* note 29, at 82.

<sup>67</sup> HENKIN, *supra* note 29, at 82 (stating that the legislative branch retains informal, extra-constitutional powers such as influence in the field of foreign relations). Usually the legislative branch debates foreign policy at the committee and subcommittee level, with most exchanges becoming a part of the formal record. See Hammond, *supra* note 62, at 84 (describing the processes used by the legislative branch to discuss foreign policy). "[H]earings are used for information gathering, to build a record, for legislative history." *Id.* These hearings provide formal means for the legislative branch to oversee the actions of the executive branch without usurping the executive branch's power to conduct foreign relations. See *id.* (stressing the importance of legislative hearings in the foreign relations process).

<sup>68</sup> See SILVERSTEIN, *supra* note 32, at 14 (distinguishing the influence of the legislative branch against having actual control of an aspect of foreign policy); see also Oksenberg, *supra* note 66, at 227 (describing the legislative branch's influence as "fragmented, highly personal, and often contradictory"). Cf. U.S. CONST. art. II, § 2, cl. 2 (listing treaty-making as a time the executive branch should listen to the legislative branch).

<sup>69</sup> See SILVERSTEIN, *supra* note 32, at 196-97 (establishing the relationship between the legislative branch and the electoral support base). The relationship between the executive and legislative branches creates an important dichotomy in American politics, "For Presidents need Congress, have to get along with it, must take its views into account; and individual members of Congress often reflect public opinion and can create opinion for or against Presidential policies." HENKIN, *supra* note 29, at 81.

<sup>70</sup> See Mark J. Oleszek & Walter J. Oleszek, *Institutional Challenges Confronting Congress After 9/11: Partisan Polarization and Effective Oversight*, in CONGRESS AND THE POLITICS OF NATIONAL SECURITY 45, 60-61 (David P. Auerswald & Colton C. Campbell eds., 2012) (emphasizing the "watchdog" role of the legislative branch as being important to keep the general public informed so that on election day, the voters may make informed decisions); see also SILVERSTEIN, *supra* note 32, at 200 ("[The legislative branch] must weigh the negative incentive of blame avoidance against the positive incentives of claiming credit and improving American policy.").

general population in Washington, D.C.<sup>71</sup> The constituents' sentiments on a particular issue may directly or indirectly influence the representative and cause them to vote or act a certain way.<sup>72</sup> The cohesive attitude of the nation about a negotiation with a FTO may sway the executive branch, but statutorily, the executive branch does not have to adhere to these sentiments.<sup>73</sup>

Under statute, the legislative branch had little authority over foreign negotiations; however, the longstanding precedent of congressional advice kept the legislative branch involved in foreign policy.<sup>74</sup> The executive branch may ask the legislative branch for advice or a report on the problem facing the nation.<sup>75</sup> This process can happen throughout the foreign policy decision-making process, from bill introduction to law

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<sup>71</sup> See THE FEDERALIST NO. 52, at 268 (James Madison) (Ian Shapiro ed., 2009) (urging the newly formed states to allow for diversity of representatives, other than being twenty-five years old and a resident for seven years, to reflect the makeup of the voting base). "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people." *Id.*

<sup>72</sup> See SILVERSTEIN, *supra* note 32, at 196 (highlighting the effects of the electorate on representatives in Washington D.C.). Members of the executive and legislative branches are concerned with re-election bids and support for their upcoming campaigns causing some members to take a cautious approach to foreign relations and the judgment calls that need to be made in this field. *Id.* A motivating factor for the executive branch to listen to the legislative branch is the need to place blame on others in the hope of getting re-elected. *Id.* While this sentiment may seem to be pessimistic or jaded about the political process, the fact remains that to keep a job, the executive and legislative branches must answer to the voters. *Id.*

<sup>73</sup> See *id.* at 14 (distinguishing the influence of the legislative branch against having actual control of an aspect of foreign policy). Although the executive branch might not necessarily need the consent of the legislative branch in foreign affairs, the executive branch does need the legislative branch's support in other areas of legislation. See HENKIN, *supra* note 29, at 81 (lending support to having the legislative branch active in foreign relations).

<sup>74</sup> See 18 U.S.C. § 2339B(j) (2012) (stating that the Secretary of State may determine what material support can be given to opposing factions); see, e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2726 (2010) (finding that the legislative branch's reasoning for enacting a law encompasses many aspects of the debate and that the executive or judicial branch should consider that reasoning when making a decision).

<sup>75</sup> See RAMSEY, *supra* note 15, at 154 (describing "advice and consent" as an important part of the legislative process and a necessary check on the power of the executive branch). In addition, the Congressional Research Service ("CRS") works to provide information and resources to the legislative and executive branch when considering foreign relations issues. *About CRS*, CONGRESSIONAL RESEARCH SERVICE, <http://www.loc.gov/crsinfo/about/> [<http://perma.cc/EMG9-RRZX>]. The website describes the documents produced by the CRS as reports, confidential memoranda, briefings, seminars, expert testimony, and individual inquiries. *Id.*

signing to oversight of the law provisions.<sup>76</sup> In certain circumstances, the Constitution mandated the “Advice and Consent” of the legislative branch before the executive branch acted.<sup>77</sup> When the Constitution or a statute listed this requirement, the executive branch notified the legislative branch and waited for a response either before or after taking action.<sup>78</sup> Ideally, the executive branch considered the report and advice of the legislative branch, but in most cases, the legislative branch’s instruction was non-binding and the executive branch made its own determination.<sup>79</sup>

Traditionally, the legislative branch provided recommendations when the executive branch negotiated with hostile countries or faced foreign relations issues.<sup>80</sup> For example, the legislative branch used the open forum of Congress to provide advice to the executive branch on providing material support to Iraq.<sup>81</sup> Sometimes the information learned by the legislative branch necessitated its involvement to assist the executive branch.<sup>82</sup>

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<sup>76</sup> See *About CRS*, *supra* note 75 (describing the role of the CRS as “shared staff to congressional committees and Members of Congress. CRS experts assist at every stage of the legislative process—from the early considerations that precede bill drafting, through committee hearings and floor debate, to the oversight of enacted laws and various agency activities.”).

<sup>77</sup> See U.S. CONST. art. II, § 2, cl. 2 (providing that the executive branch should make treaties with the “Advice and Consent of the Senate”); see also RAMSEY, *supra* note 15, at 154 (requiring the “Advice and Consent” of the legislative branch was one measure the Framers took to make the executive branch “less king-like”).

<sup>78</sup> See U.S. CONST. art. II, § 2, cl. 2 (mandating participation by the legislative branch in treaty-making); 22 U.S.C. § 1732 (2012) (directing the executive branch to notify the legislative branch when negotiating for the release of prisoners).

<sup>79</sup> See HENKIN, *supra* note 29, at 83 (separating the power of the executive branch to conduct foreign policy from the legislative branch’s ability to influence the policies through indirect means); Susan B. Epstein, *Foreign Aid Oversight Challenges for Congress*, in CONGRESS AND THE POLITICS OF NATIONAL SECURITY 144, 156–57 (David P. Auerswald & Colton C. Campbell eds., 2012) (noting that the legislative branch’s ability to oversee and communicate with the executive branch about foreign relations has decreased because of the proliferation of executive agreements); Hammond, *supra* note 62, at 86–87 (detailing the methods the legislative branch can use to influence the executive branch, but reminding the reader that the executive branch does not have to listen to the advice of the legislative branch).

<sup>80</sup> See U.S. CONST. art. II, § 2, cl. 2 (providing for legislative “Advice and Consent” in treaty-making); see, e.g., 154 CONG. REC. 12385, 12419–20 (2008) (regarding the reticence of the executive branch to provide the legislative branch with information about on-going negotiations with Iraq over long-term security solutions and aid).

<sup>81</sup> See 154 CONG. REC. 24070, 24080–81 (2008–09) (imploping President Obama to utilize the legislative branch when making executive decisions regarding Iraq).

<sup>82</sup> See *generally id.* (urging the legislative branch to act according to new information and take hold of the constitutional right to oversee decisions when the executive branch uses the military internationally).

Another way the legislative branch exerted influence over foreign policy was through appropriations.<sup>83</sup> No matter the executive branch's goals in foreign relations, the legislative branch could control the actions of the executive branch by granting or denying funding requests.<sup>84</sup> The legislative branch may fund or defund the actions of the executive branch through appropriations bills.<sup>85</sup> Due to the long-standing tradition of the executive branch being in charge of foreign relations, the legislative branch usually was obligated to provide funding to those causes.<sup>86</sup>

Without a strong constitutional or statutory foundation for a role in foreign relations, the legislative branch struggled to find power and influence in foreign relations.<sup>87</sup> The legislative branch has been steadily denied participation in foreign affairs, but there have been circumstances where the executive and legislative branches worked together on foreign relations problems.<sup>88</sup> The question of the legislative branch's involvement surfaced again after the Iran Hostage Crisis in *Dames & Moore v. Regan*.<sup>89</sup>

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<sup>83</sup> See U.S. CONST. art I, § 9, cl. 7 (giving the legislative branch the power to control the release of money from the Treasury under appropriations); SILVERSTEIN, *supra* note 32, at 156 (stressing that the power of the purse is important as long as the legislative body decides to use it). See generally HENKIN, *supra* note 29, at 74–75 (summarizing the ability of the legislative branch to control the flow of funds for the federal government).

<sup>84</sup> See HENKIN, *supra* note 29, at 74–75 (defining the parameters of the legislative branch's power through appropriations); RAMSEY, *supra* note 15, at 113 (reasoning that there is a great need for substantial limits on the power of the executive branch, such as allowing the legislative branch to control appropriations).

<sup>85</sup> See HENKIN, *supra* note 29, at 74–75 (stating that the executive branch may veto these appropriations bills, although this action is not very likely because the executive branch needs some sort of funding to go through).

<sup>86</sup> See *id.* at 74 (noting that the legislative branch usually feels politically or morally obligated to fund the executive branch's foreign relations programs); see also RAMSEY, *supra* note 15, at 252–53 (providing a pro-executive branch argument that says that the legislature "cannot regulate contrary to the President's wishes without infringing the President's position as commander-in-chief").

<sup>87</sup> See SILVERSTEIN, *supra* note 32, at 156 (limiting the legislative branch's influence on foreign relations to the power of the purse); see generally *supra* Part II.A.1–2 (decreasing the legislative branch's role in foreign policy-making through case law).

<sup>88</sup> See 154 CONG. REC. 24070, 24080–81 (2008–09) (describing the legislative and executive branch working together to find a solution for Iraq). The legislative and executive branches have worked together in the past to pass major foreign policy. Oleszek & Oleszek, *supra* note 70, at 48. For example, the Marshall Plan and NATO were enacted during President Truman's presidency. *Id.* These actions were significant because President Truman was a Democrat, and the Republicans controlled Congress during his presidency. *Id.*

<sup>89</sup> 453 U.S. 654, 665–66 (1981). During the Iran Hostage Crisis, the executive branch negotiated with Iran, promising Iran that assets frozen by the United States Government would be released in exchange for the release of American citizens. See RAMSEY, *supra* note 15, at 214 (relating the role of the legislative branch in the Iran crisis, and providing the background of *Dames & Moore*). The settlement was a product of an executive agreement, so the legislative branch did nothing to stop or restrict the executive branch. See *Dames & Moore*, 453 U.S. at 655–56 (describing the events that lead to President Carter's issuing of executive

*Dames & Moore* used the policy of non-action by the legislative branch to infer that it indirectly supported the executive branch's adoption of The Algiers Accords.<sup>90</sup> In fact, there was limited action by the legislative branch when a committee reviewed President Carter's negotiations, but instead of discussing the legislative branch's role in the negotiations, the committee worried about whether the new statutory framework of the International Economic Emergency Powers Act ("IEEPA") limited the executive branch too much.<sup>91</sup> The legislative branch's concern about over-restricting the executive branch led to the legislative branch backing away from making determinations about foreign policy.<sup>92</sup>

Opinions and advice from the legislative branch indirectly increased its role in foreign relations, but the strong precedent set by the policies and case law of the twentieth century led to unchecked power of the executive branch in foreign negotiations.<sup>93</sup> In an attempt to restore the balance of

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orders regarding Iran). In fact, *Dames & Moore* was "an intrusion of the President upon the powers of the Senate," but the legislative branch did nothing to prevent the executive branch from engaging in the settlement. RAMSEY, *supra* note 15, at 215.

<sup>90</sup> See *Dames & Moore*, 453 U.S. at 678-79 (determining that if the legislative branch wanted to restrict the executive branch, they would have expressed that sentiment); SILVERSTEIN, *supra* note 32, at 178 ("[T]he court found support for an executive initiative in foreign policy not in the Constitution itself, nor in a particular act of Congress but in Congress' lack of action."). Continuing the precedent of allowing the executive branch to act as the "sole organ" of foreign relations, the legislative branch left the Supreme Court no choice but to accept the executive agreement as binding. See *id.* (leading the reader to believe that the outcome of *Dames & Moore* could have been different if the legislative branch stepped in and commented on the executive branch's actions).

<sup>91</sup> See SILVERSTEIN, *supra* note 32, at 154-55 (finding that President Carter attempted to adhere to the framework of the IEEPA). IEEPA provided the executive branch with unprecedented power to act during a national emergency. See 50 U.S.C. § 1701 (2012) (allowing the executive branch to act in certain ways when a national emergency is declared). The nature of "national emergency" is not strictly defined, and may be under the discretion of the executive branch. See *id.* (putting the need for these special powers up to the discretion of the executive branch); SILVERSTEIN, *supra* note 32, at 155 (noting the ambiguity of the term "national emergency" and the failure of the legislative branch in defining it). However, there is a provision for the executive branch to notify the legislative branch should it choose to enact these powers. See 50 U.S.C. § 1703 (2012) (mandating that the executive branch "consult with Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised"). Instead of limiting the amount of power exercised by the executive branch, President Carter's administration saw IEEPA as an opportunity to expand the power of the executive branch. See SILVERSTEIN, *supra* note 32, at 155 (examining the motivations for enacting IEEPA).

<sup>92</sup> See SILVERSTEIN, *supra* note 32, at 155 (showing a change since the ruling in *Curtiss-Wright* for the legislative branch to remain hands off in the realm of foreign relations).

<sup>93</sup> See *supra* Part II.A.3 (discussing the role the legislative branch can play in foreign affairs through formal and informal means).

power intended by the Constitution, the legislative branch enacted the Case-Zablocki Act of 1972.<sup>94</sup>

*B. A Diamond in the Rough: The Case-Zablocki Act of 1972*

In an effort to regain some influence in foreign relations, the legislative branch passed the Case-Zablocki Act in 1972.<sup>95</sup> The Case-Zablocki Act compelled the Secretary of State, as an agent of the executive branch, to report to the legislative branch “the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force[.]”<sup>96</sup> The history of executive interaction with foreign entities continued to evolve and change, prompting the legislative branch to expand the definition of international executive agreements.<sup>97</sup> While the

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<sup>94</sup> See *supra* Part II.A.3 (exemplifying the precedent since *Curtiss-Wright* of the legislative branch having a decreased role in foreign relations).

<sup>95</sup> See Spitzer, *supra* note 28, at 96 (introducing the Case-Zablocki Act). The Case-Zablocki Act grew out of legislative branch frustration from not being informed about various executive negotiations and agreements in the 1960s, specifically with Ethiopia, Laos, Thailand, and Korea. *Id.* Senator Case, when introducing this bill in the Senate, expressed concern that in the ever-changing situation overseas with troop deployments and foreign relations, legislative involvement in foreign agreements was needed more than ever. 116 CONG. REC. 39556 (1970) [hereinafter Senator Case’s Remarks] (statement of Sen. Case). The Case-Zablocki Act states:

The Secretary of State shall transmit to the Congress the text of any international agreement (including the text of any oral international agreement, which agreement shall be reduced to writing), other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. Any department or agency of the United States Government which enters into any international agreement on behalf of the United States shall transmit to the Department of State the text of such agreement not later than twenty days after such agreement has been signed.

1 U.S.C. § 112b(a) (2012).

<sup>96</sup> 1 U.S.C. § 112b(a); see also Spitzer, *supra* note 28, at 96 (stating that the Secretary of State must give information about international agreements to the legislative branch).

<sup>97</sup> See *supra* Part II.A-B (revealing the constant evolution of the nature of agreements and negotiations with other countries). See, e.g., *Transmittal of Executive Agreements to Congress: Hearing on S.596 Before the S. Comm. on Foreign Relations*, 92nd Cong. 13 (1971) (statement of

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Constitution only mandated that the executive branch notify the legislative branch when entering into a treaty, the Case-Zablocki Act expanded the requirement to include any international agreement.<sup>98</sup> Additionally, the Case-Zablocki Act provided a timeline for action, ordering the executive branch to notify the legislative branch “as soon as practicable after such agreement has entered into force.”<sup>99</sup> Furthermore, the Case-Zablocki Act provided a statutory means for the legislative branch to be notified about international agreements made by the executive branch.<sup>100</sup>

Although the Case-Zablocki Act increased the legislative branch’s ability to oversee the executive branch, problems arose in the actual implementation and use of the statute.<sup>101</sup> The first problem was the vague wording, especially the definition of “international agreement” and what constitutes the “text” of an oral agreement.<sup>102</sup> The second problem with

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Sen. McGee, member S. Comm. of Foreign Affairs) (advocating for a change in the status quo of foreign relations). Senator McGee states:

The consequences of the advent of a bipolar world, of the nuclear age, of a diminishing of space itself around the world and the consequences of World War II—all of these things have suddenly brought into focus historical responsibilities and decision-making requirements that probably did not always plague our forebears in the business.

*Id.*

<sup>98</sup> Compare U.S. CONST. art. II, § 2, cl. 2 (stating that the executive branch must make treaties with “the Advice and Consent of the Senate”), with 1 U.S.C. § 112b(a) (ordering the executive branch to relay information about the agreement after the negotiations and agreement with the other country occurred).

<sup>99</sup> 1 U.S.C. § 112b(a).

<sup>100</sup> See *Lee v. U.S. Air Force*, 354 F.3d 1229, 1246 (10th Cir. 2004) (“The Case-Zablocki Act is evidently meant to mediate between the foreign relations powers of Congress and the President.”). See generally 1 U.S.C. § 112b (outlining the steps that must be taken by the executive branch to ensure proper notification of the legislative branch).

<sup>101</sup> See Spitzer, *supra* note 28, at 97 (estimating that from 1972–75 “presidents had entered into from 400 to 600 understandings with other governments that had not been reported to Congress”). The problem of non-compliance continued to occur throughout the 1970s. *Id.*

<sup>102</sup> See *Transmittal of Executive Agreements to Congress: Hearing on S.596 Before the S. Comm. on Foreign Relations*, 92nd Cong. 14 (1971) [hereinafter Professor Bartlett’s Remarks] (statement of Professor Ruhl J. Bartlett, Fletcher School of Law and Diplomacy, Tufts University) (attempting to decide what kinds of international agreements should be regulated to the legislative branch). Professor Bartlett defined international agreements as:

[A]n international agreement has been called an international compact and it is an agreement between one nation and another or between one head of a state and another . . . in international law the international lawyer would consider executive agreements to be those that are believed by governments to bind their countries.

*Id.* See generally Letter to Congress on Case-Zablocki Act 3-6-1997, 1997 WL 100962 (portraying the transmission of a report from President Clinton to the Speaker of the House in compliance with Case-Zablocki, but also revealing the relative generality of the report);

the Case-Zablocki Act was the enforcement because there were not substantial means for the legislative body to rely on if the executive branch did not comply with the statute.<sup>103</sup> The Case-Zablocki Act had been in effect since 1972, yet the legislative branch rarely relied on the Act to force the executive branch into active notification.<sup>104</sup> The problem remains the same today, but the Case-Zablocki Act outlines the method in which the legislative branch can regain power in foreign relations.<sup>105</sup>

C. *The Evolution of the Material Support Statute, 18 U.S.C. § 2339B*

The legislative branch enacted the material support statute as an extension of the Constitution's foreign relations precedents, *Curtiss-Wright*, and the current operations of the legislative branch.<sup>106</sup> Part II.C.1 discusses the creation and reasoning of the material support statute under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").<sup>107</sup> Then, Part II.C.2 explores revisions made to the material support statute under the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") and the statute in place today.<sup>108</sup>

1. The Anti-Terrorism and Effective Death Penalty Act of 1996

In 1996, after facing multiple threats from FTOs, the legislative branch passed and signed the AEDPA to identify and provide a statutory

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RAMSEY, *supra* note 15, at 216 (stating that neither branch has the full power of the government when entering international agreements).

<sup>103</sup> See 18 U.S.C. § 112b (containing no methods of enforcement or punishment if the executive branch does not comply with the Act). See also Spitzer, *supra* note 28, at 97 (outlining other ways the legislative branch might be able to force compliance). To gently persuade the executive branch to comply with the Case-Zablocki Act, the legislative branch could refuse funding, or "threaten public disclosure of controversial secret agreements." *Id.*

<sup>104</sup> See, e.g., 18 U.S.C. § 2339B(j) (2012) (lacking any mention of reporting the release of material support to the legislative branch in compliance with the Case-Zablocki Act). Throughout all the literature considered for this Note, the Case-Zablocki only gets mentioned in one book (this is of course, exempting the Congressional Record and Committee Hearings).

<sup>105</sup> See *infra* Part III.D.1 (combining the Case-Zablocki Act with the material support statute).

<sup>106</sup> See 18 U.S.C. § 2339B (exhibiting the current wording of the material support statute); *supra* Part II.A.1-3 (describing the evolution of the roles of the executive and legislative branches in foreign relations).

<sup>107</sup> See *infra* Part II.C.1 (elaborating on the AEDPA's effect on foreign relations).

<sup>108</sup> See *infra* Part II.C.2 (discussing the changes made to the material support statute by the IRTPA and the use of those changes today).

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framework for how to deal with emerging FTOs.<sup>109</sup> Through this Act, the legislative branch gave the executive branch the power to identify certain groups as FTOs.<sup>110</sup> The AEDPA defined a FTO as a group that “engages in terrorist activity . . . or retains the capability and intent to engage in terrorist activity or terrorism and . . . the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”<sup>111</sup> Under the AEDPA, the Secretary of State identified these groups, which prevented citizens from providing

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<sup>109</sup> See Antiterrorism and Effective Death Penalty Act of 1996, § 301, Pub. L. No. 104-132, 110 Stat. 1214 (engaging new prohibitions against supporting FTOs). See also RAPHAEL PERL, CONG. RESEARCH SERV., IB95112, TERRORISM, THE FUTURE, AND U.S. FOREIGN POLICY 5 (2003) (signaling a shift in policy regarding punishing and deterring individual FTOs rather than focusing on state sponsors). The trend of terrorism has expanded from state sponsors of terrorism to smaller groups that are more mobile, have independent financing, and have safe havens throughout the world. See *id.* (exploring the impact of a changing environment in terrorism).

<sup>110</sup> See AEDPA § 302, 8 U.S.C. § 1189 (1996) (providing the guidelines for designating a group as a FTO). Under the AEDPA, the Secretary of State determined which groups are designated FTOs. See *id.* (designating the Secretary of State as the executive branch’s agent). See also DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 137 (2006) (naming the Secretary of State as the person determining the status of a suspected FTO). The courts are not always able to review the Secretary’s determination because the Secretary’s decision may be based on classified information. See *id.* at 139 (determining that the role of the judiciary in checking the FTO determinations of the executive branch are extremely limited). Over a year after the implementation of the AEDPA, the executive branch designated thirty groups as FTOs. See *id.* at 163 (stating that the list of thirty FTOs were only released after pressure from political groups). After the implementation of the AEDPA, the State Department released the list of FTOs that an individual could be prosecuted if material support was provided. See *id.* (describing the reasoning for releasing the list of FTOs). These groups included: Abu Nidal Organization, Abu Sayyaf Group, Aum Supreme Truth, Basque Fatherland and Liberty, Democratic Front for the Liberation of Palestine, al-Gama’at al-Islamiyya, HAMAS, The Harakat ul-Ansar, Hizballah, Japanese Red Army, al-Jihad, Kach and Kahane Chai, Kurdistan Workers’ Party, The Liberation Tigers of Tamil Eelam, Manuel Rodriguez Patriotic Front, Mujahedin-e Khalq Organization, National Liberation Army, The Palestine Islamic Jihad, Palestine Liberation Front, The Party of Democratic Kampuchea, Popular Front for the Liberation of Palestine, Popular Front for the Liberation of Palestine-General Command, Revolutionary Armed Forces of Colombia, Revolutionary Organization 17 November, Revolutionary People’s Liberation Party/Front, Revolutionary People’s Struggle, Sendero Luminoso, and Tupac Amaru Revolutionary Movement. *Patterns of Global Terrorism: 1997 Appendix B Background Information on Terrorist Groups*, STATE DEP’T, <http://www.state.gov/www/global/terrorism/1997Report/backg.html> [http://perma.cc/TGN6-NMF2]. The FTO designation is good for two years, and must be renewed by the Secretary of State to remain valid. HOWARD BALL, THE USA PATRIOT ACT OF 2001: BALANCING CIVIL LIBERTIES AND NATIONAL SECURITY 167 (2004).

<sup>111</sup> 8 U.S.C. § 1189(a)(1)(B)–(C) (2012).

material support to the groups because the materials may be used to support terrorism ends.<sup>112</sup>

Subsequently, the enactment of the AEDPA solidified the exclusion of the legislative branch from foreign relations.<sup>113</sup> Not only did the executive branch designate groups as FTOs, but when it exercised that power, the legislative branch had no substantial ability to refute or support the designation except through enacting new legislation.<sup>114</sup> The legislative branch retained minimal influence through advice and opinion, but only if the executive branch specifically sought out this information.<sup>115</sup> The AEDPA permitted the executive branch to disregard legislative branch information and do what it thought was best for the safety and security of the nation.<sup>116</sup>

The executive branch held exclusive control over this facet of the AEDPA, which did not require legislative oversight.<sup>117</sup> However, the executive branch had to notify legislative branch leaders of the intent to designate a new FTO because the statute only required notice and not

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<sup>112</sup> See AEDPA § 301(b), 8 U.S.C. § 1189 (prohibiting anyone from providing material support to listed FTOs). “The purpose of this subtitle is to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.” *Id.* Granting the executive branch power to limit support for terrorist organizations can be traced back to the Reagan era when the Reagan administration sent Congress a bill criminalizing supporting terrorist organizations. See COLE & DEMPSEY, *supra* note 110, at 127 (noting the similarities between the AEDPA and the proposed legislation during the Reagan era). Congress rejected the bill for constitutional concerns. *Id.* The Bush administration also tried to obtain power to limit support for terrorist organizations, but Congress again rejected the proposal. *Id.* Finally, under the Clinton administration, additional amendments helped to pass the provision, which became the AEDPA. *Id.*

<sup>113</sup> See generally AEDPA § 302 (shifting the focus to the executive branch’s power to designate groups as FTOs when the need arises).

<sup>114</sup> See *id.* (stating that if the legislative branch does not agree with the executive branch’s designation of a FTO, the designation may be repealed through “an Act of Congress”). Also, within thirty days of the executive branch’s designation, the group designated as a FTO may appeal to the judiciary for a ruling. *Id.*

<sup>115</sup> See *id.* (determining the parameters for legislative involvement in designating FTOs); see also Part II.A.3 (reiterating the importance of allowing the legislative body to comment on actions taken by the executive branch, but reminding that the executive branch can still act how they want according to existing statutes and the Constitution).

<sup>116</sup> See AEDPA § 302 (allowing the executive branch to make the designation of whether a group should be classified as a FTO).

<sup>117</sup> See *id.* (giving the executive branch control over designations of FTOs). At the time of publication, there is proposed legislation to amend this statute. H.R. 5348, 113th Cong. (2014). The amendment would allow the legislative branch to oversee the designations by the executive branch. *Id.* Specifically, the executive branch would have 120 days to report to the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs. *Id.*

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oversight.<sup>118</sup> The legislative branch could reverse a FTO designation after the executive branch made a determination and published the findings in the Federal Register, but the legislative branch had no other means of oversight in the designation of a FTO.<sup>119</sup>

Once the executive branch designated a group as a FTO, citizens could not provide material support to these groups.<sup>120</sup> The AEDPA defined material support as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”<sup>121</sup> Individual citizens providing this type of support faced prison and fines as penalties.<sup>122</sup> The executive branch’s responsibilities included: recommending updates to the definitions of the statute, designating the FTOs, and enforcing the statute through the court system.<sup>123</sup> However, the AEDPA did not give the executive branch direct authority to release material support and the statute remained silent on the issue until the enactment of IRTPA.<sup>124</sup>

## 2. The Intelligence Reform and Terrorism Prevention Act of 2004

In an effort to broaden the role of the executive branch in foreign relations, specifically with terrorism, the IRTPA grew out of the PATRIOT Act of 2001 and gave the executive branch authority to release material

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<sup>118</sup> See AEDPA § 302, 8 U.S.C. § 1189(a)(2)(A)(i) (requiring the Secretary of State to notify congressional leaders in a classified message the intent to designate and the factual basis for the designation, but the congressional leaders cannot reject the designation at this point).

<sup>119</sup> See *id.* § 1189(a)(5) (guiding the process for the legislative branch to repeal a designation made by the executive branch).

<sup>120</sup> See AEDPA § 323, 18 U.S.C. § 2339A (1996) (building off of the statute allowing the executive branch to designate a FTO by prohibiting individuals from providing material support to those groups); see also Steven W. Becker, “*Mirror, Mirror on the Wall . . .*”: Assessing the Aftermath of September 11th, 37 VAL. U. L. REV. 563, 608–09 (2003) (explaining the impact of the Secretary of State’s designation of a FTO on people peripherally affiliated with the group).

<sup>121</sup> AEDPA § 323, 18 U.S.C. § 2339A(b).

<sup>122</sup> See *id.* (defining the possible punishment as “fined under this title, imprisoned not more than 10 years, or both”).

<sup>123</sup> See AEDPA § 303, 18 U.S.C. § 2339B (1996) (outlining the specific roles of the executive branch in designating FTOs and releasing material support).

<sup>124</sup> See *id.* (noting the lack of what will become later subsection (j) of 18 U.S.C. § 2339B); *supra* Part II.C.2 (discussing IRTPA as an outgrowth of AEDPA, particularly with more focus and expanded role for the executive branch in the release of material support).

support.<sup>125</sup> The IRTPA extended and clarified portions of the AEDPA, while continuing to exclude the legislative branch from participating in foreign relations and the release of material support.<sup>126</sup> The amended statute did not mention a role for the legislative branch, nor had the legislative branch considered notification of the material support released by the executive branch.<sup>127</sup> The culmination of years of pushing the legislative branch out of foreign relations led to the executive branch's control of U.S. foreign policy.<sup>128</sup>

The IRTPA added an exception to the original material support statute from the AEDPA to allow the Secretary of State, with the Attorney General's approval, to release material support should the occasion arise.<sup>129</sup> The inclusion of subsection (j) to the already existing statute

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<sup>125</sup> See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (expanding the statutory language of AEDPA). See also STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE AND FREE* 5 (2005) (stating that the IRTPA wanted to reorganize the intelligence community and modify parts of the PATRIOT Act that did not get to be completely vetted before voting). Although IRTPA gave broader power to the executive branch, no transparency accompanied the increased responsibility. See *id.* at 6 (losing accountability endangers the decision-making process). IRTPA clarifies definitions of services and training found in AEDPA. COLE & DEMPSEY, *supra* note 110, at 165. The wording of 18 U.S.C. § 2339A changed to include:

(2) in subsection (b) –

(A) by striking “or other financial securities” and inserting “or monetary instruments or financial securities”; and

(B) by inserting “expert advice or assistance,” after “training,”

USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 805(a)(2)(A)–(B). See also COLE & DEMPSEY, *supra* note 110, at 195–96 (explaining how, after September 11, 2001, the legislative branch all but gave up any rights to oversee the actions of the executive branch). The executive branch, through the actions of the Attorney General, pushed through the PATRIOT Act to gain broad power in the realm of foreign relations and national security. See *id.* at 196 (noting that due to the sheer length of the PATRIOT Act and the quickness of the vote meant that the legislators could not have read and understood all provisions in the bill).

<sup>126</sup> Compare AEDPA § 303, 18 U.S.C. § 2339B(g) (stopping with subsection (g) and failing to note the executive branch's role in the release of material support), with IRTPA § 6603, 18 U.S.C. § 2339B(j) (2004) (permitting the executive branch to release material support when the situation demands it).

<sup>127</sup> See IRTPA § 6603 (designating the executive branch as the entity to release material support).

<sup>128</sup> See *supra* Part II.A–B (showing the evolution of the executive and legislative branches in foreign relations).

<sup>129</sup> See IRTPA § 6603 (giving the executive branch power to release material support). The direct wording of the statute is:

No person may be prosecuted under this section in connection with the term “personnel”, “training”, or “expert advice or assistance” if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity.

authorized the executive branch to continue conducting negotiations with foreign entities, while maintaining secrecy and speed.<sup>130</sup> Through the inclusion of this new subsection (j), IRTPA expanded the divide between the executive and legislative branches in foreign relations and defied the mandate of the Case-Zablocki Act.<sup>131</sup>

Broadening the power of the executive branch in the release of material support to FTOs naturally arose out of the environment after September 11, 2001, specifically allowing the executive branch to act unilaterally, without legislative oversight or notification.<sup>132</sup> The years after September 11 were deemed a time of national emergency, which caused the legislative branch to statutorily expand the executive branch's power over foreign policy.<sup>133</sup> Currently under the material support statute, the legislative branch cannot compel the executive branch to notify the legislative branch in a prompt manner.<sup>134</sup> The current version of the Case-Zablocki Act directs the executive branch to alert the legislative branch to any international agreements, and remedies the lack of guidance in the material support statute.<sup>135</sup>

### III. ANALYSIS

The material support statute coupled with the Case-Zablocki Act reasserts the power of notification and the influence of the legislative branch in foreign relations.<sup>136</sup> The legislative branch's role in foreign relations, while stifled from years of the executive branch imposing its will, exists and should be included in the release of material support and

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*Id.*

<sup>130</sup> See *id.* (including the new part giving the executive branch the power to release material support directly excludes the legislative branch from the negotiation process); see also *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (emphasizing the importance of conducting international diplomacy with secrecy and speed).

<sup>131</sup> See *supra* Part II.B–C (discussing the relationship between the Case-Zablocki Act and the material support statute).

<sup>132</sup> See IRTPA § 6603, 18 U.S.C. § 2339B(j) (2004) (neglecting to mention the legislative branch's role in providing material support); see also 18 U.S.C. § 2339B(j) (2012) (mentioning explicitly the Secretary of State and the ability to release material support to FTOs).

<sup>133</sup> See BALL, *supra* note 110, at 37 (enabling the executive branch to hunt and destroy terrorist organizations right after September 11, 2001).

<sup>134</sup> See *supra* Part II.B–C (noting the lack of guidance in the material support statute and suggesting the implementation of the Case-Zablocki Act procedures into it).

<sup>135</sup> See *infra* Part III.D.2 (advocating for the combination of the material support statute with the Case-Zablocki Act).

<sup>136</sup> See *infra* Part III.D (increasing the role of the legislative branch by incorporating the Case-Zablocki Act into the material support statute).

negotiations with FTOs.<sup>137</sup> Including the legislative branch in foreign negotiations with FTOs does not diminish the executive branch's power to act as the nation's representative in foreign affairs.<sup>138</sup> The Case-Zablocki Act presents a starting point for including the legislative branch in the relatively new field of negotiations with FTOs and extends a statute that is not always followed.<sup>139</sup>

To show that the material support statute should be amended to include the legislative branch in negotiations with FTOs, Part III.A evaluates the inherent checks and balances problems in foreign relations and advocates for legislative involvement in a traditional realm of executive branch influence.<sup>140</sup> Then, Part III.B examines why the Case-Zablocki Act should be the beginning step for the legislative branch to regain leverage in foreign relations.<sup>141</sup> Part III.C analyzes the problems with the existing material support statute.<sup>142</sup> Finally, Part III.D argues for the combination of the material support statute and the Case-Zablocki Act as the best solution to increase the legislative branch's role in negotiations with FTOs and foreign relations in general.<sup>143</sup>

#### A. *Re-evaluating Current Problems with Checks and Balances*

Increasing the legislative branch's role in foreign relations requires an in-depth look at its history and an analysis of why the stigmas remain enforced today.<sup>144</sup> For example, a brief reading of the Constitution shows that the executive branch should negotiate with foreign entities and the legislative branch should legislate.<sup>145</sup> However, a closer reading of the Constitution reveals that the legislative branch may hold foreign relations

<sup>137</sup> See *supra* Part II.A–C (relating the evolution of the legislative branch's role in foreign relations, stretching from the Constitution to the dominant case law of *Curtiss-Wright* and through the enactment of the Case-Zablocki Act).

<sup>138</sup> See *infra* Part III.A (interpreting the role of the legislative branch in the Constitution).

<sup>139</sup> See *infra* Part III.B (explaining the role of the Case-Zablocki Act in negotiations with FTOs).

<sup>140</sup> See *infra* Part III.A (expanding upon the scarcity of the legislative branch's role in foreign relations).

<sup>141</sup> See *infra* Part III.B (advocating for the expansion of the Case-Zablocki Act into negotiations with FTOs).

<sup>142</sup> See *infra* Part III.C (discussing the shortcomings of the current material support statute, 18 U.S.C. § 2339B (2012)).

<sup>143</sup> See *infra* Part III.D (determining that amending the material support statute is the best way to involve the legislative branch in negotiations with FTOs).

<sup>144</sup> See Ornstein, *supra* note 22, at 64 (examining the history and determining that the framework for the legislative branch's involvement in foreign relations is fractured).

<sup>145</sup> See U.S. CONST. art. I, § 1, cl. 1 (regulating legislative power to the legislative branch); U.S. CONST. art. I, § 8, cl. 18 (giving the legislative branch the power to make laws); U.S. CONST. art. II, § 1 (outlining the duties of the executive branch). See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (using the Constitution to justify the executive branch's claim to be the representative in foreign relations).

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powers that are not as blatant as those of the executive branch.<sup>146</sup> The ability of the legislative branch to provide “Advice and Consent” to major pieces of foreign relations directly involves the legislative branch in a field predominantly occupied by the executive branch.<sup>147</sup> This allowance coupled with the ability of the legislative branch to create laws, implies that the Constitution inherently allows the legislative branch to be involved in foreign relations.<sup>148</sup>

The Constitution leaves room for the legislative branch in foreign relations because the Constitution’s ambiguities about the roles of the executive and legislative branches create room for interpretation.<sup>149</sup> The constitutional clauses do not directly outline how the executive branch obtains “Advice and Consent” from the legislative branch during treaty formation, nor does the Constitution specifically spell out the procedures for conducting international agreements other than treaties.<sup>150</sup> These ambiguities indicate that lawmakers and scholars should rely on reasonable interpretations to determine which branch of the government should be involved.<sup>151</sup> Having a Constitution that can be debated and

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<sup>146</sup> See generally Spitzer, *supra* note 28, at 85–86 (discussing the roles of the legislative and executive branches in foreign relations, specifically that the Constitution does not enumerate roles for either branch in foreign relations, except for formal treaty-making).

<sup>147</sup> See U.S. CONST. art. I, § 8, cl. 18 (giving the legislative branch the power to make laws necessary for the continuing function of the federal government); U.S. CONST. art. II, § 2, cl. 2 (reserving the power of “Advice and Consent” to the legislative branch). See also *Youngstown*, 343 U.S. at 610 (exploring how the powers of the executive and legislative branches under the Constitution, while not completely defined, obtain definition from the separation of powers in the framework of the Constitution). To enhance the framework of the Constitution, the totality of the circumstances, including the present situation, the history of interaction between the branches, and any definitions provided by the Constitution must be considered. *Id.*

<sup>148</sup> See U.S. CONST. art. II, § 2, cl. 2 (giving the legislative branch power to influence the executive branch through the “Advice and Consent” clause); see also U.S. CONST. art. I, § 8, cl. 18 (providing the legislative branch with the power to create laws).

<sup>149</sup> See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (comparing the words of the Constitution to the Federalist Papers to show that the constitutional clauses sometimes contradict each other, but the Federalist Papers help give perspective on the enumerated and non-enumerated powers); see also RAMSEY, *supra* note 15, at 28 (stating that the Constitution should not be looked at in isolation, but combined with the history and contemporary issues to gain a true understanding and meaningful interpretation).

<sup>150</sup> See U.S. CONST. art. II, § 2, cl. 2 (enumerating the procedure for entering into formal treaties); Spitzer, *supra* note 28, at 85–86 (noticing that the executive branch’s foreign relations powers are much more direct in the Constitution, and the legislative branch’s effect on those powers is not as clear); see also RAMSEY, *supra* note 15, at 130 (cautioning that scholars should not “overstate the Constitution’s executive foreign affairs powers”).

<sup>151</sup> See SILVERSTEIN, *supra* note 32, at 12 (revealing that the founders created the government with different branches to not only separate the powers, but to help the government keep itself in line with the Constitution through competition and debate).

redefined without changing the underlying intent and meaning empowers legislators to meet new foreign relations challenges.<sup>152</sup>

The seemingly firm, yet flexible framework of the Constitution permits the executive and legislative branches to meet new challenges in the field of foreign relations.<sup>153</sup> Even though the Constitution regulated foreign negotiations to the executive branch, the intent of the Framers to include the legislative branch cannot be ignored.<sup>154</sup> The Constitution separated the branches of the government to spread power to all three branches and ensure effective governance through checks and balances because without flexibility, the Constitution would not remain a contemporary source of law.<sup>155</sup> Including the legislative branch in negotiations with FTOs hearkens back to the Framers' original intent to have the legislative and executive branches work together to find solutions to foreign relations problems.<sup>156</sup>

As an extension of early constitutional interpretations, Justice Sutherland's "sole organ" doctrine in *Curtiss-Wright* kept the legislative branch out of foreign relations.<sup>157</sup> The holding in *Curtiss-Wright* effectively eliminated the opportunity for the legislative branch to participate in

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<sup>152</sup> See, e.g., *id.* (stressing the importance of compromise and debate between the branches of government to act in the best interest of the country, especially when meeting the new challenges in foreign relations in the 1970s).

<sup>153</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596 (1952) (explaining that since the Constitution was written for an unknown future, a reading of the document should be both spacious to accommodate the new circumstances and narrow enough to avoid abuse). See also Ornstein, *supra* note 22, at 62 (relating the expanded parameters of the Constitution to the relationship between the branches). Ornstein notes that the Framers:

[A]ttempt[ed] to provide the executive with some leeway in carrying out military action and maintaining international intercourse and diplomatic relations . . . But they made certain that foreign policy would be well grounded in a popular foundation through the elaborate set of checks and balances built into the war power, the treaty power, and the other authority they designated.

*Id.* Although at times the pendulum between the branches has moved back and forth depending on the circumstances, the Framers' foundation held firm and continues to assist the government in meeting new challenges. *Id.*

<sup>154</sup> See Ornstein, *supra* note 22, at 38-39 (involving the legislative branch in foreign relations was an original intent of the Framers until later in the debate and negotiations).

<sup>155</sup> See generally Adler, *supra* note 47, at 20 ("[T]he overwhelming preference of both the Framers at the Constitutional Convention and the ratifiers in the various state conventions for collective decision making in foreign as well as domestic affairs and, second, their equally adamant opposition to unilateral executive control of U.S. foreign policy.").

<sup>156</sup> See THE FEDERALIST NO. 84, *supra* note 36, at 438 (supporting a collaborative relationship between the executive and legislative branches). A reexamination of the Constitution shows that the legislative branch should not usurp the power of the executive branch, but should assist the executive branch in foreign relations. *Id.*

<sup>157</sup> See RAMSEY, *supra* note 15, at 14 (finding that proponents of a strong executive branch and of *Curtiss-Wright*, not surprisingly, tend to be members of the executive branch).

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foreign relations.<sup>158</sup> The small gains from a liberal reading of the Constitution faded away and a ban on the involvement of the legislative branch in foreign relations began.<sup>159</sup> Justice Sutherland's naming the executive branch the "sole organ" of foreign relations created the impression of an all-powerful, never yielding executive branch.<sup>160</sup> This opinion entered into mainstream American politics during the Cold War, when many voters advocated for a stronger, centralized government to meet the threat of the Soviet Union.<sup>161</sup> By perpetuating Justice Sutherland's "sole organ" doctrine, the executive and legislative branches separated themselves further and made collaboration on foreign relations a difficult road.

Justice Sutherland's misinterpretation of the Constitution in *Curtiss-Wright* continued to harm United States' foreign policy throughout the twentieth century.<sup>162</sup> Relied upon by proponents of a strong executive branch, the policy misconstrues the attempts of the Constitution to maintain a government based on checks and balances and puts all of the power of foreign relations on the executive branch.<sup>163</sup> Not only did the "sole organ" doctrine separate the powers too far, but it also did not produce concrete guidance for the executive branch on how to approach new problems in foreign relations.<sup>164</sup> The lack of direction meant that the

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<sup>158</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (holding that the executive branch is the best part of the government to deal with foreign relations because the legislative branch is too fragmented and works too slowly for most diplomatic issues).

<sup>159</sup> See Adler, *supra* note 47, at 26 (examining the effect of *Curtiss-Wright* on foreign relations). Sometimes, Justice Sutherland's "sole organ" doctrine is dismissed as dicta, but when there are new questions regarding executive or legislative power in foreign relations, the doctrine finds a way to be included. *Id.* "[T]he ghost of *Curtiss-Wright* has been made to walk again. Even the most cursory review of the cases in which it has been invoked makes clear that the essence of this 'spirit' is great 'deference to executive judgment in this vast external realm' of foreign relations." *Id.*

<sup>160</sup> See *Curtiss-Wright*, 299 U.S. at 319-20 (expanding the executive branch's foreign relations power to answer only to the Constitution); Newsom, *supra* note 21, at 102 (justifying minimizing the legislative branch's involvement in foreign relations to increase the executive branch's power).

<sup>161</sup> See SILVERSTEIN, *supra* note 32, at 41 (revealing that Justice Sutherland hoped to create a strong, centralized government equipped to meet threats from abroad).

<sup>162</sup> See generally Adler, *supra* note 47, at 45 (noting the profound effect of *Curtiss-Wright* on foreign relations law); Koh, *supra* note 59, at 159-60 (stating the effects of *Curtiss-Wright*'s holding on the work of scholars throughout the twentieth century).

<sup>163</sup> See SILVERSTEIN, *supra* note 32, at 41 (relying on the flawed reasoning of *Curtiss-Wright* continued throughout the twentieth century, neglecting to realize that foreign affairs powers are intertwined between the branches of government).

<sup>164</sup> See *Curtiss-Wright*, 299 U.S. at 320 (guiding the executive branch by saying that foreign policy should be conducted with caution and secrecy). Additionally, the executive branch should weigh the needs of the nation when determining how to negotiate with foreign entities. *Id.*

executive branch would also have wide discretion on how to conduct the foreign relations, without any help from the legislative or judicial branches.<sup>165</sup> The holding in *Curtiss-Wright* upset the balance of powers intended by the Constitution's Framers and created a misguided and unworkable precedent in foreign relations, leading to the marginalization of the legislative branch for many years.<sup>166</sup>

*B. Regaining Influence and Keeping an Eye on the Executive Branch in Foreign Relations*

In an effort to regain influence lost under *Curtiss-Wright*, the legislative branch has had to find other ways to persuade the executive branch in foreign relations.<sup>167</sup> By obtaining the power of oversight in specific instances, the ability to publicly comment, and control appropriations for any executive branch suggested program, the legislative branch earned back some influence in foreign relations.<sup>168</sup> At first glance, these options for the legislative branch satisfy the ideals of the Constitution and help the legislative branch keep the executive branch in check; however, this is not the case.<sup>169</sup> If the legislative branch relies on public comment or appealing to the voters, the executive branch is not necessarily bound to the suggestions of the legislative branch.<sup>170</sup> The best way the legislative branch can influence the executive branch's decision making is through the control of appropriations.<sup>171</sup> The Constitution does not grant the executive branch power to control spending, so the legislative branch can use this enumerated power to directly impose its will on foreign policy.<sup>172</sup> Even this option, mandated by the Constitution, does not always influence the executive branch because of the "sole organ" doctrine and legislators' hesitation to bar the passage of

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<sup>165</sup> See *id.* at 319 (giving the executive branch wide deference in foreign relations and the other branches should automatically defer to those decisions).

<sup>166</sup> See *supra* Part III.A (explaining the mess of the *Curtiss-Wright* holding and how it directly refutes the Framers' intent of the Constitution).

<sup>167</sup> See *supra* Part II.A.3 (outlining the existing ways the legislative branch can influence the executive branch).

<sup>168</sup> See *supra* Part II.A.3 (expanding upon the means of influence).

<sup>169</sup> See Hammond, *supra* note 62, at 84 (noting that legislative involvement is "an open process, with numerous opportunities for access by the executive and the public, and for changed decisions all along the route. There is also potential for delay and obstruction.").

<sup>170</sup> See HENKIN, *supra* note 29, at 81 (portraying legislative branch resolutions as important in the foreign relations process, but not binding upon the decisions of the executive branch).

<sup>171</sup> See *id.* (declaring that the legislative branch, while having little power to bind the executive branch in foreign relations outside of legislation, can "exercise tremendous influence even on such policy" through appropriations).

<sup>172</sup> See U.S. CONST. art. I, § 9, cl. 7 (allowing the legislative branch to control the allocation of money to various parts of the federal government).

appropriations.<sup>173</sup> The legislative branch's lack of direction in foreign relations allows the executive branch to carry out important policy without input from other branches of the government.<sup>174</sup> The apprehension of legislators to restrict executive branch decisions, using specifically enumerated powers, shows that the legislative branch has been pushed out of foreign relations for so long that they are afraid to assert any checks upon the executive branch in foreign policy.

Another way the legislative branch tried to gain back foreign relations influence after the spread of the *Curtiss-Wright* holding was through the enactment of the Case-Zablocki Act.<sup>175</sup> The legislative branch reexamined definitions and enforcement of the Case-Zablocki Act to reassert authority in foreign relations because it provided an important check on the power of the executive branch.<sup>176</sup> The Case-Zablocki Act took the small, specific instances of oversight and made a statute demanding notification of any international agreement.<sup>177</sup> Moving from *Curtiss-Wright's* declaration that the executive branch was the "sole organ" to requiring notification of executive agreements was an unprecedented step for the legislature to take in foreign relations.<sup>178</sup> Passing the Case-Zablocki Act gave the legislative branch a significant role in foreign relations because the legislative branch had statutory means to oversee actions of the executive branch outside of appropriations and informal means.<sup>179</sup>

Although the Case-Zablocki Act increased the legislative branch's participation in foreign relations, there are problems with it.<sup>180</sup> For

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<sup>173</sup> See generally HENKIN, *supra* note 29, at 74–75 (describing the reasons why withholding appropriations may not directly influence the executive branch when making foreign policy decisions).

<sup>174</sup> See *supra* Part II.A.1 (outlining the Constitution and the interpretation of the executive branch's powers in foreign relations); see also RAMSEY, *supra* note 15, at 201 (determining that executive powers in foreign relations do not need to be enumerated to be enforced under Article II, section 1); see, e.g., 18 U.S.C. § 2339B(j) (2012) (designating the executive branch as the sole branch to release material support without providing oversight opportunities for other branches).

<sup>175</sup> See generally Spitzer, *supra* note 28, at 96 (providing a general history and explanation of the Case-Zablocki Act).

<sup>176</sup> See 1 U.S.C. § 112b (2012) (forcing the executive branch to report any international agreements to the legislative branch, thus allowing the legislative branch oversight in foreign policy decisions).

<sup>177</sup> See Spitzer, *supra* note 28, at 96 (remarking that the legislative branch was tired of being left out of important international agreements that affected the entire nation).

<sup>178</sup> See Senator Case's Remarks, *supra* note 95 (noting the non-involvement of the legislative branch in foreign relations before the introduction of the bill); see also Spitzer, *supra* note 28, at 107 (attempting to adapt to a changing foreign relations environment by passing legislation including the legislative branch in the predominately executive branch realm).

<sup>179</sup> See generally 1 U.S.C. § 112b(a) (increasing the legislative branch's role in foreign relations by requiring the executive branch to report any international agreements).

<sup>180</sup> See *id.* (providing the language of the Case-Zablocki Act).

example, the Case-Zablocki Act does not define “international agreement” or what and how the executive branch needs to report to the legislative branch.<sup>181</sup> Moreover, defining “international agreement” leaves the nature of the agreement up to the discretion of the executive branch, thus giving the executive branch discretion on whether to notify the legislative branch.<sup>182</sup> Additionally, the executive branch does not have to report negotiations or the release of material support to FTOs.<sup>183</sup> Thus, the absence of a solid definition of what types of international agreements are covered under this statute makes enforcement difficult.<sup>184</sup>

On the other hand, the ambiguity of the definition of “international agreement” assists the legislative branch because the legislative branch could say that a specific agreement fits the broad definition and should be reported. The broad definition could include the material support statute regarding negotiations and the release of material support to FTOs.<sup>185</sup> The Case-Zablocki Act is a valuable tool for the legislative branch to impact the foreign policies of the executive branch and give meaningful oversight to a usually secretive process of negotiating and providing material support to FTOs.

### C. *The Material Support Statute: Still Leaving the Legislative Branch Out in the Cold*

Despite the influence gained through appropriations and the Case-Zablocki Act, the introduction of the AEDPA continued the practices of the twentieth century by excluding the legislative branch from foreign relations, particularly when dealing with FTOs.<sup>186</sup> When the material support statutes were enacted as a part of the AEDPA, the focus on punishing nations who sponsor FTOs shifted to the prosecution of

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<sup>181</sup> See *id.* (defining international agreement as a writing or oral agreement entered into with a foreign entity by the executive branch); Professor Bartlett’s Remarks, *supra* note 102, at 14 (defining international agreement as “an agreement between one nation and another or between one head of a state and another” and with each country having an intent to bind their respective countries).

<sup>182</sup> See Spitzer, *supra* note 28, at 96 (“The act did not define executive agreements, and thus presidents have applied their own definitions, which have excluded understandings that many members of Congress believed were agreements.”).

<sup>183</sup> See *infra* Part III.D (combining the Case-Zablocki Act with the specific negotiations for the release of material support).

<sup>184</sup> See, e.g., Spitzer, *supra* note 28, at 96–97 (describing when President Nixon negotiated with South Vietnam for full engagement, but did not inform Congress, who then became angry at the non-disclosure and refused to uphold the United States’ end of the bargain).

<sup>185</sup> See Professor Bartlett’s Remarks, *supra* note 102, at 14 (establishing a broad definition for international agreement as an agreement between two international nations).

<sup>186</sup> See *supra* Part II.C.1 (discussing the enactment of the AEDPA).

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individuals who provided material support.<sup>187</sup> This change in focus indicates that the United States Government recognizes that restricting funds and supplies to the FTOs limits crimes and atrocities.<sup>188</sup> The government's recognition of the importance of material support and its effect on FTOs shows that the material support statute is the most established and comprehensive statute available regarding negotiations with FTOs.

The material support statute contributes basic definitions of FTOs and material support, thus providing a beginning outline for congressional notification of an ever-changing situation in foreign relations.<sup>189</sup> For example, the statute includes a definition of what items constitute material support.<sup>190</sup> While there are some specifics, the material support statute uses broad terms like "currency" or "transportation" to leave room for the branches to determine needs in a changing situation.<sup>191</sup> The statute also outlines procedures on how to designate a group as a FTO without limiting the executive branch.<sup>192</sup> By amending the statute already containing these two critical definitions, there would be little reason for the legislative branch to modify definitions that already work in foreign

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<sup>187</sup> See PERL, *supra* note 109, at 5 (engaging state sponsors of terrorism through the military or diplomatically until the passage of the AEDPA, whereas before, the focus was on punishment). The problem came when the FTOs became more trans-national and integrated into civilian populations. *Id.* at 4. To meet these new problems, Congress enacted the AEDPA with the intent of targeting individual sponsors of FTOs and attempting to cut off all resources from these groups. *Id.* at 5.

<sup>188</sup> See *id.* (emphasizing the fact that if the government limits supplies to FTOs, then the international community should band together and sanction the FTOs).

<sup>189</sup> See 18 U.S.C. § 2339A(b) (2012) (defining material support as property in various forms that is given from individuals or groups to FTOs on the executive branch's list).

<sup>190</sup> See generally 18 U.S.C. § 2339A(b)(1) (providing a definition for material support). The statute specifically defines material support as:

[T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

*Id.*

<sup>191</sup> See *id.* (defining what constitutes material support).

<sup>192</sup> See generally 8 U.S.C. § 1189 (2012) (outlining the method to designate a particular group as a FTO).

relations.<sup>193</sup> Amending the already existing material support statute promotes continuity in foreign relations, where the United States must maintain a strong, unified front.<sup>194</sup>

Enacting IRTPA expanded the material support statute and continued the practice of prohibiting the legislative branch from directly participating in foreign policy.<sup>195</sup> The material support statute, after revision and consideration by various lawmakers, still does not specifically define the foreign policy roles of the executive and legislative branches.<sup>196</sup> The bulk of the statute addresses prohibitions on private citizens to give material support to FTOs, but subsection (j) permits the executive branch to release material support to FTOs.<sup>197</sup> The subsection (j) exception does not mention a role for the legislative branch.<sup>198</sup> The material support statute outlines what private citizens may or may not furnish to FTOs, but this statute does not allow for congressional notification if the government releases material support to a FTO.<sup>199</sup> A statute without a firm role for the legislative branch gives the executive branch unchecked power during negotiations with FTOs.<sup>200</sup>

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<sup>193</sup> See *A Review of the Material Support to Terrorism Prohibition Improvements Act*, 109th Cong. 10 (2005) (statement of Daniel Meron, Principle Deputy Asst. Att’y Gen., Civil Division) (“[T]he language that was added in the amendments makes the language sufficiently specific and clear. It is clearly constitutional on its face, and the courts remain ready to consider any challenge . . .”).

<sup>194</sup> See generally Moore, *supra* note 51, at 954–55 (advocating primarily for a non-unified voice to government, but realizing that some particular aspects of foreign policy require the government to speak with one voice). Participation of other branches of the government may help increase the strength of negotiations and a mutually satisfactory agreement can be reached. *Id.* at 1025.

<sup>195</sup> See SCHULHOFER, *supra* note 125, at 127 (implementing a new agency under the executive branch would help oversee the intelligence gathering means). The creation of this new office took the power of oversight away from the legislative body, effectively allowing the executive branch to oversee itself. See *id.* (describing the methods of implementation). The IRTPA also mandated a “Civil Liberties Oversight Board in the Executive Office of the President, charged with providing advice to the president on the development and implementation of national security policies that affect privacy and civil liberties.” *Id.*

<sup>196</sup> See generally 18 U.S.C. § 2339B(j) (2012) (designating a role for the executive branch in the release of material support, but not the legislative branch); *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the S. Subcom. on Terrorism, Technology, and Homeland Security*, 109th Cong. 6 (2005) (statement of Daniel Meron, Principal Deputy Asst. Att’y Gen., Washington D.C.) (portraying the thought and revisions put into the drafting of the material support statute to have a consensus in the fight against terrorism).

<sup>197</sup> See 18 U.S.C. § 2339B(j) (exploring the role of the executive branch in the release of material support).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Compare Cole & Dempsey, *supra* note 110, at 138 (noting that the Secretary of State has unchecked power when determining FTOs), with 18 U.S.C. § 2339B(j) (putting no restrictions on the executive branch when releasing material support).

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Subsection (j) mentions that an agent of the executive branch could authorize the release of material support, but does not elaborate how the executive branch should release the materials.<sup>201</sup> The difficulty in determining how a FTO will use any received material support justifies the legislative branch's involvement.<sup>202</sup> Amending the statute to include the legislative branch would begin remedying the lack of guidance for the executive branch by ensuring a second check on the executive branch's power.<sup>203</sup>

The negative effects of ambiguity highlight the need for further clarification and definition of legislative branch's role in negotiations with FTOs.<sup>204</sup> Amending the statute to include legislative notification in the release of material support will help the executive and legislative branches determine appropriate support for specific situations.<sup>205</sup> Precise definitions allow the executive branch to adapt to changes in negotiations and give the legislative branch the tools to oversee the process.<sup>206</sup> While the interpretation and clarification of statutes is a job of the judiciary, legislative involvement is a step to speed up the process as the judiciary tends to move even more slowly than the legislative branch.<sup>207</sup> Therefore,

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<sup>201</sup> See 18 U.S.C. § 2339B(j) (defining the executive branch's involvement in releasing material support). The agent mentioned in the part (j) exception is the Secretary of State. *Id.* The Secretary of State works as an agent of the President, in the greater executive branch of the government. *Id.* Under the proposed amendment, the legislative branch would oversee anyone from the executive branch who engaged in negotiations with FTOs and require a report as dictated under the Case-Zablocki Act. See *infra* Part III.D (combining the material support statute and the Case-Zablocki Act to create certainty in the roles of the executive and legislative branches in foreign relations).

<sup>202</sup> See generally JOHN ROLLINS & LIANA SUN WYLER, CONG. RESEARCH SERV., R41004, TERRORISM AND TRANSNATIONAL CRIME: FOREIGN POLICY ISSUES FOR CONGRESS 21 (2012) (relating the role played by the legislative branch in preventing transnational crime to the oversight role it plays in that field).

<sup>203</sup> See *infra* Part III.D.2 (commenting on the proposed increased role for the legislative branch in foreign relations). While the scope of this Note only suggests an oversight role for the legislative branch, more comprehensive measures may be needed to provide proper guidance for the executive and legislative branches during negotiations with FTOs.

<sup>204</sup> See generally 18 U.S.C. § 2339B (generalizing the methods for the executive branch to release material support, and completely leaving out any role for the legislative branch).

<sup>205</sup> See *infra* Part III.D (discussing the benefits of adding the Case-Zablocki Act procedures directly into the material support statute).

<sup>206</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B, 1 (2010) (noticing the legislative branch's attempt to expand and clarify definitions of the material support statute); see also PERL, *supra* note 109, at 4 (emphasizing the role of politics in definitions dealing with terrorism); ROLLINS & WYLER, *supra* note 202, at 2 (noting the increase of other types of terrorist groups threatening the United States).

<sup>207</sup> See, e.g., *Dames & Moore, v. Regan*, 453 U.S. 654, 661 (1981) (revealing that the role of the judiciary is not to oversee the government action, but to provide support through interpretation).

the most efficient way to deal with ambiguity is to involve the legislative branch in the process of releasing material support, particularly during negotiations with FTOs.

The policies formed under the Constitution, case law, and statutes are not the only thing stopping the legislative branch from obtaining more influence in foreign relations, there is also the underlying cultural policy that “the United States does not negotiate with terrorists.”<sup>208</sup> The strength and resolve of this statement created a backbone of American foreign policy that continues to be found in contemporary issues.<sup>209</sup> As this phrase remains an integral portion of American foreign policy, the legislature will have problems gaining traction in actively participating in negotiations with FTOs.<sup>210</sup> However, the makeup and needs of FTOs continue to change because of the various avenues of support.<sup>211</sup> These changes, along with an evolving American political landscape, open the door for the legislative branch to participate in foreign negotiations.<sup>212</sup>

As FTOs evolve and new threats emerge, U.S. foreign relations policies must change to meet each new situation.<sup>213</sup> The legislative branch’s opportunities to participate in foreign relations grow from the Constitution’s ambiguity to the express involvement in the Case-Zablocki

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<sup>208</sup> See PERL, *supra* note 109, at 7–8 (providing examples of the United States’ interactions with FTOs). Former CIA director James Woolsey noted that “[i]ncreasingly, terrorists don’t just want a place at the table, but rather to destroy the table and all sitting there, possibly with weapons of mass destruction.” *Id.* at 8.

<sup>209</sup> See *id.* at 7–8 (highlighting the effects of not negotiating with terrorists).

<sup>210</sup> See generally 18 U.S.C. §§ 2339A, 2339B (2012) (criminalizing giving support of any kind of FTOs).

<sup>211</sup> See PERL, *supra* note 109, at 6 (referencing the changing format of FTOs specifically that fractured terrorist groups are a growing threat to the safety of the United States).

<sup>212</sup> See *infra* Part III.D (providing a way for the legislative branch to participate in foreign agreements).

<sup>213</sup> See *A Review of the Material Support to Terrorism Prohibition Improvements Act*, 109th Cong. 13 (2005) (statement of Andrew C. McCarthy, Senior Fellow, Foundation for the Defense of Democracies) (examining the ways the United States can meet the threat of new FTOs). When discussing amendments to the material support statutes, Chairman Kyl recognized that terrorist organizations constantly adapt methods of attack and organization to meet the new statutes and roadblocks instituted by the United States. *Id.* To meet this growing challenge, Chairman Kyl cautioned that the law must be as flexible as possible, while retaining the tough stance against supplying FTOs. *Id.* To enhance the response of the Federal Government in crime-terrorism, Congress has directed multiple federal agencies to use diplomatic responses. *Id.* While issues may occur with time delays and having a consensus, diplomacy is a viable alternative to force. See PERL, *supra* note 109, at 8 (“[G]roups that are well-entrenched in a nation’s political fabric and culture, engaging the group might be preferable to trying to exterminate it. Increasingly, governments appear to be pursuing policies which involve verbal contact and even direct negotiations with terrorist groups or their representatives.”); ROLLINS & WYLER, *supra* note 202, at 21 (emphasizing the role and preference for diplomacy in situations concerning FTOs).

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Act.<sup>214</sup> Likewise, the executive branch's role transforms to meet new concerns in dealing with FTOs.<sup>215</sup> The continuing expansion of foreign relations elicits the need for a flexible, yet firm solution to evolving threats from FTOs, ensuring a unified response to FTOs.<sup>216</sup>

*D. Moving Toward a Solution: Combining the Case-Zablocki Act and the Material Support Statute*

Allowing the branches of the government to work together in foreign relations is beneficial for presenting a unified front against terrorism.<sup>217</sup> While the executive branch relies on the "one-voice doctrine" in *Curtiss-Wright*, this theory should not mean that the legislative branch loses all power of oversight or communication with the executive branch in foreign relations.<sup>218</sup> The executive branch is responsible for negotiations with foreign entities and retains autonomy to make instant decisions; however, legislative involvement can assist in the process.<sup>219</sup> Thus, the addition of congressional notification into negotiations with FTOs encourages the executive and legislative branches to work together without obstructing the power of the executive branch to conduct foreign negotiations.

The executive branch's ability to negotiate with FTOs, without legislative branch involvement, may harm American interests.<sup>220</sup> The purpose of enacting the material support statute was to protect American interests by prohibiting American citizens from giving material support to FTOs, even if the intention was humanitarian.<sup>221</sup> A unilateral negotiation with a FTO requiring the release of material support could

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<sup>214</sup> See Adler, *supra* note 47, at 20–22 (discussing the evolution of Congress' role in foreign relations, primarily stemming from the Constitution); see also 1 U.S.C. § 112b (2012) (outlining a specific role for the legislative branch in foreign relations).

<sup>215</sup> See *supra* note 126 (comparing the old AEDPA role of the executive branch in releasing material support with the new powers specifically granted under the IRTPA).

<sup>216</sup> See *infra* Part III.D (providing a solution to the problem of minimal legislative involvement in foreign relations).

<sup>217</sup> See Moore, *supra* note 51, at 954–55 (explaining that the one-voice doctrine could be helpful because it provides a united government front against threats to the country).

<sup>218</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (designating the executive branch as the "sole organ" of foreign policy); Moore, *supra* note 51, at 973–74 (exploring the impact of *Curtis-Wright's* use of the "one-voice" doctrine in holding that the executive branch should be the "sole organ" of foreign relations).

<sup>219</sup> See 1 U.S.C. § 112b(a) (allowing the legislative branch to keep tabs on the actions taken and agreements made by the executive branch without hindering the power of the executive branch to conduct foreign negotiations).

<sup>220</sup> See PERL, *supra* note 109, at 6–7 (evaluating the effect of changing power structures within FTOs).

<sup>221</sup> *A Review of the Material Support to Terrorism Prohibition Improvements Act*, 109th Cong. 5–6 (2005) (statement of Mr. Meron, Principal Deputy Asst. Att'y Gen., Civil Division, Dep't of Justice) (discussing Congress' intent in creating a bipartisan plan to prevent groups from providing material support as a way to combat terrorism before attacks occur).

harm the American people because the executive branch could make a mistake and release material that could be used militarily against American interests.<sup>222</sup> Additionally, the funds which would have been used by the FTO to purchase material goods could be transferred to other areas of the budget focusing on terrorist attacks.<sup>223</sup> For example, assume the FTO has to apply fifty percent of its budget to provide food for the population and twenty-five percent of the budget applies to violent activities. If the FTO receives food through a negotiation with the United States, the money used to buy food could then be shifted to the terrorism budget.<sup>224</sup> The FTOs' shift in funds after receiving material support directly harms the United States because the more money a FTO can put into military-like operations, the further those operations can reach.<sup>225</sup> To reduce the likelihood that a FTO will misuse the material support, the executive and legislative branches should collaborate and share intelligence information.<sup>226</sup> Sharing the responsibility during interactions with FTOs ensures that the executive branch will make well-informed decisions that will not negatively affect U.S. citizens.

To fix the ambiguity and uncertainty of negotiations with FTOs, the material support statute should be amended to include language from the Case-Zablocki Act authorizing congressional notification of any foreign negotiations by the executive branch.<sup>227</sup> The current material support statute contains some ambiguity, but this statute includes guidelines for the executive branch in releasing material support to FTOs during negotiations.<sup>228</sup> The Constitution and contemporary examples show the benefits of the legislative and executive branches working together in foreign relations.<sup>229</sup> Additionally, inclusion of procedures from the Case-Zablocki Act regarding congressional notification provides a standard for

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<sup>222</sup> See PERL, *supra* note 109, at 5 (showing that the clandestine nature of FTOs hampers the United States' attempts to approach the groups diplomatically and usually requires more intelligence officers on the ground).

<sup>223</sup> See DOYLE, *supra* note 207, at 1-2 (explaining that giving material support to a FTO may free up other resources that would later be used to conduct terrorist activities).

<sup>224</sup> This hypothetical is the musing of the author.

<sup>225</sup> See DOYLE, *supra* note 206, at 1-2 (relating the indirect relationship between giving material support to a FTO and possible terrorist attacks).

<sup>226</sup> See Spitzer, *supra* note 28, at 107 (stating that the legislative branch will have a continuing role in releasing various forms of material support to foreign entities).

<sup>227</sup> See *supra* Part III.B (introducing the Case-Zablocki Act); see also *supra* Part III.C (discussing the various reasons the material support statute should include the legislative branch in an oversight role).

<sup>228</sup> See 18 U.S.C. § 2339B(a) (2012) (prohibiting material support to FTOs); 1 U.S.C. § 112b(a) (2012) (outlining the mandate that the executive branch report any international agreement to the legislative branch).

<sup>229</sup> See *supra* Part II.A, C (exhibiting an existing relationship between the executive and legislative branches in foreign relations).

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the executive and legislative branches to collaborate in negotiating with FTOs.<sup>230</sup>

Using accepted and established definitions, even if they are ambiguous, helps the legislative branch determine whether the executive branch complied with the terms of the material support statute during negotiations. Although the executive branch has substantially defined roles under the material support statute, the notification of the legislative branch can provide effective oversight of any actions taken by the executive branch.<sup>231</sup> A well-developed statute regarding negotiations with FTOs acts as a rubric for congressional oversight of the executive branch. Any new addition to the statute must be workable for both branches and the Case-Zablocki Act fulfills this need.<sup>232</sup> Thus, providing specific directions to the legislative branch is the ultimate goal of combining these two pieces of legislation.

Congressional notification of negotiations with FTOs does not decrease the power of the executive branch.<sup>233</sup> The carefully enumerated powers in the Constitution and the further limits on the reach of the legislative branch in statutes retain the separation of powers.<sup>234</sup> Even though the legislative branch may direct portions of the executive branch's power, certain powers granted under the Constitution still rest with the executive branch, such as foreign negotiations.<sup>235</sup> The executive branch conducts the actual negotiations with a FTO, but congressional notification is a safeguard against releasing material support to FTOs who may use the support for further terrorist attacks.<sup>236</sup> The executive branch does not gain or lose any power in the following proposed statute; the

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<sup>230</sup> See 1 U.S.C. § 112b(a) (providing procedures for the notification of the legislative branch).

<sup>231</sup> See 18 U.S.C. § 2339B(j) (revealing the role of the executive branch in the release of material support).

<sup>232</sup> See 1 U.S.C. § 112b (showing that this statute was enacted in 1972 and has not been substantively redefined since enactment, therefore showing a workable method of notification).

<sup>233</sup> See *supra* Part II.B (showing that when the legislative branch has oversight, the executive branch is not hindered in any way).

<sup>234</sup> See *supra* Part II.A (discussing the impact of the Constitution on the legislative branch's foreign relations powers).

<sup>235</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (giving the executive branch broad foreign relations powers); see also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 302e (1987) (reaffirming that the legislative branch cannot itself negotiate, negotiation power rests solely with the executive branch).

<sup>236</sup> See 1 U.S.C. § 112b(a) (describing the role of the legislative branch to oversee the international agreements of the executive branch); 18 U.S.C. § 2339B(j) (stating the role of the executive branch to release material support when they deem it necessary); SCHULHOFER, *supra* note 125, at 131 (strengthening the response to foreign threats requires the efforts of both branches).

only thing that is gained is a check on the uncontested power of the executive branch in foreign negotiations.

1. Proposed Amendment to the Material Support Statute to Include the Notification Standards of the Case-Zablocki Act, 1 U.S.C. § 112b

In its current form, the material support statute does not require notification of the legislative branch when the executive branch releases material support.<sup>237</sup> To remedy this problem, the legislative branch should amend the material support statute with the Case-Zablocki Act, giving the legislative branch clear oversight over negotiations to release material support. The material support statute should be amended to include the following language:

(j) Exception. — No person may be prosecuted under this section in connection with the term “personnel”, “training”, or “expert advice or assistance” if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).  
*(k) The Secretary of State must report any agreement to release material support to Congress in compliance with the procedures of the Case-Zablocki Act, 1 U.S.C. § 112b.*<sup>238</sup>

2. Commentary

The proposed amendment to the material support statute rebalances and strengthens the relationship between the executive and legislative branches in three ways. First, the amendment merges the ability of the executive branch to conduct negotiations on behalf of the United States, with the notification and inclusion of the legislative branch. Second, the amendment clarifies ambiguities of the material support statute by providing a specific oversight role for the legislative branch. Third, the amendment to the material support statute increases the flow of information and communication between the branches, ensuring the safety and progress of the United States’ foreign policy agenda.

<sup>237</sup> See 18 U.S.C. § 2339B(j) (neglecting to include the legislative branch in the release of material support).

<sup>238</sup> The proposed amendment, in italics, is the contribution of the author. See 1 U.S.C. § 112b(a) (providing the base language for the proposed amendment).

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Amending the material support statute begins to repair the damage done by Justice Sutherland's dicta in *Curtiss-Wright*, which delegated foreign relations power to the executive branch. The legislative branch attempted to fix this issue through the Case-Zablocki Act, but the discourse was deeply ingrained in foreign relations so its enactment had little effect.

This proposed amendment does not take away any power from the executive branch to respond quickly to a national security threat. The legislative branch's involvement does not occur until after the executive branch enters negotiations to release material support.<sup>239</sup> Within the Case-Zablocki Act, the executive branch must notify the legislative branch "as soon as practicable."<sup>240</sup> Notifying the legislative branch does not hamper the executive branch's ability to freely negotiate with FTOs because the executive branch will conclude negotiations by the time it notifies the legislative branch.<sup>241</sup> Additionally, the transparency created by this amendment would not lead to security leaks. The Case-Zablocki Act already includes provisions for how the legislative branch should handle confidential information.<sup>242</sup> These safeguards protect the sensitive nature of negotiations for material support. Thus, including the legislative branch in foreign relations enhances the efficiency of the government and guarantees the protection of the most sensitive materials.<sup>243</sup>

By inserting the Case-Zablocki Act's clear language directly into the material support statute, the legislative branch will be more inclined to enforce it. Critics may argue that the amendment is too miniscule or naive to make any sweeping changes in the role of the legislative branch in foreign relations, but the Case-Zablocki Act was enacted in the 1970s, and yet the legislative branch does not utilize this important tool. The Case-Zablocki Act is not a perfect solution for balancing the foreign relations powers, but legislative oversight is a powerful tool that should be reinstated.

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<sup>239</sup> *Id.* (regulating the legislative branch's notification to "after such agreement has entered into force").

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* (mandating that the executive branch contact the legislative branch after the agreement is complete); Oleszek & Oleszek, *supra* note 70, at 48 (stating that the legislative and executive branches have worked together before on projects like NATO and the Marshall Plan).

<sup>242</sup> *See* 1 U.S.C. § 112b(a) (communicating that if the agreement could cause national security issues, the executive branch should notify the Committee on Foreign Relations in the Senate and the Committee on International Relations in the House of Representatives); *see also* Oleszek & Oleszek, *supra* note 70, at 64 (explaining the need to conduct some oversight in secret to protect the country).

<sup>243</sup> *See* Oleszek & Oleszek, *supra* note 70, at 60 (finding that notification and oversight are important to provide transparency so that the American people can make informed decisions at election time).

Incorporating legislative oversight diminishes threats to American assets rather than the regulation of government contracts and foreign corporations. Critics of this amendment may state that the focus of the legislative branch's oversight should not be on the executive branch, but on government contracts or foreign companies. The material support statute already addresses this issue by limiting the interactions between private companies, individuals, and FTOs. Focusing on private entities would detract from the primary goal of this Note, which is to advocate for the legislative branch's increased involvement in foreign relations. If the United States deals with a threat requiring the release of material support, the proposed amendment provides a comprehensive plan to deal with that threat and assures the continued safety of the American people.

#### IV. CONCLUSION

Including the Case-Zablocki Act in the material support statute provides the legislative branch with the power to influence the actions of the executive branch. The Constitution allows the legislative branch some oversight in foreign relations, but the introduction of *Curtiss-Wright* halted the possibility of extending that power. Retaining the constitutionally protected rights of "Advice and Consent" and appropriations control permitted the legislative branch to minimally influence foreign policy. The enactment of the Case-Zablocki Act marked a turning point for the legislative branch. Tired of the marginalization, the legislative branch created a statute mandating the notification of any international agreement. Unfortunately, the Case-Zablocki Act is not enforced, and the involvement of the legislative branch in foreign relations remains small. In the specialized field of foreign negotiations for the release of material support, the introduction of the Case-Zablocki Act recreates the lost influence and oversight of the legislative branch, instituting a way for the legislative branch to rein in unchecked power of the executive branch in foreign relations.

Returning to the hypothetical posed at the beginning of this Note, Senator Jones realizes the hidden potential of the legislative branch to influence foreign policy and returns to chambers energized to rally fellow Senators to enforce the Case-Zablocki Act. As compared with the status quo, where few directions for the executive and legislative branches exist on negotiating with FTOs, this amendment offers a practical solution without infringing the separation of powers. The statute allows the executive branch to conduct the negotiations, but involves the legislative branch in a consultation and oversight role. To prevent a potential foreign relations disaster, this proposed statute provides a safeguard against inadvertently giving FTOs access to "material support" that could be used

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to create or purchase weapons. The addition to this statute will increase communication between the two branches of government and help the government to act in the best interest of the American people.

**Alyssa Spartz\***

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\* J.D. Candidate, Valparaiso University Law School (2016); M.A., Near Eastern Languages and Cultures, Indiana University (2009); B.A., History, University of Wisconsin-Milwaukee (2006). First, I would like to thank my family, John, Wendy, Drew, Erin, Steven, Morgan, and Leah for always believing in me, encouraging me to follow my dreams, and providing me with entertainment and laughter. Also, thank you to my friends near and far who listen to my complaining and yet, give me the strength to continue this journey. Your enthusiasm is contagious. Thank you to Professor Robert Knowles, who helped me organize this Note and find a topic that was interesting and timely. Additional thanks to my law review mentor, Lacey Wentworth. Your comments helped form my ideas into a readable, organized Note and I could not have done it without you. Finally, thank you to everyone who helped perfect my Note. I learned innumerable lessons from each of you and I hope you find those lessons reflected in this Note and throughout my legal career.