

Treaties and the Constitution

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." [Constitution, Art. 2, Sec. 2, cl. 2] Alexander Hamilton described this provision as "one of the best digested and most unexceptionable parts of the plan." [*The Federalist*, No. 75] But there is little doubt that this treaty power, as it operates today, is one of the least understood parts of the Constitution.

The "Advice and Consent of the Senate" quickly evolved into a requirement that the Senate approve (or disapprove) of treaties once they have been made by the President, rather than a formal Senatorial participation in the negotiation of treaties. A treaty has two functions. It is an international agreement, binding in international law until it expires or is terminated. A treaty can be terminated as provided in its terms, by impossibility of performance, or by a war between the parties. Or it can be terminated by a later statute enacted by Congress and signed by the President, or approved over his veto on the theory that the last act of the sovereign controls. There is also precedent for termination of treaties by action of the President with the consent of the Senate, without the consent of the House of Representatives.

However, in *Goldwater v. Carter*, in 1979, the President gave unilateral notice of the termination of the mutual defense treaty between the United States and the Republic of China (Taiwan), pursuant to the provision in the treaty allowing either party to terminate the treaty on one year's notice. This was the first time in American history that a President had attempted to terminate an important treaty without the approval of either house of Congress. The suit claimed that the President's notice of termination was ineffective without Congressional or at least Senatorial approval. The Supreme Court rejected the suit on procedural grounds without addressing the merits of the claim.

In addition to its function as an international agreement, a treaty is also the domestic law of the United States. This

follows from the Supremacy Clause (Art. VI, cl. 2): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land. . . ." And Article III, Section 1, clause 1, provides: "The judicial Power shall extend to . . . treaties made, or which shall be made. . . ." Under the Supremacy Clause, laws of the United States must be in pursuance of the Constitution if they are to be the supreme law of the land; treaties, however, are the supreme law if they are merely made under the authority of the United States. One explanation for the difference lies in the fact that the Treaty Clause was apparently designed to validate treaties made prior to the adoption of the Constitution, including the peace treaties restoring property of British subjects that had been confiscated by the states. Those treaties were not made "in pursuance of" the Constitution, which had not yet been adopted. It is clear from the records of the Constitutional Convention that treaties were intended to supersede state laws. Yet, it is also clear from *The Federalist Papers* that the treaty power was an aspect of foreign relations, with incidental supremacy over state law, and that it was not conceived as a grant of power to legislate by treaty over the entire range of domestic legislation reserved to the states. The language of the Treaty and Supremacy Clauses, however, does not clearly settle the matter.

Once it is approved by the Senate, a treaty is immediately effective, according to its terms, as an international obligation. Indeed, under international custom the United States would appear to be obliged to observe a treaty's terms — or at least not interfere with their operation — during the period after the President makes a treaty and before the Senate acts upon it. With respect to its function as domestic law, however, a treaty is either self-executing or non-self-executing. If it is self-executing, the treaty will immediately become effective as the domestic law of the land without the ne-

cessity of any legislation by Congress. If a treaty is non-self-executing, it will become effective as domestic law only upon enactment of implementing legislation by Congress.

In *Missouri v. Holland*, in 1920, the Supreme Court upheld a federal statute, enacted pursuant to a treaty with Canada, to regulate the hunting of migratory birds. An earlier act of Congress had been held unconstitutional as a violation of the commerce clause. The Court held that the treaty conferred power on Congress to enact the second statute, which would have been unconstitutional in the absence of the treaty. The opinion for the Court, by Justice Holmes, left unsettled the issue of whether there are any limitations on the treaty power. The Bricker Amendment, proposed in the 1950s but not adopted, provided that a treaty would become effective as the internal law of the United States only through legislation that would be valid in the absence of a treaty. The Bricker Amendment would have made every treaty non-self-executing as domestic law and would have required legislation enforcing a treaty to conform to the powers conferred by the Constitution apart from the treaty power.

In 1957, in *Reid v. Covert*, the Supreme Court allayed some of the fears that had led to the proposal of the Bricker Amendment. The Court held unconstitutional an executive agreement (with Great Britain) that authorized trial by court martial of civilian dependents of American military personnel, in time of peace, for offenses committed outside of the United States. The Court held, in effect, that the treaty power is subject to the Bill of Rights, including the Sixth Amendment protection of the right to trial by jury. In the same year, however, the Court upheld Status of Forces agreements that permitted the United States to cede to other countries jurisdiction to try an American serviceman for offenses committed in those countries. This case is probably explainable on the ground that military personnel may be subject to greater infringements on their constitutional rights than are civilians. The Fifth Amendment, for example, guarantees

the right to a grand jury "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." With respect to the denial of constitutional rights of civilians, *Reid v. Covert* would seem to indicate that the treaty power is subject at least to the protections guaranteed by the Bill of Rights.

It should be noted here that the President has not only the explicit power to make treaties but also the implicit power to make executive agreements with foreign nations. Such agreements do not require Senate approval.

In *U.S. v. Belmont* (1937) and *U.S. v. Pink* (1942), the Supreme Court had held that executive agreements made by the President with other countries have the same status as treaties with respect to their ability to override state laws. Executive agreements, therefore, are the supreme law of the land, as are treaties. *Belmont* and *Pink* involved the Litvinov Assignment, whereby the Soviet Union assigned to the United States certain Soviet claims to assets of Russian companies in New York banks. The New York courts had refused to honor the Soviet claims on the ground that it was contrary to New York's public policy to recognize an extra-territorial expropriation of property such as that involved in the Soviet claims. The Litvinov Assignment was part of the executive agreement by which President Franklin D. Roosevelt recognized the Soviet Union in 1933. In *Belmont* and *Pink* the Supreme Court held that the executive agreement, of which the Litvinov Assignment was a part, overrode New York law and that therefore the United States, acting on authority of that assignment from the Soviet Union, could recover those assets even though, prior to the executive agreement, the policy of New York had prevented recovery.

Reid v. Covert, in 1957, is significant as a direct holding that an executive agreement is unconstitutional on account of its infringement of a Bill of Rights protection. While no United States court has ever held a treaty unconstitutional, it is likely that both treaties and executive agreements will be held subject to at least some constitutional limitations, as the Supreme Court held in *Reid v. Covert* in 1957 with respect to the executive agreement that infringed the right to jury trial. ■

— CHARLES E. RICE

WORTH REPEATING

The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither one or the other. It relates neither to the execution of the subsisting laws nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

To have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. . . . It must indeed be clear to a demonstration that the joint possession of the power in

question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them.

— Alexander Hamilton
Federalist Paper #75

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. The idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.

— John Jay
Federalist Paper #64

It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void.

— James Madison
Federalist Paper #43

[The President of the United States] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. . . .

— U.S. Constitution
Article 2, Section 2