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Constitutional Law - Separation of Powers - Current Proposals to Limit International Compacts by the United States Government

Gordon Thompson

sion affirmed judgment for defendant."[82] Whether this one-sided ratio is indicative of district court cases not appealed is mere speculation, but the futility in appealing a decision is readily apparent. Without the aid of blood tests any attempt to refute a bastardy charge in court is so difficult that an out-of-court settlement is often more advantageous, both to the defendant's finances and his reputation. Certainly the infrequency of bastardy proceedings in North Dakota does not justify judicial and legislative inertia. The defendant in a bastardy action should not be denied the right to submit competent scientific evidence in his defense. To effect a remedy the Legislature should pass the Uniform Act *in toto*.

WILLIAM E. PORTER

CONSTITUTIONAL LAW — SEPARATION OF POWERS — CURRENT PROPOSALS TO LIMIT INTERNATIONAL COMPACTS BY THE UNITED STATES GOVERNMENT.—The American Bar Association recently recommended to the Congress the adoption of a constitutional amendment to the effect that treaties could become effective as internal law "only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty." [1] Designed, according to its sponsors, to ward off the danger that basic constitutional principles might be subverted by the use of the federal government's treaty-making powers, the proposal has provoked wide-spread controversy. Its opponents charge that it amounts to a drastic curtailment of the federal government's freedom of action on the international scene, and that it is unnecessary in view of well-settled principles of constitutional law.

Following the meeting at which this resolution was passed, the ABA's Standing Committee on Peace and Law Through United Nations took up the study of executive agreements. The Committee has since proposed that the American Bar Association recommend to Congress the following amendment to the Constitution:

N.D. 316, 216 N.W. 576 (1927); State v. Luithle, 57 N.D. 316, 221 N.W. 885 (1928); State v. Anderson, 58 N.D. 721, 227 N.W. 220 (1929); State v. Rudy, 62 N.D. 403, 244 N.W. 28 (1932); State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939).

81. State v. Burnette, 28 N.D. 539, 150 N.W. 271 (1914), State v. Sibla, 46 N.D. 337, 179 N.W. 656 (1920); State v. Weber, 49 N.D. 325, 191 N.W. 610 (1922); State v. Kvenmoen, 60 N.D. 60, 232 N.W. 475 (1930); Weisser v. Preszler, 62 N.D. 75, 241 N.W. 505 (1932); State v. Muldoon, 64 N.D. 564, 254 N.W. 475 (1934).

82. State v. McKnight, 7 N.D. 444, 75 N.W. 790 (1898).

1. The full text of the proposed amendment is as follows: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty." 76 A.B.A. Rep. 7 (1952) (Report of Standing Committee on Peace and Law Through United Nations).

"Executive agreements shall not be made in lieu of treaties. Congress shall have power to enforce this provision by appropriate legislation. Nothing herein shall be construed to restrict the existing power of Congress to regulate executive agreements under the provisions of this Constitution." [2]

Earlier last year, two similar resolutions were presented to Congress. Senator McCarran of Nevada introduced S. J. Res. 122 [3] and Senator Bricker of Ohio introduced S. J. Res. 130.[4] Both had the objective of curbing treaties and executive agreements, though by different methods. Senator McCarran would do so by legislation, while Senator Bricker's resolution called for contitutional amendment.[5]

In the light of these proposals, all of which have received some degree of public discussion in the press and elsewhere, it would seem desirable to examine the historical basis of the United States government's powers in the field of foreign affairs and the manner in which they have been exercised. For the immediate purposes of this discussion, a treaty may be defined as an international act approved by two-thirds of the Senate; all other international compacts of the United States are considered "executive agreements." [6]

Because the Constitution of the United States provides that treaties—together with the Constitution itself and the laws made pursuant to it—are the "supreme law of the land," [7] the view has often been expressed that there is a considerable danger that various fundamental liberties might be subverted through the use of treaties which would override the Federal Constitution, state constitutions, state laws and federal statutes.[8] Indeed, the possibility that a treaty could be used to overturn some of the provisions of the Federal Constitution became involved in the last presidential

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2. *Id.* at 14.
3. 98 Cong. Rec. 301 (Jan. 21, 1952).
4. 98 Cong. Rec. 920 (Feb. 7, 1952).
5. Either or both of these methods could be conceivably employed. Passing a statute would be effective at once, so far as the problem is susceptible of statutory treatment; Senator Bricker's proposed constitutional amendment would then remove any conceivable doubt.
6. McClure, International Executive Agreements 3 (1941).
7. U.S. Const., Art. VI, §2.
8. Deutsch, *The Treaty-Making clause: A Decision for the People of America*, 37 A.B.A.J. 659 (1951); Fleming, *Danger to America: The Draft Covenant on Human Rights*. 37 A.B.A.J. 739 (1951); Ober. *The Treaty-Making and Amending Powers: Do They Protect Our Fundamental Rights?*, 36 A.B.A.J. 715 (1950); Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A.J. 707 (1950). Opposing the proposed restrictions are Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305 (1952); Note, 19 Geo. Wash. L. Rev. 422 (1951); Wright, *The Constitutionality of Treaties*, 13 Am. J. Int. L. 242 (1919) (dealing with previous proposals of the same type).

election.[9] The immediate inspiration for much of the discussion is the well-known case of *Missouri v. Holland*[10] —a decision which has been bitterly assailed and, conversely, warmly defended.[11] The case arose from the efforts of the Federal Government to protect the migratory waterfowl of the nation from extermination at the hands of hunters. Since control of wild life had historically been vested in the states,[12] federal statutes proved ineffective.[13] A treaty was then entered into between the United States and Great Britain for the protection of the birds, and Congress proceeded to enact legislation specifying uniform hunting seasons. When the right of the Federal Government thus to do by indirection what it could not do directly was challenged by the State of Missouri, the Supreme Court of the United States upheld the supremacy of the federal statute passed pursuant to the treaty.[14]

Despite the furor it created among those who thought that the Tenth Amendment[15] had been violated, *Missouri v. Holland* can scarcely be termed precedent-shattering. In fact, precisely the same point of view had been adopted as early as 1796. The treaty of 1783 by which the War of Independence was concluded provided for the restoration of all lands and the payment of all debts owed to British citizens after the American Revolution.[16] However, the State of Virginia, during the Revolution, had passed legislation providing that all debts owed British citizens would be discharged by payment to the State. Many debtors who thought they had thus settled their accounts were understandably indig-

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9. Thus, in a political broadcast Mr. Clarence Manion, former Dean of the College of Law, University of Notre Dame, expressed the position of the proponents of the restrictions on the treaty power as follows: "In that list of treaties there are provisions which affect your right to practice religion, things which affect the freedom of the press, which affect your right to hold property, things which affect the rights of labor to organize and of management to meet with employees and to discuss with them the problems of their industry — all these things to be established by treaty law in spite of the determination of Congress, and in spite of the determination of the States . . ." Manion, Radio Address at South Bend, Indiana, October 31, 1952.

10. 252 U.S. 416 (1920).

11. *Compare* Black, *Missouri v. Holland — A Judicial Milepost on the Road to Absolutism*, 25 Ill. L. Rev. 911 (1931), *with* Wright, *supra* note 8, written a year before *Missouri v. Holland* was decided.

12. Geer v. Connecticut, 16 U.S. 519 (1896); Corfield v. Coryell, 6 Fed Cas. 546, No. 3, 230 (E.D.Pa. 1823). See Note, 26 N.D. Bar Briefs 274 (1950).

13. United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914), *app. dismissed*. 248 U.S. 594 (1919); United States v. McCullagh, 221 Fed. 288 (D.Kan. 1915); State v. McCullagh, 96 Kan. 786, 153 Pac. 557 (1915); State v. Sawyer, 113 Me. 458, 94 Atl. 886 (1915).

14. "No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power." Missouri v. Holland, 252 U.S. 416, 434 (1920).

15. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

16. 8 State. 80 (1783).

nant when the British creditors presented bills which the Americans felt had already been satisfied. However, in *Ware v. Hylton* [17] the United States Supreme Court held that the provisions of the treaty effectively superseded the state law on the subject.

The implications which it is possible—though not necessary—to draw from the knowledge that "treaties. . . . are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States," [18] has caused a growing uneasiness among those persons who consider themselves defenders of the rights of the states as opposed to the Federal Government. These fears were given added impetus last year by the fact that much of the government's position in the so-called *Steel Seizure* case [19]—which involved the power of the President to seize industrial plants important to the defense effort which were threatened with labor shutdowns—was based upon analogies drawn from precedents involving the foreign relations of the United States.

If it is possible to draw worrisome implications as to possible future changes in internal law from the potential scope of the treaty powers—which appear to be simply coextensive with the needs of the nation dealing as an equal with other sovereigns [20]—it is possible to point to even more far-reaching potentialities with respect to executive agreements. Treaties, at least, are subject to a constitutional check and balance. They must secure the approval of two-thirds of the Senate. But executive agreements do not legally require Congressional approval, though a large majority of them have been submitted to Congress and ratified by simple majorities of both houses. It has been pointed out that "In scores of cases—some of them involving policy of prime importance to the nation—(the president) has acted solely on his own initiative as well as on his own responsibility." [21] Nor is there any clear distinction between what subjects are appropriate for the use of executive agreements and what matters ought to be handled through treaties.

As in the case of the doctrine that the treaty power can be used to override state laws, the executive agreement stems from

17. 3 U.S. 199, 244 (1796). "Our Federal Constitution establishes the power of a treaty over the Constitution and laws of any of the states; and I have shown that the words of the Fourth Article were intended, and are sufficient, to nullify the law of Virginia and the payment under it."

18. Baldwin v. Franks, 120 U.S. 678, 683 (1886).

19. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

20. Asakura v. City of Seattle, 265 U.S. 332 (1924); United States v. Curtiss Wright Export Corp., 299 U.S. 304 (1936).

21. McClure, International Executive Agreements 3 (1941).

the early days of the nation's history. Benjamin Franklin negotiated an executive agreement modifying an existing treaty with France in 1784,[22] while Timothy Pickering, Postmaster General under Washington, used the device of the executive agreement in arranging for the interchange of mail with Canada. *To this day,* about two-sevenths of all executive agreements are bipartite postal arrangements.[23] By far the most famous of the early executive agreements was that between the United States and Great Britain regarding limitation of armament on the Great Lakes.[24] Although Louisiana, Florida, the Gadsden Purchase, Alaska and the Virgin Islands were acquired by treaty, Texas and Hawaii were absorbed by executive agreement.[25] Texas, for example, was absorbed as a state although the treaty of annexation failed to pass the Senate.[26]

A famous instance of the use of the executive agreement occurred during the administration of Theodore Roosevelt. The financial breakdown of the Dominican Republic had caused threats of European intervention. When the Senate refused to ratify a treaty which Roosevelt submitted to it for the purpose of allowing the United States to intervene effectively in the situation, Roosevelt accomplished the same purpose through the use of an executive agreement.[27] Two years later a treaty was ratified putting an end to his fears that the agreement would not survive his term of office.[28]

The history of World War I is replete with bipartite agreements made by the United States.[29] Similarly, a preview of World War II was provided by the agreement reached in 1940 with Great Britain for the lease of certain bases to the United States in return for fifty destroyers,[30] and the agreements made toward the close of the conflict remain a subject of considerable political controversy even today.

This brief discussion of the role of the executive agreement should be sufficient to suggest that, in comparison to the device of

22. 2 Miller, Treaties and Other International Acts of the United States 185 (1931).
23. McClure, International Executive Agreements 5 (1941).
24. McClure, *op cit. supra* note 23, at 13.
25. *Id.* at 13.
26. *Id.* at 62.
27. *Id.* at 30.
28. Roosevelt, An Autobiography 553 (1913).
29. The first Liberty Loan Act on April 24, 1917, provided for American purchase of Allied government obligations with a view to establishing credits. All told, war and reconstruction loans reached a sum of about nine and one-half billions of dollars. When peace treaties with Austria, Germany and Hungary failed to get the necessary approval, Congress adopted a joint resolution declaring the war at an end. Debt settlement agreements following the war were ratified by Congress. The vote in the case of Italy was sufficiently close, 54-33, to have prevented a two-thirds ratification of a treaty. McClure, *op. cit. supra* note 23, at 118.
30. 54 Stat. 2405 (1940) (executive agreement).

the treaty, the executive agreement is by far the more important medium available to the United States government for the making of international compacts. This situation — carrying with it the corollary of decreased Congressional participation in the handling of foreign affairs—has not passed unnoticed by the Congress. Thus, Senator Robert A. Taft remarked in 1942, "As a matter of fact, no treaties of any importance have been submitted to the Senate since I have been a member of the body." [31] And the late Professor Borchard, in 1944, said that, "If the Senate waives its treaty prerogatives long enough in the face of a continuing Presidential determination to make compacts with foreign countries by executive agreements, the Senate may, by such default, lose its constitutional prerogatives altogether." [32]

Despite these criticisms of current procedure, however, it may be doubted that the trend toward the increased use of the executive agreement rather than the treaty will be reversed in the future.[33] A pragmatic reason may be suggested: That experience in the past has proved that the use of the treaty method too often tends to involve the international relations of the United States in the vagaries of internal politics, with sometimes disastrous results.[34] This suggests that in the future, the courts, in their consideration of the legal problems involved in the use of such agreements, will probably be motivated by the influences suggested by Mr. Justice Holmes. "The very considerations which judges most rarely mention, and always with an apology, are the secret root form which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned:" [35] This process has long since been carried to the point where the executive agreement has attained a respectable legal position. "To doubt their validity in law at this day would be almost as futile as to doubt their existence in fact." [36]

The precise effect of the executive agreements as compared with a treaty has also caused discussion. It has been argued that both have precisely the same force. Thus, McClure states that "The President can do by executive agreement anything that he can do by treaty, providing Congress by law cooperates. And

31. 98 Cong. Rec. 9276 (1942).
32. Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 Yale L.J. 677 (1944).
33. McClure estimates that the United States entered into 1200 executive agreements from 1789 to 1939. During the same period about 800 treaties were put in force.
34. E.g., the Treaty of Versailles, following World War I.
35. Holmes, The Common Law 35 (1881).
36. McClure, International Executive Agreements 189 (1941).

there is a very wide field of action in which the cooperation of Congress is not necessary; indeed, where Congress possesses no constitutional authority to dissent." [37] On the other hand, a careful study has reached the following conclusions:

"From the point of view of international law, treaties and executive agreements are alike in that both constitute equally binding obligations upon the nation. From the point of view of our constitutional law, however, there are important differences of substance as well as of form. Treaties may be negotiated which depart widely from our existing laws or policies, and the Senate in approving their ratification is subject to no restraint or consideration within the general limits of the treaty-making power under our form of government other than what is best for our nation. But the President in making executive agreements has no such free hand. He must act scrupulously within the laws and conform to the policies already established by the Congress." [38]

The international compacts presently in use by the United States have been divided into five distinct categories: [39]

1. *Treaties,* that is, agreements to which two-thirds of the Senators give "advice and consent." These are never referred to the House of Representatives.

2. *Congressional-Executive agreements,* that is, agreements negotiated by the Executive with the authority of both houses of Congress. A simple majority is adequate.

3. *Agreements* made pursuant to authority conferred in an existing treaty and agreements in effectuation of a policy enunciated in a treaty.

4. *Presidential Agreements,* that is, agreements made by the President in his capacity as the "sole organ of the nation in its external relations and its sole representative with foreign nations." [40]

5. *Agreements made by the President pursuant to overlapping authority,* that is, where Congress authorizes the President to enter into an agreement dealing with a question which under the Constitution is also subject to independent Presidential control.

It is the fourth classification, above, which has generated the most controversy because of the extensive nature of the powers

37. McClure, *op. cit. supra,* at 363. And see McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 Yale L.J. 199, 201 (1945). "There is no difference between treaties and agreements aside from the method used in obtaining them."

38. Sayre, *The Constitutionality of the Trade Agreements Act,* 39 Col L. Rev. 751, 755 (1939).

39. McDougal and Lans *supra* Note, 37, at 204 *et seq.*

40. This is a description of the Presidential function first used by John Marshall while a member of the house of representatives. See note 39, *supra.*

which the President is enabled to employ through the use of such agreements. These have customarily been exercised by "strong" Chief Executives in a vigorous manner, as witness Theodore Roosevelt's agreement with the Dominican Republic,[41] and Franklin Delano Roosevelt's agreement to give the British fifty over age destroys shortly before the United States became embroiled in World War II. It should be pointed out, moreover, that such agreements affect this country in other spheres than that of the exclusively international. They are, in many instances, effective to alter the internal rights of citizens despite state laws to the contrary. Thus, in the *Litvinov Assignment cases,*[42] an exchange of notes between President Franklin Roosevelt and Maxim M. Litvinov, People's Commissar for Foreign Affairs, resulted in the United States extension of de jure recognition to the Union of Soviet Socialist Republics. One of the agreements entered into as a condition to recognition assigned Russian property to the United States in liquidation of claims held by this government against the U.S.S.R. In the meantime, property belonging to a Russian insurance company which had been nationalized by the revolutionary government in Russia had been distributed in New York according to that state's law. It was held that the de jure recognition extended to the Russian government carried with it acceptance, so far as this government was concerned, of the legality of the Soviet decrees of confiscation; and since the Soviet rights had been transferred to the United States government by the assignment, it could take possession of the New York assets of the Russian firm despite the fact that New York law was to the contrary.[43]

As late as the time of Theodore Roosevelt, the feeling prevailed that an executive agreement might not survive the term of an incumbent president.[44] At present, it is generally held that such agreements are as enduring as treaties.[45] Both the proposals of Senator McCarran and Senator Bricker seek to limit the effective duration of executive agreements to either six months or one year after the term of the president who makes them expires, unless they

41. Roosevelt, An Autobiography 552 (1913).

42. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

43. "A treaty is the law of the land under the supremacy clause of the Constitution. Such international compacts and agreements as the Litvinov assignment have a similar dignity." United States v. Pink, 315 U.S. 203, 230 (1942).

44. Roosevelt, An Autobiography 552 (1913).

45. "Indeed, confronted with the extent of the variety exhibited by even a very few of the historical facts bearing upon the subject, one finds manifest difficulty in contending that the Constitution, whether with respect to the authorized treaty-making power or otherwise has set up exclusive directions regarding either the conclusion or the dissolution of international acts, whether executive agreements or treaties." McClure, International Executive Agreements 29 (1941).

are extended by the next administration. However, a former Solicitor General of the United States has said of these proposals: "The provision. . . . that executive agreements would terminate, unless extended, after the end of the term of the President within whose tenure they were negotiated, would impose obvious and crippling impediments to the effective negotiation of and adherence to all sorts of executive agreements, frequently of an administrative character, whose nature presupposes a relatively long term." [46]

Opinions as to the intrinsic worth of the proposals put forth to limit the power of the American government in foreign affairs will, of course, take varying positions. But it seems possible, nevertheless, to suggest a few conclusions with respect to them. The customary justification urged for the adoption of the amendment providing that treaties should become effective as internal law "only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty" is that in other nations this is the course generally followed. It is certainly true that few other nations make treaties effective as a portion of their internal law without legislative action; in that respect, the United States is unique. If, therefore, the proposed amendment were to provide only that a treaty should not become effective as internal law unless legislation implementing the treaty as such were thereafter enacted by Congress, it would have the effect of placing this country on the same footing as many others. But it is to be noted that the proposed amendment did not say that treaties were to become effective as internal law "only through legislation by Congress." Added to the foregoing clause is another of much more far-reaching effect, not perceived until the section is carefully analyzed: the legislation must be of a class which the Congress "could enact under its *delegated* powers in the absence of such treaty." If this proposal were to become law, it seems clear that the ability of the United States to carry on successful international negotiations would be seriously hampered. The United States can scarcely hope to be able to bargain effectively for non-discriminatory treatment of American nationals living in foreign nations, for instance, unless it is able to offer to the foreign governments a reciprocal guarantee with respect to foreign nationals living here. But how could it do so if the protection it sought for American citizens abroad was of a type Congress could not reciprocally furnish to foreign nationals in this country because of its inability to

46. Perlman, *On Amending the Treaty Power*, 52 Col. L. Rev. 863 (1952).

exercise any but specifically delegated powers? [47] The proposal to limit the treaty power seems clearly unsound.

The various proposals to curtail executive agreements may be criticized on basically similar grounds. Almost from the beginning of the nation's history, there has been a controversy over the scope and nature of the authority vested in the executive department by the Constitution. Theodore Roosevelt gave one view of the matter a classic enunciation when he stated his position to be "that it is not only (the President's) right but his duty to do anything that the needs of the nation (demand), unless such action (is) forbidden by the Constitution or by the laws." [48] His successor took a different view, arguing that, "The president can exercise no power which cannot fairly and reasonably be traced to some specific grant power, or justly implied and included within such grant of power and necessary to its exercise. . . . There is no undefined residuum of power which he can exercise because it seems to him to be in the public interests." [49]

Whatever the limits upon the president's powers in purely internal affairs, in the field of foreign affairs the power of the executive is plenary, subject to subsequent approval in certain instances by Congress. And it seems equally clear that it *ought to be so.* To impose upon the government of the United States, enmeshed in the web of the international community whether it wishes or not, limitations upon its freedom of action in the field of foreign affairs is to place the United States at a serious disadvantage in dealing with foreign sovereigns which recognize no such restrictions upon their own powers. In an atomic era, the need for quick and decisive action is obvious. The present distribution of power specified in the Constitution has served well throughout the nation's history. To change it now appears both unnecessary and unwise. So long as the United States remains a democratic nation, the ultimate remedy for any abuses of the power to conduct foreign affairs will rest in the hands of the people.

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47. An illustration may clarify the point. In *Asakura v. City of Seattle,* 265 U.S. 332 (1924), the Supreme Court upheld the contention of a Japanese citizen living in Seattle that under a treaty between the United States and Japan containing a non-discrimination clause he was entitled to operate a pawnshop despite the argument of the City of Seattle that a municipal ordinance forbidding aliens to engage in pawnbroking was an exercise of the police power which the Constitution reserves to the States. Presumably if the proposed amendment to the treaty power were adopted, the decision would necessarily go the other way as to similar cases in the future. What chance would there then be of securing similar rights for American nationals doing business in foreign countries?

48. Roosevelt, An Autobiography 388 (1913).

49. Taft, Our Chief Magistrate and His Powers 141 (1916).