1952

The Structure of Federal Power over Foreign Affairs


Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2586

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
THE STRUCTURE OF FEDERAL POWER OVER FOREIGN AFFAIRS*

Wm. W. Bishop, Jr.**

In discussing the structure of federal power over foreign affairs, it seems appropriate to examine the problems first from the standpoint of our own constitutional law and then to see what international law may contribute to our understanding of the subject. It is desirable to look at the general power to carry on foreign affairs, which lies solely with the federal government rather than with our several states and over which the federal executive has predominant influence. Then it seems well to look at the power to make international agreements, both in the form of treaties and of agreements made by the executive alone or by the executive with the collaboration of both Houses of Congress. Our powers with respect to international organizations should be touched on and bare mention made of the war power. Turning to the viewpoint of international law, the United States is seen to have the same powers as any other nation, regardless of political structure. Finally, regardless of all questions of legal powers, the really important thing to stress is the need for cooperation between the organs of government, rather than to emphasize the constitutional system of "checks and balances"; our system of government works well if there is both the will and the understanding needed to make its operation effective.

What does the Constitution say about powers with respect to foreign affairs? In the first place, the President is given the power to "nominate, and by and with the advice and consent of the Senate, . . . appoint" ambassadors, other diplomatic officers and consuls;


**Professor of Law, University of Michigan (with the assistance of Douglass E. Dayton, University of Michigan Law School).
and to "receive ambassadors and other public ministers." He is made the "Commander-in-Chief of the Army and Navy of the United States." He is given the "Power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." He is charged with "care that the laws be faithfully executed." Finally, we note that "the Executive power shall be vested in a President of the United States of America." These indeed are broad grants of power to deal with the field of foreign affairs, and the interpretations placed upon them by the courts and by the other organs of our government to broaden rather than to narrow the executive control over foreign relations.

The Senate has specific functions with respect to the approval of treaties and the confirmation of diplomatic and consular officials of the United States. In fields touching upon foreign affairs Congress is given the power to regulate foreign commerce, to establish a uniform rule of naturalization, to regulate the value of foreign coin, to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," "To declare war . . . and make rules concerning captures on land and water," "To raise and support armies" and "To provide and maintain a navy," and "To make rules for the government and regulation of the land and naval forces."

Finally, the several States are prohibited from entering into "any treaty, alliance, or confederation," and "No State shall, without the consent of Congress, . . . keep troops or ships of war in time of peace, enter into agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

In the course of his opinion in United States v. Curtiss-Wright Corporation Mr. Justice Sutherland said:

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union."
... In this 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. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613.'

**Determination of Policy**

In the day to day conduct of foreign affairs the most important power of the President lies in his control over the formulation of foreign policy and the execution of such policy through the Department of State and American diplomatic and consular representatives abroad, the executive being the channel through which communications from foreign governments are received. Undoubtedly the Senate or the House of Representatives or both Houses of Congress may by resolution express their views regarding the proper action to take in any international political incident, but it is the executive branch of the government which has the authority and the responsibility to formulate the policy and make the decisions. Leaving aside the specific powers granted to Congress in such matters as the declaration of war, maintenance of our military forces, control over foreign commerce, and the "power of the purse strings," Congress lacks legal capacity to determine what shall be the course of action in foreign affairs. Of course no President or Secretary of State will in practice disregard the views of Congress or of its more influential members, any more than they will disregard public opinion. However, unless one of the specific powers of Congress (or the Senate) is involved, there seems to be no legal method of constraint upon the freedom of executive discretion in matters of foreign affairs—save in so far as the possibility of impeachment may lie in the background.

As an example of this federal executive control over the formulation of policy, and as a power specifically derived from that to send and receive ambassadors, we find that the decision of the executive is completely controlling on the question of whether to recognize or to deny recognition to a foreign state or government.

2. On the executive as the sole proper channel of communication with foreign nations, see 4 Moore, Digest of International Law 680 (1906) [subsequently cited as Moore's Digest]; 4 Hackworth's Digest of International Law 642 (1940-1944) [subsequently cited as Hackworth's Digest].
At times Congress has been consulted or has expressed its views in advance. In 1906 John Bassett Moore wrote:

"In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes . . . according to the rules of international law, a formal recognition. In numerous other cases the recognition was given by the Executive solely on his own responsibility."³

In 1819 Monroe's Cabinet discussed the question of recognition of the newly formed Latin-American Republics. Attorney General Wirt and Secretary of the Treasury Crawford thought approval of the Senate, and House appropriation for ministers' salaries, desirable. Secretary of State J. Q. Adams took a strongly contrary position, pointing out that Washington and Madison as Presidents had made their own decisions on recognition. In his message to Congress March 8, 1822, presenting the question of recognition, President Monroe said he did so in order that there might be "such cooperation between the two departments of the Government as their respective rights and duties may require." He recommended recognition and suggested that if Congress concurred they would make the necessary appropriation. $100,000 was appropriated "for such missions to the independent nations of the American continent as the President . . . may deem proper."⁴

It seems perfectly clear at the present time that the legal power to decide whether to recognize the Chinese Communists or the Nationalists as the Government of China rests in the hands of the President alone.⁵ Indeed, it was held in United States v. Pink that the power to recognize the Soviet Government carried with it "the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees" and their effect on property which was in the United States. In this respect the Court held that "the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy."⁶

³. 1 Moore's Digest 243-244.
⁴. Id. at 244-245.
⁵. 1 Hackworth's Digest 161-165.
Furthermore, we find that the courts refrain from passing upon many of these questions involving foreign affairs, calling them "political questions." Thus in *Oetjen v. Central Leather Co.*, Justice Clarke said:

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative —'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

Applying this principle, Justice Gray said in *Jones v. United States*:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."

**Treaty-making Power**

The constitutional provision with respect to the making of treaties is broad and unlimited in its scope. The Constitution states that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land..." No treaty has ever as yet been held unconstitutional by the Supreme Court, although the Court feels free to pass upon the question of constitutionality of treaties. Indeed, it is unlikely that the Supreme Court will ever hold a treaty unconstitutional, since it is difficult to conceive of two-thirds of the Senate approving any treaty which the Court would hold unconstitutional, even if the executive branch

---


8. 137 U. S. 202, 212 (1890). In Guaranty Trust Co. v. United States, 304 U. S. 126, 137 (1938), Justice Stone said:

"What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, although they are free to draw for themselves its legal consequences in litigations pending before them."
of the government should go so far as to conclude it. It is far more likely that the President and Senate will prove unwilling to go even so far in the exercise of the treaty-making power as the Supreme Court might well allow.

In the early days of the Constitution, Thomas Jefferson wrote in his Manual of Parliamentary Practice that proper subjects of the treaty-making power: (1) must concern the foreign nation; (2) must be "objects which are usually regulated by treaty, and cannot be otherwise regulated"; (3) must not include "the rights reserved to the states"; and (4) must also exclude "subjects of legislation" upon which power was conferred on the Congress.

What is left at the present time of Jefferson's criteria? The last is clearly incorrect; from the very beginning of our government treaties have been made with respect to foreign commerce, customs tariffs, naturalization, and numerous other topics with respect to which Congress is expressly granted power to legislate. With respect to a report of the Senate Committee on Foreign Relations in 1844, criticizing a proposed reciprocity treaty with Prussia on the ground of the lack of "constitutional competency" to make a treaty allegedly invading the field of legislative powers delegated to Congress, Secretary of State Calhoun wrote:

"If this be the true view of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution. . . . So far, indeed, is it from being true, as the report supposes, that the mere fact of a power being delegated to Congress excludes it from being the subject of treaty stipulations, that even its exclusive delegation, if we may judge from the habitual practice of the government, does not—of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has

9. "By the Constitution of the United States, this department of legislation is confined to two branches only, of the ordinary legislature; the President originating, and the Senate having a negative. To what subject this power extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, res inter alios acta. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and can not be otherwise regulated. (3) It must have meant to except out of these the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others." 5 Moore's Digest 162.
been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation.110.

As for matters normally reserved to the states, the Supreme Court in a long series of cases has approved action by the treaty power even though Congress might lack the power to make laws in the absence of treaty. Although the control of a state over debts would normally not fall within the federal power, in *Ware v. Hylton*11 the Supreme Court held that the treaty of peace with Great Britain enabled British creditors to recover debts from American citizens who had paid such debts into the Virginia State Treasury during the Revolution under the authority of a Virginia law sequestrating debts owed to British subjects.

Obviously the power of a state over the ownership and devolution of real property within its borders is normally unaffected by the powers delegated to Congress. Nevertheless, from early times the Supreme Court has upheld and given effect to treaties between the United States and foreign nations under which aliens were given rights and privileges with respect to the acquisition or inheritance of real and personal property located within our states. As the Supreme Court said in *Hauenstein v. Lynham*, "We have no doubt that this treaty is within the treaty-making power conferred by the Constitution."112 On this question Secretary of State Livingston wrote to the Russian chargé d'affaires in 1831,

10. Secretary Calhoun to Mr. Wheaton, minister to Prussia, June 28, 1844; see 5 Moore’s Digest 164. See also speech of Sen. Kellogg of Minnesota of August 7, 1919, 58 Cong. Rec. 3680 (1919); 5 Hackworth’s Digest 10-13.

11. 3 Dall. 199 (U.S. 1796). See also Hopkirk v. Bell, 3 Cranch 454 (U.S. 1806). In the *Ware* case, Justice Chase expressed doubt whether the Court had power to declare a treaty void, saying “If the court possess a power to declare treaties void, I shall never exercise it but in a very clear case indeed.” 3 Dall. 199, 237 (U.S. 1796). On this point see also United States v. Reid, 73 F. 2d 153, 155 (9th Cir. 1934).

"By the Federal Constitution the several States retained all the attributes of sovereignty which were not granted to the general government. The right of regulating successions in relation to the subject in question is not among those conceded rights; consequently it was reserved to, and is still vested in, the several States. But by the same Constitution it is provided that treaties made under the authority of the general government shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding."

In 1920 the Supreme Court upheld the validity of the Migratory Bird Treaty of 1916 with Great Britain, despite the contention that the treaty and the statute of 1918 implementing it violated the reserved powers of the states. In this famous case of Missouri v. Holland, Mr. Justice Holmes said:

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . .

"It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. United States v. Shawver, 214 Fed. Rep. 154. United States v. McCullagh, 221 Fed. Rep. 288. . . .

"Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of

13. 5 Moore's Digest 177.
15. The Tenth Amendment provides: "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."
Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."  

In like vein, Chief Justice Hughes said of treaties with Persia and Italy regarding decedents' estates:

"The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield."  

Although the control of an occupation like pawn-broking seems clearly to fall within the reserved powers of the States, in Asakura v. Seattle the Supreme Court held invalid a Seattle ordinance limiting pawn-broking to citizens, as being in violation of the treaty with Japan giving Japanese nationals the "liberty" to engage in "trade" on the same terms as citizens. Justice Butler said:

"The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations."  

Neither the Supreme Court nor the course of practice has made entirely clear the scope or the limitations of the doctrines expressed in the foregoing cases, but we may safely say that the mere fact that power to legislate upon some subject is reserved exclusively to the states does not prevent the validity of a treaty dealing with that subject.

As for Jefferson's second criterion, that the treaty-making power is limited to the "objects which are usually regulated by treaty," there appears to be little disposition to say that the United States cannot be among the first nations to enter into treaties regarding

subjects undreamed of in 1789, such as radio or aviation. However, courts, statesmen and writers are all inclined to refer to the prevalence of similar treaties when giving their reasons in support of the constitutionality of any agreement which has been questioned.10

There still seems validity in Jefferson's first test, that the treaty "must concern the foreign nation"; at least it is difficult to conceive of the President and Senate actually entering into international agreements which do not deal with matters of international concern. Of course the scope of "matters of international concern" has greatly broadened with the passage of time; at the present day in a more closely knit world there may be grave international concern regarding matters which a few years ago would have been considered domestic questions entirely inappropriate for action by any but the nation on whose territory they took place or whose citizens they immediately affected. Despite this constantly changing standard of what may be considered "matters of international concern," it should be noted that in the interval after he was Secretary of State and before he became Chief Justice, Charles Evans Hughes said in 1929:

"It seems to me that, whatever doubts there may originally have been or may yet linger in some minds in regard to the scope of the treaty-making power, so far as it relates to the external concerns of the nation there is no question for discussion. I think it is perfectly idle to consider that the Supreme Court would ever hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power of the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated.

"... I have been careful in what I have said to refer to the external concerns of the nation. I should not care to voice any opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such... But if there is a limitation to be implied, I should say it might be found in the nature of the treaty-making power.

"... The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be

19. In Holden v. Joy, 17 Wall. 211, 242-243 (U.S. 1872) Justice Clifford said of the treaty-making power "it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."

In In re Ross, 140 U. S. 453, 463 (1891) Justice Field said: "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."
exercised, it may be assumed, with respect to matters that have no relation to international concerns."^{20}

As of the present time, we may agree with Justice Field's statement in *Geofroy v. Riggs*:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."^{21}

Numerous dicta in Supreme Court opinions as well as statements in public documents and by writers support the view that a treaty cannot validly contravene specific provisions of the Constitution.^{22}

---


22. Secretary Marcy wrote in 1854 with respect to the possible conflict between the consular convention with France which granted certain immunities to a consul and the provision of the Sixth Amendment to the Constitution giving the right to defendants in criminal prosecution to have compulsory process to have the attendance of witnesses: "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition. . . . Neither Congress nor the treaty-making power are competent to put any restriction on this constitutional provisions." 5 Moore's Digest 167. Likewise Secretary Blaine wrote in 1881 that: "A treaty, no less than the statute law, must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision
There has from time to time been discussion of the dictum in *Geofroy v. Riggs* regarding the cession by treaty of any portion of the territory of a state without its consent. In the only cases where such territory has been ceded, namely in the cases of the northeastern boundary in 1842 and the treaty with Mexico for the elimination of "bancos" along the Rio Grande, consent was in fact obtained from the states of Maine, Massachusetts, and Texas respectively. Despite the dicta, however, views have been expressed by responsible official that by treaty the United States *could* cede territory belonging to a state although discretion would forbid doing so without the state's consent.23

To summarize, then, it may be safely said that the treaty-making power extends to all matters of international concern where the conclusion of a treaty may become necessary and desirable—so long as no specific guarantee of the Constitution is violated. Thus there would appear to be no constitutional limitation upon the United States becoming a party to the Genocide Convention,24 or to the present draft of the International Covenant of Human Rights,25 whether or not one may believe that it would be wise policy to do so.

Does this mean that we are to fear that the treaty-making power will supersede all other governmental organs? Need we really join some of the recent doubters in the circles of the American Bar Association,26 or the 1917 writer who asked:

"Have we granted the President the power, if two-thirds of the Senate concur, to contract some of our citizens into slavery on foreign soil in order to acquire for the rest of us desirable


rights?... [Or] an agreement that all the inhabitants of California shall be transplanted to Formosa, a selected number to be devoured by cannibals, the rest to labor as Japanese slaves, and in their place the State of California to be populated by Japanese citizens with autocratic powers?27

Obviously not, even as a purely theoretical matter, in view of what we have seen regarding constitutional restraints on the treaty power. And as a practical matter, there is wisdom in Professor Chafee's statement that:

"The truth is that legislators and office holders in free countries possess all sorts of enormous powers which will never be used, because they are controlled by what Dicey calls internal sanctions. They exercise their authority in accordance with their character, which is itself moulded by the circumstances under which they live, including the moral feelings of the time and the society to which they belong. So love for fundamental freedoms is a part of ourselves and those whom we elect. . . . Parliament, being unrestrained by any constitution, has power to repeal the Habeas Corpus Act any day. It can, but it won't. King George and the Labor Cabinet can dismantle the British Navy, without needing any statute. They can, but they won't. President Truman has complete constitutional 'power to grant . . . Pardons for Offences against the United States.' Hence he might turn every prisoner in Alcatraz loose tomorrow, and nobody on earth could prevent him. He can, but he won't."

In reality we may trust the President and the Senate in this field at least to the extent of believing that any treaty which violates the Constitution or which does not deal with a matter of international concern will have no chance of obtaining favorable action by two-thirds of our Senators in addition to the President.

However, just because of this great breadth of the treaty-making power, including subjects which are reserved to the states so far as concerns interference through the legislative competence of Congress, there is need for the inclusion of a federal-state clause29

28. Chafee, supra note 22, at 443.

"In the case of a Federal State, the following provisions shall apply:

"(a) With respect to any articles of this Covenant which are determined in accordance with the constitutional processes of that State to be appropriate in whole or in part for federal action, the obligations of the federal government shall to this extent be the same as those of parties which are not Federal States;"
in some proposed treaties if we wish to ensure that such treaties will not make a change in the actual division of powers between the state and federal governments such as was brought about by the earlier treaties regarding payments of debts, ownership and inheritance of land, or protection of migratory birds. When it is considered desirable to prevent any such shift of authority to the federal government, this precaution can and should be attempted either by careful drafting or by appropriate reservation.

**Executive Agreements**

Although the Constitution specifies only the treaty-making process (involving the President and Senate), from the early days of our government international agreements have been made by the President which did not constitute treaties in the domestic constitutional sense. Such agreements are known in our constitutional parlance as "executive agreements," whether they be made by the President alone or by the President in conjunction with both Houses of Congress acting by majority vote in each House. They may be made by the President alone within the scope of his power to conduct foreign relations or his power as Commander-in-Chief, as was the case with the "Destroyer-Naval Bases" arrangement of September 9, 1940,30 with respect to which his authority was upheld by the Attorney General.31 The power of the President to enter into such agreements is broad. You will all recall the Supreme Court's approval of the agreement between the United States and the Soviet Union known as the Litvinov Assignment in connection with the recognition of the U.S.S.R. in 1933, whether or not one agrees with the application of that agreement in *United States v. Pink*32 and *United States v. Belmont*. In the *Belmont* case Justice Sutherland said for the court:

"The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution . . . , require the advice and consent of the Senate . . . an international compact, as this was, is not always a treaty which requires the participation of

30. 54 Stat. 2405 (1940).
32. 315 U. S. 203 (1942).
the Senate. There are many such compacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations.33

In the case of agreements made by the President under specific authorization of Congress (as with the American entry into the ILO), under general congressional authorization (as with postal agreements and the Hull Reciprocal Trade Agreements), or on the condition that the agreement becomes effective only when approved by Congress (as in the case of the 1942 fur seal agreement with Canada or the funding agreements for the World War I loans), this power is as broad as the powers of the President alone added to the powers of Congress in the general field of foreign affairs. There has been little litigation testing the validity of such agreements but they have received the approval of the Supreme Court.34

There is no doubt that within a very wide field the powers of the President and Congress to enter into international agreements is co-extensive with the power of the President and Senate to make treaties.55 The courts have not yet told us the limitations upon this manner of entering into international agreements. Certainly there is no reason to suppose that the Constitutional prohibitions limiting the treaty-making power (such as those of the Bill of Rights) do not equally restrict such Congressional-executive agreements. And on the evidence before us, it is by no means sure that the President and Congress may by executive agreement do everything which may be accomplished by the treaty-making process; we do not know whether the President and Congress could invade the sphere usually reserved to the States so far as can the treaty-making power in situations like *Missouri v. Holland* or cases involving land or engaging in local occupations discussed above. Wallace McClure has written that:

"... the President, acting with Congress, where simple majorities prevail, can, in the matter of international acts, legally accomplish under the Constitution anything that can be legally accomplished by the treaty-making power. ... There is nothing

33. 301 U. S. 324, 330-331 (1937).
34. Altman & Co. v. United States, 224 U. S. 583 (1912); Field v. Clark, 143 U. S. 649, 681-694 (1892).
that can be done by treaty that cannot be done by Congress-confirmed executive agreement."

Leaving aside those who strongly oppose the use of executive agreements, we find the more cautious conclusion of Professor Hyde, a former Solicitor of the Department of State, who wrote in 1945 that:

"The recourse to executive agreements . . . however impressive in scope and development, fails to show that the Government has in fact acted on the theory that the President, with or without the aid of Congress, may conclude in behalf of the United States any arrangement which could be concluded through the instrumentality of a treaty. There have been, moreover, instances where a Secretary of State has felt that for purposes of agreement the use of a treaty was obligatory."

Whatever may be the ultimate development of the law in this field, it appears that in practice the Executive and Congress are unwilling to go so far as some writers say that they may. As of the present time, certain types of international agreement are normally made by the treaty process alone. In the actual opinion of the public officers handling such agreements, some fields are regarded as suitable for action by President and Senate, rather than by President and Congress. But there is a very broad area in which the President may decide freely whether the agreement should be framed as a treaty for approval by the Senate or as an agreement for approval by Congress.

**Participation in International Organizations**

The United States takes part in the work of international organizations pursuant to both treaties and executive agreements under approval of Congress. Thus under the treaty process the United States became, through presidential ratification following the advice and consent of the Senate, a member of the United Nations, the Organization of American States, the International Union for the

---


38. 2 Hyde, *International Law* 1416 (2d ed. 1945).


40. 96 Cong. Rec. 13608, 13613.
Protection of Industrial Property,\textsuperscript{41} the International Telecommunications Union,\textsuperscript{42} the International Civil Aviation Organization,\textsuperscript{43} and such bilateral organizations as the International Joint Commission (dealing with boundary waters with Canada).\textsuperscript{44} Organizations in which the United States acquired membership through becoming a party to agreements pursuant to the authorization of both Houses of Congress include the Food and Agriculture Organization,\textsuperscript{45} the International Labor Organization,\textsuperscript{46} the International Monetary Fund,\textsuperscript{47} the International Bank for Reconstruction and Development,\textsuperscript{48} the International Refugee Organization,\textsuperscript{49} the United Nations Educational, Scientific and Cultural Organization,\textsuperscript{50} the World Health Organization,\textsuperscript{51} and the Universal Postal Union.\textsuperscript{52}

The policy and action of the United States in these international organizations appears to be controlled by the executive branch of the government, acting primarily through the Department of State, although in the case of some of the more specialized agencies other interested government offices may as a practical matter formulate policy and control day to day operations. Congress has sometimes made provision by legislation that representatives of the United States on the governing bodies of these organizations should receive the confirmation of the Senate. In the case of the United Nations, Congress specified in the United Nations Participation Act of December 20, 1945,\textsuperscript{53} that American representatives shall act in accordance with instructions of the President and shall vote as directed by such instructions; it authorizes him to make agreements with the Security Council under Article 43 of the Charter for the supply of armed forces and facilities, the agreements being subject to the approval of Congress.

\textsuperscript{43} 61 Stat. 1180, T. I. A. S. 1591.  
\textsuperscript{44} 36 Stat. 2448.  
\textsuperscript{46} 48 Stat. 1182, 49 Stat. 2712. The 1946 amendments to the constitution of the International Labor Organization were ratified by the President pursuant to the advice and consent of the Senate, 62 Stat. 1672, T. I. A. S. 1810; and a joint resolution of Congress approved the acceptance, 62 Stat. 1151.  
\textsuperscript{49} 61 Stat. 214, T. I. A. S. 1846.  
\textsuperscript{50} 60 Stat. 712, 61 Stat. 2495, T. I. A. S. 1580.  
\textsuperscript{51} 62 Stat. 441, T. I. A. S. 1808.  
\textsuperscript{52} 17 Stat. 283, 304, 19 Stat. 577.  
War Power

Bare mention should be made of the vast war power of the federal government, based on the powers of the President as Commander-in-Chief and the powers of Congress to declare war, provide for and maintain the army and navy, etc. (This is not the appropriate place to discuss the relationship of the Executive to Congress in this field, or the extent to which normal constitutional rights and powers may be modified by the existence of war, nor the relative extent of Executive and Congressional authority to bring about or to terminate a state of war.) As Chief Justice Hughes has said:

"... the war power of the Federal Government ... is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."

Here we have in the federal government a tremendously broad power which has played an important part in the conduct of our foreign affairs and which must be borne in mind—much as we may hope that occasion does not arise for its exercise!

Other Constitutional Powers

There are yet other aspects of federal supremacy in matters relating to foreign affairs. Specific constitutional grants to Congress of powers (over foreign commerce, naturalization, and the like) result in Congressional legislation which is held to have "filled the field" and to leave no room for state action in such matters. Thus federal control over aliens precluded Pennsylvania from requiring registration of aliens. Furthermore, other Constitutional limitations on state action, such as those of the Fourteenth Amendment,

54. See Rossiter, The Supreme Court and The Commander In Chief (1951); Corwin, Total War and the Constitution (1947); Berdahl, War Powers of the Executive in the United States (1920).

55. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934) ("Minnesota Mortgage Moratorium Case"). Note the language of Mr. Justice Strong for the Court in Miller v. United States, 11 Wall. 268, 305 (U.S. 1870), that "Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted." In that case the dissenting Justices joined in an opinion by Field, in which it was said: "legislation founded upon the war powers of the government . . . is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. . . . The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations." Ibid. at 315.

restrict our several States in what they may do with respect to aliens. Thus an Arizona statute, requiring all employers of more than five workers to hire not less than 80 per cent American citizens, was held to deny "equal protection of the laws." 57

From the International Law Viewpoint

Opinions vary as to the international legal effect of an international agreement which contravenes the constitutional provisions of one of the parties. Regardless of invalidity in domestic law, the weight of international practice supports the validity in the international sphere of an agreement entered into by a nation’s chief executive. As Legal Adviser G. H. Hackworth said on November 29, 1944, in response to inquiries from Senators in Hearings on the St. Lawrence Waterway:

"... in international law the head of the government is entitled to speak for the state, and if the President enters into an obligation with a foreign government, that foreign government is entitled to rely upon it. It is not under the obligation of enquiring into our constitutional processes. It takes the word of the head of the State. If the obligation is violated, it is a violation of an international obligation pure and simple, whether the President exceeded his authority or not." 58

Difficulty may arise when an international agreement clearly contravenes the express wording of a written constitutional provision of which the other party to the treaty may reasonably be expected to take notice, 59 but the better opinion accords with that of Sir Arnold McNair, now British judge on the World Court, when he wrote:

"... in concluding a treaty if one party produces an instrument ‘complete and regular on the face of it’... though in fact


59. The Harvard Research in International Law concluded in its 1935 Draft Convention on the Law of Treaties, that: "A state is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a state may be responsible for an injury resulting to another state from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty." 29 Am. J. Int’l L. Supp. 992 (1935). The discussion stressed the notoriety of constitutional provisions regarding the making of treaties.
constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to the obligations of the treaty."  

Thus it would appear that a treaty or agreement which violates constitutional limitations, and thus is not enforceable in our domestic courts, may nevertheless be obligatory on the United States internationally and if breached result in liability to pay damages ordered by an international tribunal. In this respect the situation resembles that where Congress has by subsequent legislation superseded the domestic effectiveness as law of the land of a valid treaty whose international obligation remains unaltered.  

60. Constitutional Limitations upon the Treaty-Making Power, in Arnold, Treaty-Making Procedure 6 (1933). To like effect, see Willoughby, Fundamental Concepts of Public Law 315 (1924): "Peculiarities of constitutional structures of one state are without international significance to other states. Each state, as a member of the international society of states, has an organ of government through which it communicates with and enters into contractual and other relations with other states. Whatever undertakings are entered into by such organs are internationally binding upon the state which they represent." G. G. Fitzmaurice, Assistant Legal Adviser of the British Foreign Office, wrote in 1934 that: "it is submitted that the only rule which is both logical and readily applicable from the practical point of view is to the effect that states have no concern whatsoever with, and cannot as a general proposition be held to have any knowledge of each other's laws or constitutions; that a state which purports to become regularly bound by an international engagement, by giving its international ratification thereto, or otherwise, must be presumed to have complied with all necessary internal constitutional requirements, and that other states are entitled to assume that this is so. If it afterwards turns out that such requirements have not in fact been complied with, the state must nevertheless be regarded as being internationally bound and cannot plead the failure in question as absolving it from its obligations: any state whose executive has placed it in this position must seek its remedy by proceeding internally against the executive in question or its individual members, and externally by denouncing the treaty at the earliest possible moment; but it cannot plead that the treaty is void ab initio." [1934] British Yearbook of International Law 113, 136. These statements are supported by the attitude of the Permanent Court of International Justice with respect to the Ihlen Declaration by the Norwegian Foreign Minister in the Eastern Greenland Case, in 1933 (P.C.I.J. ser. A/B., No. 53, 71); and by the diplomatic practice discussed in 5 Hackworth's Digest 154-157, and Jones, Full Powers and Ratification 134-157 (1946).  

61. See Rainey v. United States, 232 U. S. 310, 316 (1914); Chae Chan Ping v. United States, 130 U. S. 581 (1889); Whitney v. Robertson, 124 U. S. 190 (1888); The Cherokee Tobacco, 11 Wall. 616 (U.S. 1870). However, a treaty will not be deemed modified or abrogated as domestic law by later Act of Congress unless such purpose on the part of Congress is clear, Cook v. United States, 288 U. S. 102, 120 (1933).  

62. See 5 Hackworth's Digest 186, 194-195. Secretary Hughes wrote Secretary Mellon on February 19, 1923 that: "a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which is established by our legislative and judicial decisions and may be inconsistent with an existing
On the delictual or tort side of the law, it is perfectly clear that the United States, like any other federal state, is not absolved from international legal responsibility because violations of treaties or other wrongs to an alien are committed by one of our States. This is true, whether or not as a matter of constitutional law the federal government has any control over the action of local authorities in the matter in question. As Secretary Stimson informed the Preparatory Committee of the Conference for the Codification of International Law, May 22, 1929:

"The Federal Government has frequently paid indemnities for the delinquencies of the States where the States have failed to furnish protection and redress... In claims against foreign States, the United States has refused to recognize the plea that the federal organization of the respondent State was not internationally responsible for the maintenance of order and the provision of effective redress in its constituent political subdivisions."

As illustration selected at random, the United States has been required by international tribunals to pay damages to Mexico because of the failure of Texas officials to prosecute and punish the known

Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is an arbitration in which international rules of action and obligations would be the subject of consideration." 

Ibid. at 194-195.

63. Discussing the lynching of Italians at New Orleans in 1891, President Harrison said in his message to Congress December 9, 1891: "It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal Courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts." The United States paid Italy 125,000 francs as indemnity, pointing out that though the injury "was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity." 6 Moore's Digest 840.

64. League of Nations pub. 1929. V. 10, p. 21, quoted 5 Hackworth's Digest 595. The League Committee of Experts reported in 1927 that: "any international responsibility which may be incurred by one of the member States of a federation devolves upon the federal Government, which represents the federation from the international point of view; the federal Government may not plead that, under the constitution, the member States are independent or autonomous." League of Nations pub. 1927. V. 1, p. 105; quoted 5 Hackworth's Digest 595.
killer of a Mexican citizen, and because a Texas deputy constable assaulted the Mexican Consul in El Paso after local officials knew of his hostility toward the Mexican representative, similarly, the United States was ordered to pay damages to Peru when the Surrogate of New York County, in disregard of a treaty with Peru, failed to give the administration of a Peruvian decedent's estate to the Peruvian Consul, with resulting loss to the Peruvian heir.

Indeed, we may well say that in the eyes of international law, the United States as a sovereign nation has all the powers to carry on international relations which are possessed by independent nations generally and are considered inherent in sovereignty. As Justice Field declared for the Supreme Court in upholding the federal power to exclude certain groups of Chinese aliens:

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and to their subjects or citizens are one nation, invested with powers which belong to independent nations."

Justice Sutherland followed the same reasoning in the Curtiss-Wright case, saying:

"...the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. ... The power to acquire territory by discovery and occupation (Jones v. United States, 137 U. S. 202, 212), the power to expel undesirable aliens (Fong Yue Ting v. United States, 149 U. S. 698, 705 et seq.), the power to make such international agreements as do not con-

68. The Chinese Exclusion Case, 130 U. S. 581, 604 (1889). In Fong Yue Ting v. United States, 149 U. S. 698, 711 (1893), upholding the constitutionality of a federal law providing for the deportation of certain Chinese aliens, Mr. Justice Gray said for the court:
"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective."
stitute treaties in the constitutional sense (Altman & Co. v. United States, 224 U. S. 583, 600-601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.”

Despite this concentration of legal power over foreign affairs in the federal government rather than the states, and in the executive rather than the other branches, need for close cooperation remains—all the more so, indeed, because of this concentration of authority in the federal executive. When we leave the realm of naked legal power and turn to that of government in action, we find that close cooperation between Executive and Congress is essential. Consultation of President and Secretary of State with Congressional leaders is necessary, and does take place. Much of it is informal. Consideration need be given to the question whether the advantages of informal and intimate contacts can be preserved while more regularly established institutional procedures are created to ensure the permanent and frequent use of such consultation. Senators and Representatives have served ably among our treaty negotiators and on our UN delegations. In the Department of State one Assistant Secretary of State deals solely with Congressional relations. In past times party discipline has often kept Congress and President together on foreign policy. During the last decade we have seen the success of “bipartisanship” in bringing about cooperation in foreign affairs when good will and a sense of responsibility were present among leaders of both major parties.

As for cooperation with the states in international matters closely concerning certain states, a considerable measure of success has been achieved in at least some of the more technical fields like fish conservation. The working together of state and federal governments in fields of international concern may be facilitated by interstate compacts or the Council of State Governments as well as by direct contacts of the officials concerned.

These developments must be borne in mind when seeking a true

picture or evaluation of our national system of "doing business" in the international sphere. They are as important a part of the whole as the legal structure which especially interests our profession. They call for study, creative criticism, and constant improvement, if we are to make our governmental structure operate successfully in the conduct of foreign affairs. Like the strictly legal problems, they too require widespread popular understanding. Only in this way can we hope to have the type of foreign policy and action in foreign affairs necessary in present times for a nation bearing heavy responsibilities in the world.