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## TREATIES AND EXECUTIVE AGREEMENTS

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THE RECENT ATTEMPTS to amend the federal Constitution so as to alter, procedurally and substantively, the treaty-making powers, while unsuccessful, have nevertheless served an excellent purpose, namely, to impress upon the country what has long been a neglected feature of our federal system. For lawyers especially, the Great Debate of 1954 should be understood, both in its historic and legal significance. This short essay, therefore, is designed to present various legal facets of the overall and the particular problems involved, first from the procedural, and then from the substantive, treaty points of view, concluding with a discussion of the just-rejected attempts to change both of these.

### I. THE TREATY-MAKING PROCEDURE

Numerous writers<sup>1</sup> and newspaper columnists, but apparently not the President of the United States,<sup>2</sup> refer to the Senate's

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<sup>1</sup> Even Mr. Justice Davis, in *Haver v. Yaker*, 76 U. S. (9 Wall.) 32 at 35, 19 L. Ed. 571 at 573 (1870), wrote: "In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to *ratify* it, must agree to it." Italics added.

<sup>2</sup> For example, President Eisenhower sent various treaties of friendship to the Senate, as with Sen. Ex. O., 83rd Cong., 1st Sess., involving Japan, and, in his message of transmittal, began: "With a view to receiving the advice and consent of the Senate to ratification. . . ." This is standard State Department language and apparently desires that the Senate consent to ratification *by the President*.

“ratification” of a treaty. The Senate itself, in much the same way, provides that “Treaties transmitted by the President to the Senate for ratification shall be” taken up in a certain way.<sup>3</sup> Procedurally, however, the federal Constitution, when dealing with the powers of the President,<sup>4</sup> grants to him power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>5</sup> The Constitution, therefore, speaks of the “advice and consent” of the Senate in making treaties, provided two-thirds “concur.” Ratification, by that precise term, is not mentioned. When the Senate does “advise and consent,” a simple majority of a quorum is sufficient to vote on amendments and reservations, whereas concurrence is by a two-thirds vote of a quorum.<sup>6</sup> Since the Senate is composed of ninety-six Senators, a majority for simple voting purposes, and for the two-thirds rule mentioned above, can be simply calculated, *i. e.*, twenty-five and thirty-three, respectively, at least.

With the noting of these linguistic and mathematical points, it is proper to turn to the question of where, and how, “ratification” enters into the treaty-making procedure. There are, in brief, four stages, namely: negotiation, submission, concurrence, and ratification, but it should be pointed out that it is only in the third of these stages that any Senate “advice and consent” may take place.<sup>7</sup>

<sup>3</sup> See Senate Rule XXXVII.

<sup>4</sup> The President, and his office, powers, duties, etc., have been examined in great detail by numerous authorities, some of whom are: Corwin, *The President, Office and Powers*, 3d Ed.; Hart, *The American Presidency in Action*; Hyman, *The American President*; and Laski, *The American Presidency, An Interpretation*.

<sup>5</sup> U. S. Const., Art. II, § 2, cl. 2.

<sup>6</sup> Both votes are taken under U. S. Const., Art. I, § 5, which reads: “A Majority . . . shall constitute a Quorum to do Business.”

<sup>7</sup> See generally, Wilcox, *The Ratification of International Conventions* (1935). Lecturing in 1907, Woodrow Wilson, later to become president, stated: “One of the greatest of the President’s powers I have not yet spoken of at all; his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.” Wilson, *Constitutional Government in the United States* (1908), p. 77 et seq.

## A. NEGOTIATION

In 1936, in the famous case of *United States v. Curtiss-Wright Export Corporation*,<sup>8</sup> Mr. Justice Sutherland wrote that the President "alone negotiates [treaties]. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it."<sup>9</sup> Historically, however, as the learned Justice knew, the original draft of the Committee of Detail in the Federal Convention of 1787 provided that "the Senate . . . shall have power to make treaties. . . ."<sup>10</sup> The clause finally adopted, quoted above, therefore assumes Senate "advice and consent" in the making, *i. e.*, negotiating treaties, and Washington, in the days when both the founding fathers and he knew at first hand what was intended, personally appeared before the Senate, with his advisers, for advice during the negotiation period.<sup>11</sup> The consequences, galling to the high office of the Chief Executive, dissuaded all succeeding presidents from repeating this "mistake." Since 1816, when the Senate Committee on Foreign Relations became a standing committee, other presidents have utilized this medium for such purpose, when and if so desired.<sup>12</sup> As Jefferson put it, the "transaction of business with foreign powers is executive altogether," and this principle of politics has now become translated into a rule of law.

<sup>8</sup> 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

<sup>9</sup> 299 U. S. 304 at 319, 57 S. Ct. 216, 81 L. Ed. 255 at 262.

<sup>10</sup> Farrand, *The Records of the Federal Convention of 1787* (1911), Vol. II, p. 183.

<sup>11</sup> See Hayden, *The Senate and Treaties 1789-1817* (1920), pp. 21-7, who details the facts concerning Washington's first, and only, visit to the Senate chamber, "to advise with them on the terms of a treaty to be negotiated with the Southern Indians." See also Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1902* (1905), Vol. I, p. 61. His experience made Washington say, when he left the Senate chamber, that "he would 'be damned' if he ever came there again." Hayden, *op. cit.*, p. 23.

<sup>12</sup> Woodrow Wilson felt that the Constitutional Convention of 1787 intended the relations of the President and Senate "to be very much more intimate and confidential than they have been; that it was expected that the Senate would give the President its advice and consent in respect of . . . treaties in the spirit of an executive council associated with him upon terms of confidential cooperation rather than in the spirit of an independent branch of government. . . . The Senate has shown itself particularly stiff and jealous in insisting upon exercising an independent judgment upon foreign affairs, and has done so so often that a sort of customary *modus vivendi* has grown up between the President and the Senate, as of rival powers. . . . [T]he President is expected to be very tolerant of the Senate's rejection of treaties, proposing but by no means disposing even in this critical chief field of his power." Wilson, *op. cit.*, p. 138 et seq.

## B. SUBMISSION

Assuming negotiations have been satisfactorily concluded, the President forwards the proposed treaty to the Senate for concurrence.<sup>13</sup> In theory, the Senate has advised and consented, so that concurrence should be little more than an idle gesture but, as the actual advice and consent may have involved no more than a handful, or perhaps a majority, of the Committee members, whereas concurrence requires a two-thirds vote, further action is needed. The act of concurrence is assumed to be one involving a degree of considered deliberation and of cautious voting but, as the Senate debates will evidence, this unfortunately has not always been the case.

## C. CONCURRENCE

With respect to concurrence itself, the Senate may do one of several things. It may (1) concur unconditionally by at least a two-thirds vote of a quorum;<sup>14</sup> (2) reject unconditionally by a vote of one more than one-third of a quorum; (3) amend by a simple majority vote of a quorum; or (4) attach reservations, adopted by a simple majority vote of a quorum, to its two-thirds vote of concurrence. The first and second are self-explanatory and, if the first occurs, the President thereafter proceeds as in the next stage set out below. An amendment adopted by a majority vote would operate to alter the treaty itself, so the document would have to be returned to the President who could either reject

<sup>13</sup> See note 2, ante, for the style of the Presidential message. David Lawrence, in a Washington dispatch dated Feb. 2, 1954, points out that the President is "under no obligation contained in the Constitution to submit any international agreement or treaty to the Senate at a particular time. He can wait a month or four years and his successor can continue indefinitely to ignore the ratification process of the Senate."

<sup>14</sup> This vote need not be recorded by yeas or nays, hence a voice vote, often by a handful of Senators, may suffice to consent to a treaty. As pointed out below, this procedure has been criticized by the proponents of the constitutional amendment hereinafter mentioned. However, Senate Rule XXXVII, which prescribes the method to be followed in voting on a treaty, specifies that, by a simple majority vote, the procedure may be changed so as to force a roll-call on every treaty up for consent. This Rule may even provide for a two-thirds vote of the entire Senate, totalling 64 instead of a quorum, *i. e.*, 33; or, separately or in addition, provide that the same two-thirds or majority vote may also state whether the treaty is to be self-executing or non-self-executing by an amendment or reservation which now can be added by a majority vote.

the amendment and refuse to proceed further, thereby dropping the treaty,<sup>15</sup> or else seek to obtain the consent of the other party to the "contract" or to re-negotiate in the light of the Senate's amendments.<sup>16</sup> A reservation, by contrast, does not alter the treaty but limits the obligations of this government under it, thereby permitting the President to proceed to the next stage mentioned below, *i. e.*, ratification. If the other party dislikes the reservation, or reservations, there is no international reason why the treaty may not be rejected or otherwise denounced by it. Generally, however, an amendment is utilized when only one nation is the other contracting party, whereas reservations are used when more than one such nation is so involved.

Perhaps the outstanding illustration of this Senate ability to amend or to reserve a treaty to death may be observed in the 1919 debate over the Treaty of Versailles which gave birth to the League of Nations although, since 1789, the Senate has rejected or modified 28% of some 1,224 submitted treaties. With reference to that illustration, ex-President Taft cabled President Wilson, then in Paris, to have certain principles included in the clauses of the Covenant for the League but, a draft having already been agreed upon, the other nations desired to make additional amendments if Wilson so proposed to do. The latter, therefore, felt constrained to strike personal bargains to comply with Taft's suggestions and yet not re-open the Covenant. Nevertheless, the Senate Committee on Foreign Relations ultimately recommended forty-five amendments and four reservations, to become the famous Lodge reservations which had first numbered fourteen. A series

<sup>15</sup> See, for example, the Hay treaties of 1904-5, providing for the general arbitration of international disputes and requiring each nation to "conclude a special agreement defining" the dispute, etc. The Senate approved the British treaty but substituted "treaty" for "agreement," whereupon Theodore Roosevelt refused to proceed further, holding the Senate action to be tantamount to rejection. Article 43 of the United Nations Charter speaks of special agreements to be made by the member nations, undertaking to make available to the Security Council men, material, and the like, to preserve the peace. The Charter was consented to by the Senate without any change of language. To date, of course, no such agreements have been entered into as the Korean War did not involve forces thereunder. The United Nations Participation Act of Dec. 20, 1945, authorizes the President to negotiate such agreements: 22 U. S. C. § 287 et seq., particularly § 287d.

<sup>16</sup> See concurring opinion of Mr. Justice Brown in *Fourteen Diamond Rings v. United States*, 183 U. S. 176 at 183, 22 S. Ct. 59, 46 L. Ed. 138 at 143 (1901).

of three Senate votes in 1919, and one in 1920, rejected the Treaty without these reservations. The 1920 presidential campaign found the Democratic platform somewhat ambiguous concerning the reservations, and that of the Republican Party even more so. The Harding landslide was interpreted as a mandate against the League, which thereby died a natural (political) death for the United States, and separate peace treaties with the defeated nations were ratified the following year.<sup>17</sup>

#### D. RATIFICATION

The Senate, as has been seen, may concur unconditionally, whereupon, in theory, the President should, but query if he must, ratify. If he should refuse, the judiciary would probably not mandamus him to act for his is a political act, although this question of enforcement has never materialized. Impeachment, of course, might be the answer, but this would depend upon factors yet unknown. It would seem, therefore, that the President, in the final analysis, has the last say concerning the existence or non-existence of a treaty although, for practical purposes, it would be the Congress which may, or may not, ultimately breathe life into it by the power of the appropriation purse.<sup>18</sup> If unconditional rejection by the Senate has occurred, there could, of course, be no ratification by the President. Senate amendments, as has been seen, require re-submission and re-negotiation, if necessary, while reservations permit immediate presidential ratification but subject to the other party's right to reject or denounce.

<sup>17</sup> The story of the Wilson-Lodge struggle has been told by numerous writers. See, for example, Bemis, *A Diplomatic History of the United States* (1942), Ch. 34, and Fleming, *The United States and the World Court* (1945), Ch. 2.

<sup>18</sup> Washington, in 1792, desired to negotiate with Algiers to ransom American captives of the Barbary pirates. Secretary of State Jefferson suggested that appropriations would require House consent, hence he urged sanction by the entire Congress for the treaty. Washington nevertheless put the matter to the Senate alone and the House later made the money available. It did, however, in 1796, when Washington requested money to effectuate the Jay treaty, set forth its money authority in the record, saying: "When a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency of carrying such Treaty into effect, and to determine and act thereon as, in their judgment, may be most conducive to the public good." See *Annals*, Vol. 5, p. 771 (April 6, 1796), and p. 782 (April 7, 1796).

Again, this does not mean that these procedures must be initiated by the President. If dissatisfied with either or both of these last Senate actions, he could drop the entire matter, thereby relieving the other party from any obligations.

The foregoing description and analysis of the involved and cumbersome treaty-making power<sup>19</sup> discloses, to an extent, just how extended or limited the power actually is, both in theory and in practice. The President may propose, but not alone may the Senate dispose, for the House may thereafter refuse to appropriate funds to effectuate existing treaties. Furthermore, as with the Russian Treaty of 1911, the Congress may insist upon its power of abrogation; or, as in 1939, the "area within which the president might maneuver" may be clearly limited by the implications of existing legislation, as was the case with respect to the Neutrality Act of 1937.<sup>20</sup>

## II. THE EFFECT OF THE TREATY

Under the "supremacy" clause of the Constitution, a ratified treaty becomes, as with Congressional legislation, the supreme law of the land,<sup>21</sup> although it is not a legislative act but more nearly a contract between two or more nations.<sup>22</sup> In other words, it is legislation adopted by a procedure different from that ordinarily thought of, but, as will be seen below, may be on a higher level.<sup>23</sup> It may operate within the nation as such law in and of itself, that is, be self-enforcing, or it may require Congressional legis-

<sup>19</sup> Laski, *op. cit.*, p. 189, says: "The truth is that the treaty-making power displays the whole American scheme of government at its worst. It multiplies all the difficulties that are inherent in the separation of powers. . . ."

<sup>20</sup> Laski, *op. cit.*, p. 172.

<sup>21</sup> U. S. Const., Art. VI.

<sup>22</sup> In *Foster v. Neilson*, 27 U. S. (2 Pet.) 253 at 314, 7 L. Ed. 415 at 436 (1829), Chief Justice Marshall said that a treaty is nevertheless "to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court."

<sup>23</sup> A statute must be made "in pursuance" of the Constitution in order not to run afoul of that document, but a treaty need only be made "under the authority of the United States." This was carefully pointed out by Mr. Justice Holmes in *Missouri v. Holland*, 252 U. S. 416 at 433, 40 S. Ct. 382, 64 L. Ed. 641 at 647 (1920).



lation to become law if it is of the non-self-enforcing or executory type. It may contain provisions which confer rights upon individuals, thereby partaking of the nature of internal law, capable of being enforced between private parties within the country,<sup>24</sup> or be non-private in character.

With regard to treaties of the self-enforcing type, reference might be made to the 1783 treaty of peace between Great Britain and the United States which was construed, in the case of *Ware v. Hylton*,<sup>25</sup> to operate as a nullification of a Virginia statute, thereby permitting a British creditor to sue a Virginia debtor who had, in reliance on the local statute, paid the debt to the state and had received a discharge of the debt from it. Treaties may also work to supersede state laws of limitation which bar collection of a debt after a stated period of time,<sup>26</sup> state laws concerning rights of aliens to inherit property,<sup>27</sup> and the like.<sup>28</sup>

Suppose, however, that a treaty conflicts with a provision of the United States Constitution or contradicts the terms of a federal statute. Which, then, governs? In the first of these situa-

<sup>24</sup> "A treaty is primarily a compact between independent Nations. It depends for . . . enforcement . . . on the interest and the honor of the governments. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Edge v. Robertson* (Head Money Cases), 112 U. S. 580 at 598, 5 S. Ct. 247, 28 L. Ed. 798 at 804 (1884). See also *United States v. Schooner Peggy*, 5 U. S. (1 Cranch) 102 at 110, 2 L. Ed. 49 at 51 (1801).

<sup>25</sup> 3 U. S. (3 Dall.) 199, 1 L. Ed. 568 (1796).

<sup>26</sup> In *Hopkirk v. Bell*, 7 U. S. (3 Cranch) 454, 2 L. Ed. 497 (1806), the same 1783 treaty provision with Great Britain was held to prevent the operation of a Virginia statute of limitations designed to bar the collection of existing debts.

<sup>27</sup> See, for example, *Hauenstein v. Lynham*, 100 U. S. 483 at 489-90, 25 L. Ed. 628 at 630 (1880), and *Boyd*, "Treaties Governing the Succession to Real Property by Aliens," 51 Mich. L. Rev. 1001 (1953).

<sup>28</sup> See *Fairfax's Devisee v. Hunter's Lessee*, 11 U. S. (7 Cranch) 603, 3 L. Ed. 453 (1813), as interpreted in *Martin v. Hunter's Lessee*, 14 U. S. (1 Wheat.) 304, 4 L. Ed. 97 (1816), and the case of *Asakura v. City of Seattle*, 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924). While the case of *Terrace v. Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923), permitted California to exclude Japanese aliens from owning real estate because the treaty there invoked did not cover the claimed rights, the United States Supreme Court in *Oyama v. California*, 332 U. S. 633, 68 S. Ct. 289, 92 L. Ed. 249 (1948), felt that the "equal protection clause" of the Fourteenth Amendment served to shield these persons from the strictures of the state law. In this, the California Supreme Court later agreed: *Sei Fujii v. California*, 38 Cal. (2d) 718, 242 P. (2d) 617 (1952). Where a treaty provision does cover the situation, as in the case of the German nationals protected under the 1923 treaty, contrary state laws must fall: *Clark v. Allen*, 331 U. S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947).

tions, the United States Supreme Court has indicated, albeit the language is obiter, that the treaty would be ineffective<sup>29</sup> although it has never had a case before it in which it could so hold.<sup>30</sup> In the latter situation, a self-executing treaty would serve to repeal earlier conflicting federal<sup>31</sup> and state<sup>32</sup> enactments, but Congress, despite the treaty, could thereafter pass conflicting legislation, subject to a presidential veto, which would then supersede the treaty.<sup>33</sup> In other words, as is true of other statutory enactments, the latest particular treaty or law would win out,<sup>34</sup> subject to a judicial determination as to whether or not an ambiguous treaty is, or is not, self-executing in character.<sup>35</sup> Congress may, in this fashion, see fit to repeal a clause or two in a self-

<sup>29</sup> *DeGeofroy v. Riggs*, 133 U. S. 258 at 267, 10 S. Ct. 295, 33 L. Ed. 642 at 645 (1890), and *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525 at 541, 5 S. Ct. 995, 29 L. Ed. 264 at 270 (1885). In *New Orleans v. United States*, 35 U. S. (10 Pet.) 662 at 736, 9 L. Ed. 573 at 602 (1836), the Jeffersonian view was expounded with the court saying: "Congress cannot by legislation enlarge the federal jurisdiction nor can it be enlarged under the treaty-making power." See, however, the subsequent discussion in connection with the case of *Missouri v. Holland*, post, at note 42.

<sup>30</sup> See *United States v. Thompson*, 258 F. 257 at 260 (1919). There is respectable argument that such a question, one dealing with the constitutionality of a treaty, is a political one and "not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U. S. 297 at 302, 38 S. Ct. 309, 62 L. Ed. 726 at 732 (1918); *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 at 319, 57 S. Ct. 216, 81 L. Ed. 255 at 262 (1936). When examined, however, these cases, and others not here cited, are seen not to be directly in point. See also the decisions from *Ware v. Hylton*, 3 U. S. (3 Dall.) 199, 1 L. Ed. 568 (1796), to *United States v. Reid*, 73 F. (2d) 153 (1934), to the effect that it is "doubtful whether the courts have the power to declare the plain terms of a treaty unconstitutional."

<sup>31</sup> On this, see *United States v. Schooner Peggy*, 5 U. S. (1 Cranch) 103, 2 L. Ed. 49 (1801); *Foster v. Neilson*, 27 U. S. (2 Pet.) 253, 7 L. Ed. 415 (1829); *United States v. Percheman*, 32 U. S. (7 Pet.) 51, 8 L. Ed. 604 (1833); and *Whitney v. Robertson*, 124 U. S. 190, 8 S. Ct. 456, 31 L. Ed. 386 (1888). Compare with *Willoughby, Constitutional Law* (1929), Vol. 1, p. 555.

<sup>32</sup> *Ware v. Hylton*, 3 U. S. (3 Dall.) 199, 1 L. Ed. 568 (1796); *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628 (1880). Municipal ordinances will also fall: *Asakura v. City of Seattle*, 265 U. S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924).

<sup>33</sup> See *Cherokee Tobacco v. United States*, 78 U. S. (11 Wall.) 616, 20 L. Ed. 227 (1870); *Whitney v. Robertson*, 124 U. S. 190, 8 S. Ct. 456, 31 L. Ed. 386 (1888); *Botiller v. Dominquez*, 130 U. S. 238, 9 S. Ct. 525, 32 L. Ed. 926 (1889); *Bas v. Tingy*, 4 U. S. (4 Dall.) 37, 1 L. Ed. 731 (1800). In *Moser v. United States*, 341 U. S. 41, 71 S. Ct. 553, 95 L. Ed. 729 (1951), Mr. Justice Minton said the Supreme Court was not "doubting that a treaty may be modified by a subsequent act of Congress." Treaties terminable on notice, or which have lapsed, are not here discussed.

<sup>34</sup> Mr. Justice Field, in *Chae Chan Ping v. United States*, 130 U. S. 581 at 600, 9 S. Ct. 623, 32 L. Ed. 1068 at 1073 (1889), put the point tersely when he wrote: "In either case the last expression of the sovereign will must control."

<sup>35</sup> Compare *Foster v. Neilson*, 27 U. S. (2 Pet.) 253, 7 L. Ed. 415 (1829), with *United States v. Percheman*, 32 U. S. (7 Pet.) 51, 8 L. Ed. 604 (1833). See also *Corwin, The Constitution of the United States of America* (1953), in Sen. Doc. 170, 82nd Cong., 2d Sess., p. 418.

executing treaty without thereby terminating the treaty, although the other party might then see fit to do so. For that matter, if Congress wished, it might denounce an entire treaty.<sup>36</sup>

If, on the other hand, the treaty is executory, *i. e.*, of the non-self-enforcing type, affirmative legislation by Congress would be required before it could be enforced within the nation. Such a treaty, or any right resting thereon, would not *per se* form a part of internal law and could not until Congress acted to make it so. But, and here is an important question, would Congress have any choice in the matter? Put differently, as the treaty would then be part of the supreme law of the land, would it then be supreme even over Congress, so that Congress must pass such legislation? Or, does the "supremacy" clause of Article VI lump the constitution, laws "made in pursuance thereof," and "treaties made . . . under the authority of the United States" into one "supreme law of the land?" The preceding paragraph has given the law upon this phase of the discussion, but what of appropriations to carry treaty clauses and agreements into effect? Here a different question is presented, for it is not a question of validity or legislation *per se* but of purse strings, and this problem is, as yet, unresolved.<sup>37</sup>

<sup>36</sup> Taylor v. Morton, 23 Fed. Cas. No. 13,799 (1855); Edye v. Robertson, 112 U. S. 580 at 598, 5 S. Ct. 247, 28 L. Ed. 798 at 804 (1884); La Abra Silver Mining Co. v. United States, 175 U. S. 423 at 460, 20 S. Ct. 168, 44 L. Ed. 223 at 236 (1899). See also Laski, *op. cit.*, p. 167: "Negotiation is the prerogative of the president; but the treaty is binding upon the citizens of the United States only with the consent of the Senate. There is a sense, also, in which the relation of the House of Representatives to a treaty is important; for no money can be raised to complete its implementation without the consent of that house. . . . Congress, and above all the Senate, [is not to] be prejudiced constitutionally in the exercise of its powers in its own [treaty consent] sphere, by what the president has done in his."

<sup>37</sup> It is here assumed that no internal "law" need be legislated but, for enforcement of the treaty provisions, funds must be supplied. Since U. S. Const., Art. I, § 9, says that an appropriation is required before funds can be withdrawn from the Treasury, and the Congress must pass the appropriation bill, may it now refuse to do so? That is, can a valid and existing treaty be negated by Congressional refusal to appropriate? The United States Supreme Court in DeLima v. Bidwell, 182 U. S. 1 at 198, 21 S. Ct. 743, 45 L. Ed. 1041 at 1056 (1901), said: "We express no opinion as to whether Congress is bound to appropriate the money . . . in this case, as Congress made prompt appropriation of the money stipulated in the treaty." To date, no case in point has arisen but, if Congress should decide to defy the President, may it not, through its control of the appellate jurisdiction of the Supreme Court, also oust that body of jurisdiction over such a private case? See Laski, *op. cit.*, p. 167, quoted in note 36, *ante*. On the effect of revenue laws, apart from the purse-string concept of effectuation, and the treaty-making power, see Willoughby, *Constitutional Law* (1929), Vol. 1, p. 558.

Still another question remains for examination. Speaking in terms of Congress versus a treaty, it has been said that the latest expression overrides the earlier. But, can Congress legislate on everything or is its power in the field of legislation subject to limitation? It, without doubt, possesses certain "enumerated" powers with respect to legislation,<sup>38</sup> for the exercise of which it does not depend upon a treaty and with regard to which it independently enjoys a constitutional justification. But the states likewise have their own powers which, under the Tenth Amendment, are "reserved" to them except insofar as these powers have been delegated to the United States or have been prohibited by the Constitution.<sup>39</sup> In theory, therefore, the Congress cannot invade the state's powers and if it attempted to do so, as by the enactment of laws concerning marriage or the adoption of children, it would be acting in an unconstitutional fashion. Within the sphere of the enumerated powers, Congress may unquestionably exercise its authority when, and if, it desires to enact legislation to effectuate treaties for the power would exist independently of the treaty. But suppose no enumerated power is found, or some exercise of the states' "reserved" power is necessary for effectuation,—what then? In other words, can a treaty become the basis for a Congressional power not found in the Constitution?

Two possible situations are presented. Under one of them, no reserved powers of the states would be involved, but an absence of express power in the Congress may be noted. Under the other, no express powers having been granted to Congress, the states' reserved powers could be involved. In the first of these situations, the Congress, acting on the basis of the "necessary and proper" clause,<sup>40</sup> has legislated so as to effectuate treaties and the Supreme Court has approved this exercise of power.<sup>41</sup> In the second situation, however, the states' rights or

<sup>38</sup> The "enumerated" powers are listed in U. S. Const., Art. I, § 8, clauses 1-17.

<sup>39</sup> See, in general, Jackson, "The Tenth Amendment Versus The Treaty Power," 14 Va. L. Rev. 331 (1928).

<sup>40</sup> U. S. Const., Art. I, § 8, cl. 18.

<sup>41</sup> As to the extradition of fugitives to effectuate treaty provisions, see 18 U. S. C. § 3181 et seq. The power to punish private acts of violence in a state where

powers would be "impaired" or "diminished" or, at the very least, slighted. Nevertheless, the Supreme Court has seen fit to uphold congressional legislation and the famous Migratory Bird case serves as a basis for this statement.

The case last mentioned, that of *Missouri v. Holland*,<sup>42</sup> dealt with a 1916 treaty between Great Britain and this country for the reciprocal protection of migratory birds making seasonal flights between Canada and the United States. Before the two nations had so acted there had been earlier and independent Congressional efforts to regulate but these had been denounced,<sup>43</sup> for which reason the treaty under consideration had been entered into.<sup>44</sup> Congress then legislated,<sup>45</sup> acting under the treaty and the "necessary and proper" clause, to give the Secretary of Agriculture power to regulate the hunting of the migratory birds, subject to the penalties provided in the statute. Mr. Justice Holmes, writing an opinion for the United States Supreme Court, which had voted to uphold the legislation, stated that "the national well being" required "national action" when the states "individually are incompetent to act."<sup>46</sup>

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allens are deprived of treaty rights is discussed in *Baldwin v. Franks*, 120 U. S. 678, 7 S. Ct. 656, 30 L. Ed. 766 (1887). For a statute conferring judicial power upon American consuls stationed abroad, see *In re Ross*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581 (1891).

<sup>42</sup> 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920). The decision was early criticized in Black, "Missouri v. Holland—A Judicial Milepost on the Road to Absolutism," 25 Ill. L. Rev. 911 (1931).

<sup>43</sup> See *United States v. McCullagh*, 221 F. 288 (1915), and *United States v. Shauver*, 214 F. 154 (1914), for prosecutions under an earlier statute.

<sup>44</sup> Mr. Justice Holmes referred to the point in a paragraph which also gives the main argument against Congressional exercise of powers under a treaty which it did not possess beforehand. He wrote: "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 . . . . The same argument is supposed to apply now with equal force." *Missouri v. Holland*, 252 U. S. 416 at 432, 40 S. Ct. 382, 64 L. Ed. 641 at 647.

<sup>45</sup> The treaty contained an agreement that both powers would take or propose to their legislatures the necessary measures for effectuating its provisions. Pursuant thereto, the statute of July 3, 1918, 16 U. S. C. § 703 et seq., was passed.

<sup>46</sup> 252 U. S. 416 at 433, 40 S. Ct. 382, 64 L. Ed. 641 at 648. Compare this with the like reasons given for upholding the unemployment tax provisions of the Social Security Act. Justice Cardozo, in *Charles C. Steward Mach. Co. v. Davis*, 301 U. S. 548 at 586, 57 S. Ct. 883, 81 L. Ed. 1279 at 1291 (1937), speaking for a bare

Nothing in the Constitution specifically prohibited the statute,<sup>47</sup> continued Holmes, and the only question was whether it was "forbidden by some invisible radiation from the general terms of the Tenth Amendment." Since a national interest of "very nearly the first magnitude" was involved, and protection could be accomplished only by "national action in concert with that of another power," Congress had power so to act, especially since the subject matter was "only transitorily within the State" and had no "permanent habitat therein." Pointing to the fact that, but for the treaty and the statute, there soon might be no birds for any powers to deal with, he expressed the belief that "nothing in the Constitution . . . compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain. . . ."<sup>48</sup>

### III. THE EXECUTIVE AGREEMENT

Separate and apart from the treaty-making power is another which results in the formation of what are called "executive" agreements.<sup>49</sup> The Constitution does not jumble "treaties," "contracts," "agreements," "conventions," and the like into one mass,

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majority, remarked: "The fact developed quickly that the states were unable to give the requisite relief. The problem [of unemployment] had become national in area and dimensions. There was need of help from the nation if the people were not to starve."

<sup>47</sup> "If the treaty is valid," wrote Holmes, "there can be no dispute about the validity of the statute under article 1, § 8, as a necessary and proper means to execute the powers of the government." 252 U. S. 416 at 432, 40 S. Ct. 382, 64 L. Ed. 641 at 647.

<sup>48</sup> 252 U. S. 416 at 435, 40 S. Ct. 382, 64 L. Ed. 641 at 648. Illustrations of other types of treaties, such as the one with the Indian tribes concerned in *The Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 8 L. Ed. 25 (1831), are not here discussed.

<sup>49</sup> See, in general, McClure, *International Executive Agreements* (1941); Borchart, "Treaties and Executive Agreements—A Reply," 54 *Yale L. J.* 616 (1945); Brandon, "Analysis of the Terms 'Treaty' and 'International Agreements,'" 47 *Am. J. Int'l L.* 46 (1953); Satterfield, "Constitutional Amendment by Treaty and Executive Agreement," 24 *Miss. L. J.* 280 (1953); Welch, "Treaties and Executive Agreements," 41 *Ill. B. J.* 93 (1953); and a note entitled "International Agreements Other Than Treaties," in 47 *Am. J. Int'l L.* 147. Since the Constitution was adopted, approximately 1,000 treaties and 2,600 executive agreements have been concluded, but unpublished executive agreements are not included in this count. According to Secretary of State Dulles, these number into the thousands.

but neither does it define or distinguish them beyond question.<sup>50</sup> The source of the power to make executive agreements is one question; the manner of its exercise is another.

Three possible sources may be found, to-wit: (1) the President's independent constitutional power as commander in chief and as the federal organ for foreign relations, (2) legislative delegation to the President from among those powers which Congress possesses, and (3) based on treaties. It is usually the second of these sources which has been regarded as the accepted basis for an executive agreement, but the others may not be thereby disregarded.<sup>51</sup> For example, in *Tucker v. Alexandroff*,<sup>52</sup> five of the justices pointed out that no legislation authorized a series of agreements with Mexico, made between 1882 and 1896, permitting each country to pursue marauders across the border.<sup>53</sup> Nevertheless, they felt that such a power "was probably assumed to exist from the authority of the President as commander in chief." On the other hand, four of the justices felt that presidential action of this nature required an express treaty or statute.

These "executive" executive agreements, based on the first

<sup>50</sup> See *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540 at 570 and following, 10 L. Ed. 579 at 594 (1840), where Chief Justice Taney attempted so to do. Mr. Dana Backus, Chairman of the Committee on International Law of the City Bar Association, testifying in 1952 on the predecessor of S. J. Res. 1, said: "I have difficulty in determining . . . the difference between a treaty and an executive agreement, whether one should be a treaty or an executive agreement, or can we insist upon it being a treaty?" See Hearings, Subcommittee of Senate Judiciary Committee, 82nd Cong., 2nd Sess., "Treaties and Executive Agreements," p. 82.

<sup>51</sup> *Crandall*, op. cit., Ch. VIII; *McClure*, op. cit., Ch. I and II, for agreements entered into upon the basis of the President's own powers; *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 10 L. Ed. 579 (1840).

<sup>52</sup> 183 U. S. 424, particularly pp. 435 and 467, 22 S. Ct. 195, 46 L. Ed. 264, particularly pp. 269 and 281 (1902).

<sup>53</sup> Similar agreements have been made, in time of war, between our commanding generals and others, or by the President, as commander in chief, with other nations. The Korean executive agreement to receive the 22,000 anti-Communist prisoners who refused expatriation or the Berlin agreement partitioning the city are but illustrations. It might be noted that, of the ten conflicts in which the United States has participated, five came about without a Congressional declaration of war: the Korean "war," the United States-Mexican hostilities of 1914-17, the French naval war of 1798-1800, the first Barbary war of 1801-5, and the second one of 1815. On the other hand, five were declared by Congress: the two World Wars, the Mexican and Spanish-American wars, and the one with England in 1812. Congressional declaration would not be required when the United States is attacked, as at Pearl Harbor, and it would be superfluous to give the President a power to repel an invader by any means at his command. The declaration would be required, however, if other powers were to be granted by delegation.

of the abovementioned sources, as distinguished from the "legislative" executive agreements of the second type, have been used by McKinley,<sup>54</sup> Theodore Roosevelt,<sup>55</sup> Wilson,<sup>56</sup> and Franklin Roosevelt,<sup>57</sup> although it is true that, under the last-named president, they mushroomed in number to a point where they threatened to replace treaties as the basis for American foreign policy. In the famous case of *United States v. Pink*,<sup>58</sup> decided in 1942, the Litvinov "executive" agreement of 1933 was held to be "final and conclusive on the courts" insofar as Soviet recognition had there been accorded. The court further reasoned that, since a treaty is the supreme law of the land and such "international compacts and agreements . . . have a similar dignity,"<sup>59</sup> state law had to yield if it was inconsistent with, or impaired the policy or provisions of, a treaty or of an international compact or agreement. In that fashion, although the "supremacy" clause declared that only the Constitution, laws made in pursuance thereof, and treaties made under the government's authority, were the supreme law, independently arrived at "executive" agreements were judicially assigned a place of equality with laws and treaties.<sup>60</sup> Even more challenging in effect was the 1940 series of executive agreements with Canada and Great Britain, following on the collapse of France, which established a Permanent Joint Board on

<sup>54</sup> See illustrations and discussions in Crandall, *op. cit.*, p. 103; Willoughby, *op. cit.*, Vol. I, p. 539; and Wright, *The Control of American Foreign Relations* (1922), p. 245.

<sup>55</sup> McClure, *op. cit.*, p. 98; Dennett, *Roosevelt and the Russo-Japanese War* (1925), p. 112 et seq.

<sup>56</sup> McClure, *op. cit.*, p. 99 et seq.

<sup>57</sup> His first important agreement was the Litvinov one of 1933 whereby recognition was accorded to the Union of Soviet Socialist Republics. It was upheld in *United States v. Belmont*, 301 U. S. 324 at 330-2, 57 S. Ct. 758, 81 L. Ed. 1134 at 1139 (1937), where Justice Sutherland said the President was "the sole organ" in international relations and that these executive agreements constituted an international compact.

<sup>58</sup> 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). This case involved the same Litvinov agreement discussed in the Belmont case, mentioned in the preceding footnote. The reasoning in the earlier case was reaffirmed and emphasized. The narrow holding in the Pink case should be limited to the overriding of state laws by executive agreements. The question still remains whether such agreements could operate to override prior federal laws. On this, see note 62, post.

<sup>59</sup> 315 U. S. 203 at 230, 62 S. Ct. 552, 86 L. Ed. 796 at 818.

<sup>60</sup> This alleged interchangeability of treaties and executive agreements has caused McDougal and Lans to remark that the former is now a "sort of constitutional veriform appendix." See their "Treaties and Congressional-Executive or Presidential Agreements," 54 *Yale L. J.* 181 at 534-5 (1945).



Defense and led to the exchanging of fifty overage destroyers for a 99-year lease on British naval bases.<sup>61</sup> By these agreements, American strict neutrality became changed to something in the nature of belligerency. Even better known, but also more condemned, among the secret war and post-war "executive" agreements are those made at Teheran, Yalta, and Potsdam, with at least one eminent authority asserting the claim that such executive agreements should bind only the signing president.<sup>62</sup>

Those compacts designated as "legislative" executive agreements, *i. e.*, agreements made by the executive department but deriving their power from Congressional delegation, are probably the ones least known but those most frequently concluded. These were first entered into with reference to the postal service<sup>63</sup> but have been carried over into such areas as reciprocal trade and the like. The Supreme Court has upheld these delegations to the President,<sup>64</sup> and has said that, for purposes of federal court jurisdiction, such agreements, while not technically treaties requiring ratification, nevertheless were treaties within the mean-

<sup>61</sup> U. S. Const., Art. IV, § 3, cl. 2, grants to Congress the "power to dispose of . . . property belonging to the United States." No judicial decision has been rendered upon the question of whether President Roosevelt thereby exceeded his powers or whether, independently, as commander in chief, he had power over such property in war time. The closest judicial approximation, albeit indirect, is to be found in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 at 330, 56 S. Ct. 466, 80 L. Ed. 688 at 702 (1936).

<sup>62</sup> See Borchard, *op. cit.*, and also his "Shall the Executive Agreement Replace the Treaty?" 53 Yale L. J. 664 (1944). The Supreme Court has not yet decided whether an executive agreement will override a prior federal statute but it may soon do so. In *United States v. Guy W. Capps, Inc.*, 204 F. (2d) 655 (1953), Chief Judge Parker's forceful opinion held it would not. The Supreme Court has granted certiorari: — U. S. —, 74 S. Ct. 135, 98 L. Ed. (adv.) 81 (1953). In that case, the Agricultural Adjustment Act of 1948 delegated to the President, after ordinarily lengthy Tariff Commission hearings, the power to impose import quotas and duties. By an executive agreement with Canada, an embargo placed on potato imports from it, except for seed purposes, short-cut these hearings. The defendant imported potatoes, ostensibly for seed, but sold the same for food. The government sued to recover its loss in support payments. The Court of Appeals for the Fourth Circuit held the short-cut was unsupported by any independent or delegated authority. The Attorney General is now arguing that the 1948 statute contained a specific provision to the effect that treaties and executive agreements might be made to carry out the purposes of the statute. The Supreme Court could peg its determination on this fact and thereby find the existence of a delegated power leading to the making of a "legislative" executive agreement.

<sup>63</sup> McClure, *op. cit.*, p. 38. The President, in June, 1950, sent troops into Korea under the auspices of the United Nations Security Council pursuant to an executive agreement not previously submitted to Congress for approval. See note 15, *ante*.

<sup>64</sup> *Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892).

ing of the Circuit Court of Appeals Act.<sup>65</sup> The spectacular Lend-Lease Act of 1941 furnishes another illustration. By it, Congress empowered the President to authorize his departmental heads to procure defense items and to sell, lend, or lease them to friendly nations. Pursuant thereto, executive "mutual aid" agreements were entered into leading to the furnishing of over forty billions of dollars worth of munitions and other items to American allies. While the United Nations Participation Act of 1945 also authorizes the President to enter into special agreements with the Security Council,<sup>66</sup> nothing thereunder has eventuated to date.<sup>67</sup>

#### IV. RECENT EFFORTS TO AMEND THE TREATY POWER

Dissatisfaction with certain of the events and consequences here noted has provoked recent efforts to bring about some form of amendment in the treaty-making power. The first Congressional effort to amend<sup>68</sup> the Constitution began with S. J. Res. 130, sponsored by Senator Bricker and fifty-nine other Senators, introduced into the Second Session of the 82nd Congress on February 7, 1952. Extended hearings were held<sup>69</sup> but, the resolution expiring with the Congress, a new S. J. Res. 1 was introduced at the First Session of the 83rd Congress on January 7, 1953, this time sponsored by sixty-four Senators. Again extended hearings were held and, on June 8, 1953, by an 8-4 vote, the Senate Judiciary Committee recommended a revised text for adoption.<sup>70</sup>

<sup>65</sup> *Altman & Co. v. United States*, 224 U. S. 583 at 601, 32 S. Ct. 593, 56 L. Ed. 894 at 910 (1912).

<sup>66</sup> See note 15, ante, for details.

<sup>67</sup> The objection to "secret" war and post-war agreements resulted in the passage of P. L. 821, 81st Cong., approved Sept. 23, 1950, which requires all treaties and other international agreements to be published by the Secretary of State separately from the Statutes at Large.

<sup>68</sup> The President, of course, has no constitutional role in the amending process except as he may make recommendations on the point in his messages to Congress.

<sup>69</sup> See note 50, ante, for citation. Space requirements prevent quotation from this document or with respect to the other proposals.

<sup>70</sup> Numerous other resolutions were introduced, both in the Senate and in the House, all of which were considered, generally as well as in principle, by the Senate Judiciary Committee. See, for example, S. J. Res. 2, a re-introduction by Senator McCarran of his prior S. J. Res. 122, and S. J. 43. House Resolutions were numbered 7, 12, 25, 28, 32, 57, 65, 79, 84, and 141, respectively. The reasons for the variety, and for their sponsorship by different organizations, are not here discussed. The text of the resolution recommended by the Senate Judiciary Committee was

The proposed amendment consisted of five sections, with the important first three sections reading as follows:

1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.
3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitation imposed on treaties by this article.

The fourth section purported to empower Congress to enforce the amendment by appropriate legislation, and the fifth specified a seven-year period for ratification.

It will be quickly noticed that Section 1 is, in effect, little more than a codification of constitutional law doctrines as espoused in the form of dicta by the Supreme Court, while Section 3 includes "executive and other agreements" within the purview of Congressional regulation. Such agreements, however, are not alone those with "any foreign power," *i. e.*, another nation, but also include any with an "international organization," for example, the United Nations.<sup>71</sup> Such agreements would, under the amendment, hereafter come within the limitations imposed by Sections 1 and 2.

The Second Section requires more careful consideration to realize its full import. Self-executing treaties, and also non-self-executing treaties which have been effectuated by legislation, pres-

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apparently a revision of one suggested by the American Bar Association, introduced by Senator Watkins as S. J. Res. 43. The Committee's comment was that the resolution, "with slight and unsubstantial variations, now conforms to the American Bar Association proposal . . . but will continue to be known as the Bricker Amendment."

<sup>71</sup> Senator Bricker, testifying on S. J. Res. 130, 82nd Cong., 2nd Sess., p. 21, stated: "The primary purpose of Senate Joint Resolution 130 is to prohibit the use of the treaty as an instrument of domestic legislation, and to prevent its use as a vehicle for surrendering national sovereignty. The necessity for this amendment is shown by the activities of the United Nations and certain of its specialized agencies. There is practically no human activity which treaties now [May 21, 1952] under consideration by the U. N. do not seek to regulate."

ently become the supreme internal law of the land, overriding federal and state legislation and state constitutions but not the federal Constitution or subsequent federal legislation in conflict therewith. This is "automatic" law, that is, nothing further is required to be done for a treaty to become domestic law once these conditions have been met. In contrast, Section 2 says that, hereafter, a treaty would not become internal law except "through legislation which would be valid in the absence of a treaty." This is the so-called "which" clause. Two conditions subsequent are there set forth, to-wit: (1) the enactment of legislation, and (2) the constitutional validity thereof when measured without the treaty as a basis. When these conditions have been complied with, but not until then, the treaty would become internal law, serving to override prior federal legislation, state constitutions, and state legislation. Each of these conditions should now be examined.

As to the first, dealing with the necessity for legislation, it is obvious that there could, hereafter, be no self-executing treaties.<sup>72</sup> Each new treaty, regardless of its terms, would be treated as the non-self-executing ones now are and, without subsequent federal legislation, such treaties could not become internal law. Congressional action, beyond the point of mere Senate concurrence, would hereafter be an essential concomitant to every effective exercise of the treaty-making power. But there is also a further qualification, one brought into play by the second condition, and that deals with the fundamental validity of any legislation so enacted.

Regarding this second condition, it has been pointed out that Congressional impotence because of lack of an enumerated power has been overcome, in the past, by an exercise of the treaty power plus resort to the "necessary and proper" clause. The case of *Missouri v. Holland*,<sup>73</sup> whereunder an earlier Supreme Court de-

<sup>72</sup> The arguments generally advanced for this included one based on a fear that state license requirements for professions might be overthrown. In the case of treaties with Denmark, Greece, Israel, Japan and West Germany, however, the Senate adopted a reservation excluding aliens from practicing professions involving public functions, health, or safety wherein a state license, limited to American citizens, was required.

<sup>73</sup> 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920).

cision was, in effect, overruled by the President and the Senate, so illustrates. Under the amendment, this could no longer happen for Congress would be powerless to control the hunting of migratory birds for lack of constitutional authority on the point and no treaty could serve to plug the constitutional gap.

Nor, for that matter, under the Third Section of S. J. Res. 1, could executive or other agreements be treated any differently. Even war-time agreements would, conceivably, require Congressional approval, assuming Congress possessed a constitutional power on the point, despite the fact the agreement in question might deal, for example, with the Canadian stationing of troops to repel an attack upon the American coastline. In that instance, the President, as commander in chief, might well claim a separate and distinct constitutional power<sup>74</sup> to enter into "executive" executive agreements, because the Second Section might be said to relate only to "legislative" executive agreements. Within the assumed situation, the Supreme Court would undoubtedly agree. But how far the Court would permit additional extensions is, of course, presently a matter of pure speculation. Nevertheless, the possibility is one which may well be posed. Put differently, every ratified treaty would become subject to litigation concerning its constitutionality and, until a test case had upheld it, no nation could rely upon the federal government's written word.<sup>75</sup>

<sup>74</sup> See, for example, the arguments of Chief Justice Vinson and the minority in the Steel Seizure Cases, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952). The case, of course, dealt with a peace-time situation. Absent this condition and despite a lack of Congressional authority, a war-time President would probably be upheld with respect to any reasonable action taken upon emergency grounds. It might be noted that the government did not contend therein, as some commentators have inferred, that treaties formed the basis of the presidential power exercised in the case. The reference in the government's arguments to treaties was furnished to describe the overall picture within which the President acted in an emergency situation to avert a national disaster.

<sup>75</sup> Prof. Eagleton, in a letter to the editor of the *New York Times*, Jan. 30, 1954, suggested that "international law holds the treaty, once ratified, to be binding upon us." He would infer that, once a treaty has been ratified, its constitutionality could not be inquired into. He overlooks two things: (1) a treaty is invalid if it violates the Constitution and no special procedure need be set up for such determination, and (2) nations are presumed to be aware of the internal treaty-making procedures of their national brethren, so that conditions subsequent, even as today, are not new. See Hackworth, *Digest of International Law* (1943), Vol. V, p. 26 et seq. The practical, as differentiated from the legal, difficulties would be increased by the proposed amendments, but this discussion is limited to the legal aspects of the problem.

One argument has been made to the effect that resort to the "which" clause would require the consent of all forty-eight states for, if a Missouri-Holland situation again occurred, invalid federal legislation could not penetrate into the domain of the states.<sup>76</sup> It is here suggested that even this approach assumes too much and that much more than forty-eight consents would be required. Assume the Missouri-Holland facts.<sup>77</sup> Under Section 2 of the Resolution, a treaty could be entered into and eventually ratified but would not become internal law until Congress legislated. But, by it, prior legislation would have been overturned, so that the treaty alone would afford no valid base. How, then, could Congress now obtain this base? Assume all forty-eight states unanimously legislated uniformly,—would this grant Congress the necessary power? Since the enumerated powers of Congress could not be increased, for Section 2 is involved, save by a constitutional amendment, and that would require prior action by a two-thirds majority of both branches of Congress as well as the required degree of state approval, the unanimous state legislative action would appear to be insufficient to sanction the federal legislation. Such practical state unanimity might conceivably work, but even so the "which" clause would freeze into a constitutional mold all possibility of ever permitting a unanimous federal and state team to work unless a constitutional amendment was adopted for each treaty falling within the assumed situation.<sup>78</sup> In those instances, not alone would favorable action by two-thirds of the Senate present be needed to consent to the treaty but, in addition, two-thirds of each House would, in effect, have to re-approve.

<sup>76</sup> One group of opponents contended that the term "legislation," as used in Section 2 of S. J. Res. 1, would require enactments by all state legislatures, thereby giving each state a "Russian" veto over everything. This, apparently, is not what Senator Bricker had in mind for, in his revised proposal, he took the states entirely out of the picture. It might be argued, of course, that he was forced to do so.

<sup>77</sup> This suggestion is made merely for convenience. The State Department has listed twelve treaties, consented to by the Senate, where the subject matter lies outside the area of delegated Congressional powers, as for example a Bonn agreement concerning the validation of bonds, another with the signers of NATO regarding the status of their forces, and another concerning the status of NATO itself.

<sup>78</sup> This would go beyond the pre-Constitution days when, under the Articles of Confederation, although Congress could enter into treaties, it could not compel their observance by the states. Under U. S. Const., Art. I, § 10, the individual states are powerless to enter into agreements or compacts directly with foreign governments.

To the foregoing analysis must be added the fact that the "which" clause would involve some degree of senatorial abdication of power, if not of prerogative. Today, as has been shown, the Senate may, by a simple majority vote, attach a reservation or amendment to a treaty making it non-self-executing, thereby requiring subsequent legislation for domestic effectuation. Hereafter, under the Resolution, the Senate would have no such power for, no matter what it did, the House would have to "get into the act" inasmuch as a statute would be required in every case.

The arguments offered by the proponents and opponents of S. J. Res. 1, or with respect to its offspring, go beyond the province of this essay and are not further discussed. What is of interest is the Senate action taken thereon. On February 15, 1954, by a 62-20 vote, the Senate approved the inclusion of the words "or other international agreement" in the first section so that it then read: "A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect." The following day, voting 72-16, the Senate provisionally adopted a procedural proposition to the effect that its consent to ratification of all future treaties should always be by roll-call vote.<sup>79</sup> On February 17th, by provisionally approving certain language by a 44-43 vote, the Senate disapproved, and officially eliminated, the amended Section 1 by substituting for the present treaty portion of the "supremacy" clause a requirement that no treaty "shall be the supreme law of the land unless made in pursuance of this Constitution." Treaties, therefore, but not "executive" international agreements, would be, in effect, the sole matter covered. According to various Washington commentators, President Eisenhower indicated that he had no objection to the submission of such an amendment to the people.

The second section of the proposed amendment as originally submitted, one which directed that a treaty, or agreement, would require Congressional approval before becoming internal law, was rejected on February 25th by a 50-42 vote, despite a rider

<sup>79</sup> This, as discussed in note 14, ante, could be accomplished by a change in the Senate's own Rule XXXVII.

thereto, applying only to treaties, which would have permitted them to become internal law without further action if the two-thirds consenting should so declare. This vote therefore left alive, out of the original proposal, the three substituted items mentioned in the preceding paragraph as well as Section 3, which had not, to that point, been voted upon. On February 26th, by a 61-30 vote, the substitute amendment offered by Senator George was adopted, thereby killing all these other items and presenting, for final consideration, a single proposed amendment.

The proposal of Senator George consisted of four sections, the last being the usual seven-year ratification requirement. Section 1, identical in language with the previously-approved requirement, recited: "A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect." Section 2 related only to international agreements and required Congressional action to make them effective as internal law. Section 3, in effect, was the previously-approved roll-call provision. Immediately after replacing this substitute for the others, the Senate, voting 60-31, then defeated the new, and only surviving, proposal by a one-vote margin.<sup>80</sup> This was the last required vote upon any remaining Senate proposal but, on March 2nd, 1954, Senator Lennon (D., N. Car.), who had been paired for the proposal, filed a motion to have the Senate reconsider and reverse itself, a motion designed to lead to a possible approval of the George amendment. The status of the Great Debate of 1954 is, therefore, one of uneasy quiet for, so long as the Senate is in session, the Lennon motion could be called up for a vote at any time.

What is of greater interest and importance is the matter of the future composition of the Senate for the next session. Of the sixty-four original sponsors of S. J. Res. 1, nine of the eleven who voted against even the watered-down George proposal came from the Eastern seaboard. The fall elections of 1954 must, therefore, be examined not only for party nominees and candidates'

<sup>80</sup> The two-thirds provision required 61 favorable votes out of 91 voting. There was also a pairing of two for and one against.



platforms but, ultimately, for the people's choice. The next Congress should be able to start anew but, with the experience of this year's battle, assuming a revived George proposal would still be unacceptable, the question will then be whether an even weaker compromise substitute would be proposed. If so, could it be said that an amendment to the Senate rules, so as to require a formal roll-call on all treaty votes, and a statement of a standard procedure for consents, as, for example, a clause stating that neither the treaty nor its operation should affect or involve internal law, would suffice?

It should be noted that most of the heat engendered during the Great Debate has been brought about by what has been styled the "executive" executive agreement, for the Senate is able to control treaties and "legislative" executive agreements through its constitutional power to consent or to join with the House in the enactment of legislation. The "executive" executive agreement cannot, as has been shown, be constitutionally impaired by the Congress for, in this sphere, the President acts by virtue of his constitutional authority. Restrictions upon, or diminution in, such executive power could be accomplished only by an amendment to the Constitution. The basic problem, then, is to determine the mischief or defect for which the law does not provide,<sup>81</sup> to determine whether it threatens to eventuate,<sup>82</sup> and then, assuming it is apt to occur, to decide whether the mischief would be so great as to sufficiently outweigh those other evils which might result from a constitutional amendment or whether it would be better to leave well enough alone.<sup>83</sup>

<sup>81</sup> The "mischief" rule for interpreting statutes was enunciated by Blackstone, *Comm.*, I, 87, on the basis of *Heydon's Case*, 3 *Coke* 7a, 76 *Eng. Rep.* 637 (1584). It was followed in *American Historical Society, Inc. v. Glenn*, 248 *N. Y.* 445, 162 *N. E.* 481 (1928). See also statement of Mr. Justice Stone in *Apex Hosiery Co. v. Leader*, 310 *U. S.* 469 at 489, 60 *S. Ct.* 982, 84 *L. Ed.* 1311 at 1321 (1940).

<sup>82</sup> This, of course, has been the procedure advocated by the courts in applying the "clear and present danger" test. In *Dennis v. United States*, 341 *U. S.* 494, 71 *S. Ct.* 857, 95 *L. Ed.* 1137 (1951), however, the Supreme Court adopted the approach of Judge Learned Hand. He wrote: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion [here of constitutional executive power] as is necessary to avoid the danger." See 183 *F.* (2d) 201 at 212.

<sup>83</sup> The "balancing" concept, akin to the utilitarian philosophy of John Stuart Mill and his predecessors in England, has been utilized in American politics and jurisprudence for generations. It partakes, too, of the pragmatic consequence-approach as well as of the "down-to-earth" school of American realism.

Obviously, this procedure would require a non-emotional approach. Aside from the matter of adoption or rejection of an amendment, policy questions will always intrude as the issue concerns the effect such an amendment would have on the success or failure of American interests both at home and abroad. Part of the answer may be found in a proper evaluation of the mischiefs and evils, if any, in the present system, but the importance of the issue on the national well-being calls for a double consideration. On this suggested basis for evaluation there should be no disagreement. On the evaluation itself, honest disagreement could result. In that conclusion, however, whatever the conclusion may be, responsible Americans will join as they act within the framework of democratic procedures.