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## The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions

ONE of the dark spots on the map of federal powers, the features of which have become more and more definite through the incessant explorations of the Supreme Court, is the power of the federal government in the conduct of foreign relations, the most important aspect of which is the treaty power. The scope and structure of this power are vague,<sup>1</sup> and it is therefore of great interest that three times during the last year and a half, the Supreme Court had occasion to venture into this seldom invaded territory.

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<sup>1</sup> See (1) *Special studies*: BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (1902); CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917); CRANDALL, *TREATIES—THEIR MAKING AND ENFORCEMENT* (2d ed. 1916); DEVLIN, *THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES* (1908); MATHEWS, *AMERICAN FOREIGN RELATIONS, CONDUCT AND POLICIES* (1928); MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* (1936); WILCOX, *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* (1935); WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922); *RESEARCH IN INTERNATIONAL LAW*, Harvard Law School (1935) Part III, *LAW OF TREATIES*; Butler, *Limitations of the Treaty-Making Power of the United States in Matters Coming Within the Jurisdiction of the States* (1929) 23 *PROC. AM. SOC. INT. LAW* 176; Foster, *The Treaty-Making Power Under the Constitution* (1901) 11 *YALE L. J.* 69; Henry, *When Is a Treaty Self-Executing* (1929) 27 *MICH. L. REV.* 776; Lenoir, *Treaties and the Supreme Court* (1933) 1 *U. OF CHI. L. REV.* 702; Moore, *Treaties and Executive Agreements* (1905) 20 *POL. SCI. Q.* 385; Nielsen, *Our Methods of Giving Effect to International Law and Treaties* (1934) 20 *A.B.A. J.* 503; Scott, *Treaty-Making Under the Authority of the United States* (1934) 28 *PROC. AM. SOC. INT. LAW* 2; Wilson, *International Law and the Constitution* (1933) 13 *B. U. L. REV.* 234, 462; (2) *General works on constitutional law*: RAWLEY, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1825) 56 ff., 314; SERGEANT, *CONSTITUTIONAL LAW* (1822), especially at p. 391; 3 STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833) 351 ff.; 2 TUCKER, *THE CONSTITUTION OF THE UNITED STATES* (1899) 720; 2 WATSON, *THE CONSTITUTION OF THE UNITED STATES* (1910) 948 ff.; WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* (1936) 427; 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 513 ff. For a general bibliography see LIBRARY OF CONGRESS, *LIST OF REFERENCES ON THE TREATY-MAKING POWER* (1920).

The first occasion was the case of *Van Der Weyde v. Ocean Transport Co. Ltd.*,<sup>2</sup> decided February 3, 1936; the second, that of *United States v. Curtiss-Wright Export Corp.*,<sup>3</sup> handed down December 21, 1936; and the third, the case of *United States v. Belmont*,<sup>4</sup> decided May 3, 1937. The decisions are widely divergent in their importance and elaboration of reasoning. The first case involved the jurisdiction of the federal courts in a libel suit against a vessel of a Japanese corporation, and the effect of an international treaty upon the jurisdiction; the second concerned the powers of the President of the United States to prohibit the sales of certain goods, such as arms, for the purpose of safeguarding the neutrality of the nation; and the third dealt with the effect of Russian recognition by the United States and the concomitant relations upon the validity of Russian corporation decrees in American courts. The opinion of the Chief Justice in the *Van Der Weyde* case is short and of rather a sweeping character; the opinions in the other two, both written by Mr. Justice Sutherland, contain detailed and minute discussions of the problems presented. All three cases, however, have this basic problem in common: the problem of the powers of Congress and the President in international relations. One should note that this problem is not so much one of the powers of the national government as such, as one of the division of these powers among Congress, the President, and the President and the Senate together.<sup>5</sup>

Congress has power under the Constitution "to regulate commerce with foreign nations,"<sup>6</sup> and to declare war;<sup>7</sup> the President has power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur;<sup>8</sup> and the President alone has power in the control of foreign relations, as head of the state vested with "the executive power."<sup>9</sup> This last power over international relations was considered as the essence of the executive power by the originator of the doctrine of separation of powers—by Montesquieu himself. He wrote: "In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law

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<sup>2</sup> 297 U. S. 114.

<sup>3</sup> 299 U. S. 304.

<sup>4</sup> 81 L. Ed. Adv. Op. 715.

<sup>5</sup> The difficulties and problems concerning the distribution of powers among these different branches of the National government are treated generally in a somewhat summary but instructive fashion by Taft, *The Boundaries between the Executive, the Legislative and the Judicial Branches of the Government* (1916) 25 YALE L. J. 599.

<sup>6</sup> U. S. CONST., Art. 1, § 8, Cl. 3.

<sup>7</sup> U. S. CONST., Art. 1, § 8, Cl. 11.

<sup>8</sup> U. S. CONST., Art. 2, § 2, Cl. 2.

<sup>9</sup> U. S. CONST., Art. 2, § 1, Cl. 1.

of nations; and the executive in regard to things that depend on the civil law."<sup>10</sup> As Montesquieu stated, this second executive power is more properly called the judicial power, and the first "simply the executive power of the state." American decisions have followed his views and accordingly considered the President's power in foreign relations as a special federal power vested in him. Thus an early decision of the Supreme Court contrasts the President and Congress, calling the former "that department which is entrusted with foreign intercourse," and the latter "that which is invested with the powers of war."<sup>11</sup> This competency of the several departments with respect to the conduct of foreign relations is the cause of much difficulty in deciding how far the powers of each one extend, and in deciding whether a certain act falls within the scope of one or the other. Here the principal cases present some new aspects of the problem.

## I

## THE VAN DER WEYDE CASE: THE POWER TO TERMINATE TREATIES

The power to make treaties is vested by express grant of the Constitution in the President and Senate. The framers of the Constitution had special reasons for this regulation.<sup>12</sup> The wording of the clause of the Constitution, however, covers only the making of treaties; the question thus arises what is the law with respect to their termination, the problem involved in the *Van Der Weyde* case.

The facts of this case were as follows: The petitioner brought a libel against the *Taigen Maru*, owned by the Ocean Transportation Company Ltd., a Japanese corporation, for personal injuries suffered in 1922 when the ship was owned by a Norwegian company. The Norwegian consul intervened, claiming interest because the Japanese company would have a right to reimbursement against the former Norwegian owner by virtue of the warranty contained in the contract of sale of the vessel. The consul invoked a treaty of 1827 between the United Kingdom of Norway and Sweden on the one hand, and the United States of America on the other, and argued that the treaty deprived the United States courts of jurisdiction and gave it to Norway, to be exercised through consular arbitration.

<sup>10</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Engl. transl. 1768) Book 11, c. VI.

<sup>11</sup> *The Amelia* (1801) 5 U.S. (1 Cranch) 1, 38. Quoted in *Yang-Tsze Ins. Ass'n. v. Furness, Withy & Co.* (1914) 215 Fed. 859, 866.

<sup>12</sup> Cf. 3 STORY, *op. cit. supra* note 1, at 354; 2 WATSON, *op. cit. supra* note 1, at 950; 2 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 297, 392, 538, 540, 548. Practical reasons, particularly the necessity of secrecy and immediate dispatch, were the main factors causing the power to be vested in the President and Senate rather than in Congress. Under Article 9 of the Articles of Confederation of 1777, Congress had the power to enter into treaties.

The federal district court dismissed the cause "in the exercise of its discretion." The circuit court of appeals affirmed the decree, but upon the ground that the dismissal should have been for want of jurisdiction rather than as an exercise of discretion,<sup>13</sup> basing its decision upon the exclusive jurisdiction of Norway stipulated by Articles XIII and XIV of the treaty. The Supreme Court reversed the decision, declaring the opinion of the court below erroneous because the respective articles of the treaty had ceased to be in force. It stated the history of this termination as follows.<sup>14</sup>

"Section 16 of the Seamen's Act of March 4, 1915, expressed 'the judgment of Congress' that treaty provisions in conflict with the provisions of the Act 'ought to be terminated', and the President was 'requested and directed' to give notice to that effect to the several Governments concerned within ninety days after the passage of the Act. It appears that, in consequence, notice was given and that a large number of treaties were terminated as a whole or in part. The Treaty with Sweden and Norway of 1827 provided that it might be terminated, after an initial period of ten years, upon one year's notice. On February 2, 1918, the Government gave notice to the Norwegian Government of the denunciation of the treaty in its entirety, to take effect as of February 2, 1919, but later by an exchange of diplomatic notes, this Government formally withdrew its denunciation, except as to Articles XIII and XIV. [Foreign Relations of the United States 1919, pp. 50-52.] It was expressly stated that Articles XIII and XIV of the treaty, being in conflict with provisions of the Seamen's Act, were deemed to be terminated on July 1, 1916, so far as the laws of the United States were concerned. [*Id.*, pp. 53, 54.]"

The respondent contended that the treaty was not validly terminated on the ground that: (1) the Seamen's Act did not specifically direct the abrogation of Article XIII; (2) the Act was not so unavoidably inconsistent with all the provisions of Article XIII as to require its entire abrogation; and (3) the diplomatic negotiations attempting to effect abrogation of the whole of Article XIII "were in excess of congressional direction and in violation of constitutional authority."<sup>15</sup>

The court discarded these contentions with the following statement:<sup>16</sup>

"The first and second points are unavailing, if Article XIII was actually abrogated in its entirety, and that this was the purport of the diplomatic exchanges between the two Governments is beyond dispute. As to the third point, we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with

<sup>13</sup> *The Taigen Maru*, Van Der Weyde v. Ocean Transport Co. Ltd. (C. C. A. 9th, 1934) 73 F. (2d) 922.

<sup>14</sup> Van Der Weyde v. Ocean Transport Co., Ltd., *supra* note 2, at 116-117.

<sup>15</sup> *Ibid.* at 117.

<sup>16</sup> *Ibid.* at 117-118.

the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway agreed to the termination of Articles XIII and XIV and her consul cannot be heard to question it."

It is extremely difficult to gather the *ratio decidendi* from these sentences. With all the respect to the Supreme Tribunal, the reader is inclined to feel like the reader in Mark Twain's famous *Mr. Bloke's Item*. The more often one reads the statement the more confused does it appear. It has been said that the case "seems to be a clear holding by the Supreme Court that Congress can terminate a treaty obligation."<sup>17</sup> But this, of all things, is clearly not what the Chief Justice said, for he states explicitly that it was the action of the President through the Secretary of State that terminated the operation of the articles of the treaty in question.<sup>18</sup>

It is difficult to determine from what source this power of the President is derived. The Court did not base the power to terminate the treaty on the treaty-making power; neither did it base it entirely on the power of the President as head of the executive branch charged with the conduct of international relations. Rather it based the power to terminate on the presence of Congressional action. But it does not clearly appear whether it was based on the Congressional authorization and direction as such, or on an implied power resulting from the inconsistency of the new Act with the treaty coupled with the President's constitutional power and duty<sup>19</sup> "to take Care that the Laws be faithfully executed," plus his power to conduct negotiations with foreign powers. The Court did not state squarely that Congress could direct the President to terminate a treaty, but held only that, if Congress enacts a statute and requests the termination of inconsistent treaties, the President has the power and duty to do so, if in the exercise of his sound discretion he finds any inconsistency.

Even though these statements seem to show an anxiety on the part of the Court not to discuss the question too fully and are, therefore, in themselves extremely restricted, one is amazed to find a still further limitation in the concluding sentence. "Norway agreed to the termination and her consul cannot be heard to question it." Does this intimate that the consent of Norway prevents her from asserting jurisdiction and from invoking her rights under the treaty even in a case where the organ of

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<sup>17</sup> Note (1936) 35 MICH. L. REV. 88, 94.

<sup>18</sup> Van Der Weyde v. Ocean Transport Co. Ltd., *supra* note 2, at 118.

<sup>19</sup> U. S. CONST., Art. II, § 3.

the other contracting party which undertook to denounce the treaty lacked power to denounce it? This would be a very strange and highly questionable extension of the estoppel doctrine the acceptance of which, in itself, seems to be not unquestionable in the field of international law.<sup>20</sup> Furthermore, the objection, that the attempted Presidential termination of the treaty was invalid, was raised by a third party, *i.e.*, the Japanese corporation. Could the consent of Norway to an unauthorized act of the President of the United States and the assumed resulting estoppel of her consul to question the validity of the act deprive the respondent of the right, arising under the treaty, not to be brought within the federal jurisdiction? If the termination would have been inoperative, the consent of Norway could hardly have validated it with respect to the rights of third parties.

It seems that a great many questions are here involved which unfortunately have not been kept distinct; and these deserve a further analysis. It is important to emphasize at the outset the twofold character of the question, namely the international aspect and the municipal aspect. An international treaty, so far as the international sphere is concerned, is a compact between nations by virtue of which international rights and duties are acquired, and which may be enforced in international tribunals so far as provision is made for such enforcement.<sup>21</sup> But an international treaty under United States law has also another and non-international effect by virtue of Article VI of the Constitution. It becomes part of the "Supreme" law of the land if made under the authority of the United States, and it must be applied by the courts as a component of the body of statute law, together with the Constitution.<sup>22</sup> The

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<sup>20</sup> For a discussion of this problem see Friede, *Das Estoppel Princip im Völkerrecht* (1933) 5 ZEITSCHR. F. AUSL. ÖFF. RECHT UND VÖLKERRECHT 517.

<sup>21</sup> The literature on the nature and effect of international treaties is enormous. Of the most recent studies on this topic see RESEARCH IN INTERNATIONAL LAW, *supra* note 1, where copious references and citations may be found; DEHOUSSE, *LA RATIFICATION DES TRAITÉS, ESSAI SUR LES RAPPORTS DES TRAITÉS ET DU DROIT INTERNE* (1935).

<sup>22</sup> This, however, is not the case in many other States, *e.g.*, Italy, Germany, or Great Britain, where special laws or ordinances for the municipal "execution" of treaties are required. In many countries the topic of execution is controversial, but a discussion of that problem is not within the scope of the paper. With respect to Great Britain, see McNair, *When Do British Treaties Involve Legislation* (1928) 9 BRITISH YEARBOOK OF INT. LAW 59. *Cf.* the recent Privy Council case, *Attorney-General for Canada v. Attorney-General for Ontario* (Jan. 28, 1937) 53 T. L. R. 325, (1937) 31 AM. J. INT. LAW 348, 353: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law."

framers of the Constitution adopted this solution in order to safeguard the enforcement of the treaties in the states, which was both lax and difficult under the Articles of Confederation.<sup>23</sup>

Even though treaties are superior to state laws under the Constitution, their rank in respect to other federal laws is not established by the Constitution. The Constitution itself, however, is superior to all treaties, as it is superior to other laws, and the courts may examine the constitutionality of treaties as they do in regard to statutes, and this for the same reasons.<sup>24</sup> All this refers, however, only to the effect of treaties as municipal law. What of their binding force so far as the international sphere is concerned? Here the answer can only be given by the rules of international law.

It is often said that treaties are part of the municipal law *proprio vigore*.<sup>25</sup> True it is that they are part of the law of the land "without the aid of any legislation, state or national,"<sup>26</sup> but they have this effect not by reason of their own force, but by virtue of Article VI of the Constitution, *i.e.*, by virtue of a rule of municipal law.<sup>27</sup> On the other hand

<sup>23</sup> Cf. RAWLE, *op. cit. supra* note 1, at 59 ff., 69, and the letter from Congress prepared by Mr. Jay, then Secretary for Foreign Affairs, printed in RAWLE, *op. cit. supra* note 1, at 314. See also Madison's remarks, 1 FARRAND, *op. cit. supra* note 12, at 126, 164, 316; Pinkney's remarks, 1 *ibid.* at 164; 1 *ibid.* at 171; and the resolution, 1 *ibid.* at 229, 236, 245. The form that the treaties should operate as supreme laws was introduced in the convention by Mr. Patterson, 1 *ibid.* at 245, and again by Mr. Luther Martin, 2 *ibid.* at 28. Cf. the resolution of the Committee of Detail, 2 *ibid.* at 132.

<sup>24</sup> The question seems to have been doubtful at first. See SERGEANT, *op. cit. supra* note 1, at 403. "Whether the judiciary have power to declare an article of a treaty to be unconstitutional and therefore void, query." He cites the remark of Chase, J., in *Ware v. Hylton* (1796) 3 U. S. (3 Dall.) 199, 237, to the effect that "If the court possesses a power to declare treaties void, [he] would exercise it, but in a very clear case indeed." One must observe that at this time the power of judicial review was not yet established. But the same reasons which give the Supreme Court the power of judicial review with respect to the constitutionality of statutes apply equally to the constitutionality of treaties. In fact the Court has frequently examined the constitutionality of treaties, often in the form of a discussion of the treaty power limits. Cf. *New Orleans v. United States* (1836) 35 U. S. (10 Pet.) 662, 736; *The Cherokee Tobacco* (1870) 78 U. S. (11 Wall.) 616, 620-621 ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of government."); *Geofroy v. Riggs* (1890) 133 U. S. 258, 266; *Missouri v. Holland* (1920) 252 U. S. 416; *Asakura v. Seattle* (1924) 265 U. S. 332. There exists, however, no decision where a treaty has been declared unconstitutional on the question as to what the constitutional limitations are. Cf. *infra* note 44.

<sup>25</sup> *E.g.*, WRIGHT, *op. cit. supra* note 1, at 353.

<sup>26</sup> *Asakura v. Seattle, supra* note 24, at 341.

<sup>27</sup> There is a famous controversy among scholars of international law and general jurisprudence regarding the problem whether international law is applicable "as such" in municipal courts or only "transformed" by virtue of a municipal rule of incorporation. The prevailing view is the so-called pluralistic doctrine, that inter-

there are treaties which are not immediately part of the law of the land but require the aid of a statute. Consequently, one must distinguish between treaties which involve additional legislation and "self-executing" treaties; and the problem therefore arises as to what treaties are self-executing.<sup>28</sup> Professor Wright has attempted a classification, and distinguishes three classes of non-self-executing treaties;<sup>29</sup> (1) Treaty provisions dealing with finances; (2) Treaty provisions which require for their performance detailed supplementary legislation or specific acts which the Constitution provides shall be performed by Congress (e.g., incorporation of territory, organization of offices and courts, and declaration of war); and (3) Treaty provisions which are by nature self-executing, but because of historical tradition and constitutional interpretation, require legislation to be executed (e.g., treaties defining crimes). This classification, however, is perhaps not very methodical. It would appear more orderly to emphasize other points of distinction. There are classes of treaties which *cannot* be self-executing because the Constitution itself, expressly or impliedly, prescribes that the act which the treaty makes obligatory shall be done by Congress. Such is the case where a treaty

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national law is applicable only by virtue of constitutional, statutory or customary rule of domestic law. It is developed by Triepel, *VÖLKERRECHT UND LANDESRECHT* (1899, French transl. by Brunet, Carnegie Found. ed. 1920); adopted and defended by Anzilotti, *CORSO DI DIRITTO INTERNAZIONALE* (1928); Strupp, *Les règles général du droit de la paix* (1934) 47 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL* 263, 404; CAVAGLIERI, *CORSO DI DIRITTO INTERNAZIONALE* (1934); WALZ, *VÖLKERRECHT UND STAATLICHES RECHT* (1933). It is opposed by the "monistic" approach espoused by Professor Kelsen and his school, who consider international law applicable by its own force. Kelsen's most recent studies on the topic are his *Théorie générale du droit international public* (1932) 42 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL* 119 ff, and *La Transformation du droit international en droit interne* (1936) 43 *REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC* 5. Compare also the discussion of Pilotti, *Plurality or Unity of Juridical Orders* (1934) 19 *IOWA L. REV.* 244. In the United States the problem is seldom discussed. Chief Justice Marshall declared in *Foster v. Neilson*, *infra* note 31, at 314, that treaties are of infraterritorial operation only because the Constitution provides so; Mr. Justice Holmes likewise took a rigidly pluralistic view in *The Western Maid* (1922) 257 U. S. 419, 432: "When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules." During the drafting of the Constitution, Congress was originally endowed with power to enforce treaties. This power on the motion of Morris was eliminated "as being superfluous since treaties were to be laws." 2 *FARRAND, op. cit. supra* note 12, at 382, 390.

<sup>28</sup> Cf. 2 *BUTLER, op. cit. supra* note 1, at 67; *CRANDALL, op. cit. supra* note 1, at 162; *DEVLIN, op. cit. supra* note 1, § 85; *MATHEWS, op. cit. supra* note 1, at 447; 1 *WILLOUGHBY, op. cit. supra* note 1, at 548; *WRIGHT, op. cit. supra* note 1, at 207, 228, 353; Dickinson, *Are the Liquor Treaties Self-Executing?* (1926) 20 *AM. J. INT. LAW* 444; Henry, *op. cit. supra* note 1. British law is dealt with by McNair, *op. cit. supra* note 22.

<sup>29</sup> *WRIGHT, op. cit. supra* note 1, at 354, 355.

calls for an appropriation of money which is exclusively within the power of Congress.<sup>30</sup> Here therefore, the Constitution itself prevents the treaty from being self-executing. Apart from this group, judicial interpretation has created another limitation on the broad rule of Article VI of the Constitution: Chief Justice Marshall, in the case of *Foster v. Neilson*,<sup>31</sup> drew a distinction dependent upon whether the parties made an agreement which by its terms was to operate directly on private rights or engaged themselves only to take certain legislative action. In the latter case, not the constitutional grant of power to Congress, but the intent of the "High Contracting Parties," their shaping of the content of the obligation, is the controlling factor.<sup>32</sup> The question becomes thus a problem of construction which has offered many difficulties.<sup>33</sup>

The foregoing considerations show that the international validity of treaties is a different problem from the question of their "infra-terri-

<sup>30</sup> This is the generally accepted view and practice. Cf. *Turner v. The American Baptist Missionary Union* (C. C. D. Mich. 1852) Fed. Cas. No. 14,251; RAWLE, *op. cit. supra* note 1, at 63-64. See also 2 BUTLER, *op. cit. supra* note 1, at 78-79; MATHEWS, *op. cit. supra* note 1, at 467; 1 WILLOUGHBY, *op. cit. supra* note 1, at 549; Dickinson, *op. cit. supra* note 28, at 449; Henry, *op. cit. supra* note 1, at 780. Doubts exist with respect to treaties affecting the revenue laws (MATHEWS, *op. cit. supra* note 1, at 467, n. 2, 469; Henry, *op. cit. supra* note 1, at 780), and with respect to treaties involving the creation of criminal offenses. Certain cases seem to intimate that special legislation is necessary. See *The Bello Corrunes* (1821) 19 U. S. (6 Wheat.) 152, 171, approved by Mathews, *op. cit. supra* note 1, at 451, and apparently by Sergeant, *op. cit. supra* note 1, at 396. See also *The Over the Top* (D. Conn. 1925) 5 F. (2d) 838, 845: "It is not the function of treaties to enact . . . the criminal law of a nation." This was approved in 9 HUGHES, *FEDERAL PRACTICE* (1931) 18, n. 34. The same rule is announced by WRIGHT, *op. cit. supra* note 1, at 356. *Contra*: Dickinson, *loc. cit. supra* note 28. *Doubting*: Henry, *op. cit. supra* note 1, at 782. It might be added in favor of the view which requires statutory action that the Supreme Court in the first of the liquor treaty cases alluded to the fact that the "treaty creates no offense against the law of the United States." *Ford v. United States* (1927) 273 U. S. 593, 602. Furthermore, in *United States v. Flores* (1933) 289 U. S. 137, 151, there is a *dictum* that "the criminal jurisdiction of the United States is wholly statutory; . . ."

<sup>31</sup> (1829) 27 U. S. (2 Pet.) 253, 314: "Our constitution declares a treaty to be the law of the land. It is, consequently, 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 legislative must execute the contract, before it can become a rule for the court." The statement has been repeated in *United States v. Arredondo* (1832) 31 U. S. (6 Pet.) 691, 735, and in *Rhode Island v. Massachusetts* (1838) 37 U. S. (12 Pet.) 657, 747.

<sup>32</sup> Cf. Dickinson, *op. cit. supra* note 28, at 451; Henry, *op. cit. supra* note 1, at 777.

<sup>33</sup> This is very well illustrated by the fact that the Court a few years later had to reverse its construction of the treaty given in *Foster v. Neilson*, *supra* note 31, in the case of *United States v. Percheman* (1833) 32 U. S. (7 Pet.) 51. Cf. *Rhode Island v. Massachusetts*, *supra* note 31, at 747.

torial" operation, as Marshall styled it. The question thus arises, what is necessary to the international validity of treaties, particularly if they *cannot* be executed without Congressional action. Is Congressional action necessary in such cases for the treaty to become *internationally* effective? The effect of a constitutional provision upon the international validity of treaties is controversial.<sup>34</sup> One theory goes so far as to maintain that every treaty ratified by the head of the state is binding regardless of constitutional restrictions.<sup>35</sup> More strongly supported is the opposite view, 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," invoking the old maxim, *qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus*.<sup>36</sup> Professor Dehousse has suggested a compromise view and distinguished between "extrinsic" and "intrinsic" unconstitutionality of treaties. If the treaty is entered into by a constitutionally incompetent organ, it is void; if the organ is constitutionally authorized to act but the treaty's content is not within the constitutional powers, it is valid.<sup>37</sup> But even if it be accepted that a treaty is valid only if made by a constitutionally authorized organ, it does not follow that the Constitution requires the co-operation of Congress for the international formation of the contract, even though its internal efficacy may require legislation. The contrary is true. It may be advisable to defer ratification until Congress has acted,<sup>38</sup> but Congressional action is not a constitutional prerequisite to the making of the treaty even where it is

<sup>34</sup> A survey of the controversy is given in RESEARCH IN INTERNATIONAL LAW, *op. cit. supra* note 1, Comment to art. 21. See the later discussion by Fairman, *Competence to Bind the State to an International Agreement* (1936) 30 AM. J. INT. LAW 438; and also von Szaszy, *Die Parlamentarische Mitwirkung beim Abschluss völkerrechtlicher Verträge* (1934) 14 ZEITSCHR. ÖFF. RECHT 459.

<sup>35</sup> Partisans of this theory are such outstanding European writers as BITTNER, *DIE LEHRE VON DEN VÖLKERRECHTLICHEN VERTRAGSURKUNDEN* (1924); ANZILOTTI, *CORSO DI DIRITTO INTERNAZIONALE* (1928) 259, 359; Mestre, *Les traités et le droit interne* (1931) 3 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 237, 241, n. 1. TRIEPEL, *op. cit. supra* note 24, at 233; and many others. See references in RESEARCH IN INTERNATIONAL LAW, *loc. cit. supra* note 34. Von Szaszy, *op. cit. supra* note 34, likewise considers as binding all treaties entered into by the head of the state except those "in manifest violation" of the constitution.

<sup>36</sup> This is the view taken in 2 TUCKER, *op. cit. supra* note 1, at 724; 1 WILLOUGHBY, *op. cit. supra* note 1, at 528 (but apparently with some limitations, *infra* note 37); RESEARCH IN INTERNATIONAL LAW, *loc. cit. supra* note 1; and the writers there referred to.

<sup>37</sup> DEHOUSSE, *LA RATIFICATION DES TRAITÉS* (1935) 58, 149. Willoughby apparently takes a similar position. 1 WILLOUGHBY, *op. cit. supra* note 1, at 528, 579. Another compromise view, similar to Dehousse's theory is advanced by Fairman, *loc. cit. supra* note 34. See finally, the compromise view of Szaszy referred to *supra* note 34.

<sup>38</sup> This practice is recommended for Great Britain by McNair, *op. cit. supra* note 22, at 67; and for the United States by MATHEWS, *op. cit. supra* note 1, at 475.

necessary for its enforcement. The question is one of constitutional interpretation.<sup>39</sup> The view here taken seems clearly sound where Congressional action is required only because of the intent of the parties, but apparently it is also the case where the executability depends on Congressional action because of the Constitution itself.<sup>40</sup> One may not say that the action is an implied condition under international law, even though it may be made an express one. If Congress does not act the nation is liable for breach of the international covenant even if one take the view that constitutional limitations on the exercise of the treaty-making power affect the binding force of treaties in international law.<sup>41</sup>

A different question, which has been much discussed, is the problem of whether Congress is under a "duty" to pass such a statute. This ques-

Mere expression of approval by the parliament does not, however, operate as law according to *Attorney-General for Canada v. Attorney-General for Ontario*, *supra* note 22, at 353.

<sup>39</sup> If, as in many countries, no special department for the conclusion of treaties exist and the constitution require in certain or all cases the ratification of or approval by the parliament, the situation is not the same; the act of parliament may be a constitutional requirement for the formation of the treaty. Concerning the various constitutional provisions in other countries see *THE TREATY-MAKING POWER IN VARIOUS COUNTRIES*, ms. U. S. Dept. of State (1919); *ARNOLD, TREATY-MAKING PROCEDURE* (1933). *DEHOUSSE, op. cit. supra* note 37, at 124 ff.; *DUCRET, LES ATTRIBUTIONS ADMINISTRATIVES DES PARLEMENTS* (1935) 58 ff. A special treaty power exists in the United States, Mexico, Ecuador, and Cuba. In many countries the significance of the constitutional provisions requiring acts of parliament is doubtful, as for instance in Belgium. See Muûls, *Le traité international et la constitution Belge* (1934) 61 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISL. COMPARÉE* 451.

<sup>40</sup> This position was evidently taken by President Washington in the famous Jay Treaty controversy. 1 *BUTLER, op. cit. supra* note 1, at 426; *SERGEANT, op. cit. supra* note 1, at 402. The view seems to be generally adopted. Thus Chief Justice Marshall in *Foster v. Neilson*, *supra* note 31, held the United States internationally bound to pass an act to execute the treaty. See also *Taylor v. Morton* (C. C. D. Mass. 1855) *Fed. Cas. No. 13,799, aff'd* (1862) 67 U. S. (2 Bl.) 481; *The Over the Top*, *supra* note 30, at 845; 1 *BUTLER, op. cit. supra* note 1, at 426; 1 *KENT. COMM.* 286; *MATHEWS, op. cit. supra* note 1, at 468; *RAWLE, op. cit. supra* note 1, at 62 ff., 66; *SERGEANT, op. cit. supra* note 1, at 402; 1 *WILLOUGHBY, op. cit. supra* note 1, at 579. *Contra: TUCKER, op. cit. supra* note 1, at 724, in his *LIMITATIONS ON THE TREATY-MAKING POWER*, and in his report of 1887 to the House of Representatives on occasion of the Hawaiian Reciprocity Treaty, cited 1 *BUTLER, op. cit. supra* note 1, at 439. A *dictum* to this effect seems to be contained in *Turner v. American Baptist Missionary Union*, *supra* note 30, at 344: "... every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required." The decision stands, however, only for the point that such a treaty is not operative as a municipal act.

It must be emphasized that much confusion is derived from the failure to keep distinct three different questions: (1) Is the treaty internationally binding without congressional act; (2) Is the legislative act necessary for its execution; (3) Is the legislature under a constitutional duty to fulfill the international obligation?

<sup>41</sup> The law of Great Britain is similar. *Cf. Attorney-General for Canada v. Attorney-General for Ontario*, *supra* note 22, at 353, where it is stated that acts of parliament are not required for the formation but only the execution of treaties.

tion, however, must be kept well distinct from the problem of whether the nation is internationally obliged to pass appropriate legislation. This duty of the Congress would be a municipal, a constitutional one, and to that extent the treaty would have a municipal effect, even before Congress acted. The question has given rise to many controversies since the treaty power was first exercised.<sup>42</sup> This, however, is of no great importance here, for even assuming one could derive from Article VI a duty of Congress to pass a statute, even the wildest phantasy could not imagine that the President could judicially enforce it by writ of mandamus against each Congressman.

Generally, at least, the courts are called to pass upon the effect and constitutionality of treaties only in so far as their municipal effect is concerned;<sup>43</sup> and for this, they scrutinize extrinsic and intrinsic<sup>44</sup> constitutionality. The international validity of an American engagement is in this respect irrelevant, unless the treaty is not a treaty at all. But what if the validity of the treaty is attacked because of unconstitutionality on the part of the other contracting party? Logically the courts would have to pass on the question. But the ingenious device of "non-

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<sup>42</sup> This question likewise arose for the first time in the discussion of appropriations necessary to carry into effect the Jay Treaty in 1796. Washington asserted the constitutional duty of Congress to fulfill the treaty obligation. Congress, asserting a liberty to pass or not pass the act, struck out the words "that provision ought to be made by law" and declared merely "the expediency of passing the laws." See SERGEANT, *op. cit. supra* note 1, at 402. This latter view is probably correct in view of the war power of Congress, but it does not affect the validity of the treaty.

The view that Congress has the constitutional discretion to fulfill the treaty obligation or refuse to do so was defended by John Marshall. *Cf.* 2 BEVERIDGE, *LIFE OF JOHN MARSHALL* (1919) 135, 136. It is accepted by modern writers. MATHEWS, *op. cit. supra* note 1, at 466; 1 WILLOUGHBY, *op. cit. supra* note 1, at 549, 551. Judicial authority for it rests in the case of *Turner v. American Baptist Missionary Union*, *supra* note 30, but unfortunately Mr. Justice McLean did not clearly distinguish this problem of the discretion of Congress from the question of the constitutionality of congressional cooperation in the formation of a treaty. *Contra*: 1 KENT, *COMM.* 286. In Great Britain Parliament has the discretion to execute a treaty by passing the necessary statute. *Cf.* *Attorney-General for Canada v. Attorney-General for Ontario*, *loc. cit. supra* note 22: "Once [the treaty obligations] are created, while they bind the state as against the other contracting Parties, Parliament may refuse to perform them and so leave the state in default . . . Parliament will either fulfill or not treaty obligations imposed on the state by its executive. The nature of the obligations does not affect the complete authority of the legislature to make them law if it so chooses."

<sup>43</sup> *Cf.* *Taylor v. Morton*, *supra* note 40, at 785: "In commencing this inquiry I think it material to observe, that it is solely a question of municipal, as distinguished from public law."

<sup>44</sup> The question of the intrinsic limitations on the treaty powers is not well settled. Formerly the Supreme Court apparently took the view that the treaty power is co-extensive with the federal powers granted by the Constitution. See *New Orleans v. United States* (1836) 35 U. S. (10 Pet.) 662, 736: "The government of the United States . . . is one of limited powers. It can exercise authority over no sub-

justiciable," or "political" questions has saved the courts the trouble.<sup>45</sup>

It would seem that Congress has no constitutional voice in the conclusion of treaties. It has only power with respect to their execution. The power to bind the nation internationally by treaties belongs, according to the Constitution, exclusively to the treaty power.

According to international custom, however, not all agreements are treaties, and the American law has adopted this distinction. This phase of the problem will be more fully discussed in connection with the *Belmont* case.<sup>46</sup> There are many cases where the President, upon authorization of Congress, has entered into agreements without the assent of two-thirds of the Senate. Such agreements have been held to be constitutional. The question thus arises whether such authorization is necessary or superfluous. If one take the view that in certain cases the authorization is required, then in these cases, in contrast to regular treaties, Congress may more directly influence the conduct of international relations, its assent being an essential prerequisite for the presidential action in the formation of these agreements.<sup>47</sup>

The situation with respect to the powers of the President, Senate and Congress relating to the conclusion of treaties set forth heretofore, aids

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jects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." But in *Missouri v. Holland* and *Asakura v. Seattle*, both *supra* note 24, the Court took a much broader view. See also the discussions on this topic in BUTLER, *op. cit. supra* note 1, and by the American Society of International Law, particularly the observations of the Chief Justice, (1929) 23 PROC. AM. SOC. INT. LAW 176; Weinfield, *Are Labor Conditions a Proper Subject of International Conventions?* (1936) 24 CALIF. L. REV. 276; MITCHELL, *op. cit. supra* note 1, especially at 151 ff. In the Chinese Exclusion Case (1889) 130 U. S. 581, 609, the Court announced one limitation, namely that the power of exclusion of foreigners cannot be granted away.

<sup>45</sup> This doctrine is announced in *Doe et al. v. Braden* (1853) 57 U. S. (16 How.) 635, 657, where the unconstitutionality of a treaty concluded with the King of Spain according to Spanish law was argued. The court said "But these are political questions and not judicial . . . The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States . . . And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country . . . , if every court in the country was authorized to inquire whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." See *Fellows v. Blacksmith* (1856) 60 U. S. (19 How.) 366.

<sup>46</sup> See text *infra*, Part 3.

<sup>47</sup> Of course, Congress has power to influence the conduct of foreign relations by legislation, which does *not* require agreements. U. S. CONST., Art. 1, § 8, Cl. 3. One could imagine a case, where Congress passes a statute conditioned upon its going into effect upon the passage of a similar or corresponding law by another nation, but this would not constitute an international obligation and would not be an exercise of the treaty-making power. See Taft, *op. cit. supra* note 5, at 610.

in understanding the problems arising in connection with the termination of treaties.

A great difference exists between "making" and "termination" by virtue of the fact, mentioned before, that the Constitution is completely silent as to the latter. One could, therefore, put the puzzling question whether this power exists at all in the national government or whether it is possessed by the people of the United States under the 10th amendment. It is evidently clear, however, that by a reasonable construction some department of the federal government must possess the power, and the question is only where does it rest.<sup>48</sup>

The discussion of the law regarding the conclusion of treaties has shown that it is necessary to distinguish between their international and municipal effects, and the same distinction must also be kept with respect to the termination of treaties. So far as municipal effect, *i.e.*, the operation of treaties as "laws", is concerned, it was recognized comparatively early that Congress can override by statute the municipal law as established by statute. "International law is part of the law of the land" is a long-established doctrine,<sup>49</sup> but it has only the binding force of statutes. Rules of municipal law created by the adoption of general (customary) international law can be changed by statute,<sup>50</sup> and the same is true with respect to municipal rules created by treaty<sup>51</sup> (conversely, a treaty can override a previous statute).<sup>52</sup> The abrogation, in-

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<sup>48</sup> That the powers of the federal government with respect to the powers in international relations must be construed broadly, has been constantly emphasized by the Supreme Court. See *United States v. Curtiss-Wright Export Corp.*, *supra* note 3; *Burnet v. Brooks* (1933) 288 U. S. 378, 396; *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 295, and the cases cited therein.

<sup>49</sup> This doctrine dates back at least as early as the Grand Opinion for the Prerogative concerning the Royal Family (1717) Fort. 401, 420.

<sup>50</sup> *Cf.* *The Nereide* (1815) 13 U. S. (9 Cranch) 388, 422 ("Until such act be passed, the court is bound by the law of nations."); *The Marianna Flora* (1826) 24 U. S. (11 Wheat.) 1, 39, 40; *The Over the Top* (D. Conn. 1925) 5 F. (2d) 838, 842.

<sup>51</sup> *Cf.* *Taylor v. Morton*, *supra* note 40 (a very careful consideration); *The Cherokee Tobacco* (1870) 78 U. S. (11 Wall.) 616, 621; *Head Money Cases* (1884) 112 U. S. 580, 597; *Whitney v. Robertson* (1888) 124 U. S. 190, 195; *The Chinese Exclusion Case* (1889) 130 U. S. 581, 600-601; *Fong Yue Ting v. United States* (1893) 149 U. S. 698; *Ward v. Race Horse* (1896) 163 U. S. 504, 511; *La Abra Silver Mining Co. v. United States* (1899) 175 U. S. 423, 460; *United States v. Payne* (1924) 264 U. S. 446, 448; *Cook v. United States* (1933) 288 U. S. 102, 120; *Pigeon River etc. Co. v. Cox Co., Ltd.* (1934) 291 U. S. 138, 160. See also *HUGHES, THE SUPREME COURT OF THE UNITED STATES* (1928) 115; *RAWLE, op. cit. supra* note 1, at 61.

<sup>52</sup> *Foster v. Neilson*, *supra* note 31, at 314; *The Cherokee Tobacco*, *supra* note 51, at 621; *Whitney v. Robertson*, *supra* note 51, at 194; *Cook v. United States*, *supra* note 51, at 118; *Techt v. Hughes* (1920) 229 N. Y. 222, 246, 128 N. E. 185, 192; *RAWLE, op. cit. supra* note 1, at 60-61.

ternally, of a treaty may be an international wrong, and impose international liability, but the Congressional act is constitutional<sup>53</sup> and valid. The United States courts do not give redress against international wrongs by giving international law a preference over statutes.<sup>54</sup>

Regardless of the abrogation of the municipal effect of a treaty by an overriding statute the treaty is not abrogated in the international sense. It is breached, not abrogated.<sup>55</sup> In the international sphere, the termination of treaties is governed by the rules of international law. There are many reasons by virtue of which a treaty may cease to exist:<sup>56</sup> (1) It may expire *ipso facto*, because its performance becomes impossible, or there is war,<sup>57</sup> or the period for which it was entered into has expired. (2) A treaty can be terminated by the unilateral declaration of one party either because the other party has breached<sup>58</sup> it or because the treaty by its terms provided for termination on denouncement by either party. (3) A treaty can be ended by voluntary rescission of both parties on their mutual consent. (4) A treaty can be brought to an end by implication of international law because of a novation or because of the conclusion of another treaty incompatible therewith either between the contracting parties or between the contracting and other parties.<sup>59</sup>

<sup>53</sup> The power to breach the treaty by contravening legislation may be based upon the war power and the general power to legislate. See *Taylor v. Morton*, *supra* note 40; *Head Money Cases*, *supra* note 51, at 599.

<sup>54</sup> They would apparently apply even foreign laws which violate international law. *Shapleigh v. Mier* (1936) 299 U. S. 468, 471.

<sup>55</sup> This distinction in the decisions is often not clearly observed. It serves no purpose to quote these *dicta*. The courts usually are concerned only with the internal effect. See *Head Money Cases*, *supra* note 51, at 599: "... so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass . . ." The distinction of the text is announced by *Pigeon River etc. Co. v. Cox Co., Ltd.*, *supra* note 51; *Taft, op. cit. supra* note 5, at 610; *HUGHES, loc. cit. supra* note 51, at 115; 1 *WILLOUGHBY, op. cit. supra* note 1, at 552; *Wilson, op. cit. supra* note 1, at 466.

<sup>56</sup> The reasons for the termination of treaties in international law have not yet exhaustively been investigated. See *CAVAGLIERI, op. cit. supra* note 27, at 491; 2 *HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED IN THE UNITED STATES* (1922) 79, ff.; *McNair, La terminaison et la dissolution des traités* (1929) 22 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL* 459; *TOBIN, THE TERMINATION OF MULTIPARTITE TREATIES* (1933); *Garner and Jobst, The Unilateral Denunciation of Treaties* (1935) 29 *AM. J. INT. LAW* 569; *Rohrlich, Self-Release from Treaties* (1932) 66 *U. S. L. REV.* 18 ff.; *Woolsey, Unilateral Termination of Treaties* (1926) 20 *AM. J. INT. LAW* 346.

<sup>57</sup> See *Karnuth v. United States* (1928) 279 U. S. 231; *Techt v. Hughes, supra* note 52.

<sup>58</sup> *Cf. Charlton v. Kelly* (1913) 229 U. S. 447.

<sup>59</sup> As to the latter point there are some doubts. *Rousseau, De la compatibilité des normes juridiques contradictoires dans l'ordre international* (1932) 39 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 133. See also in general, *TOBIN, op. cit. supra* note 56, at 206 ff.

If the treaty has internationally expired or is terminated, its municipal effect also ceases, but the converse is not true. Which department of the government is vested with the power to terminate a treaty within the international sphere? Constitutions are determinative here also. In the United States one must probably distinguish the different situations outlined above. If the treaty is abrogated impliedly by virtue of international law through the conclusion of a new inconsistent treaty, there is no doubt that the treaty power is the only one which can bring about this result. If the treaty is abrogated by express mutual consent of the nations, it is within the treaty power to make such an arrangement and that, not only in case of the formation of a new treaty<sup>60</sup> but also in the case of outright rescission, particularly since it is within the scope of the treaty power to add to an existing treaty an article limiting its life. Mutual rescission is a contract, and it can be reasonably argued that the term "treaty" in the constitution extends to an agreement by which an existing treaty is rescinded.

But what is the constitutional rule with respect to unilateral denunciation? That was the question before the Court in the *Van Der Weyde* case. It could not avoid the issue and base its decision on the rule that a later statute overrides a prior inconsistent treaty so far as municipal law is concerned, because the Seamen's Act provided in section 18<sup>61</sup> that it did not immediately abrogate the municipal effect of inconsistent international treaties, but was to take effect only after the *international* termination of those treaties. The municipal effect of the Seaman's Act depended, therefore, upon the international termination of the inconsistent parts of the treaty.

The problem of what organs are vested with the power to denounce treaties has been an object of great controversy in American practice and literature, while in foreign countries it has received little attention. It seems there to be assumed that the power to denounce is vested in the department that concludes treaties.<sup>62</sup>

<sup>60</sup> Cf. MATHEWS, *op. cit. supra* note 1, at 486.

<sup>61</sup> 38 STAT. (1915) 1185: "That this Act shall take effect, . . . as to foreign vessels twelve months after its passage, except that such parts hereof as are in conflict with articles of any treaty or convention with any foreign nation shall take effect as regards the vessels of such foreign nation on the expiration of the period fixed in the notice of abrogation of the said articles so provided in section sixteen of this Act."

<sup>62</sup> The writer has found but one foreign author who has mentioned the question, and he assumes the identity of treaty making with the denouncing power as a matter of course. KUNDERT, *VÖLKERRECHTLICHER VERTRAG UND STAATSVERTRAGSRECHT IM SCHWEIZERISCHEN RECHT* (1919) 20: "Die Endigung des Staatsvertragszustandes erfolgt durch Kündigung seitens des dazu befugten Organs, das selbstverständlich identisch sein wird mit demjenigen, das den Vertrag auch abgeschlossen hat."

In the United States different views are taken. There is, in the first place, authority that Congress has the power. In *Ropes v. Clinch*<sup>63</sup> the court said:

"There are three modes in which congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms; and even where, . . . there is a provision for the notice, I think the government of the United States may disregard even that, and declare that 'the treaty shall be, from and after this date, at an end.'"<sup>64</sup>

The import of this *dictum* is that Congress may give the notice of denunciation. The same view is taken by Professor Corwin:

"All in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is a party belongs, as a prerogative of sovereignty, to Congress alone. This result no doubt transgresses the general principle of residual power of the Executive in foreign relations, but it flows naturally, if not inevitably, from the power of Congress over treaty provisions in their quality as 'law of the land.' Furthermore, by Article I, Section 8, Paragraph 10 of the Constitution, Congress has the power to 'define and punish . . . offenses against the Law of Nations,' and so, it has been held, the power to define International Law is general for the United States."<sup>65</sup>

It would seem, however, that this view,<sup>66</sup> at least in the form in which it is stated, is erroneous. Mere Congressional action has never been deemed sufficient to operate as a peaceful termination of a treaty in the international sphere; the *dictum* of the circuit court is unique; Professor Corwin's reasoning from legislative precedent is doubtful,<sup>67</sup> and his other arguments are of little weight. From the fact that Congress may define the judicial application of international law, it does not follow that it has power to act directly for the United States in the international sphere; neither does it follow from the power of Congress to abrogate the internal operation of treaties. The argument invoking the "prerogative of sovereignty" is likewise without strength; it is sound

<sup>63</sup> (C. C. S. D. N. Y. 1871) Fed. Cas. No. 12,041.

<sup>64</sup> *Ibid.* at 1174.

<sup>65</sup> CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 115.

<sup>66</sup> Also supported by Rawle. RAWLE, *op. cit. supra* note 1, at 61.

<sup>67</sup> As an instance where Congressional action, as such, terminated a treaty, the Act of July 7, 1798, terminating the treaty with France (1 STAT. (1845) 578), has often been referred to. But this abrogation was explained by the Committee of Foreign Relations in 1856 on the basis of the state of hostility between France and the United States. SEN. REP. No. 97, 34th Cong. 1st Sess. (1856) 4. One could base it on the war power. The relations between the United States and France were a qualified state of war. *Bas v. Tingy* (1800) 4 U. S. (4 Dall.) 37. The Act itself purported to be an abrogation of the treaty by reason of repeated breaches and of authorization by France for the pursuance "of a system of predatory violence." This power to declare a treaty terminated because of hostilities committed by the

only in so far as the powers of the national government as a whole<sup>68</sup> are concerned; it cannot be supported with respect to the distribution of these powers among the three departments of the national government.

Without doubt it is the function of the President, as head of the executive, to give notice to the other High Contracting Powers in his capacity as representative of the nation, for he makes all other declarations save the declaration of war.<sup>69</sup> The President is the voice, and the only voice of the nation in the field of international relations.<sup>70</sup> The action of Congress alone does not suffice.<sup>71</sup> The problem is thus narrowed to one of the three possibilities, either

- (a) The treaty power can denounce a treaty, or
- (b) The President alone can denounce a treaty, or
- (c) The President on authorization by Congress can denounce a treaty.

The most logical view is that the power to denounce a treaty is vested in the President by and with the advice and consent of the Senate, so that the department of the government which makes the treaty can terminate it, regardless of whether the termination is by unilateral, but lawful, denunciation or by a new treaty. This would not too greatly

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other party (which declaration, if unjustified is itself a breach) and even more the power to declare that a state of hostility exists are certainly quite different from the power to terminate a treaty by notification pursuant to and in compliance with the terms of a treaty. This distinction has correctly been emphasized by the resolution of the Committee of Foreign Affairs referred to above. The war power could clearly not be invoked for such a peaceful termination in compliance with the terms of the treaties. Furthermore, attention must be called to the fact that it is doubtful whether the power to declare a treaty terminated because of breaches, which are not acts of violence, as in the case of the French treaty, belongs to Congress or the President. Mr. Justice Iredell in *Ware v. Hylton* (1796) 3 U. S. (3 Dall.) 199, 260, 261, seems to have thought that Congress must make the declaration, and so did President Grant when the question of the breach of the treaty with Great Britain was raised in 1876 (*Cf. WILLOUGHBY, op. cit. supra* note 1, at 582-3); but in a more recent decision the Supreme Court intimated that the executive has this power. *Charlton v. Kelly* (1913) 229 U. S. 447, 476. *Cf. Terlinden v. Ames* (1902) 184 U. S. 270, 288. And Mr. Justice Cardozo in *Techt v. Hughes, supra* note 52, at 243, 128 N. E. at 192, seems also to have thought that President and Senate must act together in these cases.

<sup>68</sup> This has repeatedly been emphasized by the Supreme Court. See *Mackenzie v. Hare* (1915) 239 U. S. 299, 311; *Monaco v. Mississippi* (1934) 292 U. S. 313, 331; *United States v. Curtiss-Wright Export Corp., supra* note 3, at 318, and the authorities there referred to.

<sup>69</sup> In the *Curtiss-Wright* case the Court said, "The President alone has the power to speak . . . as a representative of the nation." *Supra* note 3, at 319.

<sup>70</sup> *Cf. United States v. Curtiss-Wright Corp., supra* note 3, at 319; *United States v. Belmont, supra* note 4, at 718.

<sup>71</sup> *Cf. Taft, op. cit. supra* note 5, at 609: "Congress has at times passed resolutions affecting our foreign relations which the Executive in its correspondence with foreign countries had declined to recognize as an authoritative expression of our government. Resolutions passed to be transmitted to a foreign government by the

extend the treaty power. The same reasons, *i.e.*, secrecy and dispatch, which induced the framers of the Constitution to vest the power to make treaties in the President and the Senate and not in the Congress, may well apply to the power of denunciation. The entire subject matter of the international effect of treaties, including for example, conclusion, alteration, prolongation and lawful and peaceful termination either by mutual consent or by unilateral act pursuant to the terms of the treaty or even by denunciation on account of adverse breach,<sup>72</sup> were vested in the same persons. Judicial authority to this effect is a *dictum* by Cardozo in *Techt v. Hughes*:<sup>73</sup> "President and senate may denounce the treaty and thus terminate its life." Taft,<sup>74</sup> Crandall<sup>75</sup> and Willoughby<sup>76</sup> likewise think that this is the law under the Constitution. Practice furnishes additional authority. There are instances where treaties were terminated in this way,<sup>77</sup> and the Committee of Foreign Relations has approved of this procedure with respect to denunciation.<sup>78</sup> It is noteworthy, furthermore, that President Wilson objected on occasion of the Merchant Marine Act to any interference by Congress in regard to the denunciation of treaties, on the ground that a request of Congress to this effect would be an infringement of the treaty power.<sup>79</sup>

On the other hand there seems to be at least one instance where the President alone without cooperation of Senate or Congress has terminated certain treaty provisions, *i.e.*, in the case of a treaty with Switzerland.<sup>80</sup> It would seem more difficult to justify this course of action. One

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Congress of the United States may or may not be so transmitted by the Executive in his discretion."

<sup>72</sup> As far as denunciation because of an adverse breach is concerned, one could have greater doubts than in the other case. *Cf. supra* note 67.

<sup>73</sup> *Supra* note 52, at 243, 128 N. E. at 192 (italics ours). It should be noted in connection with the remarks *supra* note 42, that Cardozo made this general statement with respect to the denunciation of treaties in a case involving the termination of treaties because of war; consequently it would appear that he thought the whole field of termination by denunciation was in the control of the treaty power.

<sup>74</sup> *Op. cit. supra* note 5, at 610: "The abrogation of the treaty involves the exercise of the same kind of power as the making of it."

<sup>75</sup> CRANDALL, *op. cit. supra* note 1, at 461.

<sup>76</sup> 1 WILLOUGHBY, *op. cit. supra* note 1, at 561 *et. seq.*

<sup>77</sup> See WRIGHT, *op. cit. supra* note 1, at 259; CRANDALL, *op. cit. supra* note 1, at 459; 1 WILLOUGHBY, *op. cit. supra* note 1, at 586; Note (1936) 35 MICH. L. REV. 88, 93.

<sup>78</sup> SEN. REP. NO. 97, 34th Cong. 1st Sess. (1856) 4.

<sup>79</sup> *Cf. Reeves, The Jones Act and the Denunciation of Treaties* (1921) 15 AM. J. INT. LAW 33; WRIGHT, *op. cit. supra* note 1, at 258. In Note (1936) 35 MICH. L. REV. 88, 92, it is stated that President Hayes had taken the opposite view, but his statement is explained as meaning the internal effect only. See 1 WILLOUGHBY, *op. cit. supra* note 1, at 584.

<sup>80</sup> 1 WILLOUGHBY, *op. cit. supra* note 1, at 586; MATHEWS, *op. cit. supra* note 1, at 488.

might argue in its favor that unilateral denunciation does not involve an obligation of the nation but only the bringing to an end of such an obligation; that it is a mere unilateral act of the executive with respect to foreign relations and as such is within the power of the President as are other unilateral acts, as for instance, recognition of new states and governments. This view is defended by Reeves<sup>81</sup> and Mathews.<sup>82</sup> The latter writer gives as a reason that since the Senate has already, in its treaty-making capacity, acted upon a treaty providing for its termination upon notice, no further senatorial action is necessary in effecting such termination.

Finally there are cases where joint resolutions or acts of Congress authorized or requested the President to terminate treaties. In 1846 Congress passed a "Joint Resolution concerning the Oregon Territory" whereby the President was "authorized at his discretion" to give notice of the termination of the Treaty of 1827 with Great Britain.<sup>83</sup> In 1856 Congress passed a Joint Resolution Providing for the Reciprocity Treaty of June 5th, 1854, between the United States and Great Britain, "charging the President with the communication of such notice."<sup>84</sup> In 1883 Congress passed a "Joint Resolution providing for the termination of articles . . . of the treaty between the United States and Her Britannic Majesty, *etc.*" in which it directed the President to give and communicate notice of termination at the time provided for by the treaty and simultaneously declared that from this time said articles should be deemed to have expired and of no force and effect by every department of the Government.<sup>85</sup> Another important instance is the authorization and direction of the President by Congress to terminate the agreements under the Tariff Act of 1897, contained in section 4 of the Tariff Act of 1909. There it was provided, "That the President shall have the power and it shall be his duty to give notice, within 10 days . . ., to all foreign countries with which commercial agreements in conformity with the authority granted by section three of the Act entitled 'An Act to provide revenue for the Government [*etc.*]', have been or shall have been entered into, of the intention of the United States to terminate such agreement . . ."<sup>86</sup> Recent instances are the Seamen's Act of 1915, involved in the *Curtiss-Wright* case and the Merchant Marine Act of 1920, which provoked the above mentioned protest of President Wilson.

Insofar as the termination of agreements under the Tariff Act of

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<sup>81</sup> *Op. cit. supra* note 79, at 38.

<sup>82</sup> *Op. cit. supra* note 1, at 515.

<sup>83</sup> 9 STAT. (1846) 109.

<sup>84</sup> 13 STAT. (1865) 566.

<sup>85</sup> 22 STAT. (1883) 641.

<sup>86</sup> 36 STAT. (1909) Part I, 11, at 83.

1909 is concerned, one might easily argue that this termination has no value as precedent whatsoever, because no treaty but only executive agreements under special congressional authorization were involved. But the other situations are clearly instances of authorization of the President by Congress to denounce treaties and, save the first instance, of even imposing a duty on him to do so. The Senate Committee on Foreign Relations, which held that the treaty power must act in the denunciation, believed that it makes no difference whether the Senate acts in conjunction with the House of Representatives or alone.<sup>87</sup> This is not correct. Where the Senate acts in the exercise of the treaty power, no other body of legislators is required to act as when it acts as part of Congress, and furthermore, the necessary number of votes in favor of a treaty (two-thirds of the Senators present) differs from the number necessary if the Senate is in session as a legislative body. Differences exist seemingly also with respect to the quorum. Therefore, it is clearly relevant to decide whether this practice is constitutional.

The *Van Der Weyde* case has the effect of sanctioning this practice, at least to a certain extent. Considering the many legislative precedents and the policy of the Court not to disturb, if possible, long established constitutional practice, this was not amazing.<sup>88</sup> It is, however, necessary to examine how far this sanction extends. This is not easy as the Court was vague.

In the first place the Court has not said that the President could not give effect to a unilateral denunciation of the treaty without congressional authority, *i.e.*, that the authorization is indispensable. It has likewise not said that the treaty power could not denounce a treaty. But it did say that the President could denounce a treaty if authorized by a congressional act under the circumstances of the case. The opinion starts, as we have seen, with the mysterious sentence: "The question as to the authority of the executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States is not involved." This is, it must be submitted, not quite correct. The power of the President in the absence of the treaty-making power was involved. The President acted not under concurrence of two-thirds of the Senate present, but upon authority of Congress. Hence the Court decided, that the power to denounce a treaty can be exercised under certain circumstances by the president in conjunction with Congress, leaving open the question whether this can be done concurrently with or in

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<sup>87</sup> SEN. REP. NO. 97, *op. cit. supra* note 78, at 6.

<sup>88</sup> *Cf. Field v. Clark* (1892) 143 U. S. 649, 691; *United States v. Curtiss-Wright Export Corp.*, *supra* note 3, at 328, 329; *Cincinnati Soap Co. v. United States* (1937) 81 L. Ed. Adv. Op. 707, 711.

exclusion of the treaty power. Furthermore, one must observe the circumstances of the case. There was an act of Congress introducing regulations inconsistent with the treaty. Consequently all that has been decided comes down to the following: If there exists a self-executing treaty and Congress passes a statute inconsistent therewith, (either outright or reserving treaty rights until notice has been given) and the statute authorized the President to denounce the treaties, then the notice of denunciation of the treaties by the President without concurrence of two-thirds of the Senate present is considered to be internationally valid and terminates the municipal effect of such treaties. From the opinion more can hardly be deduced than that the action by Congress removed, in the mind of the Court at least, any doubt of the effectiveness of the notice by the President. It invoked simultaneously the President's power in the conduct of foreign relations and his duty to take care that the laws are faithfully executed. Thus many questions remain unanswered, particularly the following:

- (a) Can the President, with concurrence of two-thirds of the Senate, terminate treaties by giving notice in compliance with their terms?
- (b) Can the President without any action of Congress or Senate give such notice?
- (c) Was the *Van Der Weyde* case a special case, or can the President generally give notice of termination on authorization of Congress; in other words, was the enactment of an inconsistent statute the reason that the President had the power to give a valid notice?

It has already been pointed out that the Court was very careful in its language regarding the duty of the President to follow the direction of Congress in the conduct of foreign relations. All that is said is that if an inconsistent act is passed and the President is directed to terminate a treaty in so far as such inconsistency exists, the President has the duty to "reach a conclusion" in respect to the inconsistency.<sup>89</sup>

Thus one must be careful not to overemphasize the importance of the *Van Der Weyde* case. It settles positively only that under certain circumstances the termination of treaties through notice in compliance with its terms can be given without concurrence of two-thirds of the Senate but by the President alone following a direction of Congress.

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<sup>89</sup> Certainly the Court did not even intimate that the President could be compelled to give the notice. That this cannot be done is generally accepted. *Cf. Reeves, op. cit. supra* note 79, at 37; MATHEWS, *op. cit. supra* note 1, at 496. On the other hand the Court did not strongly deny any legal duty on the part of the President as Mathews and Taft seem to do. MATHEWS, *op. cit. supra* note 1, at 495, 496; Taft, *op. cit. supra* note 5, at 609.

The case, however, is indicative of a tendency of the Supreme Court in regard to constitutional construction so far as the conduct of foreign relations is concerned: if the President and Congress are in harmony and act together the Court will, if possible, consider such action as proper. In the *Van Der Weyde* case this tendency resulted in a refusal to extend the scope of the treaty power; in the *Curtiss-Wright* case it resulted in a refusal to extend the delegation-of-power prohibition to the field of international relations.

## II

### THE CURTISS-WRIGHT CASE: THE CONDUCT OF INTERNATIONAL RELATIONS AND THE PROHIBITION OF DELEGATION OF POWERS

In the case of *United States v. Curtiss-Wright Export Corp.*,<sup>90</sup> the question to be decided arose from the following facts. The joint resolution of Congress of May 28, 1934,<sup>91</sup> provided that:

"... if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place of the United States to the countries now engaged in that armed conflict, . . . until otherwise ordered by the President or by Congress.

"Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished. . ."

The President issued such a proclamation. The defendants were indicted for conspiracy to violate the joint resolution. The district court sustained a demurrer to the indictment on the ground that the Joint Resolution constituted an improper delegation of legislative power to the President. The Supreme Court held that this was error.

The decision itself, even though of great political importance, does not, from a legal point of view, deserve so much interest as the *Van Der Weyde* case; the latter was of much greater novelty. What makes the *Curtiss-Wright* case interesting is the broad, far-reaching discussion by Mr. Justice Sutherland.

The problem, it may be emphasized, was not of the power of Congress to enact an embargo, for this power had clearly been established by Chief Justice Marshall in *Gibbons v. Ogden*<sup>92</sup> and re-affirmed only recently.<sup>93</sup> The delegation to the President to regulate the operation was

<sup>90</sup> (1936) 299 U. S. 304.

<sup>91</sup> 48 STAT. (1934) 811.

<sup>92</sup> (1829) 22 U. S. (9 Wheat.) 1, at 191, 192.

<sup>93</sup> *Norman v. Baltimore & Ohio Railroad Co.* (1934) 294 U. S. 240, 305. "The Congress may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo."

the only problem. On this point also, the outcome could safely be predicted. In *United States v. Chavez*<sup>94</sup> and *United States v. Mesa*<sup>95</sup> the Court had upheld indictments based upon a similar resolution of March 14, 1912;<sup>96</sup> in *The Brig Aurora*,<sup>97</sup> the Court had upheld the Non-Inter-course Acts of March, 1809, and of May, 1810, which authorized the President to issue a proclamation that neutral commerce had been restored, whereupon the prohibition should come to an end; in *Field v. Clark*<sup>98</sup> the Court had approved by *dictum* the Embargo Act of June 4, 1794, authorizing President Washington to lay an embargo on all ships and vessels in the ports of the United States. Furthermore in *Jones v. United States* the Court had upheld an act empowering the President in his discretion to declare certain islands outside the sovereignty of other powers as possessions of the United States.<sup>99</sup> In *Panama Refining Co. v. Ryan*,<sup>100</sup> where the Court reviewed the entire field of delegation of powers, the delegation in cases like the ones mentioned was justified on the ground that the authority confided to the President was cognate to the conduct by him of the foreign relations of the Government. Thus not the result, but the reasoning of the Court is the most interesting aspect of the principal decision.

Mr. Justice Sutherland had, shortly before, in the *Carter Coal* case,<sup>101</sup> made a statement that the question of the inherent powers of the government in the external affairs of the nation and in the field of international law is very different from the analogous question with respect to the internal affairs. The *Curtiss-Wright* case gave him the occasion to outline broadly the whole field of constitutional law in foreign affairs.

The opinion starts with an exposition of "the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs." The differences are fundamental and relate to both origin and nature. The power of the federal government over internal affairs delegated to it by the Constitution, has only that extent carved out explicitly or impliedly from the general mass of legislative powers *then possessed by the states*,<sup>102</sup> the others being left with the states. Its power with respect to foreign affairs, according to the opinion, on the contrary was never possessed by the

<sup>94</sup> (1913) 228 U. S. 525. The constitutionality was, however, not argued.

<sup>95</sup> (1913) 228 U. S. 533.

<sup>96</sup> (1912) 37 STAT. (1934) 630.

<sup>97</sup> (1813) 11 U. S. (7 Cranch) 382, 388.

<sup>98</sup> *Supra* note 88, at 684.

<sup>99</sup> (1890) 137 U. S. 202, 217.

<sup>100</sup> (1934) 293 U. S. 388.

<sup>101</sup> *Carter v. Carter Coal Co.* (1936) 298 U. S. 238.

<sup>102</sup> *Italicised in the original, supra* note 90, at 316.

states but passed from the Crown of Great Britain to "the colonies in their collective and corporate capacity as the United States of America."<sup>103</sup> "The Union existed before the Constitution."<sup>104</sup> "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."<sup>105</sup> The court lists many cases where the decision of the Supreme Court turned on the full sovereignty of the United States in international relations.

The opinion then continues: "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast 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."<sup>106</sup> The Court cites as authority Marshall's statement 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." It adds a report of the Senate Committee on Foreign Relations of February 15, 1816, to the same effect.

Coming to the point of delegation the opinion proceeds: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."<sup>107</sup> The Court then calls attention to the caution and secrecy required in the conduct of foreign relations, cites President Washington's view on this point in the Jay Treaty controversy, and mentions the fact that Congress in the field of internal affairs *directs* the departments to furnish information, while in the field of foreign affairs it *requests* the President to furnish the information "if not incompatible with the public interest."<sup>108</sup> Finally the Court refers

<sup>103</sup> *Ibid.* at 316.

<sup>104</sup> *Ibid.* at 317.

<sup>105</sup> *Ibid.* at 318.

<sup>106</sup> *Ibid.* at 319. Italics added.

<sup>107</sup> *Ibid.* at 319-320.

<sup>108</sup> *Ibid.* at 321. But compare the comment of Edmunds, *THE LAWLESS LAW OF*

to the impressive array of similar legislation and the policy of the Court not to disturb an established practice which rests upon an admissible view of the Constitution. The conclusion reached is the constitutionality of the joint resolution in question.

It might be arguable whether all these statements are *ratio decidendi* or only *obiter dicta*, and whether an analysis of them is of any value. The basic theory and starting point of the opinion is the view expounded with vigor by Mr. Justice Story,<sup>109</sup> that the United States came into being as such from the very moment of independence, and that the Constitution did not confer any powers with respect to the conduct of foreign relations. Neither the states nor even the people of the United States have residuary powers in this respect; they are all vested in the federal government.<sup>110</sup>

This being the law, the distribution of these powers among the different organs of the federal government becomes troublesome. Who has the *plenitudo potestatis* if the Constitution is silent, Congress, or the treaty power, or the President? Mr. Justice Sutherland saw this difficulty and he tried to answer it with the seemingly strange sentence already quoted: "Not only . . . is the federal power over external affairs . . . different from that over internal affairs, but participation in the exercise of the power is significantly limited." The Justice obviously means the distribution among the branches of the federal government. It is noteworthy how much the power of the President is emphasized and how far the language of the decision goes. Here the parallel with the *Van Der Weyde* case is interesting, and it shows that one cannot be too careful in interpreting the opinion of the Chief Justice. Mr. Justice Sutherland writes an epopee on the powers of the Chief Executive with respect to

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NATIONS (1925) 167, upon this practice, which seems to have been observed for considerable time. Cf. 3 HIND, PRECEDENTS OF HOUSE OF REPRESENTATIVES (1907) § 1904.

<sup>109</sup> Cf. 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) § 210 ff., especially § 216: "I entertain this general idea, that the states retained all internal sovereignty; and that congress properly possessed the rights of external sovereignty."

<sup>110</sup> One may safely doubt whether these discussions of the formation of the Union were necessary to the decision at all. One may cite many *dicta* of the Supreme Court to the opposite effect. *E.g.*, License Cases (1847) 46 U. S. (5 How.) 504, 587. Particularly interesting is Justice Chase's analysis in *Ware v. Hylton* (1796) 3 U. S. (3 Dall.) 199, 221 ff. He pointed to the fact that it was several years before all states belonged to the Confederation, and said relating to the Declaration of Independence: "I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, . . . but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any power upon earth." *Ibid.* at 224. The several states had even entered into treaties. A legal explanation of the facts is extremely problematical and would be of slight

the external affairs.<sup>111</sup> He has, in the language already quoted, "the very delicate, plenary and exclusive power as the sole organ of the federal government in the field of international relations." "In this vast external realm, with its important, complicated and manifold problems, the President alone has the power to speak or listen as the representative of the nation." And what is most interesting, this predominance of the President is carried into the field of treaty-making.

The negotiation of treaties can be accomplished only by the President. Not even the Senate has a right to interfere in this stage. The Court thus takes an interesting position on a point which has been the object of a conflict within the federal government and among scholars.<sup>112</sup> Furthermore, it must be emphasized that Mr. Justice Sutherland did not think that the power of the President to declare the embargo resulted from the authorization of Congress. He expressly stated that "we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority *plus* the . . . power of the President . . . in the field of international relations . . . which does not require as a basis for its exercise an act of Congress, . . ."<sup>113</sup> Here also a comparison with the *Van Der Weyde* case is illuminating. It is amazing that among the long list of cases cited the *Van Der Weyde* case does not appear, even though it, more than any other, was of significance. The statement that the power of the President to declare the embargo did not depend upon authorization by Congress, but resulted from the authorization "plus" his own constitutional powers, again puts the constitutional riddle of the indispensability of an act of Congress, which we saw in the *Van Der Weyde* case. As a conclusion one may say that the *Curtiss-Wright* case has reaffirmed the rule that the President and Congress, cooperating in the field of international relations, are not hampered in the attainment of a smooth-running and adaptable policy by the obstacle of a strict application of the doctrine of separation of powers. The Court has not, however, indicated how the power is divided between the President and Congress or where the cooperation of Congress is indispensable.

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significance for the powers of the federal government. This is shown by the fact that Professor Scott, *loc. cit. supra* note 1, reaches the same result concerning the extent of the powers of the federal government in international relations from a point of view exactly opposite to Mr. Justice Sutherland's, *i.e.*, that the state as such originally had full powers.

<sup>111</sup> See also in this connection the interesting note of Garner, *Executive Discretion in the Conduct of Foreign Relations* (1937) 31 AM. J. INT. LAW 289.

<sup>112</sup> Cf. Black, *The United States and the Treaty Power* (1931) 4 ROCKY MOUNTAIN L. REV. 1, treating the conflict between Washington's and Wilson's view on this question. See also Scott, *op. cit. supra* note 1, at 14.

<sup>113</sup> *Supra* note 90, at 319-320. Italics added.

## III

THE POWER OF THE PRESIDENT TO ENTER INTO AGREEMENTS WITHOUT  
THE ASSENT OF TWO-THIRDS OF THE SENATE AND THEIR  
EFFECT ON MUNICIPAL LAW

The last of the cases to be discussed is *United States v. Belmont*.<sup>114</sup> The facts of this case are as follows: A Russian corporation, prior to 1918, had deposited with the defendant a sum of money which the United States sought to recover. The United States claimed the money as assignee of the Russian Soviet Government under an assignment effected by an exchange of diplomatic correspondence in connection with the recognition granted to the Soviet Government. The latter had terminated and liquidated the corporation, and nationalized and expropriated all its property. The district court dismissed the plaintiff, because the nationalization decree could not be given effect, being contrary to the public policy of the state where the action was brought. The Supreme Court reversed the judgment, Mr. Justice Sutherland delivering the opinion of the Court.

He commenced with his conclusion that no state policy could prevail against the international compact involved in the case. He then pointed to the fact that the assignment took place in connection with the recognition of the Soviet Government, the effect of which was "to validate so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence."<sup>115</sup> The Justice stated that "The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."<sup>116</sup> This compact, however, was held to be valid without the advice and consent of the Senate. Mr. Justice Sutherland then elaborated upon this point, distinguishing between treaties, which signify, as the Court had said before,<sup>117</sup> "a compact made between two or more independent nations with a view to the public welfare,"<sup>118</sup> and other compacts, as protocols, *modi vivendi*, postal conventions, commercial agreements, *etc.* Having thus established that the agreement was valid without the assent of the Senate, the Justice proceeded to examine the conflict between the agreement and the alleged public policy of the

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<sup>114</sup> (May 3, 1937) 81 L. Ed. Adv. Op. 715, reversing *United States v. Belmont* (C. C. A. 2d, 1936) 85 F. (2d) 542.

<sup>115</sup> *Ibid.*, at 718.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Altman & Co. v. United States* (1912) 224 U. S. 583, 600.

<sup>118</sup> 81 L. Ed. Adv. Op. at 719.

state in which the suit was instituted. He concluded that the agreement prevailed. Even though the agreement be not a treaty within the meaning of Article VI, Clause 2 of the Constitution, "the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."<sup>119</sup> As authority the *Curtiss-Wright* case was cited.

Mr. Justice Stone, in whose opinion Justices Cardozo and Brandeis concurred, approved the result but not the reasoning of the opinion delivered by Mr. Justice Sutherland. According to Mr. Justice Stone, it did not appear that the public policy of the state where the suit was brought would allow the defendant to question the title of the Soviet Government acquired by the expropriation decree, and therefore, the United States could claim the money as against the defendant. From this point of view he believed that it was "unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty" within the rule, assumed to be correct, that a treaty can override the public policy of a state law.<sup>120</sup>

Both opinions throw light on problems connected with the so-called executive agreements. In international law it seems universally recognized that not all agreements are treaties. As early a writer as Grotius distinguished between international contracts and "*sponsions*", the latter being agreements entered into by a public officer and similar persons under the authority of the sovereign.<sup>121</sup> The distinction was adopted by later writers, as for instance, Rutherford.<sup>122</sup> Vattel likewise distinguished treaties and other accords and conventions.<sup>123</sup> To him, however, the distinction was not based upon the presence or absence of authorization by the sovereign, but upon the nature of the compact. Accords or conventions, in his view, concern transitory affairs in contrast to treaties which have a more permanent nature. This seems to have become international practice. There is on the one hand the bulk of solemn international instruments designated as treaties, and on the other a vast amount of less formal agreements, spoken of as protocols, *modi vivendi*, etc.<sup>124</sup> This distinction has been taken over by American constitutional law as developed by the courts. The Constitution itself,<sup>125</sup> probably under the

<sup>119</sup> *Ibid.* at 719.

<sup>120</sup> *Ibid.* at 721.

<sup>121</sup> GROTIUS, *DE JURE BELLI AC PACIS*, Book 2, c. 15, §§ 3, 16.

<sup>122</sup> NATURAL LAW (1756) 611.

<sup>123</sup> VATTEL, *LAW OF NATIONS* (Eng. trans. 1805) § 153.

<sup>124</sup> See RESEARCH IN INTERNATIONAL LAW, *op. cit. supra* note 1, Comment to art. 1.

<sup>125</sup> U. S. CONST., Art. I, § 10, Cl. 3.

influence of Vattel's terminology,<sup>126</sup> distinguishes treaties and agreements and compacts in so far as the prohibition for the States is concerned. Why not also apply the distinction in other respects? It has, in many cases, offered a welcome way to avoid the necessity of complying with the two-thirds rule of the treaty-making clause of the Constitution,<sup>127</sup> which has often been bitterly criticized as a serious obstacle to a sound development of international relations.<sup>128</sup> Thus a practice has grown up for the President, either upon the authorization of Congress or alone, to enter into agreements of various characters, and the use of this device has increased in recent years.<sup>129</sup> Perhaps the most important instances are the reciprocal trade agreements, which have been made by the President upon authorization of the Congress. It is certainly not without significance that the Executive agreements published by the Department of State formerly in the "Treaty Series", now appear in a special "Executive Agreement Series."<sup>130</sup>

This practice has been much discussed by writers and in general is considered to be constitutional.<sup>131</sup> Authors have even spoken of an agree-

<sup>126</sup> See the excellent study of Winfield, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?* (1936) 3 U. OF CHI. L. REV. 453.

<sup>127</sup> Cf. WILCOX, *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* (1935) Part III, Methods of Evading Ratification.

<sup>128</sup> For recent studies on this point see HOLT, *TREATIES DEFEATED BY THE SENATE* (1933); Fleming, *The Role of the Senate in Treaty-Making, A Survey of Four Decades* (1934) 28 AM. POL. SCI. REV. 583; McClendon, *The Two-Thirds Rule in Senate Actions Upon Treaties 1789-1901* (1932) 26 AM. J. INT. LAW 37.

<sup>129</sup> It is sometimes difficult to determine whether an agreement is a treaty or not. Such an instance is the acceptance of membership in the International Labor Organization by the President upon authorization of Congress, the Senate voting unanimously. There one can hardly doubt that the two-thirds rule was complied with. Cf. Hudson, *The Membership of the United States in the International Labor Organization* (1935) 309 INTERNATIONAL CONCILIATION 115, at 120. It is probably indicative that the proclamation is published in the "Treaty Series" (No. 874) and not in the "Executive Agreement Series." Hyde, *loc. cit. supra* note 56, seems to overlook the fact.

<sup>130</sup> U. S. DEPT. OF STATE, *EXECUTIVE AGREEMENT SERIES* (1930-19-).

<sup>131</sup> From the copious literature see 2 HYDE, *INTERNATIONAL LAW, CHIEFLY INTERPRETED AND APPLIED BY THE UNITED STATES* (1922) 27; MATHEWS, *op. cit. supra* note 1, at 431; WILCOX, *op. cit. supra* note 1, at 226 ff.; 1 WILLOUGHBY, *op. cit. supra* note 1, at 537; Bairett, *International Agreements without the Advice and Consent of the Senate* (1905) 15 YALE L. J. 18 ff., 63 ff.; Hackworth, *Legal Aspects of the Trade Agreements Act of 1934* (1935) 21 A. B. A. J. 570; Hyde, *Agreements of the United States Other Than Treaties* (1905) 17 GREEN BAG 229; Hyde, *Constitutional Procedures for International Agreements* (1937) 31 PROC. AM. SOC. INT. LAW 45; Martin, *The International Regulation of Tariffs* (1934) 28 PROC. AM. SOC. INT. LAW 44; Moore, *op. cit. supra* note 1. But see Culbertson, *Legal Aspects of the Trade Agreements Act of 1934* (1935) 21 A. B. A. J. 600; Frazer, *The Constitutionality of the Trade Agreements Act* (1937) 31 PROC. AM. SOC. INT. LAW 55; Wise, *The Unconstitutionality of "Foreign Legislative Contracts"* (1932) 18 VA. L. REV. 875. Both express doubt. Wise's explanation, however, seems to suffer from serious

ment-making power in contrast to the treaty-making power.<sup>132</sup> The Supreme Court, according to its tendency not to overthrow a constitutional practice of long standing,<sup>133</sup> has looked with favor on this development. In *Field v. Clark* the Court upheld the Tariff Act of 1890, stating that it did not constitute an unconstitutional delegation of the treaty-making power.<sup>134</sup> In *Altman & Co. v. United States*, the Court upheld an agreement under the Tariff Act of 1897 by holding that the construction of such an agreement might be reviewed on appeal to the Supreme Court.<sup>135</sup> In the *Curtiss-Wright* case the Court again expressly affirmed "the power to make such agreements as do not constitute treaties,"<sup>136</sup> and the *Belmont* case reiterates this view.

Many problems, however, remain unsettled. What type of international agreement may be made without compliance with the provisions of the treaty-making clause of the Constitution? The answer to this question will depend upon what compacts are held to come within the Court's definition of a "treaty"—was it a compact made "with a view to the public welfare." The Court has not, however, indicated what tests will be applied?

Another important problem is the question whether the President can act alone, or whether in at least some cases, the authorization of Congress is necessary. It has been suggested that one must distinguish between "simple executive agreements" and those "under congressional authorization."<sup>137</sup> For both groups numerous examples can be given. *Modi vivendi*, assignments and settlements of claims have been made without congressional authorization; trade agreements, postal conventions are examples where such authorization took place.<sup>138</sup> The President alone may act if the subject matter belongs to the executive tasks, while Congress must authorize his action if the agreement affects subjects of legislation; but it is difficult to draw a clear line. It is noteworthy that the *Belmont* case is the first case in which the Supreme Court has dealt with an agreement reached without authorization by Congress. In the other cases the agreement was made under authority of a special statute.

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misconceptions. See in this connection the report of the Committee of Ways and Means, H. R. REP. NO. 166, 75 Cong. 1st Sess. (1937) 14, approved by the Senate committee, SEN. REP. NO. 111, 75 Cong., 1st Sess. (1937).

<sup>132</sup> MATHEWS, *op. cit. supra* note 1, at 431; Hyde, *op. cit. supra* note 131.

<sup>133</sup> See cases cited *supra* note 88.

<sup>134</sup> *Field v. Clark*, *supra* note 88, at 694.

<sup>135</sup> (1912) 224 U. S. 583.

<sup>136</sup> *Supra* note 90, at 318. This case has been considered as important authority by the House and Senate Committee Reports, *supra* note 131.

<sup>137</sup> MATHEWS, *op. cit. supra* note 1, at 434, 440.

<sup>138</sup> Compare the various instances cited by Barrett, Hyde, Mathews, and Moore, all *op. cit. supra* note 131.

A further problem is the effect of such agreements in the courts and upon municipal law. In the *Altman* case, it was held that the executive agreement was a treaty within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed on appeal to the Supreme Court. In the *Belmont* case the majority opinion went further and extended the equiparation of such agreements to treaties so as to consider both as the supreme law of the land, and that, even in a case where there was no authorization by congressional act. It thus took a view which Professor Hyde had advanced as early as 1905.<sup>139</sup> But it is noteworthy that Mr. Justice Stone, with the concurrence of Justices Cardozo and Brandeis, expressly reserved an opinion on this point. The *Altman* case did not necessarily require such a result as Mr. Justice Sutherland reached,<sup>140</sup> and a lower court seems to have taken an opposite view.<sup>141</sup> Thus one may doubt whether this rule of the majority can be regarded as settled. It is certainly a liberal construction of the constitutional powers to hold that the President, without even congressional authorization, merely on the strength of his position as chief executive vested with the conduct of foreign relations, may override state law and public policy. Without doubt the majority opinion in the *Belmont* case represents one of the most extreme extensions which could be accorded to the power of the President in the field of international relations.

If one considers the line of the three cases as discussed, one can arrive at the following conclusions: The Supreme Court is decidedly in favor of a narrow limitation of the field which is reserved as an exclusive realm to the treaty-making power, *i.e.*, to the President acting with the advice and consent of the Senate. It does not develop the concept of a special "diplomatic branch of the government," a fourth department, composed of the President and two-thirds of the Senate, once conceived by Pinkney.<sup>142</sup> But it is still vague as to how the powers of the federal government in the conduct of foreign relations are distributed between the President and Congress. In the *Van Der Weyde* case and the *Curtiss-Wright* case the Court seems to recognize a scheme of cooperation between Congress and the President, a "tandem-constellation"<sup>143</sup> as it has been aptly called, which is certainly strange to the rigid doctrine of division of powers, but which a "steady stream" of practice, as Mr. Jus-

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<sup>139</sup> *Op. cit. supra* note 131.

<sup>140</sup> *Cf. Lenoir, op. cit. supra* note 1, at 608, 609.

<sup>141</sup> See *Four Packages of Cut Diamonds v. United States* (C. C. A. 2d, 1919) 256 Fed. 305, where it is said that such agreements are neither treaties nor have they the force of law.

<sup>142</sup> *Cf. Scott, op. cit. supra* note 1, at 13. See *WRIGHT, op. cit. supra* note 1, at 141 ff.

<sup>143</sup> (1937) 50 HARV. L. REV. 691, 692.

tice Sutherland pictured it, has eaten into the constitutional rock. In the *Belmont* case, in contrast thereto, the powers of the President alone are far extended. In addition the *Van Der Weyde* and *Curtiss-Wright* cases differ between each other in that the former tends to emphasize the power of Congress within the tandem scheme by its accent on the duty of the President, while the *Curtiss-Wright* case is clearly "in the direction of increasing rather than diminishing the President's power in the field of international relations."<sup>144</sup> A coordination of these three different tendencies seems difficult. How the distribution of powers will finally be worked out and what will happen if the President and Congress should disagree can hardly be prophesied.<sup>145</sup> It seems desirable, however, that the Court should definitely determine where the President may act alone and where the authorization of Congress is required.

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<sup>144</sup> Garner, *op. cit. supra* note 111, at 293.

<sup>145</sup> Even so strong a President as Washington has said, in his Farewell Address, speaking of his neutrality policy, that he was governed by the spirit of the measures taken by both Houses of Congress.