Kon. Bat. Gen.
Vol.
115

With the Author's compliments

TREATIES AND THE CONSTITUTIONAL DISTRIBUTION OF THE POWERS IN THE UNITED STATES

By QUINCY WRIGHT

[Reprinted from the American Journal of International Law
Volume 12, Number 1, January, 1918.]

Geschenk uit de boeken van
C. van Vollenhoven.

Pp 266-200
Vol. 115

TREATIES AND THE CONSTITUTIONAL SEPARATION OF POWERS IN THE UNITED STATES

THE Constitution wholeheartedly accepted Montesquieu's theory [1] of the separation of the powers of government into three departments, and the courts have maintained as a fundamental principle of constitutional law that no department shall exercise powers properly belonging to either of the others.[2] The treaty-making power is established in Article II of the Constitution dealing with the executive, and consequently treaty-making has been ordinarily considered one power of the executive department. It is, however, stated that "the executive power shall be vested in a President of the United States of America," [3] whereas the treaty-making power is vested in the President acting "by and with the advice and consent of the Senate — provided two-thirds of the senators present concur." [4] Furthermore "treaties made . . . under the authority of the United States" are "the supreme law of the land." [5] Thus, both by composition and function the treaty-making power appears to be fully as much legislative as executive, a situation emphasized by Hamilton in the *Federalist*. [6]

[1] Montesquieu, *L'Esprit des Lois*, liv. xi, c. 6. See also Garner, Introduction to Political Science, New York, 1910, pp. 406 *et seq.*

[2] Kilbourne *v.* Thompson, 103 U. S. 188; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447. The principle is implied from the first section of the first three articles of the Constitution. See also Farrand, Records of the Federal Convention, *2*: 56, 77; the *Federalist*, Nos. 47, 48; J. P. Hall, Constitutional Law, Chicago, 1910, p. 16.

[3] Art. 2, sec. 1, cl. 1.

[4] Art. 2, sec. 2, cl. 2. Executive participation in treaty-making was an afterthought. The treaty power under the Articles of Confederation was vested in Congress (Art. 9). In the first draft of the Constitution prepared by the Federal Convention, the treaty power was vested in the Senate alone (Report of Committee on Detail, Aug. 6, 1787, Art. 9; Farrand, Records of the Federal Convention, *2*: 183), and proposals were made to vest it in Congress (Farrand, *2*: 297, 392, 538).

[5] Art. 6, sec. 2.

[6] The *Federalist*, No. 75. The treaty power is really neither executive nor legislative, since its ends transcend the domestic purposes of ordinary legislation as

R. H. S.

Regarding the treaty-making power as a distinct department of government, the question of constitutionality might arise, in case it attempted to perform or delegate functions assigned by the Constitution to another department.

TREATY POWER AND LEGISLATIVE POWER

The Constitution states that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[7] But as treaties are made the supreme law of the land, it is clear that some legislative authority is vested in the treaty-making power.[8] A treaty could scarcely be regarded as a usurpation of the powers of Congress and unconstitutional simply because it was legislative. To so regard it would destroy the meaning of the phrase in Article VI. Question could only arise in case the treaty concerned matters specifically assigned by the Constitution to Congress.

1. The Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law."[9] In accord with the resolutions[10] adopted by Congress after the extensive

much as its means, characterized by the contraction of permanent obligations of general effect, differ from the methods of ordinary execution and administration. John Locke divided the departments of government into legislative, executive, and *federative*, attributing to the latter the function of dealing with foreign nations. The "federative" thus corresponds to the treaty-making power and is distinguished from the executive or power of law enforcement and administration. (Locke, Two Treatises of Government, c. xii, secs. 143, 144, 146.) A combination of the classifications of Locke and Montesquieu suggests a fourfold classification of departments of government into legislative, judicial, executive, and federative. See also E. Root, this JOURNAL, *1*: 278.

[7] Art. 1, sec. 1, cl. 1.

[8] The inconsistency was seen by some members of the Federal Convention who thought that treaties should not become "law" "till ratified by legislative authority." (Farrand, *2*: 297, 392, 538.) See also remarks by Gallatin in debate on the Jay Treaty, 1796, Annals, 4th Cong., 1st sess., p. 464. Some legislative power has also been vested in American ministers in countries where the United States enjoys extraterritorial jurisdiction. They exercise a limited power to legislate for citizens of the United States, even in criminal matters. (Rev. Stat., sec. 4086; Cushing, Att. Gen., 1855, 7 Op. 495, 504; Moore, *2*: 617.)

[9] Art. 1, sec. 9, cl. 7.

[10] This resolution, which was largely the work of Madison, agreed that the

debate on the Jay Treaty of 1794, this was interpreted during the administrations of Jefferson and Madison as rendering it beyond the competence of the treaty power alone to conclude a treaty requiring an appropriation.[11] In deference to this opinion Congress has sometimes been requested to make a provisional appropriation before ratification of the treaty,[12] and the treaty itself has sometimes stated that its effectiveness is dependent upon action by Congress.[13]

The weight of practice[14] and authority,[15] however, indicates that

authority to make treaties was vested solely in the President and Senate, "but when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect and to determine and act thereon, as in their judgment may be most conducive to the public good." Annals, 4th Cong., 1st sess., p. 771. The resolution was affirmed without debate in 1871. Cong. Globe, 42d Cong., 1st sess., 835; Wharton, *2*: 19.

[11] "Mr. Madison's resolution of the year 1796, which asserts the abstract right of the House of Representatives, was adopted by a majority of the House, and remains, unrepealed of record on its journal, and it cannot be denied that during the sixteen years of the administrations of Presidents Jefferson and Madison that was the avowed construction of the Constitution by the Government of the United States." Mr. Gallatin to Mr. Everett, Jan., 1835, Gallatin's Writings, *2*: 479; Wharton, *2*: 66; Moore, *5*: 232.

[12] President Jefferson got a provisional appropriation of $2,000,000 to purchase land at the mouth of the Mississippi before entering into negotiations, but actually exceeded this amount in the Louisiana purchase without further authorization. Moore, *5*: 225. President Buchanan suggested in 1858 that an appropriation be made for a proposed purchase of Cuba. Richardson, Messages, *4*: 456, 459, 538. An appropriation was made in the Act authorizing the acquisitions for the Panama Canal. 32 Stat. 481; Crandall, Treaties, Their Making and Enforcement, 2d. ed., Washington, 1916, p. 181.

[13] Denmark, 1857, Art. 6; Hanover, 1861, Art. 5; Belgium, 1863, Art. 4.

[14] Debate on Jay Treaty, 1796; Jefferson's opinion on the Louisiana Purchase; debate on the Russian treaty of 1868 ceding Alaska, Wharton, *2*: 15–23. Wharton, after citing these discussions, concludes that "two points may be regarded as accepted in the practical working of our government. One is that without a congressional vote there can be no appropriation of money which a treaty requires to be paid. The other is that it should require a very strong case to justify Congress in refusing to pass an appropriation which is called for by a treaty." See also Moore, *5*: 224–233.

[15] During the debate in the Federal Convention on the constitution of the treaty power, Wilson of Pennsylvania was for requiring the sanction of the House

such treaties are valid and impose an obligation upon Congress to make the appropriation, a point of view well expressed by Senator Cullom in 1902:[16]

> The House, each time the question was considered, insisted upon its powers, but nevertheless it has never declined to make an appropriation to carry out the stipulations of a treaty, and I contend that it was bound to do this, at least as much as Congress can be bound to do anything when the faith of the nation has been pledged.
>
> There can, however, be no doubt but that Congress is the sole power for performing the obligation. Consequently, such provisions, although valid, cannot be executed until Congress has acted.[17]

of Representatives as well as the Senate. "As treaties," he said, "are to have the operation of laws, they ought to have the sanction of laws also." On vote, Pennsylvania alone supported the amendment, and immediately the clause as it now stands was passed unanimously. (Farrand, *2*: 538.) A few days previously an amendment proposed by G. Morris, also of Pennsylvania, had failed. It had proposed, "but no Treaty shall be binding on the United States which is not ratified by a law." (*Ibid.*, *2*: 392.) Referring to this debate in his message refusing to comply with the request of the House of Representatives for papers relating to the Jay Treaty, President Washington said, "It is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty." (Richardson, *1*: 195; Annals, 4th Cong., 1st sess., p. 760.) A recent authority says: "That Congress is under no obligation to make the stipulated appropriation has not been seriously advanced by the House since 1868, although individual advocates of the view have not been wanting. (Crandall, *op. cit.*, p. 177.) See also Kent, Commentaries, *1*: 165; Dana's Wheaton, sec. 543; Livingston, Sec. of State, 1833; Calhoun, Sec. of State, 1844; Wharton, *2*: 67–68.

[16] Cong. Rec. *35*: 1083. The House of Representatives authorized a committee to investigate this statement, but no report seems to have been made. *Ibid.*, *35*: 1178.

[17] "And in such a case the representatives of the people and the States exercise their own judgment in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislature's action in this respect, and every foreign government may be presumed to know that so far as the treaty stipulates to pay money, the legislative sanction is required." Turner *v.* American Baptist Union, 2 McLean, 344 (1852). In reference to the discretion of Congress in this matter, this undoubtedly goes farther than the bulk of authorities. *Supra*, note 14. The House refused to vote appropriations for the purchase of Alaska until a preamble was agreed to, stating that the stipulations of such treaties "cannot be carried into full force and effect except by legislation, to which the consent of both Houses of Congress is necessary." 15 Stat. 198. See also Magoon, Reports, pp. 151 *et seq.*; C. P. Anderson, this JOURNAL, *1*: 653.

2. The Constitution gives Congress power to "regulate commerce with foreign nations," "to lay and collect taxes, duties, imposts and excises," and provides that "all bills for raising revenue shall originate in the House of Representatives."[18] The competence of the treaty power to conclude commercial treaties affecting the tariff was questioned by the House of Representatives during the debate on the commercial convention of 1815 with Great Britain. Cyrus King of Massachusetts on this occasion took the extreme position that treaties dealing with the "enumerated powers" of Congress must be laid before the House before they became valid, but this was modified in conference committee.[19] On several occasions the House has asserted its abstract right, and in 1880 passed a resolution to the effect that the alteration of customs duties by the treaty power alone would, in view of Article 1, section 7, "be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives."[20] In 1844 the Senate refused to give its assent to a commercial treaty negotiated with the German states because of "want of constitutional competency" to make it, an action which moved Calhoun, then Secretary of State, to say:[21]

> If this be the true view of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution. From the beginning and throughout the whole existence of the Federal Government, it has been exercised constantly on commerce, navigation, and other delegated powers.

Although the competence of the treaty power has been clearly established by practice, the necessity of congressional action to carry out treaties affecting the revenue has usually been recognized, the negotiated instrument itself sometimes providing that it shall not

[18] Art. 1, sec. 8, cl. 3, sec. 7, cl. 1.

[19] Annals, 14th Cong., 1st sess., pp. 538, 1019; Moore, *5*: 223.

[20] Cong. Rec., *10*: 532; House Journal, 46th Cong., 2d sess., p. 323; Crandall, *op. cit.*, p. 195. See also, in reference to Hawaiian reciprocity treaty of 1884, House Report, No. 4177, 49th Cong., 2d sess.; in reference to reciprocity treaties of 1902, Cong. Rec., *35*: 1178, 1181; C. P. Anderson, this JOURNAL, *1*: 648 *et seq.*

[21] Mr. Calhoun to Mr. Wheaton, June 28, 1844, Moore, *5*: 164.

become valid until the necessary legislation has been passed.[22] With some *dicta* to the contrary,[23] the courts have been inclined to recognize such treaties as valid and self-executing, though subject to any adverse action which Congress may subsequently take.[24]

3. Congress is given power "to dispose of and make all needful rules and regulations respecting the territory" of the United States.[25] The validity of treaties annexing or ceding territory has been questioned on the ground of the invasion of this congressional prerogative.[26] As is well known, Jefferson doubted the competence of the treaty power to acquire territory and regarded his own acquisition of Louisiana as needing congressional ratification.[27] The power was, however, acquiesced in, in the case of both Louisiana and Florida, and in American Insurance Co. *v.* Canter,[28] Chief Justice Marshall considered the acquisition of territory to be inherent in the treaty-making power and remarked that it was the rule rather than the exception for treaties of peace to involve an acquisition or cession of territory. In the Dred Scott case,[29] Chief Justice Taney went so far as to assume that the treaty-making power could acquire territory and in doing so incorporate it into the United States in the meaning of the constitutional guarantees.

[22] Art. 8 of the reciprocity treaty with Mexico of 1883 provided that the treaty should not go into effect "until the laws and regulations that each shall deem necessary to carry it into operation shall have been passed both by the Government of the United States of America and by the Government of the United Mexican States, which shall take place within twelve months from the date of the exchange of ratifications to which article ten refers." Congress failed to act, although the time was twice extended by protocol, and the treaty lapsed. Moore, *5*: 222.

[23] "It certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two-thirds of a quorum of the Senate." Fuller, C. J., in Downes *v.* Bidwell, 182 U. S. 370. See also White, J., dissent in Dooley *v.* U. S., 182 U. S. 241, and concurrence in Downes *v.* Bidwell, 182 U. S. 313.

[24] Bartram *v.* Robertson, 122 U. S. 116 (1887); Whitney *v.* Robertson, 124 U. S. 190 (1888).

[25] Art. 4, sec. 3, cl. 2.

[26] It has also been suggested that annexation of territory might seriously affect the revenues and hence amount to an invasion of Art. 1, sec. 7, cl. 1. White, J., Insular Cases, *supra*, note 23; Magoon, Reports, p. 152.

[27] Jefferson, Works, *4*: 500; Wharton, *2*: 19; Moore, *5*: 225.

[28] American Insurance Co. *v.* Canter, 1 Pet. 511 (1825).

[29] Scott *v.* Sanford, 19 How. 393 (1857).

This view, however, was somewhat modified in the Insular Cases, which have reached a peculiar compromise by acknowledging the competence of the treaty-making power to acquire territory but reserving to Congress the authority to make it a part of the United States in the usual meaning of the term in the Constitution. Thus treaty acquisitions are neither foreign [30] nor part of the United States,[31] but occupy the status of unincorporated territory, or "territory appurtenant and belonging to the United States but not part of the United States within the revenue clauses of the Constitution" or, it may be added, of the guarantees relating to criminal procedure till Congress has acted.[32] Thus treaties annexing territory and also those ceding it (with the possible exception of territory within a State) are valid, but the *status* of annexed territory depends upon congressional action. Provisions in such treaties attributing specific rights to individuals in the annexed territory are, however, self-executing and immediately applicable in courts.[33]

4. Congress is given power "to constitute tribunals inferior to the Supreme Court." [34] Treaties providing for the organization of extra territorial and international courts do not conflict with this provision, nor with the provision of Article III that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and of the inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." [35] In organizing courts the treaty power appears to be bound by none of the limitations here prescribed

[30] De Lima *v.* Bidwell, 182 U. S. 1; Fourteen Diamond Rings *v.* U. S., 183 U. S. 176; Gonzales *v.* Williams, 192 U. S. 1.

[31] Downes *v.* Bidwell, 182 U. S. 244; Dooley *v.* U. S., 183 U. S. 151.

[32] Brown, J., in Downes *v.* Bidwell, 182 U. S. 244 (1900); Hawaii *v.* Mankichi, 190 U. S. 197; Dorr *v.* U. S., 195 U. S. 138. These opinions agree with the exhaustive report of C. E. Magoon, legal adviser of the War Department, on the status of the dependencies of the United States, Report, Feb. 12, 1900, pp. 37–120; Sept. 20, 1900, pp. 121–173.

[33] U. S. *v.* Percheman, 7 Pet. 51, overruling on this point Foster *v.* Neilson, 2 Pet. 253; U. S. *v.* Arredondo, 6 Pet. 691; Moore, *1*: 415.

[34] Art. 1, sec. 8, cl. 9.

[35] Art. 3, sec. 1.

R. H. S.

for Congress in organizing "federal courts."[36] Thus the Supreme Court has said:[37]

> The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. . . . The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.

The action of the treaty power since its foundation in providing for extraterritorial courts with civil and criminal jurisdiction over American citizens in non-Christian countries;[38] for foreign consular courts with jurisdiction over the seamen of their countries in the United States;[39] for special claims courts to distribute international indemnities;[40] for

[36] It may be noted that Congress is not limited by this provision in organizing courts for the territories (American Insurance Co. *v.* Canter, 1 Pet. 511), and that the executive may organize courts for local administration, but may not endow them with general admiralty and prize jurisdiction (Jecker *v.* Montgomery, 13 How. 498), in territory under military occupation (Neeley *v.* Henkel, 180 U. S. 109), or in annexed territory under military government. (Cross *v.* Harrison, 16 How. 164; Magoon, Reports, pp. 16, 30.)

[37] *In re* Ross, 140 U. S. 453 (1890), Scott, p. 238.

[38] The earliest appears to have been with Morocco, 1787, Arts. 20–21.

[39] The authority of such courts has been called "ministerial," not "judicial" (Cushing, Att. Gen., 1857, 8 Op. 390), but it is difficult to mark the distinction, for the French treaty of 1788, Art. 12, provided that disputes between seamen "shall be determined by the respective consuls . . . either by a reference to arbitration or by a summary *judgment*" and "the *appeals* from the said consular sentences shall be carried before the *tribunals* of France or of the United States, to whom it may appertain to take cognizance thereof." The Prussian treaty of 1828, Art. 10, gives the consuls the right "to act as *judges* and arbitrators in such differences as may arise between the captain and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities." See The *Königin Luise*, 184 Fed., 170 (1910).

[40] By the treaty with France of 1803, the United States agreed to provide for the distribution of an amount not over twenty million francs to its citizens for debts other than spoliations due before Sept. 30, 1800. No specific provision was made for liquidating the spoliation claims, but after three-quarters of a century Congress authorized the Court of Claims to undertake this task. (Moore, *6*: 1022; G. A. King, The French Spoliation Claims, this JOURNAL, *6*: 359, 629, 830.) Congress

special and permanent arbitration courts,[41] and for an international court of prize,[42] adds the sanction of practice to the logic of the court. By providing supplementary legislation[43] where necessary to make such courts effective, Congress has recognized their validity, and its own obligation to carry out the undertakings initiated by the treaty power. It appears that the constitutional provisions refer only to courts exercising the judicial power described in Article III, section 2, within the territory of the actual States of the Union, and do not prevent the organization in a different manner of courts in other territory or exercising a different judicial power.[44] A possible conflict which may arise between the exercise of jurisdiction by such treaty-established courts and the judicial power of the United States will be considered later.[45]

5. The Constitution gives Congress power "to declare war."[46] In his address to the Senate on January 22, 1917, President Wilson suggested that the time was near when the United States would "add their authority and their power to the authority and power of other nations to *guarantee* peace and justice throughout the world." A widely dis-

was dilatory in establishing the commission required by Arts. 9 and 11 of the treaty with Spain of 1819, but the Supreme Court said, "undoubtedly Congress was bound to provide such a tribunal as the treaty described." (U. S. *v.* Ferreira, 13 How. 45, 48; Moore, *5*: 856.) Commissions were also established under the treaty with Mexico, 1848, Art. 15; treaty with Spain, 1898, Art. 7.

[41] See Jay Treaty with Great Britain, 1794, Arts. 6, 7; Treaty of Washington with Great Britain, 1871; I Hague, 1899, 1907.

[42] XII Hague, 1907. This convention has not been ratified, but it was signed and ratification was advised by the Senate, Feb. 15, 1911. The jurisdiction of the court was made alterable to an action in damages against the United States by a protocol, but apprehension of a conflict with *judicial* power, not *congressional* power, was the motive.

[43] In reference to American consular courts, see Act of Aug. 11, 1848, and Rev. Stat. 4083–4130; Moore, *2*: 613. In reference to foreign consular jurisdiction over seamen, see Act of June 11, 1864, 13 Stat. 12; Judicial Code of 1911, sec. 271. In reference to Spanish treaty claims court, see Act of March 2, 1901, 31 Stat. 877. International arbitration courts have not required supplementary legislation in their organization, although payment of an award against the United States requires an appropriation by Congress.

[44] See J. P. Hall, Constitutional Law, sec. 263, *supra*, notes 36, 37.

[45] *Infra*, p. 85.

[46] Art. 1, sec. 8, cl. 11.

cussed proposal for such a guarantee is that of the League to Enforce Peace. After providing for arbitration and conciliation, this program stipulates that " the signatory Powers shall jointly use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing."

It has been objected that the United States could not enter into a treaty with such a provision because, if faithfully executed, it would amount to a delegation of the power to declare war to the international commission which was given the function of declaring when the circumstances contemplated existed, or at least it would deprive Congress of its discretion in performing this "solemn, sovereign act." [47]

The question has never arisen for judicial decision, but it appears that the treaty-making power sustained the constitutionality of such a provision in ratifying the treaty with Panama of 1903. Article 1 provides "The United States guarantees and will maintain the independence of the Republic of Panama." It is impossible to interpret this provision except as demanding a declaration of war in certain contingencies.[48] Treaties of guarantee [49] and active

[47] Cosmos, The Basis of a Durable Peace, New York, 1917, p. 103; W. J. Bryan, Lake Mohonk Conference on International Arbitration, 1916, p. 146. See also St. George Tucker, ed. of Blackstone, *1*: 338.

[48] There has been much discussion of the nature of the obligation assumed by states in treaties of guarantee. It is generally agreed that the obligation must be interpreted with reference to the political situation. Thus, in a collective guarantee, the minority of guarantors would not be obliged to go to war if the majority were bent on themselves violating the guarantee. Lord Derby, 1876, Hansard, III, *229*: 1891. In 1867 Lord Derby had taken the extreme position that a collective guarantee imposed no obligation unless *all* the guarantors were in concert. (Hansard, III, *188*: 150.) Mr. Gladstone, 1870, 1872, 1877, Hansard III, *203*: 1787, *210*: 1178, *232*: 475; Oppenheim, International Law, 1st ed., *1*: 575; G. G. Wilson, Neutralization in Theory and Practice, Yale Review, *4*: 474 (April, 1915); C. P. Sanger and H. T. J. Norton, England's Guarantee to Belgium and Luxemburg, London, 1915, p. 120.

[49] The most emphatic guarantee was that made to Colombia in the treaty of 1846, Art. 35, sec 1: "And in order to secure to themselves these advantages, etc., . . . the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be

alliance[50] have not, it is true, been common in the history of the United States, although in that of other countries they play a prominent part.

Virtually the same constitutional question is at issue in treaties prohibiting war under specified conditions — the discretion of Congress to declare war is equally limited. Of this character are Article 21 of the Treaty of Guadaloupe Hidalgo with Mexico,[51] Article 1 of the II Hague Convention, 1907,[52] and the twenty-odd Wilson-Bryan peace treaties concluded since 1914. The latter, in requiring the parties "not

interrupted or embarrassed in any future time in which this treaty exists; and in consequence the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory." It does not appear to have been effective. See also treaties with France, 1778, Art. 11; Nicaragua, 1867, Art. 15; Cuba, 1903, Art. 7.

[50] The only treaty of active alliance concluded by the United States, has been that with France of 1778, concluded before either the Articles of Confederation or the Constitution were in effect. The military coöperation required by Art. 1 referred only to the existing war with Great Britain.

[51] "And if by these means they should not be able to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case." Revised, 1853, Art. 7. A number of treaties require the parties to abstain from reprisals or war for violation of the terms of the treaty until the "party considering itself offended shall first have presented to the other a statement of such injuries or damages, verified by competent proof, and demanded justice and satisfaction, and the same shall have been either refused or unreasonably delayed." Morocco, 1787–1836, Art. 24; 1836, Art. 24; Algiers, 1795–1815, Art. 22; Tripoli, 1796–1805, Art. 12; 1805, Art. 15; Tunis, 1797–1904, Art. 15; Brazil, 1828, Art. 33, sec. 3; Peru-Bolivia, 1836–1839, Art. 30, sec. 3; Colombia, 1846, Art. 35, sec. 5; Peru, 1851–1863, Art. 40, sec. 3; Bolivia, 1858, Art. 36, sec. 3.

[52] The reservations of the United States on this convention referred only to the manner of arbitration, not to the duty to abstain from war, Malloy, Treaties, etc., p. 2259. The compulsory arbitration provisions of the proposed Taft treaties of 1911 were amended by the Senate on constitutional grounds, but not the one here in question. The majority of the Foreign Relations Committee thought that ultimate decision by a joint high commission on the question of what subjects were justiciable and hence subject to compulsory arbitration would amount to an unconstitutional delegation of power to decide in each instance on this question by the treaty power itself. See *infra*, note 121.

to declare war or begin hostilities during such investigation and report" (of an international commission, which may occupy a year), limit the discretion of the war power in point of time, while the "Convention respecting the Limitation of Force for the Recovery of Contract Debts" (II Hague, 1907) limits the subject-matter which may ultimately be made a pretext for war.

Treaties of this character could hardly come before the courts for interpretation. A declaration of war contrary to the treaty, or a failure to declare war when required by the treaty, would be equally accepted by the judiciary as valid decisions of a "political question." [53] Yet it is believed that long practice [54] and the reason of the thing fully sustain the constitutional competence of the treaty-making power to conclude such agreements and their validity when ratified. The treaty power does not "declare war"; it simply, in the words of Mr. Taft: [55]

[53] The Prize Cases, 2 Black 635.

[54] Aside from its first treaty, the French treaty of alliance and guarantee of 1778, no less than thirty treaties, distributed throughout its history, definitely limit the war power of the United States (*supra*, notes 51 and 52), not to mention the obligation implied in the numerous treaties stipulating for "perpetual peace and amity" between the contracting parties, the many bilateral arbitration treaties providing for the submission to arbitration of all disputes of "a legal nature" which "do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties," and the general pacific settlement treaties of The Hague providing that "in case of serious disagreement or dispute, before an appeal to arms, the contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers."

[55] W. H. Taft, address May 26, 1916, before League to Enforce Peace, Enforced Peace, p. 64. Ex-Justice Hughes, in carefully weighed terms, has expressed the same opinion as the ex-President: "Congress alone has the power to declare war, and any agreement made by the United States to coöperate in coercive measures amounting to war would necessarily be subject to the exercise by Congress of its unquestioned authority. But this does not mean that the treaty-making power may not, if it is found to accord with national interests and policies, aid in forming an international organization believed to be necessary and practicable, although its offer of coöperation in any given contingency must be subject to the well-known conditions which inhere in our constitutional form of government. Congress indeed will have all its powers, but its course of action will depend upon the world outlook of the nation, and we should do what we can to promote an enlightened conception of our international responsibility." Address before Long Beach Conference on Foreign Relations, May 28, 1917, Proceedings, Academy of Political Science, Vol. 7, No. 2, p. 14.

creates the obligation to declare war (or refrain from doing so) in certain contingencies. That obligation is to be discharged by Congress under its constitutional power to declare war. If it fails to do so, and thus comply with the binding obligation created by the treaty-making power, then it merely breaks the contract of the Government. It is left to Congress to carry out that which we in a constitutional way have agreed to do. Thus to impose in a constitutional way, by treaty, an obligation on Congress is not to take away its power to discharge it or to refuse to discharge it.

It is probable that the use of force to fulfill the guarantees required by such a concert of Powers would not generally require a declaration of war, but would be within the competence of the President alone. Article 1, section 8, clause 15 of the Constitution authorizes Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." In conferring this power upon the President, Congress has interpreted it as including the land and naval forces as well as the militia,[56] and "danger of invasion" as well as actual invasion.[57] A violation of a treaty to which the United States was a party, if not a violation of a "law of the Union,"[58] might be accompanied by circumstances amounting to "invasion" or "danger of invasion."[59] The power to determine when these circumstances exist has been held to lie with the President,[60] and it was under this power that President Lincoln first called out the national forces to

[56] Act of March 3, 1807, 2 Stat. 443.

[57] Act of Jan. 21, 1903 (Dick Act), 32 Stat. 776, sec. 4; 35 Stat. 400; 38 Stat. 284; based on Acts of May 2, 1792, and Feb. 28, 1795, 1 Stat. 264, 424.

[58] Although by Art. 6, sec. 2, treaties are the "supreme law of the land," for this clause "laws" have been held to refer only to laws of territorial effect. Wickersham, Att. Gen., 29 Op. 322 (1912); Ordronaux, Constitutional Legislation, Philadelphia, 1891, p. 501; J. N. Pomeroy, Constitutional Law, 9th ed., Boston, 1886, p. 387; Kneedler *v.* Lane, 45 Pa. St. 238, 244 (1863). A contrary opinion was expressed by Judge Advocate General Davis in 1908, Cong. Rec., *42*: 6943. See also report of Efficiency and Economy Committee, State of Illinois, 1915, pp. 889 *et seq.*

[59] The proposition that this clause permits the use of forces only within the territory of the United States can hardly be sustained in view of the fact that statutes specify that they may be used "within or without the territory of the United States." 35 Stat. 400, sec. 5; 38 Stat. 284, sec. 4. A use outside the territory, however, could only be justified by hot pursuit of the invader or strategic necessity to apprehend a threatened attack. See Wickersham, Att. Gen., 29 Op. 324; Pomeroy, Constitutional Law, p. 387.

[60] Martin *v.* Mott, 12 Wheat. 19; Luther *v.* Borden, 7 How. 1.

suppress the Southern rebellion.[61] Undoubtedly the uses of the militia contemplated by this clause are essentially domestic, yet the practice under it shows that force may be used to the greatest extent without a declaration of war by Congress.

In external affairs an analogous authority to use the forces is given immediately to the President by the implied power over foreign relations and the powers inherent in the "Commander in Chief of the army and navy of the United States." [62] This office undoubtedly confers authority to use these forces for protective and defensive purposes in measures short of war, such as display of force and limited use of force, an authority frequently exercised.[63] Such measures as these, coupled with the economic pressure which might be brought by embargoes and nonintercourse, would be the most important means for carrying out obligations of international guarantee. The latter methods, as interfering with commerce and revenue, would require the sanction of Congress,[64]

[61] It was of course impossible to declare war in this case. See The Prize Cases, 2 Black 635.

[62] Art. 2, sec. 2, cl. 1.

[63] Authorized by President alone: Navy dispatched against Tripolitan pirates, 1801 (Jefferson's Message, Dec. 8, 1801; Richardson, *1*: 326; action later ratified by Congress, Act. of Feb. 6, 1802, 2 Stat. 129); sloop *Dale* threatened bombardment of Island of Johanna, 1851 (Moore, 7: 112); bombardment of Greytown, Nicaragua, 1854 (Moore, 7: 112); engagement of U. S. S. *Wyoming* in Straits of Shimonosiki, Japan, 1863 (Moore, 7: 116); dispatch of U. S. S. *Shawmut* to Venezuela, 1871 (Moore, 7: 112); dispatch of U. S. S. *Wachusett* to Ecuador, 1885 (Moore, 7: 108); landing of forces in Peking, China, in defense of legation from Boxers, 1900 (Moore, *5*: 476–493); landing of troops at Vera Cruz, Mexico, April 21, 1914 (Am. Year Book, 1914, p. 34; later ratified by joint resolution of Congress expressly denying intention to make war, April 22, 1914, 38 Stat. 770); punitive expedition to Mexico, 1916 (Am. Year Book, 1916, pp. 79, 312; ratified by Senate resolution denying intention to intervene, March 17, 1916, Cong. Rec., *53*: 4274).

With authority of Congress but no declaration of war: French reprisals, 1798–1799 (1 Stat. 361, 572, 578, 743; Moore, 7: 155); dispatch of navy against Algerine pirates, 1815 (3 Stat. 230); dispatch of frigate *Sabine* to Asuncion, Paraguay, 1858 (joint resolution, June 2, 1858, 11 Stat. 370; Moore, 7: 109).

See E. Root, address in the Senate, Aug. 14, 1912, Cong. Rec. *48*: 10929; Military and Colonial Policy of the United States, Cambridge, 1916, p. 157; J. R. Clark, Jr. (Solicitor of Dept. of State), Right to protect citizens in foreign countries by landing forces, Washington, 1912; E. M. Borchard, The Diplomatic Protection of Citizens Abroad, New York, 1915, p. 452.

[64] Congress has authorized general embargoes in 1794 (1 Stat. 400) and 1807 (2 Stat. 451); nonintercourse with designated foreign states, 1798 (1 Stat. 565)

but a declaration of war would seldom be appropriate. War has for its immediate end the "complete submission of the enemy" [65] so that the victorious party may carry out his ultimate political ends. The use of force here contemplated would have the immediate end of enforcing international law and treaties. There would be no question of bringing about "the complete submission" of the state acted against but only such a change of policy as might be necessary to insure the observance of law. There is no clash of equally valid political ends, but simply a clash of the policy of one with the law.

A leading authority on the protection of citizens abroad has said: [65a]

> Inasmuch as the Constitution vests in Congress authority "to declare war" and does not empower Congress to direct the President to perform his constitutional duties of protecting American citizens on foreign soil, it is believed that the Executive has unlimited authority to use the armed forces of the United States for protective purposes abroad in any manner and on any occasion he considers expedient.

If the general powers of the Executive confer this authority for the protection of citizens abroad, it seems probable that they confer an equal authority to employ forces in a joint policing operation for the maintenance of international law and treaties. It has long been recognized that the maintenance of the general law is an essential element in the security of each state,[65b] and a legal obligation on the part of each state to

and 1809 (2 Stat. 528), and an embargo on arms to American countries in case of domestic violence, 1912 (37 Stat. 630). The use of reprisals would also require congressional sanction (Constitution, Art. 1, sec. 8, cl. 11). See President Jackson's demand for authority to use reprisals against France, Message, Dec. 1834, Moore, 7: 123.

[65] U. S. Rules of Land-Warfare, 1914, Art. 10; Wilson and Tucker, International Law, 7th ed., p. 237.

[65a] Borchard, *op. cit.*, p. 452.

[65b] "The laws of natural society are of such importance to the safety of all states, that if they accustom themselves to trample them under their feet, no people can flatter themselves with the hopes of self-preservation, and of enjoying tranquillity at home, whatever wise, just, or moderate measures they may pursue. Now all men and all states have a perfect right to those things that are necessary to their preservation, since this right is equivalent to an indispensable obligation. All nations have then a right to repel by force what openly violates the laws of the society which nature has established among them, or that directly attacks the welfare and safety of that society." Vattel, *Le Droit des Gens*, prelim. sec. 22. See also Grotius, *De Jure Belli ac Pacis*, Prolegomena, secs. 18, 19; lib. 2, c. 20, sec. 40, par. 4; c. 25, sec. 6.

aid in the maintenance of that law has been growing into recognition.[65c] It follows that the employment of force, if necessary to maintain the law, is justified by the elementary right of self-preservation, if not positively demanded by the responsibilities of membership in the society of nations. Since the President, as Chief Executive and Commander in Chief of the army and navy, is charged with the defense of the nation and the fulfillment of international responsibilities of an executive nature, his authority to use the national forces so far as necessary to maintain the law of nations seems to be constitutionally recognized and its exercise would seem to be no infringement upon the prerogative of Congress to declare war.

6. Congress is given power "to define and punish piracies" and "offenses against the law of nations." [66] Secretary of State Marcy advised [67] that a provision in a proposed treaty with Venezuela providing that citizens of one country accepting letters of marque to cruise against the other should be treated as pirates, would be void as in conflict with this constitutional prerogative of Congress, although he admitted that such provisions had been included in a number of earlier treaties "evidently by an oversight of one of the provisions of the Constitution."

[65c] "If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." (E. Root, The Outlook for International Law, this JOURNAL, *10*: 9.) "That commonwealth is best administered in which any wrongs that are done to individuals are resented and redressed by the other members of the community, as promptly and as vigorously as if they themselves were personal sufferers." (Plutarch, Solon, sec. 18.) This applies to the great commonwealth of civilized states. If this feeling were utterly extinct, the phraseology of international law would be idle gibberish and the world would be utterly abandoned to the cupidity and the violence of the selfish and the strong. If this feeling were universal or even if it were materially strengthened, the projects of compulsory arbitration (which one so often reads of) would become realities instead of being sneered at as reveries, and warfare, with its calamities and its abominations, might be almost banished from the globe." (Creasy, First Platform of International Law, London, 1876, p. 44.) See also Sheldon, Amos, Jurisprudence, London, 1872, pp. 411, 456.

[66] Art. 1, sec. 8, cl. 10.

[67] Mr. Marcy, Sec. of State, to Mr. Aspurta, Nov. 15, 1854; Moore, *2*: 978, *5*: 169. See also The *Bello Corrunes*, 6 Wheat. 152.

Congress evidently did not entertain this view of its prerogatives in its early history, for the Neutrality Act of 1794 provided that "nothing in the foregoing Act shall be construed to prevent the prosecution or punishment of . . . any piracy defined by a treaty or other law of the United States." [68] The term "treaty" was undoubtedly inserted to insure the validity of provisions of this character in treaties with France (1778, Article 21), The Netherlands (1782, Article 19), Sweden, (1783, Article 23), and Prussia (1785, Article 20) all then in force.[69] By 1818 the doctrine had grown up that the Federal courts enjoy no common-law criminal jurisdiction,[70] and in the revision of the neutrality laws of that date the proviso was changed to read "any piracy defined by the laws of the United States." [71] In 1847 Congress again recognized the validity, if not the self-executing character, of such provisions by passing a law "providing for the punishment of offenses declared piracy in United States treaties," [72] an Act which Mr. Marcy must have overlooked in writing his opinion seven years later.

Congress is given power "to make rules concerning captures on land and water." [73] Rules of contraband, blockade and maritime capture were among the commonest provisions of early treaties and form a large part of the subject-matter of the Hague Conventions of 1907 and the Declaration of London of 1909.[74] No instance is known of a doubt being expressed on the constitutionality of these treaties on the grounds of usurpation of the prerogatives of Congress. On the contrary, the courts have regarded these provisions as self-executing and have applied them as law in numerous cases.[75]

[68] 1 Stat. 384, 520.

[69] Other treaties containing this provision are Great Britain, 1794, Art. 21; Spain, 1795, Art. 14; Colombia, 1824, Art. 22; Guatemala, 1849, Art. 24; Salvador, 1850, Art. 20; Peru, 1870, Art. 28; Ecuador, 1879, Art. 25.

[70] U. S. *v.* Worral, 2 Dall. 384 (1798); U. S. *v.* Hudson, 7 Cranch 32 (1812); U. S. *v.* Coolidge, 1 Wheat. 415 (1816); U. S. *v.* Eaton, 144 U. S. 677.

[71] 3 Stat. 447, 450, sec. 13.

[72] 9 Stat. 175; Rev. Stat., sec. 5374; Criminal Code of 1909, sec. 305.

[73] Art. 1, sec. 8, cl. 11.

[74] Although never ratified, the Senate advised ratification of the Declaration, April 24, 1912, Charles, Treaties, p. 266.

[75] As examples see The *Phoebe Anne*, 3 Dall. 319; The *Amity*, Fed. Cas. 9741; The *Friendship*, Fed. Cas. 3291 (all applying Art. 17 of the treaty with France,

A comparison of this provision of the Constitution with that relating to "piracies" and "offenses against the law of nations" indicates that there is no distinction between the authority of Congress in the two cases. If the prerogative of Congress could be invoked as against treaty crimes, so could it against treaty prize rules. The distinction actually rests on the fact that the criminal law applicable by the Federal courts has been held to be strictly statutory,[76] whereas prize law is embodied in international law.[77] This reasoning is further supported by the attitude of courts on treaties requiring extradition for certain offenses. These treaties involve no delegated power of Congress, so there is no possibility of a conflict, yet it has been generally held that legislation is necessary to give courts authority to execute them.[78] The obligation of Congress to supply the necessary legislation seems to be unquestionable.

7. Many of the other powers specifically given to Congress cover a subject-matter frequently included in treaties. It is enough to mention the establishment of a uniform rule of naturalization,[79] the fixing of a standard of weights and measures,[80] the establishment of post offices,[81] the protection of patents and copyrights.[82] In fact, the majority of

1778); The *Appam*, 37 Sup. Ct. 337 (applying XIII Hague Convention of 1907, Art. 22).

[76] *Supra*, note 70.

[77] Glass *v.* The *Betsey*, 3 Dall. 6 (1794); Talbot *v.* Jansen, 3 Dall. 133 (1796); The *Estrella*, 11 Wheat. 298 (1819).

[78] Case of the British Prisoners, 1 Wood and Min. 66; *In re* Metzger, 5 How. 176 (1847); Corwin, National Supremacy, New York, 1913, p. 278; this JOURNAL, *10*: 723.

[79] Art. 1, sec. 8, cl. 4. See naturalization treaties, Great Britain, 1820; North German Union, 1868, etc.

[80] Art. 1, sec. 8, cl. 5. See International Bureau of Weights and Measures, 1875.

[81] The Universal Postal Union Conventions, 1891, 1897, were ratified by the President alone, under authority of an Act of Congress, June 8, 1872, 17 Stat. 304, sec. 167; Moore, *5*: 220.

[82] Art. 1, sec. 8, cl. 8. Literary and Artistic Copyright Convention with South American States, 1902. Congress has authorized the President to regulate international copyright by proclamation on a reciprocal basis, Act of March 3, 1891, 26 Stat. 1110, sec. 13; Moore, *5*: 219. Convention for International Protection of Industrial Property (patents and trade-marks), 1883. Congress has no independent power to regulate trade-marks (Trade-Mark Cases, 100 U. S. 82 (1879), but the treaty power can act in this field and Congress may then pass laws supplementary to conventions. Corwin, *op. cit.*, p. 205.

powers delegated to Congress are eminently appropriate for treaty negotiation and have been the subject of a large part of the treaties ratified and acted upon in the past. This fact certainly raises a presumption that the treaty power is competent to deal with matters delegated to Congress, for were the opposite true, the number of constitutional treaties to which the United States is a party would probably not exceed a score, and these, dealing solely with the "nondelegated" or "reserved powers" of the States, would be the very ones denounced as unconstitutional by the "States' rights" school.[83] If in truth the treaty power were doomed to steer between a perpetual Scylla of "States' rights" and an endless Charybdis of congressional prerogatives, the ship of state would soon be shattered upon the rocks of unconstitutionality in its international dealings.

It must always be borne in mind that in most cases powers were given to Congress in pursuance of a scheme of distribution between Congress and State legislatures. Where no distribution between Congress and the treaty-making power was intended, none was made. If a ratified treaty covers a subject-matter appropriate for international negotiation, the fact that it concerns matters within the powers of Congress enumerated by the Constitution does not affect its validity. The only question that can arise is whether or not it is self-executing.

Practice indicates that treaty provisions dealing with matters which for historical and practical reasons have been placed by the Constitution peculiarly within legislative competence,[84] require congressional coöperation for their execution. Of this character are treaty provisions dealing with finances, whether (1) requiring appropriations of money, or (2) altering revenue laws and commercial regulations. While, even in these matters, Congress is under a positive obligation to act so as to give

[83] See H. S. Tucker, Limitations on the Treaty-Making Power under the Constitution of the United States, Boston, 1915; W. E. Mikell, University of Pennsylvania Law Rev., *57*: 435, 528.

[84] The Constitution not only gives the financial powers to Congress, but it gives them exclusively and especially to the House of Representatives. The terminology of Art. 1, sec. 7, cl. 1, and Art. 1, sec. 9, cl. 7, is a different sort of delegation from the powers given by Art. 1, sec. 8. This is a recognition of the historical connection between control of the purse and the rise of the House of Commons in England. See the *Federalist*, No. 58; Magoon, Reports, p. 151.

effect to a ratified treaty, yet the treaty-making power is under an equal obligation to consider, in connection with its view of international policy, the views on domestic policy of Congress, before finally ratifying the instrument. In these matters foreign and domestic policy are connected with extraordinary intimacy, and a complete collaboration of the treaty power and the legislative power is necessary. An opportunity for Congress to pass upon treaties of this character before ratification would seem generally expedient though not legally necessary.[85]

Other treaty provisions require for their performance detailed supplementary legislation or specific acts which the Constitution directs to be performed by Congress. In this category are treaty provisions requiring (3) the incorporation and administration of territory,[86] (4) the organization of courts and carrying out of their awards, and (5) a declaration of war in certain contingencies, or abstention from war.[87] In these cases Congress is bound to act and carry out in good faith the obligations which the treaty power has undertaken. These matters are ones upon which a proper decision might be expected from a comprehensive view of international relations, and hence the treaty power enjoys a greater freedom of action than in those of the former category.

Another class of treaty provisions are by nature self-executing, but because of historical tradition and constitutional interpretation require legislation to be executable. Here are included treaties (6) defining crimes and extending criminal jurisdiction. The common law has been traditionally assiduous in protecting the individual against arbitrary criminal punishment, and this spirit, especially in reference to criminal procedure, has been embodied in Article 3, section 2, clause 3, the Fifth and Sixth Amendments, but Federal courts are not denied a general

[85] The objection brought in the Federal Convention of 1787 against such submission to Congress, that it would make secrecy impossible (Farrand, *op. cit.*, 2: 538), would probably have less weight at present.

[86] The terminology of Art. 4, sec. 3, cl. 2, indicates that the power is supplementary in character.

[87] That the power of Congress to declare war is directory, rather than a peculiar congressional prerogative, is indicated by the incorporation in the same clause of the power to "make rules concerning captures," which is clearly shared with the treaty power.

criminal jurisdiction by any specific clause of the Constitution, and in some early cases they actually assumed jurisdiction of crimes defined by customary international law.[88] This view has, however, changed, and it is now held that the criminal jurisdiction of Federal courts is entirely statutory. Hence treaty crimes must be incorporated in Acts of Congress before they become cognizable in Federal courts.[89]

Still other treaty provisions are self-executing in the sense that courts can take cognizance of and apply them immediately in appropriate cases, while others may be carried out by executive, administrative, and military officers without further legislation. Yet in the cases where the coöperation of Congress is necessary, Congress is obliged to act, exercising discretion only as to the means most suitable for attaining the ends contemplated by the treaty, and the obligation is none the less binding in international and constitutional law[90] from the fact that the Constitution furnishes no power to compel it. A refusal to act would be equivalent to President Jackson's refusal to execute the decree of the Supreme Court in the case of Worcester *v.* Georgia.[91] The entire

[88] *In re* Henfield, Fed. Cas. 6360 (1793); U. S. *v.* Ravarra, 2 Dall. 297 (1793).

[89] Congress has passed laws giving courts jurisdiction over treaty piracy (Crim. Code, 1909, sec. 305); extradition (Rev. Stat. secs. 5270–5280); deserting seamen (Rev. Stat. 5280–5281), and assistance of foreign consuls (Judicial Code of 1911, sec. 271). Although State courts must regard treaties as the supreme law of the land, they appear to be excluded from jurisdiction of treaty crimes by the Judicial Code, sec. 256, cl. 1, which gives the Federal courts exclusive jurisdiction "of all crimes cognizable under the authority of the United States." A treaty crime would probably be considered in this category, even if because of the failure of Congress to act, the Federal courts could not exercise jurisdiction.

[90] A conflict between the Constitution and international law is not to be presumed. What is demanded by international law must be also by the Constitution in order that the fundamental object of the latter may be attained. International law may offer a definite sanction for the fulfillment of treaties, and were the Constitution to oppose obstacles to their fulfillment, the result might be disaster for the whole country and a complete nonfulfillment of the fundamental objects stated in the preamble, to "promote the general welfare, etc." To the same effect Pillet generalizes that courts must observe the more fundamental obligations of international law, even above municipal law, "on penalty of exposing the state to a responsibility which may paralyze its sovereignty and put obstacles to the reign of its national law." *Rev. Gén. de Droit Int. Pub., 5*: 87.

[91] Worcester *v.* Georgia, 4 Pet. 515 (1832). In another case Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." H. W. Elson, History of the United States of America, New York, 1910, p. 500.

system of the Constitution demands that each department accept in good faith and coöperate in carrying out the undertakings of the other departments.

TREATY POWER AND JUDICIAL POWER

The Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." [92] An actual exercise of judicial power by the treaty power seems improbable,[93] but question has arisen of the constitutionality of treaties vesting part of "the judicial power of the United States" in authorities other than the Supreme and inferior courts of the United States.

If courts can be organized [94] and the law to be applied laid down by treaty,[95] jurisdiction adequate to carry out the purpose of their organization would seem to be a necessary implication. Doubts have, however, been expressed. The XII Hague Convention of 1907 proposed an international prize court with appellate jurisdiction in prize cases. Doubts as to its constitutionality were felt by Secretary Root, and he instructed [96] the American delegation to the London Naval Conference (designed to codify the law for this court) to propose a supplementary protocol, whereby, instead of subjecting decisions of the United States courts to appeal and possible reversal in the International Prize Court, a direct

[92] Art. 3, sec. 1.

[93] The negotiation of a treaty finally disposing of claims of citizens of the United States could hardly be so regarded. The international claims of an individual are only inchoate rights dependent on governmental policy, so their surrender or compromise is not a decision on a question of legal right (Comegys *v.* Vasse, 1 Pet. 193 (1828); Meade *v.* U. S., 9 Wall. 691), although with the establishment of an international court such claims might become legal rights.

[94] *Supra*, notes 37–42.

[95] As treaties are "the supreme law of the land," by Art. 6, sec. 2 of the Constitution, they form a rule of decision *ex propria vigore* unless supplementary congressional legislation is required for special reasons. *Supra*, notes 88 and 89.

[96] For. Rel. 1909, p. 303.

claim might be brought there against the United States "in the form of an action in damages for the injury caused by the capture." This suggestion was adopted by the Naval Conference in a final protocol [97] and was ultimately incorporated in a protocol [98] signed by all signatories of the original Prize Court Convention.

The Committee of the London Naval Conference reported the constitutional difficulty as follows: [99]

> The (American) delegation remarked that for certain states the functioning of the International Prize Court is not compatible with that of the Constitution. The decision of national courts cannot be annulled by foreign decisions in certain countries, such as the United States of America. Recourse to the Prize Court might have the effect of annulling a decision of the Supreme Court of the United States of America, a result incompatible with their Constitution.

The option permitted by the protocol would eliminate this possibility, but it seems probable that the difficulty might have been equally met by domestic legislation allowing appeal direct from an inferior Federal court to the international court.[100]

It is clear that "the judicial power of the United States" cannot refer to the jurisdiction exercised by all courts organized under authority of the national government, for provisions of the article in reference to the tenure of judges have never been adhered to in territorial [101] or consular courts.[102] The article evidently applies only to Federal courts

[97] For. Rel. 1909, p. 318; Report of United States Delegation, *ibid.*, p. 305, and President Taft's message, Dec. 6, 1910, *ibid.*, 1910, p. viii.

[98] Charles, Treaties, p. 263. Neither the protocol nor the original convention has been ratified, though ratification was advised by the Senate on Feb. 15, 1911.

[99] Proceedings London Naval Conference, British Parl. Pap., Misc. No. 5 (1909), p. 222. See American statement, *ibid.*, p. 216.

[100] Art. 6 of the International Prize Court Convention provides that "the municipal law of the belligerent captor shall decide whether the case may be brought before the international court after judgment has been given in first instance or only after an appeal."

[101] American Insurance Co. *v.* Canter, 1 Pet. 511.

[102] *In re* Ross, 140 U. S. 453. General and special treaties requiring submission of the government to the decision of an international arbitration court have never been questioned on the score of delegation of *judicial* power, yet, according to President Taft, such courts exercise judicial power. "A submission to a judicial decision is not a delegation of power to an agent. It is a submission of an issue to a judge." Enforced Peace, p. 61.

within the territory of the States of the Union, but even with this limitation it cannot mean that the judicial power described in Article III, section 2, is lodged *exclusively* in courts organized according to Article III, section 1, for the State courts exercise such jurisdiction concurrently, except where expressly prohibited by Congress,[103] and foreign consuls, under treaties, sometimes exercise exclusive jurisdiction in admiralty and maritime cases relating to the internal order of their merchant vessels and not affecting the peace of the port.[104]

Consequently, there appears to be nothing in this article which would prevent an international court (which the treaty power is clearly competent to organize) from exercising jurisdiction in the matters enumerated in Article III, section 2, concurrently with the Federal courts (as the State courts do habitually).

The only difficulty remaining is that of appeals from the Federal courts to the international court. Congress has entire control of the jurisdiction of inferior Federal courts and is competent to withhold any part of the judicial power of Article III, section 2, allowing it to remain with the State courts.[105] It also exercises complete control of the appellate jurisdiction of the Supreme Court.[106] Only the original jurisdiction of the Supreme Court is inherent,[107] and even that may be vested concurrently in other courts.[108] An appeal from the Supreme Court to

[103] This is a necessary implication of Art. 6, sec. 2. "This Constitution, and the laws of the United States . . . and all treaties . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby." See also the *Federalist*, No. 82. (Hamilton.)

[104] *Supra*, note 38. The *Elwine Kreplin*, Fed. Cas. 4426 (1872); The *Welhaven*, 55 Fed. 80, (1892); The *Bound Brook*, 146 Fed. 160 (1906); The *Königin Luise*, 184 Fed. 170 (1910); Moore, *2*: 298; Consular Regulations (1896), 88–90.

[105] J. P. Hall, Constitutional Law, sec. 356.

[106] The entire jurisdiction of the Supreme Court is theoretically inherent, but the appellate jurisdiction is subject "to such exceptions and regulations as the Congress shall make." (Art. 3, sec. 2, cl. 2.) As Congress has from the first exercised this power affirmatively, it has been implied that all jurisdiction not specifically granted is "excepted" by Congress, hence the appellate jurisdiction in fact exists only where expressly granted by Congress. (U. S. *v.* Moore, 3 Cranch 159, 170; Durouseau *v.* U. S., 6 Cranch 307, 313; *Ex parte* McCardle, 7 Wall. 506, 513.)

[107] Kentucky *v.* Dennison, 24 How. 66.

[108] Inferior Federal courts and State courts may exercise original jurisdiction in cases brought by diplomatic ministers and consuls (Judicial Code, 1911, secs. 233,

an international court would seem anomalous from a linguistic standpoint at least,[109] but legislation providing that in certain classes of cases appeals should go from inferior Federal courts to an international court [110] instead of to the Supreme Court would seem entirely within the competence of Congress.

A system whereby all cases involving international law or treaties should be adjudicated in first instance in an inferior Federal court with appeal to an international court would seem to present no unconstitutional conflict with the judicial power of the United States, and, in view of the reciprocal advantages which such a system might offer to American citizens, would seem within the proper scope of treaty-making and hence within the constitutional competence of the treaty power. Congress would have to amend the Judicial Code before such a system could operate, but its political obligation to render a treaty of this character executable would seem the same as with the many other treaties requiring supplementary legislation.

There appears to be general agreement that the *sine qua non* of an improved world organization is the establishment of an international

256, cl. 8) and the former in cases against consuls (*ibid.*, sec. 24, par. 18; sec. 233; Bors *v.* Preston, 111 U. S. 252). From 1875 to 1911 State courts exercised concurrent jurisdiction in cases against consuls (18 Stat. 318; Wilcox *v.* Luco, 118 Cal. 639 (1898); Judicial Code, 1911, sec. 256, par. 8). Yet the Constitution gives the Supreme Court original jurisdiction "In all cases affecting ambassadors, other public ministers and consuls." (Art. 3, sec. 2, cl. 2.)

[109] Though in New York the "Supreme Court" is not the highest appellate court, and in all the States appeal lies from the State "supreme" court to the United States Supreme Court. The latter was contested in the extended controversy between John Marshall and Virginia, in which the State, although admitting that cases within national judicial power could be transferred from inferior State to inferior Federal courts, maintained that appeals could not go from the highest State court to the Supreme Court of the United States. Marshall's position, sustaining the constitutionality of Article 25 of the Judicial Code of 1789 (virtually repeated in the Judicial Code of 1911, sec. 237), providing for such appeals, has been uniformly followed. Martin *v.* Hunter, 1 Wheat. 304; Cohen *v.* Virginia, 6 Wheat. 406; W. E. Dodd, John Marshall and Virginia, Am. Hist. Rev., *12*: 776.

[110] If the subject were within the original jurisdiction of the Supreme Court, an original jurisdiction in an inferior Federal court with appeal to the international court could be provided concurrently with the inherent original jurisdiction of the Supreme Court. Thus appeal to the international court would be optional with the parties.

court. The stability of such a court and its capacity to define and develop international law would seem much greater if its jurisdiction were founded in part upon the nature of the *case* [110a] rather than entirely upon the nature of the *parties*, as has been usually suggested.[111] A case between states is very likely to involve questions of national honor or national policies, and decision on purely judicial grounds without considerations of expediency is frequently found impossible. Thus Borchard, in arguing for an international court with final jurisdiction over pecuniary claims against states, brought by individuals, says: [112]

> The divorce of pecuniary claims from political considerations, a union which now not only results in inexact justice, but often gross injustice, and the submission of such claims to the determination of an independent tribunal, must make a universal appeal to man's sentiment for justice.

The most far-reaching questions of international law, customary or conventional, may be involved in controversies between private individuals, either of the same or of different nationalities, or between individuals and a state. With an international court exercising appellate jurisdiction in all cases involving international law or treaty,[113] judicial determination of these questions could frequently be obtained in the routine of an established institution, with comparatively little danger of arousing national susceptibilities. The way would thus be open for

[110a] Jurisdiction is primarily dependent upon the nature of the case in the proposed International Prize Court (XII Hague Convention, 1907, Arts. 3, 4, 5; Charles, Treaties, p. 250) and in the Central American Court of Justice, 1907 (Arts. 2, 3; Malloy, p. 2399).

[111] Jurisdiction of cases where both parties were states was alone provided in the draft Convention for the Creation of a Judicial Arbitration Court, The Hague, 1907, Arts. 17, 21.

[112] E. M. Borchard, The Diplomatic Protection of Citizens Abroad, New York, 1915, p. 864. See also pp. 328, 373, 443, and in *The New Republic*, 7: 196 (June 24, 1916).

[113] The jurisdiction would, of course, have to be defined in detail. Cases of pecuniary claims by aliens; private rights upon succession of sovereignties; maritime cases involving the general law, such as salvage and collision, prize captures and piracy; cases involving the privileges of sovereigns, diplomatic, consular, naval and military officers; cases of territorial boundaries, jurisdictional limits, and extra-territorial jurisdiction, and all cases involving the interpretation of treaties, are some of the classes which might be included.

gradually building up a series of binding and authoritative precedents on numerous questions of international law, and when controversies between nations arose there would be considerable probability that the question had already been so covered by decided precedents that it would furnish neither a *bona fide* clash of opinion nor an excuse for veiling political aims.

The merit of such an international court, as compared with a court exercising jurisdiction only in cases between states, is evidenced by the actual jurisdiction exercised by the Supreme Court of the United States.[114] As compared with the number of cases which come before the Supreme Court because involving the Constitution, laws or treaties of the United States, or admiralty and maritime law the number is insignificant which come before it because the parties are States of the Union or persons of different States, and it is its authoritative interpretations of the Federal Constitution, national statutes, treaties, and maritime law which has made the Supreme Court an institution of remarkable value.

The logic of making jurisdiction dependent upon the *case* rather than the *parties* was recognized in the International Prize Court Convention, but the expedient adopted by the United States in the protocol would seem to sacrifice some of this advantage, for the intervention of sovereignties, with the continual possibility of arousing susceptibilities, is the very thing to be avoided. If the interpretation here suggested is correct, there seems to be no constitutional obstacle to considering such a court.

TREATY POWER AND EXECUTIVE POWER

A conflict between treaties and the executive power, which, according to the Constitution,[115] is vested in the President of the United States, has never been seriously considered,[116] and such a conflict seems impos-

[114] For distinction of the jurisdiction of the Supreme Court as determined by the character of the case and by the character of the parties, see Cohen *v.* Virginia, 6 Wheat. 264, 378, 393; U. S. *v.* Texas, 143 U. S. 621 (1891); Kansas *v.* Colorado, 185 U. S. 125.

[115] Art. 1, sec. 1, cl. 1.

[116] The Senate report on the Taft arbitration treaties of 1911, in defending the prerogatives of the Senate, says: "It is said that the powers of the President under the Constitution are given up by the 3d clause of Article 3, just as much as those

sible until a legal distinction between the functions of the Executive and the treaty power is formulated. Executive discretion in both political [117] and administrative [118] matters has undoubtedly been limited by numerous treaty provisions.

The competence of the treaty-making power to delegate its own discretion has, however, been doubted.[119] Thus, in international arbitration parties, the Senate has generally insisted upon its prerogative, as a constituent of the treaty power, to participate in the conclusion of each *compromis* submitting a specific case to arbitration.[120] In refusing consent to the ratification of the provision of the Taft arbitration treaties of 1911 which gave final decision upon the question of justiciability to a joint high commission, the majority of the Senate Committee on Foreign Relations reported: [121]

> This recommendation is made because there can be no question that, though the machinery of the joint commission, as provided in Articles II and III and with the last clause of Article III included, the Senate is deprived of its constituent power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission, powers which, under the Constitution, devolve upon the Senate. . . . To vest in an outside commission the power to say finally what the treaty means by its very general and indefinite language is to vest in that commission the power to make for us an entirely different treaty from that which we supposed ourselves to be making.

of the Senate. If this is true it only makes the case more serious, but the President, under the provisions of Articles 2 and 3, although he would be bound by the decision of the Commission, can nevertheless control the formation of that body." Cong. Rec. 47: 3935, and 62d Cong., 1st. sess., S. Doc. 98, pp. 5–6.

[117] As in arbitration and peace treaties.

[118] As in treaties establishing international administrative unions, for postal, telegraphic and radio service, sanitary inspection, etc.

[119] The well-known principle that Congress cannot delegate legislative power (Field *v.* Clark, 143 U. S. 649) is founded on the provision that "all legislative powers herein granted shall be vested in a Congress" (Art. 1, sec. 1). There is no specific provision prohibiting a delegation of *treaty-making* power.

[120] The arbitration treaties negotiated in 1904 were withdrawn because of the Senate's insistence on this point, and in the treaties of 1908 it was expressly provided that the *compromis* be made by the President "by and with the advice and consent of the Senate." (Art. 2.) See also reservations to I and II Hague Conventions, 1907. (Malloy, pp. 2247, 2259.)

[121] Cong. Rec., 47: 3935; also 62d Cong., 1st. sess., S. Doc. 98, p. 6.

A logical carrying out of this theory would seem to deny any power to conclude treaties in good faith, for all treaties require interpretation, and to say that the interpretation must always be according to the will of the existing treaty-making power of the United States, however that may differ from the intent of the original negotiation, is virtually to substitute political expediency for treaty obligation. Good faith would seem to require that the true intent of the instrument govern its application through its entire life, and it is hard to see where a more impartial determination of what this intent was could be obtained than in an international tribunal.[122]

The minority report of the Senate committee,[123] in which Senator Root had a hand, pointed out that the majority view could "not be maintained except on the theory that all general treaties of arbitration" involve a like unconstitutional delegation of power, the only difference being that the treaties under consideration submitted "certain described classes" of cases to arbitration, instead of particular cases. The decision of the joint high commission on what questions are justiciable "is not delegating to a commission power to say what shall be arbitrated;

[122] W. Kaufmann (*Die Rechtskraft des Internationalen Rechtes*, Stuttgart, 1899, p. 102) calls attention to the necessity that treaties be interpreted from an international rather than a national standpoint, and the courts have held in France that "no nation has the right to interpret to its advantage the obscure provisions of a treaty or to delegate such examination to its courts. . . . The interpretation of a treaty in case of difficulty can result only from a reciprocal agreement of the two governments." (Dalloz, *Juris. Gen., Supt.*, t. 17 (1896), *s. v. Traité Int.*, No. 14.) American courts have generally interpreted treaties on legal principles (U. S. *v.* Rauscher, 119 U. S. 407, 419), but in interpreting "political questions" have followed the legislative and executive departments (Foster *v.* Neilson, 2 Pet. 203, 308), though not if manifestly contrary to the true intent of the instrument. (Castro *v.* De Uriarte, 16 Fed. 93.) See also S. E. Baldwin, Am. Law Rev., *35*: 222; Wharton, *2*: sec. 133.) The German *Reichsgericht* refused to interpret an Italian commercial treaty with reference to analogous provisions of earlier treaties, but held that "the interpretation of the individual provisions (of treaties) permits the *autonomy* of the state" which executes it. (*Urtheil des Deutsches Reichsgerichts*, Feb. 15, 1892, *Ent., Str. 22*: 372.)

[123] 62d Cong., 1st. sess., S. Doc. 98, p. 9. This report was signed by Senators Root and Cullom. In a special minority report, Senator Burton pointed out that even after decision by the joint high commission the *compromis* would go to the Senate. "In such case, as in every other case, it would be within the power of the Senate to refuse its advice and consent to the special agreement, but it would be contrary to its treaty obligation." *Ibid.*, p. 12.

it is merely empowering the commission to find whether the particular case is one that the United States have said shall be arbitrated." Legal opinion has generally subscribed to this view,[124] and the fact that the Senate advised ratification [125] of the International Prize Court Convention, with its supplementary protocol, which subjected the United States to the jurisdiction of the International Prize Court in defined classes of cases without even the conclusion of a preliminary *compromis*, indicates that the constitutional difficulty is not insuperable. A remarkable delegation of the discretion of the authority controlling the foreign relations of the country has been ratified by the treaty-making power in the twenty-odd Wilson-Bryan Peace Treaties concluded since 1914, according to which "all disputes . . . of every nature whatsoever, which diplomacy shall fail to adjust" would have to be submitted to an international commission, with power to consider for a year and report, before hostile action could be taken.[126]

CONCLUSION

It appears that the principle of separation of powers imposes no limitation upon the treaty-making power. If the subject is appropriate for treaty negotiation, consonant with the purposes of the Constitution, and in violation of none of its specific prohibitions, the treaty, if ratified, is valid, and all other departments of government, — the legislative, executive, and judiciary, are bound by their allegiance to the Constitution to perform the acts necessary to give it effect.[127] Con-

[124] J. B. Moore, *Independent*, Aug. 8, 1911, cited by Senator Burton, *supra*, note 123. President Taft has said: "In the discussion of the general arbitration treaties in the Senate, there was a suggestion that the agreement to submit to a court questions which had not yet arisen described by definition and classification, with power in the court to take jurisdiction, was more of a delegation of power than the mere submission of an existing question to arbitrators. There is, however, not the slightest difference in principle between the two. If one is a delegation, the other is. If one is invalid, the other is; and if one is not invalid, the other is not." (Enforced Peace, p. 61.)

[125] On Feb. 15, 1911, Charles, Treaties, p. 248.

[126] G. G. Wilson, The Monroe Doctrine and the League to Enforce Peace. (Enforced Peace, p. 72.)

[127] "The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent

sidering the practical working of the government, this capacity of the treaty power to impose obligations upon the other independent departments is not remarkable. Practically every valid act of one department does the same. Every constitutional Act of Congress imposes an obligation upon the President to enforce and the courts to apply it. Every decision of the courts imposes an obligation upon the President to execute it, and if upon a constitutional question, upon Congress to recognize it in future legislation; while political acts of the President, such as recognition of foreign states, insurrection, or belligerency, impose an obligation upon the courts to conform their decisions thereto.[128]

Where the coöperation of another department is required it would always be appropriate for the treaty power itself to consider the opinion of the departments concerned, especially if the prerogatives of Congress are involved, before ratifying the treaty, but such action would seem to be dictated by courtesy or expediency rather than legal necessity. The doubt of the competence of the treaty power in this connection has been attributed by President Taft to a "failure to analyze the differences between the creation of an obligation of the United States to do a thing and the due, orderly, and constitutional course to be taken by it in doing that which it has agreed to do." [129]

for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations." Mr. Livingston, Sec. of State, to Mr. Serurier, June 3, 1833, Wharton, 2: 67. A similar view was expressed by the French *Conseil d'État* in 1839: "The execution (of treaties) . . . devolves not on a single authority, but on all, according to their competence. The execution belongs to diplomacy, when a principal treaty demands accessory conventions. . . . The execution can be confided to the army if it can be accomplished no other way. . . . The execution will be political if it concerns a treaty of alliance or an act of mediation. It can require the coöperation of the administration, if the acts are of that kind. Thus, for example, postal conventions will be executed under direction of the postal department. It must be finally admitted that the judicial authority will have its part in the execution of treaties, if on occasion there arise private controversies which are in its competence, such as questions of property, of family, of succession, or others of that kind." Dalloz, *Juris. Gen., Rept.*, t. 42, *s. v. Traité Int.* No. 131.

[128] Williams *v.* Suffolk Insurance Co., 13 Pet. 415 (1839); Jones *v.* U. S., 137 U. S. 202 (1890); The Prize Cases, 2 Black 635 (1862).

[129] Constitutionality of the Program of the League to Enforce Peace. (Enforced Peace, p. 67.)

The only limitation upon the treaty power is found in the *ends* for which it acts. The *means* of performance specified in the Constitution must be observed in this as in all other governmental activity, but the necessity of such observance is no impeachment of the validity of the instrument and furnishes no license for a refusal to act by the organs whose coöperation is required.

QUINCY WRIGHT.