

## BOOK REVIEWS

INTERNATIONAL EXECUTIVE AGREEMENTS. Democratic Procedure under the Constitution of the United States. By WALLACE McCLURE.<sup>1</sup> New York: COLUMBIA UNIVERSITY PRESS, 1941. pp. xxii, 449. \$4.75.

This volume presents a crusade in the name of democracy against the constitutional provision that the ratification of treaties requires the advice and consent of a two-thirds majority of the Senate, and on behalf of the author's proposal that the executive agreement be substituted for treaties, thus dispensing with Senate participation in international compacts. The author, in making these proposals, is motivated by his resentment against the failure of the League of Nations to obtain a two-thirds majority in the Senate, although that failure was apparently ratified by popular vote in the 1920 election. Perhaps to get around this disturbing fact, Dr. McClure says: "Minority control over treaties in the Senate does not lead to the realization of the people's considered, as opposed to their passing, will."<sup>2</sup> His solution of the supposed constitutional dilemma which he thus posits is the executive agreement, with Congress if necessary, without Congress if possible. He says: "The President can do by executive agreement anything that he can do by treaty, provided Congress by law coöperates. And there is a very wide field of action in which the coöperation of Congress is not necessary; indeed where Congress possesses no constitutional authority to dissent."<sup>3</sup> Thus, while conceding the possible necessity or desirability on occasion of Congressional "authorization" (as in the Trade Agreements Acts of 1934, 1937 and 1940), his real thesis, generally undisguised, is that the President alone, through the executive agreement, has full power to commit the United States to any international engagement; and that such executive agreement should have the constitutional force of a treaty, establishing domestic law, prevailing over state legislation and perhaps overruling earlier legislation of Congress. He is in some doubt on the latter point, and here would concede the desirability of Congressional approval of the executive agreement.

He claims for the executive agreement great flexibility, speedy action in a world of dictators, the avoidance of delays incidental to deliberation, *etc.* "Action" is the thing. Just how one man government is more democratic than the present method requiring two-thirds consent of the Senate is not made clear. The author undertakes to sustain his

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1. United States Department of State.
  2. Pp. 367-368.
  3. P. 363.

thesis by citing the facts that some 1200 executive agreements have been entered into as against only about 800 treaties; that a "Constitutional usage" accepts the executive agreement as a regular mode of international compact; that there is nothing in the Constitution which prevents the President from making such agreements; and that he is the repository of the executive power and the authorized agent or organ for conducting the foreign relations of the country. Moreover, he points out that in both the *Curtiss-Wright*<sup>4</sup> and *Belmont*<sup>5</sup> cases, the Supreme Court, through Mr. Justice Sutherland, expressed strong approval of a wide executive power in foreign affairs and in the latter case sustained the law-making character of the Litvinoff-Roosevelt executive agreement. Had the author had before him the decision of the majority justices in *United States v. Pink*,<sup>6</sup> decided February 2, 1942, his cup of joy would doubtless have been full to overflowing. He would allow some small scope for treaties and therefore for Senate consent in routine and non-controversial matters "about which no public opinion exists and no question as to their acceptability arises."<sup>7</sup> For controversial matters, the Senate method "may well be quietly abandoned,"<sup>8</sup> and the executive agreement used instead. Thus, when debate and deliberation are most vital, the President alone shall decide; when the matter is unimportant, Senate participation may be permitted. I thought only totalitarian chiefs argued thus. The author does not tell us how to distinguish a controversial from a routine matter, but presumably the President also would decide that.

This reviewer considers the author's purpose, to evade the treaty-making power by conferring still more power on the executive, as unfortunate advice in constitutional theory and practice. The evidence cited in support of the thesis is inconclusive if not indeed often inapposite. The Senate in my opinion performed a nationally useful service in rejecting American participation in the political League of Nations—another tenant in a house built on sand would not have saved it from collapse. The author evidently assumes that practically all executive agreements are models of good judgment, whereas I would contend that not a few are unfortunate and would probably not have obtained Senate approval, if submitted. The executive agreement of May 19, 1927, by which the executive practically abandoned millions of dollars of claims against Great Britain arising out of violations of American neutral rights may be cited among others. That agreement did much damage to Ameri-

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4. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

5. *United States v. Belmont*, 301 U. S. 324 (1937).

6. 62 Sup. Ct. 552 (1942).

7. P. 378.

8. P. 378.

can citizens as well as to international law, and transferred the contest over maritime rights from the legal to the political field, with far-reaching consequences. There is no proof that the Senate has abused its powers by rejecting sound treaties; the author admits that in one day thirteen were approved.

In marshalling his evidence of the so-called "constitutional usage" of concluding executive agreements, the author fails to distinguish between, and cites indiscriminately, different kinds of executive agreements: (1) those made under authority of Congress and implementing an act or policy of Congress or ratified by Congress, and (2) those made without Congressional support, authority or ratification. The former, exemplified by tariff and postal agreements (of which there have been over 300) far outnumber all others. Yet the impression is sought to be conveyed that they all represent the "methodology" of the executive agreement as an instrument of government, as an alternative to formal treaties. The second group largely covers matters distinctly within executive control, such as the recognition of foreign governments, the receiving of foreign diplomatic representatives, instructions to our own diplomatic and consular offices, the settlement and provision for the arbitration of claims against foreign governments in connection with the executive function of protecting citizens abroad, and armistice agreements made as Commander-in-Chief of armies in the field. The President also has a large power of negotiating, but the glib assumption that this necessarily confers the power finally to *conclude* all agreements is unfounded. Texas and Hawaii were admitted by Congress, not by the executive. This narrows the field of difficulty, doubt or dispute to the question of the executive power to conclude political agreements with foreign powers, and here we find that secrecy is one of the great dangers of the executive method. The Roosevelt-Katsura Agreement of 1905 and the secret clause of the Lansing-Ishii Agreement of 1917 were not disclosed for some years. Where the agreements were published and allowed to stand, like the Root-Takahira Agreement of 1908 and the Gentlemen's Agreement of 1907, it may be assumed that the Senate saw no reason to assert its prerogatives. Nor does the fact that Congress often has to appropriate money or pass legislation in execution of a treaty obligation assume the "superiority of Congress to the treaty-making power."<sup>9</sup> If the author thinks that "no more masterful opinion is recorded in judicial annals than that of John Marshall" in *Marbury v. Madison*, he ought to read Professor McLaughlin's analysis of that *tour de force*.<sup>10</sup> John Bassett Moore, ". . . one of the most

9. P. 60.

10. McLaughlin, *Marbury vs. Madison Again* (1928) 14 A. B. A. J. 155.

preëminent of American jurisconsults, . . . ”<sup>11</sup> does not in any way support Dr. McClure’s general thesis. I have his permission to say that he never intended by any of the passages quoted by Dr. McClure to convey the opinion that any part of the treaty-making power under the Constitution had been done away with or impaired by practice; and that, without imputing to Dr. McClure any purpose to misrepresent what he said, he thinks that the passages in question, when read in connection with the context, do not sustain the theory of constitutional dilapidation in support of which they are cited.

Confronted by the fact that numerous subjects, like extradition, naturalization, consular privileges, treaties of peace, arbitration of claims against the United States, and compacts modifying acts of Congress are by “constitutional usage” embodied only in treaties and not in executive agreements, Dr. McClure falls back on some doubtful aberrations, like Lincoln’s single and never repeated surrender of a fugitive from justice,<sup>12</sup> to maintain that all this could have been accomplished equally well by executive agreement. Here “constitutional usage” has no appeal for the author. On claims against the United States he might have cited the Mexican Agreement of 1834 and the *I’m Alone* protocol of arbitration, but these are exceptional and can be justified on treaty-interpretation grounds.

The author finds his greatest moral support in the dicta of Justice Sutherland in the *Curtiss-Wright* and *Belmont* cases,<sup>13</sup> in which the Court did express its approval of a wide executive power in dealing with foreign affairs. In the former case it was only necessary to pass upon the power of Congress to authorize, and the power of the President thereunder to impose, an impartial embargo on the belligerents in the Chaco War if he thought this would be conducive to peace. The pertinent remarks are actually confined to the plenary power of “negotiation” and “inquiry,” which obviously are exceedingly broad. But Justice Sutherland went further and took occasion to read into his opinion the substance of his Columbia Lectures (1918) on *Constitutional Power and World Affairs*, in which he maintained, not the thesis of Dr. McClure, but a very broad power of the federal government and the President, independently of the Constitution, to deal with foreign affairs. In the *Belmont* case, the executive agreement was indeed analogized to a treaty in its capacity to override conflicting state law, a conclusion even more fully confirmed in *United States v. Pink*,<sup>14</sup> a case not calling for any such pronouncement. In the latter opinion, the Litvinoff

11. P. 251. See also pp. 82, 331, where passages are quoted.

12. Pp. 333, 334-35.

13. See notes 4 and 5 *supra*.

14. See note 6 *supra*.

Agreement was misconstrued; Russia was, erroneously it is submitted, assumed to have successfully confiscated and assigned to the United States property situated in this country of dissolved Russian corporations, and the executive was assumed to have power to confiscate private property, notwithstanding the Fifth Amendment. Since I have written a long editorial in criticism of that opinion in the April, 1942 issue of the *American Journal of International Law*, I refrain from saying more here. The Court has inflated the executive power more even than has Congress, with its attempted abdication of its war-making powers. But it is submitted, this is not a fulfillment or construction of the Constitution—rather it is a change in the Constitution, which calls for nation-wide discussion.

It may well be that the original reasons for the two-thirds rule for Senate consent to treaties no longer prevail, but this is true of many rules of constitutional and statutory law and hardly justifies an unconstitutional abrogation or abandonment of the constitutional method of concluding international compacts with foreign countries. Dr. McClure, an official of the State Department, has exerted great efforts to prove his thesis, but this reviewer, after reading carefully every word written by the learned author, remains convinced that the end is unsound, and even if it were sound, does not justify the means.

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CORPORATE EXECUTIVES' COMPENSATION. By GEORGE T. WASHINGTON.<sup>1</sup> New York: RONALD PRESS COMPANY, 1942, pp. xii, 519. \$7.00.

Public interest in the compensation of corporate executives was originally stimulated by the 1931 complaints in the *Bethlehem Steel* and *American Tobacco Company* cases.<sup>2</sup> Additional interest was aroused when the Federal Trade Commission in 1934 secured and released figures on executive compensation—the first time this was done for any large number of corporations. These figures were thereafter supplemented and are currently kept up to date by reports filed with the Securities and Exchange Commission and available for inspection at its offices. Since 1934, when stockholders were first permitted to learn

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2. *Berendt v. Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 154 Atl. 321 (1931); *Heller v. Boylan*, 29 N. Y. S. (2d) 653 (Sup. Ct. 1941) (tracing history of the American Tobacco Co. litigation from 1931 to date).