

TREATIES AND EXECUTIVE AGREEMENTS—A REPLY

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I

THE authors of the articles under reply, Messrs. McDougal and Lans,¹ have, like McClure, essayed to show that the treaty and the executive agreement are interchangeable, and, since executive agreements are simpler to conclude, they advocate disregarding as obsolete the treaty-making power, requiring, as it does, the consent of two-thirds of the Senate, and substituting for it the use of the executive agreement. In that demand they differ radically from the constitutional conclusions which the writer, as well as many other students of the subject, have reached.

To give their proposal a more "democratic" tinge, the authors propose what they call the Congressional-Executive agreement,

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The authors of the opus under reply, in contesting my generally accepted view that the President has only limited powers in making executive agreements and that the treaty-making power has not become the secondary wreck—"a vermiform appendix"—which the authors portray, feel it incumbent upon themselves to explain my views on the treaty and the executive agreement by reason of my general views on foreign policy. Apart from the fact that I should prefer to be my own interpreter instead of being represented by disconnected passages quoted or, more generally, paraphrased, out of context by hostile critics, my views on foreign policy have no relation, so far as I know, to my views on the treaty-making power. Nor can conclusions reached after thirty-five years of professional contacts, official and unofficial, with many of the governments of Europe and Latin America be characterized as merely "preconceptions." These latter have long been entertained, though I never knew before that a person who favors economic agreements, especially commodity agreements, became stamped as a "neo-Marxist." No effort will be made in replying to their article to make reference to the caustic personal remarks which the authors indulge.

In undertaking the Herculean task of showing that the executive agreement and the treaty have become interchangeable and in supporting the McClure view [WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941)] that anything can be done by executive agreement or the suggested Congressional-Executive agreement that heretofore has been done by treaty, the authors have consumed over 200 pages. In presenting the traditional view sustained by such authorities as Moore, Dodd and Hyde, I required 19 pages. While the authors' research is commendable, it would hardly have been required had the contention advanced by them represented an obvious or generally comprehended position. Nor would a constitutional amendment as proposed by the House Judiciary Committee have been required or been debated in May 1945 with only derogatory references to the executive agreement. The alleged "complete certainty" by which they support the interchangeability of the two methods of binding the United States is engaging. I shall endeavor to demonstrate its palpable invalidity. The reader will, I trust, pardon my occasional use of the pronoun of the first person, since the articles under reply are a challenge of myself and an article that I ventured to write entitled *Shall the Executive Agreement Replace the Treaty?* (1944) 53 *YALE L. J.* 664 (hereinafter cited as 53 *YALE L. J.* 664).

1. Hereafter referred to as the authors or the gentlemen. The article under reply, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, will be cited as *Treaties*.

which, as a Congressional approval of executive agreements *already made*, has no roots in history, but is deemed by the authors to stand on an equally good footing with the executive agreement concluded pursuant to an act of Congress, of which there are illustrations in the postal and tariff agreements concluded ever since early days in the case of postal agreements and since 1890 in the case of tariffs. The authors maintain that they are justified in advocating this step by reason of the alleged defects of the treaty-making power and by the fact that a "usage" has grown up not only in favor of the Congress-sponsored executive agreement but in favor of the agreement concluded by the President under his independent powers as Commander-in-Chief and diplomatic representative of the United States, from which they draw the inference that the executive agreement which is Congressionally *approved*—by simple majority—is a generous concession to the doubters of the consequences of a broad executive power.

The gentlemen begin their thesis with an analogy between the constitutional treaty and the executive agreement, by positing the supposed plenary power of Congress² to deal with all aspects of foreign affairs,³ in spite of the fact that a constitutional amendment, discussed May 1, 2, 7, 8 and 9, 1945,⁴ was deemed by the Judiciary Committee of the House of Representatives⁵ to be necessary in order to give the House a voice in treaty-making. They then observe that the Congress has conferred on the President the power to make numerous executive agreements, notably in the field of tariffs, the mails (Postmaster General), copyright, trademarks, and on a variety of other subjects within the power of Congress.⁶ They also observe that the

2. Elsewhere it is admitted that the power of Congress may be limited. McDougal and Lans, *Treaties*, at 317, 338, 346. Yet it is asserted that Congress has "plenary" powers "to implement valid agreements." *Id.* at 238 (note 104); see also *id.* at 241 ("residual Congressional authority to legislate in the field of foreign relations"), 259 ("inherent powers to control international relations" under the Articles of Confederation). If the powers of Congress are really plenary, why is it that the St. Lawrence project, the Anglo-American oil agreement and the aviation agreements were not accepted as executive agreements approved by Congress? Why did the Senate protest in any of these cases?

3. McDougal and Lans, *Treaties*, at 241, 310, 314-5.

4. 91 Cong. Rec., May 1, 2, 7, 8 and 9, 1945, at 4079 *et seq.*, 4109 *et seq.*, 4314 *et seq.*, 4398 *et seq.*, 4414 *et seq.*

5. H. R. REP. No. 2061, 78th Cong., 1st Sess. (1944).

6. U. S. CONST. Art. I, § 8. The effort attributed to me (McDougal and Lans, *Treaties*, at 199) "to exclude from the domain of 'executive agreements' all agreements . . . effected by the President pursuant to the authorization . . . of Congress," is squarely contradicted by pages 671-3 of my article in 53 YALE L. J. They repeatedly attribute to me "a broadside condemnation of all 'executive agreements'" (McDougal and Lans, *Treaties*, at 203, note 32) which has no foundation. It was expressly conceded that the daily work of the Department of State required in the President's independent capacity as a diplomatic officer the conclusion of numerous executive agreements. See 53 YALE L. J. 664, 671-3; *Hearings before a Subcommittee of the Committee on Commerce on S. 1385*, 78th Cong., 2d Sess. (1944) 180-1. This charge is occasionally tempered by calling it "an innuendo or half-explicit assumption"

President may, by virtue of his own independent power as Commander-in-Chief and diplomatic officer, conclude numerous executive agreements, such as claims settlements, *modi vivendi*, provisional arrangements pending a treaty, protocols of agreement on particular diplomatic affairs, and even in late years a number of agreements with or without a time limit on subjects that cannot be considered unimportant.

They then maintain that since the Constitution leaves executive agreements unmentioned, it naturally draws no line between the subjects appropriate to treaties and to executive agreements;⁷ hence an arrangement or understanding on any subject can be called a "treaty"⁸ but, since it need not be submitted to the Senate, it may be included within the framework of an executive agreement. They then propose that since these things must be conceded to be valid, a conclusion by no means accepted, it is only a slight step to permit the President to make any executive agreement he desires and if Congress approves it, directly or indirectly, it becomes binding as law, national and international, so that the treaty-making power has become a needless encumbrance, a "vermiform appendix"⁹ which can be dispensed with as useless.

To reinforce their case the gentlemen usually speak of "authorization and sanction" in the same phrase, meaning that if an executive agreement is "authorized" by Congress (authorization is not an accurate word) why cannot Congress "sanction" a Presidential agreement after he takes the initiative?¹⁰ The sorry result of such a recent effort,

(McDougal and Lans, *Treaties*, at 216); again, it is "a non-expressed exclusiveness" (*id.* at 224). Obviously the gentlemen's suggestion that the treaty-making clause in the Constitution was not "exclusive," is a straw man of the type frequently set up by the gentlemen. When they suggest (*id.* at 202) that the making of treaties requires "the validation or approval of the agreement by the appropriate constitutional authority," they fail to note the distinction between the Senate and Congress. They assume it to be agreed that the Congress can "validate" agreements negotiated by the President as the law of the land. That is supposed to be "obvious."

7. The authors say (*id.* at 195-6), ". . . it seems clear that the practices and doctrines of international law neither afford any criteria for distinguishing between treaties and executive agreements nor attach to such a distinction any differences in legal consequences." This is elusive. We are discussing the distinction in *constitutional*, not international, law. The fact that no line between them is drawn in the Constitution gives proponents of the executive agreement an ostensible springboard. But practice has indicated the proper limits of an executive agreement and the subjects and conditions customary for treaties. In case of doubt, the Senate should and does often assert its prerogatives, as in the cases of the oil agreement (see *infra*, p. 634) and the Connally Resolution, Nov. 5, 1943.

8. McDougal and Lans, *Treaties*, at 196-7, 318. Briggs and Hyde, out of context, are cited in support (*id.* at 319). Would this not prove that the treaty-making power controls or should control all agreements? The authors fail to make a parallel heading: "The Executive Agreement in Constitutional Law."

9. McDougal and Lans, *Treaties*, Part II, at 535.

10. The effect of dealing with Congressional-Executive and Presidential agreements in one phrase as the authors do (McDougal and Lans, *Treaties*, at 194, 195, 216, 217, 226, and

unique in character, in the case of the St. Lawrence project ¹¹ carries with it no note of caution for the gentlemen, but the dictum in the *Belmont* case and the decision in the *Pink* case, presently to be dis-

passim), is to claim for the independent executive agreement broad power now admittedly limited, but often asserted to be unlimited, for which there is claimed to be a "usage," and then to transfer that claim to the unprecedented Congressional-Executive agreement which the authors propose, for which there is obviously no "usage." They never draw a line between them. The latter presumably is to occupy the field left unoccupied by the independent agreement. The authors vacillate considerably. It seems sometimes that the President's independent power to make executive agreements is capable of indefinite expansion (*id.* at 251), but, if there are doubts, Congress in its control of foreign affairs (*id.* at 241) can supplement the President and make the power complete. So, vice versa, if the power of Congress is considered to have any limits (see *id.* at 317, 338, 346), the President can supplement it and make it complete (see *id.* at 251). The suggestion that the Congress may "authorize" the President to make certain agreements within definite limits (having to do mainly with foreign commerce, tariffs or the mails) affords no precedent at all for the authors' conclusion that not only in these but in *other* fields of foreign affairs (presumably outside the scope of the independent Presidential agreement) Congress may "sanction" any agreements he might make. This is an obvious non-sequitur and a contradiction of the treaty-making clause of the Constitution. Yet the proposal that the President make the agreement first in his supposed control over foreign affairs and then obtain the consent of a majority of Congress is understood to be the main point of the authors' suggestions.

11. The executive agreement of March 19, 1941, was almost the same as the treaty signed July 18, 1932, submitted to the Senate on Jan. 19, 1933, and rejected March 14, 1934, by vote of 46 to 42. The agreement purported to receive approval, with other provisions, in the Aiken bill, introduced in the Senate Sept. 28, 1943 (S. 1385), defeated Dec. 12, 1944, by 56 to 25, 14 not voting (90 Cong. Rec., Dec. 12, 1944, at 9382).

A more plausible illustration of the gentlemen's thesis, though they fail to mention it, might be found in the reciprocity agreement with Canada of 1911. This related, however, to tariffs, a traditional subject of House jurisdiction. President Taft sent a message to Congress and explained his reciprocity program, got the informal acquiescence of the Congress, made his reciprocity agreement with Canada, and sent it to Congress as "a proposed arrangement." Congress passed the proposal, with approval of similar reciprocity agreements, and then Canada refused to accept it. See 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1943) 416, 417. But if the intention is to bind the United States legally, including future administrations of different political complexion, it is believed that it is desirable for a foreign country to insist upon a treaty in the constitutional sense. Without repeating any of the arguments presented in my original article in the September 1944 *Yale Law Journal*, an explanation is there afforded not only why circumstances have forced the Executive to conclude numerous independent executive agreements but why some of them have had to be "important," like armistices. 53 *YALE L. J.* 664, 670. Tacit acquiescence of the Senate in such temporary arrangements was presumed. But there is a somewhat indefinite limit to what can be done by the Executive alone in dealing with important international matters. See McDougal and Lans, *Treaties*, at 187.

I must disclaim the distorted version of what purports to be my view of American foreign policy presented by the authors (*id.* at 189-92, including note 31). Nobody of any authority, of whose name I am aware, has ever suggested the possibility of the United States shutting itself behind "Jericho-like walls"; the Founders of this country were and their academic followers have been as ardent promoters of foreign trade as Mr. Cordell Hull. On the other hand, I have some question whether collective security, with or without universal intervention, is more than an unrealizable dream. The difference between aspiration and policy was one of the grounds of the Supreme Court in invalidating NIRA in the *Schechter* case, 295 U. S. 495 (1935).

cussed,¹² are to them persuasive that an executive agreement has now miraculously achieved the same status as a treaty.¹³

In order to avoid any possibility of misrepresenting the gentlemen's position, I quote the major elements of their thesis, with a brief comment of my own. They say:

"What is completely certain is that the powers of the Congress can be superadded to those of the President, and that the two sets of powers taken together are plenary."¹⁴

Thus, two limited powers, each of which leaves large gaps, when added together—which is directly contrary to precedent—become plenary powers. This seemed unknown to any member of Congress participating in the debates on the proposed constitutional amendment, May 1, 2, 7, 8 and 9, 1945.

"Nor would it appear that any effective question can be raised about the powers of the whole Congress and the President either to frame policies for controlling the conduct of negotiations or to make any agreements concluded the law of the land."¹⁵

This rests on assertion, but if designed to claim that the Congress can approve or ratify any or all agreements of the President, it is contrary to the evidence. The gentlemen assume as an undisputed premise what they must prove as a conclusion.

Because "the powers of the Federal Government are ample to deal with any problem" of international relations,¹⁶ the conclusion is drawn that the President can make any treaty or agreement he likes, with Congress if necessary. An executive agreement is said to be "entirely upon a par with the treaty," on a "par in every respect."¹⁷ But the *Pink* case did not say this; the conclusion is a non-sequitur and rests solely on assertion.

"... throughout our history . . . international agreements" other than treaties are said to have been made "on all important subject matters" with identical consequences as in the case of treaties.¹⁸ This is an assertion, not a demonstration, and will be disproved presently.

12. *Infra*, pp. 646-8.

13. While every treaty is an agreement, it is submitted that not every agreement is a treaty.

14. McDougal and Lans, *Treaties*, at 246.

15. *Id.* at 222. Negotiation, in the authors' view, seems to include the making of agreements. That would give the President unlimited powers, since he is, or can be, the sole negotiator of treaties. Congressional action in guiding his policies in negotiations could have only persuasive force. See *id.* at 187-8. If the President has the option of selecting the method of obtaining consent, why can Congress "question the procedure" (*id.* at 188)?

16. *Id.* at 260.

17. *Id.* at 261, 286. See also *id.* at 225-6.

18. *Id.* at 226.

It could be said that some matters have uniformly been the subject of treaties.

“. . . the other relevant clauses of the Constitution [besides the ‘treaty-making’ clause] granting powers to the Congress and the President . . . are meaningful only if they include the authorizing or *sanctioning* of international agreements.”¹⁹

In other words, Article I, Section 8, and Article II of the Constitution have no meaning, the gentlemen suggest, if they do not authorize or sanction international agreements. This is a non-sequitur.

“. . . hundreds of precedents confirmed by interpretations of Supreme Court Justices, Presidents, and Congressmen, and extending throughout the 150 years of our national history . . . sustain the use of Congressional-Executive and Presidential agreements as alternatives to ‘treaties’. . . .”²⁰

One might suspect that this is slightly rhetorical; the Congressional-Executive agreement as a ratification of prior agreements is unknown in practice; the Presidential agreement is admittedly limited in scope,²¹ and hence could not be the alternative to a treaty.

Congressional-Executive agreements are not only those authorized by Congress within their authority, but “sanctioned by the Congress after the fact of negotiation.”²² This is the authors’ thesis. No evidence or practice supports the theory; if it is an agreement, not conclusive but subject to approval by Congress, it collides head-on with the function of the Senate. Moreover, would the authors include *all* agreements, or only those—necessarily limited—within the President’s independent powers? If the latter are excluded, which do they include?

“[There is] an agreement-making procedure under the control, in some instances, of the Congress and the President, and, in other instances, of the President alone.”

“. . . both constitutional practice and decision for 150 years and the words of the constitutional document itself,” it is added, “completely confirm this view.”²³ There is no connection, it is submitted, between the powers conceded to vest in Congress and in the President and the authors’ claim of Congressional power to *ratify* Presidential agreements.²⁴ The examples given by Wright and others are far from prov-

19. *Id.* at 212 (emphasis supplied). See also *id.* at 187, 199, 248, and *passim*.

20. *Id.* at 212.

21. See *id.* at 187, 255, 311, 317 (text and note 48).

22. *Id.* at 204.

23. *Id.* at 211.

24. I am unaware of any opponents of the “Congressional-Executive” agreement, confined to action by Congress within its limited powers in “authorizing” the President to

ing that the power of Congress over foreign affairs—including agreements—is unlimited.²⁵

The authors say:

“. . . the use of executive agreements and treaties as interchangeable instruments for effecting international agreements has an unimpeachable constitutional status and dignity.”²⁶

And yet we learn that

“. . . the legal consequences of consummation of international engagements by treaties or by Congressional-Executive agreements are *all but* indistinguishable with respect to both binding effect and duration. . . .”²⁷

This admits some difference, which is infinitely greater than that admitted by the word “interchangeable.” The authors add,

“It is certain, however . . . that agreements made under the President’s own constitutional powers, and *intended* to be binding on the contracting States and to have a *reasonably durable* life, share *most* of the characteristics and have legal effects *not very dissimilar* from the Congressional-Executive agreement and the treaty.”²⁸

make agreements. But the authors include therein (*id.* at 204) the power of Congress to ratify agreements, called “sanction” or “approve” or “validate”—but not to change with any controlling effect on the President (*id.* at 208–9)—and to that there is an overwhelming objection. The power to “make agreements” (*id.* at 202, 222) not only has no constitutional foundations; it squarely contradicts the treaty-making power. When the Framers meant Congress to have control—as over interstate compacts—they seem to have said so.

25. Most of the important agreements mentioned by Wright have been “authorized” by Congress. See Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, 343, citing McClure. The reciprocity agreements under the Tariff Acts of 1890 and 1897 were “authorized” by Congress. The UNRRA agreement involved consultation with the Senate and was subject to change because included in the bill (see *infra*, p. 635). The Albanian Agreement of 1922 was concluded pursuant to a tariff act. Those mentioned by Wright in *The United States and International Agreements*, *loc. cit. supra*, were entered into under authority of Congress, except that Texas and Hawaii were annexed by joint resolution of Congress, not by executive agreement. (The exchange of resolutions or the supposed offer and acceptance was not a signed agreement.) The Knox-Porter Resolution of July 2, 1921, ended the war legally for domestic purposes only and was followed by the Treaty of Berlin. The ILO was joined by the President after unanimous vote of Congress; other unions were joined under authority of Congress. The Litvinov assignment is discussed hereafter (*infra*, p. 646). The no-separate-peace was made by the President under the war power. The acquisition of naval bases by the Executive became valid when Congress accepted them. Some topics, like the settlement of claims, are within the jurisdiction of both branches of the Government, the Executive and Congress. Either may act, but the President practically never submits to arbitration a claim the award in which is likely to call for appropriations from Congress. See WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922) 244.

26. McDougal and Lans, *Treaties*, at 306.

27. *Id.* at 307 (emphasis supplied).

28. *Id.* at 307–8 (emphasis supplied). See also *id.* at 216 (“most of the important problems of peace and war”).

While probably intended as an argument for executive omnipotence, it concedes that the class is limited and that the Presidential agreement has some effects different from the treaty.

"In the *Belmont* and *Pink* cases the Supreme Court has expressly extended the doctrine of *Missouri v. Holland* to Presidential agreements in language which is broad enough, if it is needed, to cover Congressional-Executive agreements."²⁹

This is true only in so far as the Litvinov assignment, like the migratory bird treaty, was held to prevail over state law. The statement has no other validity, it is submitted.

". . . a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard [a previously enacted statute on a subject within his special constitutional competence] as an unconstitutional invasion of his own power."³⁰

This has not been put to the test; the opposite, that the executive agreement must yield to an act of Congress, is the uniform practice.

". . . international tribunals and students of international law have long repudiated the shadowy distinction between treaties and other types of agreements . . ."³¹

I know few students of international law who repudiate the distinction. The distinction is made by consitutional law, but, by reason thereof, it has important international effects.³²

29. *Id.* at 314-5.

30. *Id.* at 317. See also *id.* at 338, 346-7. Wright is quoted (*id.* at 246) as having maintained that the President's power is "plenary." McClure apparently leaves this open but does not deny it. The authors vacillate between an open affirmation (*id.* at 250-2, 260) and an implicit denial (*id.* at 187).

31. *Id.* at 318.

32. Nations may contract international obligations in various forms, with different effects. In distinguishing treaties, mentioned in the Constitution three times, from the executive agreement, never mentioned, we are dealing with a purely constitutional issue. See McDougal and Lans, *Treaties*, at 196. That is why Mr. Berle, Assistant Secretary of State, insisted to the Canadian Government that the additional diversion of waters from Niagara Falls (U. S. EXEC. AGREEM'T SER. Nos. 209 and 223) constituting a modification of the Treaty of 1909 with Canada, required submission to the Senate, upon the consent of which the agreement was made and ratified. The authors' effort to show that a treaty and an executive agreement are of the same character and are interchangeable admits the difference in the nature of the two instruments but seeks to give them an identical effect nationally and internationally.

When the authors admit, as they are obliged to do, that the President has powers only when acting "within the scope of his independent powers" (McDougal and Lans, *Treaties*, at 199) and that his executive agreements have "substantially" the same status as treaties, the assertion that this is true "under both international law and the municipal law of the United States" is necessarily unwittingly misleading—treaties cannot be terminated unilaterally at will—and the admission that the executive agreement is limited would seem to admit away the case for interchangeability.

II

To prove that the authors' reasoning involves a fatal fallacy and that it is unwittingly unsound and impractical, the following pages have been written. On the practical side, apart from the fact that other opponents of the two-thirds rule, including *The New York Times*, Professor Colegrove, and some members of the House of Representatives, regard the independent executive agreement, recently expanded beyond its normal, admitted functions, as not "honest,"³³ an "evasion of the Constitution,"³⁴ a "subterfuge,"³⁵ a "circumvention of the Constitution,"³⁶ it must be obvious that no great number of Senators will be found to vote for the proposed Congressional-Executive agreement, a device conceived to bring about the demise of the Senate's treaty-making power. Indeed, little in the recent history of politics justifies any belief in the theory that the Senate will or can voluntarily participate in the termination of its constitutional functions as the coequal partner in the making of treaties, or that it will silently acquiesce in the encroachment of an ambitious Executive upon its functions.

This is not to deny that Congress has a considerable and undefined power in the field of foreign relations under the "necessary and proper" clause. We have seen this power in operation in the Act of 1798 declaring limited hostilities with France, in the authorization or declaration of embargoes, in the annexation of foreign territory, in the Panama Tolls Act and its repeal, and in the so-called Neutrality Acts of 1794, 1818, 1935, 1937, 1939. But this is far from admitting the authors' thesis, as it is understood, that Congress can authorize the Executive to make any agreement in any department of foreign affairs, and that in the absence of advance authorization, it can approve, by joint resolution of Congress, what he has concluded definitively or tentatively.

Not only does an approved usage establish that a large number of subjects have been customarily dealt with by treaty, but it is submitted that the encroachments on the treaty-making power of recent years made by executive agreement cannot be blindly accepted as

33. N. Y. Times, April 17, 1944, p. 22, col. 1. See also N. Y. Times, May 22, 1944, p. 18, col. 2.

34. COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* (1944) 31, 110. See also 53 YALE L. J. 664, 677, n. 44. Those who, like the writer, support the Constitution do not favor "minority control" of foreign affairs. Cf. McDougal and Lans, *Treaties*, at 187, 188, 190, 192, 210, 211, 226, 227, and *passim*.

35. Mr. Gossett of Texas in 91 Cong. Rec., May 1, 1945, at 4082.

36. Mr. Kefauver of Tennessee, 91 Cong. Rec., May 2, 1945, at 4111; Miss Sumner, *id.* at 4137. Said Mr. Celler of New York, another proponent of the amendment: "But such procedure [*i.e.*, the executive agreement] is not wise nor is it healthy." *Id.* at 4117. See also Mr. Baldwin, *id.* at 4129 ("bypassing" the Senate, people, or Constitution); Mr. Wadsworth, *id.* at 4134; Mr. Robsion, 91 Cong. Rec., May 9, 1945, at 4420 ("working around the Constitution").

evidence of an established usage.³⁷ Attorney General Jackson in the "destroyer deal" legal opinion of August 1940 indicated that a line of division could be found in the criterion whether the transaction could be immediately consummated or imposed future obligations upon the legislature, to which the Executive could not commit the country. The former, an executed act and requiring no legislative commitment, when performed in his function as Commander-in-Chief, he believed might be concluded by executive agreement; the latter, the imposition of future obligations, required a treaty.³⁸ But wherever the line is drawn, in case of doubt, and in the event that there should be any substantial opinion in the Senate insisting that the arrangement should be made by treaty, no President should hesitate in adopting the method provided in the Constitution of seeking Senate approval instead of resolving the doubt in his own favor.³⁹

To make the Congressional-Executive agreement a reality and make the whole Congress rather than the Senate a partner in the treaty-making process assumes a radical change in the Constitution, the creation of machinery by which the Senate will voluntarily retire from the field and permit all agreements with foreign Powers to be made by the Executive or by the Executive with Congress, and the establishment of a method by which the agreement can be submitted to Congress for its examination and alteration, to be followed by Congressional adoption, rejection or change, and formal Presidential ratification. But since the President can, under the authors' suggested proposal, disregard any change made by Congress and make his own agree-

37. The use of the President's power to make executive agreements encroaching on the Senate's treaty-making power was not by me "found justifiable" (McDougal and Lans, *Treaties*, at 246, note 133) but was explained or "justified" on the theory that the Senate, not having openly protested, had tacitly acquiesced.

38. 39 OPS. ATT'Y GEN. 484 (Aug. 27, 1940). See also my Editorial Comment in (1940) 34 AM. J. INT. L. 690. Since Congress has to appropriate the funds for the naval bases from year to year, it may be questioned whether the agreement did not impose a future obligation on the legislature. The imposition of future obligations, requiring legislation by Congress, was the main reason why the oil agreement of 1944 became a treaty. ("An executive agreement is ineffectual to confer upon Congress legislative powers that it does not otherwise possess." Fraser, Letter to Hon. Tom Connally, August 14, 1944, p. 2.) While the distinction between executive agreement and treaty is not clear, especially when the President expands the executive agreement beyond its constitutional proportions, there is a line between them which enables practically all questions of distinction to be determined.

39. In a recent publication of the Department of State, *TREATIES SUBMITTED TO THE SENATE 1935-1944* (No. 2311, 1945) there is a list of treaties pending in the Senate (pp. 12-13); a list of the Treaty Series since No. 867 in 1932 (pp. 17-22; see also *TREATIES SUBMITTED TO THE SENATE 1789-1934* (Dep't of State, Publication No. 765, 1935) 97-131, for an earlier list), which gives a fair indication of the types of subject commonly submitted for treaty approval; and (pp. 23-27) a series of draft conventions, recommendations and resolutions of the ILO submitted (proposed?) in part for Congressional action and in part to the Senate as treaties. Action on these draft labor conventions seems never to have been taken by either house.

ments,⁴⁰ and since there seems to be an effort to portray his limited powers to conclude independent executive agreements as in reality unlimited,⁴¹ it is not apparent that he needs to submit any agreement to Congress. At least, he alone is ostensibly the judge as to what he will submit.⁴² Is this proposal supposed to impress Congress or the Senate? The House-proposed constitutional amendment reflected a realization of some of these difficulties with respect to treaties. But whereas the House failed to adopt on May 9, 1945, the resolution of the Committee making majorities sufficient for consent to treaties, the authors propose to accomplish the same result without amendment.⁴³ Can a more hopeless effort be envisaged? Needless to say, not a single member of the House in the debate of May 1, 2, 7, 8 and 9, 1945, supported the McClure theory, assiduously espoused by the authors. Much more practical would it be, as happened with the recent oil and aviation agreements and the Connally Resolution, for the Senate to use its influence to bring to a halt the gradual encroachment of the Executive on its prerogatives and to restore an adherence to the limited functions of the Executive in the making of independent executive agreements.

To exhibit graphically what has happened in recent years, John Bassett Moore has prepared the appended table which he has given me permission to use. It shows the recent treaties and executive agreements, tabulated according to year of publication: ⁴⁴

40. McDougal and Lans, *Treaties*, at 209:

" . . . in many situations the President possesses power under the Constitution to disregard the Senatorial or Congressional veto and consummate agreements on [his] own responsibility."

See also *id.* at 317, 338, 346, to the effect that the President "might" disregard a *statute* (which he had probably signed). He could also presumably disregard a treaty (*cf. id.* at 316). This seems an extraordinary theory of executive omnipotence.

41. See *id.* at 251. See also *id.* at 222-3, 310-1.

42. The authors maintain that he has the option of submitting his agreements to either the House or Senate. They say (*id.* at 187):

" . . . our constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements."

It is curious that members of Congress and most professionals on the subject are unaware of this. See the recent Congressional debate, cited *supra* note 4.

43. McDougal and Lans, *Treaties*, at 199 and *passim*.

While there would be no harm in making certain kinds of treaties, especially those relating to commerce and finance, subject to approval by simple majorities in both houses of Congress, the change cannot be effected without constitutional amendment.

44. Another statistical record comes to the following conclusion:

	<u>Treaties</u>	<u>Executive Agreements</u>
1789-1839	60	27
1839-1889	215	238
1889-1939	524	917
	<u>799</u>	<u>1182</u>

91 Cong. Rec., May 2, 1945, at 4118. See also Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, 345.

<u>Year of Official Printing</u>	<u>Treaties</u>	<u>Executive Agreements</u>
1930	25	11
1931	13	14
1932	11	16
1933	9	11
1934	14	16
1935	25	10
1936	8	16
1937	15	10
1938	12	24
1939	10	26
1940	12	20
1941	15	39
1942	6	52
1943	4	71
1944	1	74

While some of the recent executive agreements can be explained under the head of the war power, others, like the Wheat Agreement, the Silver Agreement, the Aviation and Air Transport Agreements, unemployment insurance benefits, the St. Lawrence Seaway project, agricultural experimental stations, health and sanitation, finances of foreign countries, to mention but a few, cannot be thus explained. To use this evidence of encroachment as evidence of a growing "usage" is to fail to distinguish the approved from the disapproved. It is like a writer on intervention who, writing on the "law of intervention," assembled all the interventions he could find, and, on the assumption that the law could be found in the practice of nations, induced the law from the practice, whether good or bad. This is not the first time that the violation of the limitations of law has been used to justify the doctrine of nullification. Fortunately, unlike some aspects of international law, the Constitution is a written document.

III

But what renders the gentlemen's thesis of the interchangeability of the treaty and the executive agreement unsustainable, in spite of the fact that McClure, Corwin,⁴⁵ and Quincy Wright⁴⁶ have lent their names to the thesis, is the fact that the treaty and the executive agreement exhibit fundamental differences, not explained away by such

45. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) *passim*.

46. Wright, *The United States and International Agreements* (1944) 38 *AM. J. INT. L.*

341. See also Levitan, *Constitutional Developments in the Control of Foreign Affairs: A Quest for Democratic Control* (1945) 7 *J. POLITICS* 58.

consoling expressions as "all but," "not very dissimilar," "most," "reasonably durable,"⁴⁷ or by such vague words as "functional," "instrumental," etc., etc. No light is thrown on the question by the statement of the authors that all forms of international engagement, whatever the name given them, are in effect "treaties,"⁴⁸ but the gentlemen imply, strangely, that they may all therefore be considered as executive agreements, constitutionally. "Treaties," in the constitutional and legal sense, have acquired a special significance, possessed by no other type of international document, because the Constitution mentions them alone and gives them a special constitutional protection. The "compact clause"⁴⁹ shows that the Founders were not unaware of the distinction between treaties and lesser instruments.

The differences between treaties and executive agreements can best be shown by presenting an outline in parallel columns and then elaborating the outline in succeeding paragraphs. Both types of executive agreement are covered, those made pursuant to an act of Congress, about which there is little difficulty, and those not so made. They are not, however, confused. The outline follows:

TREATIES

1. A treaty, as is evident from *Missouri v. Holland*, is like a constitutional amendment. It can deal with any subject appropriate to international negotiation.
2. A treaty can do what Congress cannot. It confers legislative power on Congress (*Missouri v. Holland*).
3. A treaty must be ratified to be binding, according to American practice.
4. A treaty, as its name indicates, binds the United States for its duration. It cannot be repealed by act of Congress except for domestic purposes only. The inter-

EXECUTIVE AGREEMENTS

- An executive agreement is strictly limited. It can deal only with subjects especially delegated by Congress or, if made independently by the President, can deal only with normal powers vested in the Commander-in-Chief and principal diplomatic officer.
- An executive agreement cannot do what Congress cannot. It cannot confer on Congress powers of legislation it did not have before.
- An executive agreement need not be ratified by the United States.
- An executive agreement, as its name indicates, "binds" only as long as it suits *both* sides. It morally "binds" only the signing Executive, not his successors. If

47. McDougal and Lans, *Treaties*, at 307-8.

48. *Id.* at 195-6.

49. U. S. CONSR. ART. I, § 10.

national obligation remains binding.

they wish it to continue, it is by voluntary act. An executive agreement is subject to repeal by act of Congress domestically and internationally. Unilateral indication of desire to terminate suffices. Repeal of authorizing statute suffices.

5. A treaty has a special significance in constitutional law. It can repeal an act of Congress.

An executive agreement is unmentioned in the Constitution and has grown only through the necessity of making agreements of a character not to warrant submission to the Senate. It can be repealed by Congress at any time, but cannot repeal an act of Congress. It can of course be nullified or abrogated by treaty, prior or subsequent.
6. A treaty, by the Constitution, is the "supreme law of the land."

An executive agreement, with a few exceptions as to contrary state law or when made pursuant to act of Congress, is not supreme law of the land.
7. Only a new treaty can alter or modify an earlier treaty.

An executive agreement cannot alter or modify a treaty.
8. A treaty is submitted to the Senate for formal consideration and consent, rejection, amendment or reservations.

An executive agreement is not "submitted" to Congress for consideration or for approval, rejection, amendment or reservations. There is no procedure for subsequent approval, sanction or ratification by Congress.
9. A treaty lasts, with unimportant exceptions, as long as its terms provide.

An executive agreement is terminable at any time at the unilateral wish of one of the parties. This is true even if it purports to run for a given number of years. No successor to the President is bound by the latter's agreement, although he may consent to permit it to stand.
10. No secret treaty can be made by the United States. Treaties must be published.

An executive agreement invites secrecy since the President can make it without notifying anybody. Several secret agreements are now known.

Now to elaborate on these points:

1. *Scope*. A treaty, under the doctrine of *Missouri v. Holland*⁵⁰ and *Geofroy v. Riggs*,⁵¹ may deal with any matters properly the subject of negotiation with a foreign Power. It is not therefore limited to the subjects placed by Article I of the Constitution within the limited legislative powers of Congress or to the subjects on which Congress has legislated in practice. The Constitution is based on the theory that this is a government of limited powers, in spite of the "necessary and proper" clause, so that the Tenth Amendment has been deemed merely a "truism," nonessential surplusage.⁵² But a treaty, that was once thought to be limited also by the Constitution,⁵³ can, as is most clearly apparent from *Missouri v. Holland*, give the Federal Government and Congress new power they never had before.⁵⁴ We have already observed that future legislative obligations require a treaty.⁵⁵

The subject matter of executive agreements is strictly limited,⁵⁶ even by "usage," to specific powers, under or outside Congressional authorization. Nor can the limited powers of either Congress or the Executive, added together, constitute the plenary power contended for.⁵⁷ Nor is any method suggested by which the two may be joined.

50. 252 U. S. 416 (1920). See also Boyd, *The Expanding Treaty Power* (1928) 6 N. C. L. REV. 428, 444.

51. 133 U. S. 258 (1890).

52. *United States v. Darby*, 312 U. S. 100, 124 (1941).

53. *Geofroy v. Riggs*, 133 U. S. 258 (1890).

54. See *infra*, p. 632.

55. *Supra*, p. 625.

56. McDougal and Lans state that the power of the President is limited. See *Treaties*, at, e.g., 211 (note 1), 311, 317. Says Dodd in *International Relations and the Treaty Power* (1944) 30 A. B. A. J. 360, 361: ". . . his complete power relates only to a limited group of transactions. . . ." Says Sayre, *The Constitutionality of the Trade Agreements Act* (1939) 39 COL. L. REV. 751, 755: "He must act scrupulously within the laws and conform to the policies already established by the Congress." That the executive agreement could grant no legislative powers was the point of Mr. Fraser's opinion, acted upon, as to why the oil agreement had to be a treaty. The same reason, including the imposition of future obligations, invalidated the St. Lawrence agreement.

57. In an earlier part of this reply (*supra*, p. 620), reference was made to the authors' allegation that the President's limited power plus Congress's limited power made the power of Congressional-Executive agreements plenary. If Congress has more power than the limited powers granted in Article I, Section 8, they must get it from the President. If his power is unlimited in the field of foreign affairs, suggested at least on certain pages (McDougal and Lans, *Treaties*, at 250-2, 260; "under the separation of powers doctrine, Congressional action might not affect either the domestic effect of the agreement or its status as an international contract." *Id.* at 338; see also *id.* at 317, 346), he can presumably abrogate or disregard statutes and treaties (see *id.* at 316), and now by hypothesis can endow Congress with the power to implement his agreement by a Congressional act, making a Congressional-Executive agreement—which possibly he may immediately disregard. This theory proves too much. *United States v. Pink* was, it is believed, wrongly decided. Levitan, *Constitutional Developments in the Control of Foreign Affairs: A Quest for Democratic Control* (1945) 7 J. POLITICS 58, 83, characterizes the *Belmont* and *Pink* decisions as not "good" law.

Even if, *arguendo*, it were admitted that Congress has all the necessary powers to deal with foreign relations, including the power to authorize all executive agreements, the fact is that they have exercised power only in specific types of cases, whereas the treaty-making power has habitually been used to deal with such subjects as naturalization, establishment, extradition, consular privileges, peace and friendship, restoration of peace, alien ownership of realty, claims against the United States, guaranty of independence and neutrality, multilateral treaties, double taxation, exercise of fishing rights, and other matters.⁵³

But it was never thought that these cases would be used to make the argument that this country is already by law a potential one-man dictatorship.

John Bassett Moore has said of the suggestion that the Executive has unlimited power to make treaties:

“ . . . In the second place, I deem it to be inconceivable that there should exist in the United States any general sentiment in favor of committing to the Executive Department of the Government the entire and absolute control of the function of treaty-making.

“It is not going too far to say that the existence in the United States of a widespread sentiment in favor of committing exclusively to the Executive the power to make treaties would justify a feeling of profound apprehension and alarm.”

5 COLLECTED PAPERS OF JOHN BASSETT MOORE (1944) 95. Alexander Hamilton added that “it would be utterly unsafe and improper to intrust that [treaty-making] power to an elective magistrate of four years’ duration.” THE FEDERALIST (Lodge, ed., 1891) 467, quoted in MOORE, *supra*, at 95.

Congress’s power is limited by Article I, not because of the Tenth Amendment, but because the powers granted withheld those not granted. Congress unless fortified by underlying treaties never has validly exercised other power.

McDougal and Lans, *Treaties*, at 317, 338, 346, and others, state that the power of Congress may be limited. See also *id.* at 187 (Congressional-Executive agreement interchangeable with the treaty “for all practical purposes”), 255 (“most, if not all, of the important problems of peace and war”), 314 (“within the scope of its powers”). Occasionally (*id.* at 211, 222-3, 238, 241, 259, 310) the authors suggest that Congress has all the balance of power in foreign affairs not possessed by the President. Yet several recent agreements, covering the St. Lawrence project, oil, peace, possibly aviation, could not be cast in the form of statute or executive agreement! Says Dodd, *International Relations and the Treaty Power* (1944) 30 A. B. A. J. 360, 361: “If action is within the power of Congress, the same result may be obtained by the two houses, subject to the approval of the President, as by the President with the concurrence of ‘two-thirds of the senators present.’ ” It has never been doubted that there is a limited area in which the powers of Congress and Senate may be deemed to overlap and Congress may “authorize” action or the treaty method may be used. That was the Texas (1845) and Hawaii (1898) annexation. But the power of Congress to “authorize” is limited and not plenary, and that would seem to defeat the thesis of interchangeability of executive agreement and treaty. For a discussion of the relation between Congress and the treaty-making power see Wright, *Treaties and the Constitutional Separation of Powers in the United States* (1918) 12 AM. J. INT. L. 64.

Does Congress get more power because the President agrees first and they are supposed to approve, sanction or implement? If so, they get power not from the Constitution but from the President. We know fairly well the limits of the President’s independent power, which includes the recognition of foreign governments.

58. See the list of subjects commonly cast in treaty form in the speech of Mr. Merrow, 91 Cong. Rec., May 7, 1945, at 4320.

The idea that Congress could "authorize" the President to make a treaty is violative of the treaty-making power. Congress can hardly "authorize" what it cannot directly ratify. Whether two-thirds of the Senate could "authorize" a treaty, thus giving their "advice and consent" in advance,⁵⁹ we need not consider. That is not the customary way treaties are concluded. In any event, there is no way to escape the treaty-making power in matters which are properly the subject of treaties. To suggest that the President has the option of submitting an agreement in the form of a treaty or an agreement to be approved by Congress⁶⁰—the authors' proposed Congressional-Executive agreement—is an assertion that when two-thirds of the Senate cannot be obtained a majority of House and Senate will satisfy the purpose. There is no constitutional warrant for this assumption.⁶¹ If the House and Senate cannot by bare majority ratify a treaty, the House and Senate cannot authorize the President to depart from the Constitution by disregarding the two-thirds Senate rule. Any House or Senate agreement to evade the constitutional provision may serve to forfeit the Senate's privileges, if practiced often enough. But it leaves the constitutional provision unimpaired. Neither by subsequent act nor by action in advance can House and Senate by majorities legally authorize a circumvention of the Constitution.

2. *Legislative Power.* That a treaty can do what Congress by statute cannot do is illustrated by *Missouri v. Holland*.⁶² The first Migratory Bird Act of 1913 was held unconstitutional, as not within the power of Congress, by one state and two federal courts.⁶³ The federal cases

59. Lodge, *The Treaty-Making Powers of the Senate* (1902) 31 SCRIBNER'S 33, 42; Black, *The United States Senate and the Treaty Power* (1931) 4 ROCKY MT. L. REV. 1, 5, 11. There is also an opinion that reservations and amendments constitute Senate "advice" before consent is final. See Senator Overton in *Hearings before a Subcommittee of the Committee on Commerce on S. 1385*, 78th Cong., 2d Sess. (1944) 201.

60. McDougal and Lans, *Treaties*, at 187, 324.

61. The proposed amendment was not passed by the House, "with House leaders admitting that the fate of the Resolution was highly uncertain." N. Y. Times, May 10, 1945, p. 24, col. 2. But a substitute, providing that a majority of the House and Senate *enrollment* must approve, was passed May 9, 1945, by a vote of 288 to 88, 56 not voting. 91 Cong. Rec., May 9, 1945, at 4440-1. It has little support in the Senate. Yet an amendment of the Constitution is the only lawful way of accomplishing the result.

62. 252 U. S. 416 (1920). Cf. Article V of the treaty with Switzerland, 1850, 2 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS (1923) 1765, permitting Swiss citizens to inherit real estate in the United States; treaties permitting consuls to administer estates of their nationals; *Rocca v. Thompson*, 223 U. S. 317 (1912); Article II of the treaty with Germany, U. S. TREATY SER. No. 725 (1923), permitting Germans to recover for personal injuries regardless of alienage; Hyde, *Constitutional Procedures for International Agreement by the United States* (1937) 31 PROC. AM. SOC. INT. L. 45, 53.

63. *United States v. Shauver*, 214 Fed. 154 (E. D. Ark. 1914); *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915); *Boyd*, *The Expanding Treaty Power* (1928) 6 N. C. L. REV. 430, 449.

were brought on appeal to the United States Supreme Court. Chief Justice White was very anxious to sustain the statute as essential to the operations of government, for he observed, as did Justice Holmes in *Missouri v. Holland*, that the states were quite unreliable in safeguarding this great natural resource, so necessary to agriculture. But the court stood divided 3 to 3, three judges being ill or absent. The Chief Justice thereupon held the cases undecided upon until a full bench could sit, but in the meantime engaged the writer, then Librarian of the Supreme Court, to make an exhaustive study of the law from Roman times until the present to endeavor to show that the Federal Government must possess the power of bird regulation. The study, which occupied several months, reached the conclusion that the states alone were the repositories of the power to regulate migratory birds, since by no possibility could this migratory resource be called interstate commerce, which depends on the acts of man. In the conversations with the Chief Justice and Dr. Holmes of the Bureau of Animal Industry, there developed an idea, earlier suggested in a resolution introduced by Senator McLean of Connecticut, that a treaty with Canada might be concluded, whereupon the legislation could be enacted again and rest for its constitutional justification upon the implementation of a treaty.

Thereupon, on August 16, 1916, a treaty with Canada was concluded and approved by the Senate in record time.⁶⁴ Because of the impending war, and for other reasons, delays occurred in the enactment of an implementing statute, so that it was not until early 1918 that the second Migratory Bird Act was passed. A federal game warden was then enjoined by the State of Missouri from enforcing the Act, and its constitutionality subjected to judicial test. As is well known, Justice Holmes sustained the Act as an execution of the treaty, and thus proved to the satisfaction of the public that a treaty not only can add to federal legislative power but can do what an act of Congress cannot. It gave rise to the inference that not only natural resources, like fish in boundary waters,⁶⁵ perhaps oil and other substances now controlled by the states, but social legislation, like labor regulation⁶⁶ and marriage and divorce, could by the exercise of the treaty power be brought under federal control by means of an underlying treaty.⁶⁷ Indeed, *Missouri v. Holland* led to such expansive conceptions of

64. 39 STAT. 1702.

65. See 22 OPS. ATT'Y GEN. 214-8 (Griggs, 1898).

66. See Boyd, *The Expanding Treaty Power* (1928) 6 N. C. L. REV. 430, 449.

67. Treaties have frequently been entered into removing from certain aliens the disabilities of alienage in the ownership or the heritability of real estate, providing for workmen's compensation for personal injuries, and governing consular administration of estates, which of course no act of Congress could consider. Only federal reluctance to encroach upon state matters prevents a wider use of such treaties. See also *Neely v. Henkel*, 180 U. S. 109 (1901).

federal power that writers anxious for states' rights protested such a development.⁶⁸ Little has been done to give substance to the fear, but, if it is entertained when limited by the two-thirds rule, how much greater and more justified would be the fear if the plan for federal regulation could be realized by mere majority vote in both houses. This will be the subject of later discussion.

Not long ago, on August 24, 1944, the President submitted to the Senate as a treaty the oil agreement of August 8, 1944, with Great Britain. The background discloses that it had first been intended to conclude the plan by executive agreement. Senators Connally and Maloney heard of the plan and became apprehensive at the proposed submersion of the Senate's prerogative, if the Foreign Relations Committee should decide that the subject ought to be dealt with by treaty. The Chairman, Mr. Connally, thereupon asked a distinguished lawyer, Mr. Henry S. Fraser, General Counsel of the Special Committee Investigating Petroleum Resources, to make a study of the subject of treaties and executive agreements for the Committee's information. On the basis of historical studies, Mr. Fraser came to the conclusion that there were certain subjects involving future legislation, including oil production and distribution, which could not be dealt with by executive agreement but required a treaty.⁶⁹

Thereupon, the President was notified and the agreement was duly submitted to the Senate. Senator Connally, after examining the treaty, expressed the opinion that it would never receive the approval of the Senate. The industry learned of the treaty. They expressed the belief that the agreement undertook to centralize the administration of the oil industry in a Petroleum Commission and in the Federal Government—which, however, was not obliged to accept the recommendations of the Commission. By legislation, that government could practically control all production, proration and marketing of oil—invalid in the absence of a treaty. In addition, no immunity from prosecution under the anti-trust laws for following the orders or recommendations of the International Petroleum Commission, when approved by the United States, was assured.

On January 10, 1945, the agreement was withdrawn by the President for renegotiation with Great Britain.⁷⁰ A revised draft treaty was proposed by the Committee. A closed hearing of the Petroleum War Council of the industry was later held and certain fundamental changes

68. See Thompson, *State Sovereignty and the Treaty-Making Power* (1922) 11 CALIF. L. REV. 242, 247, 250.

69. See Fraser, *Treaties and Executive Agreements*, SEN. DOC. No. 244, 78th Cong., 2d Sess. (1944). See also letter of Fraser to Senator Connally, Aug. 14, 1944.

70. See (1945) 11 DEP'T. OF STATE BULL. No. 290, p. 63: "It appears to the Department that the misunderstandings which have arisen come not from lack of agreement upon these objectives but from the implementing features attending them."

suggested. When the Government has made up its mind on the immunity clause, and after the two governments have come to an agreement on the other suggested changes, it is presumed that the treaty will be resubmitted to the Senate. Even though the final treaty does not include an immunity clause, it is hoped by the industry that legislation will take care of the issue. The incident illustrates the danger of the executive agreement, in attempting to commit an industry without its knowledge and to change the constitutional distribution of powers between state and federal governments.

Needless to say, no executive agreement could perform the extra-constitutional function of conferring new legislative power on Congress.⁷¹ If it is alleged that it could, excessive power would be vested in one man. If, like a treaty, it could set aside earlier acts of Congress or even prior treaties, we would have the anomalous position that the chief executive could by virtue of an executive agreement govern this country without the assistance of Congress. And if it should be asserted that he could only govern with the approval of a majority in Congress, the question naturally arises what machinery for such approval is provided, whether such a practice has ever been adopted, and how it can be supposed that the Senate would, by a majority, vote for such an unconstitutional abdication of its treaty-making power.

Possibly the nearest approach to the effectuation of any such plan is in the UNRRA agreement,⁷² hardly mentioned by the authors. After the executive agreement was signed, the Department of State called upon a subcommittee of the Committee on Foreign Relations of the Senate, consisting of Messrs. Vandenberg, Connally, Green and Thomas (Utah), to study the project and offer suggestions for change. The Committee requested some twenty-seven changes in the agreement, whereupon these were submitted to the other governments and agreed to. Since the agreement looked to a contribution of \$1,350,000,000 from the United States Congress, it was of some importance. When the changes were approved the agreement was included in a joint resolution of Congress and reintroduced as a bill. An assurance was given to the Senate by Senators Connally and Vandenberg that the agreement bound the Congress to nothing, and the Senate was urged not to insist upon its treaty powers. It would seem that the bill was at least an authorization, with the promise of future appropriations. At all events, the Congress made numerous amendments and "reserva-

71. Congress on a few occasions has decided to accept the agreement's advantages, indirectly, by making an appropriation, as in the case of Horseshoe Reef and the naval bases. See *infra*, p. 655.

72. U. S. EXEC. AGREEM'T SER. No. 352 (1943). See Briggs, *The UNRRA Agreement and Congress* (1944) 38 AM. J. INT. L. 650. Mr. Sayre testified, in *Hearings before the Committee on Foreign Affairs on H. J. Res. 192, 78th Cong., 1st and 2d Sess. (1943-1944)* 153: ". . . the draft agreement was not intended to impose binding obligations. . . ."

tions" in the bill, whereupon it passed both houses.⁷³ Professor Briggs maintains that the UNRRA was conclusively established by the executive agreement of November 9, 1943, and that the Resolution of Congress was misleadingly but actually an implementation of the agreement. He says that such a proceeding, approving adherence to an organization without contracting pecuniary obligations, is not likely to occur again and that it is *sui generis*.

3. *Ratification.* A treaty must be ratified to be binding,⁷⁴ but only rarely has an executive agreement been ratified by the United States.⁷⁵ Usually, as in Executive Agreement Series Numbers 209 and 223, it is an indication that it has been submitted to the Senate as a treaty.⁷⁶

Speaking of the Wadsworth (Paris) agreement of May 25, 1923, Secretary Hughes informed the American chargé:

"Inasmuch as the agreement is not a treaty but is rather an executive agreement for the discharge of a claim due to the Government of the United States, it is deemed by this Government that ratification by and with the advice and consent of the Senate is not necessary but that the formal approval of the agreement by the President will suffice."⁷⁷

73. Pub. L. No. 267, 78th Cong., 2d Sess. (March 28, 1944). See also report on the bill of the Senate Committee on Foreign Relations, SEN. REP. No. 668 (1944).

74. Says Quincy Wright, in *Treaties and the Constitutional Separation of Powers in the United States* (1918) 12 AM. J. INT. L. 64, 93: ". . . the treaty, if ratified, would be valid, and all other departments of government . . . are bound by their allegiance to the Constitution to perform the acts necessary to give it effect."

In U. S. EXEC. AGREEM'T SER. No. 249 (1942) 1, with Canada, dealing with military service of Canadians and Americans in the two countries, as in other executive agreements on the same subject, the Department of State in a note said: "It will be recalled that during the World War this Government signed conventions with certain associated powers on this subject. The United States Government believes, however, that under existing circumstances the same ends may now be accomplished through administrative action, thus obviating the delays incident to the *signing and ratification* of conventions." (Emphasis supplied.)

75. It was done, exceptionally, in the matter of the lease from Cuba of the Guantanamo Naval Station, 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS (1910) 360. The authors in this respect, as in others, underestimate the difference between executive agreements and treaties. See McDougal and Lans, *Treaties*, at 320.

76. These were temporary diversions of water above Niagara Falls, supplementary to the treaty of 1909. On that account, they were submitted to and approved by the Senate. The arrangement was effected by exchange of notes.

77. Quoted in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 400. See also 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1923 (Dep't of State, 1938) (hereinafter cited as FOREIGN RELATIONS: [YEAR]) 186, n. 26. See also the following paragraphs from the memorandum of the Solicitor, July 28, 1923, printed in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 400-1:

"The Constitution while conditioning the making of treaties upon the advice and consent of the Senate (Article 2, Section 2, Paragraph 2) contains not a word on the subject of ratification. As there is no reference to such action in respect to

Occasionally, foreign governments may reserve the privilege of subjecting an executive agreement to ratification of their own government,⁷⁸ but this is not the American practice.

The authors say, "Generally speaking, diplomatic practice requires a formal act of ratification before an international arrangement will be regarded as binding. . . ." ⁷⁹ Crandall, cited as authority, merely speaks of treaties as requiring ratification. Executive agreements are not ratified and require no ratification. Equally strange is the statement ⁸⁰ that the decision as to whether or not to ratify an approved agreement or treaty is wholly executive. The gentlemen fail to distinguish the two instruments, whereas in the matter of ratification, as in other respects, they are different.⁸¹

4. *Repealability.* A treaty, as its name indicates and the Constitution provides, is binding on the United States. Even though John Jay thought it reprehensible that an act of Congress should be deemed capable, even domestically, of departing from the terms of a treaty,⁸² nevertheless it is now generally conceded ⁸³ that a treaty may be re-

agreements of any character, it cannot reasonably be inferred that if the President instructs a Plenipotentiary to insert a provision for ratification in an agreement, he thereby imposes upon himself a duty to ratify solely under the conditions which would constitutionally arise if the agreement were a treaty. . . .

"In a word, it may be gravely doubted whether the Paris agreement of May 25, 1923, compels a contracting party to ratify, if in its judgment the agreement is of a character such that ratification is not demanded by the constitutional requirements of its own country. . . ."

That the ratification by the United States of an executive agreement is not necessary and is resisted, even when the foreign government suggests it, see note from Secretary Root to Germany, 1907, printed in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 416. "Postal conventions" are sometimes ratified by a foreign government, because its law so requires, but not by the United States. Said the Department of State in 1908: "Such postal treaties or conventions are not submitted to the Senate and are not therefore formally ratified by and with the advice and consent of the Senate as in the case of other treaties. . . ." 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 412.

78. See Art. IX of UNRRA agreement, U. S. EXEC. AGREEM'T SER. No. 352 (1943) 7; Briggs, *The UNRRA Agreement and Congress* (1944) 38 AM. J. INT. L. 650, 653, n. 8.

79. McDougal and Lans, *Treaties*, at 209. *Cf. id.* at 202 (note 27), 320.

80. *Id.* at 209.

81. See *supra*, p. 632.

82. ". . . treaties are made, not by only one of the contracting parties, but by both; and consequently, . . . as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government." THE FEDERALIST (Lodge, ed., 1891) No. 64, p. 405. See also Boyd, *The Expanding Treaty Power* (1928) 6 N. C. L. REV. 428, 430.

83. Since Marshall's decision in *Foster v. Neilson*, 2 Pet. 253 (U. S. 1829). This rule is said by several students of the subject to rest on the mistake made in *Taylor v. Morton*, 23 Fed. Cas. 784, No. 13,799 (C. C. D. Mass. 1855). See Potter, *Relative Authority of International Law and National Law in the United States* (1925) 19 AM. J. INT. L. 315, 316.

pealed for *domestic* purposes by an act of Congress. But the treaty still remains a binding international obligation of the United States. Its "repeal" merely means that one societal agent, the courts, are bound by the last expression of the legislative will; but the societal agent who represents the United States in foreign relations, the Executive, must give satisfaction to the foreign nation in the form of an indemnity or other amends. The treaty binds the United States until it expires.⁸⁴

Says Garner:

"Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system."⁸⁵

Said Secretary Hughes in 1922:

"It is necessary to point out the distinction between domestic law and international obligation. It is, of course, true that a Nation may by its Constitution and laws override treaties, but by such domestic acts, however sanctioned nationally, it cannot escape its international duties and obligations."⁸⁶

84. I repudiate any such suggestion as the one that treaties can be departed from at will (McDougal and Lans, *Treaties*, at 339). On the contrary, in principle *pacta sunt servanda*. See Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda* (1945) 39 AM. J. INT. L. 180. The authors have no authority to suggest my "inarticulate premise" or to attribute to me the view that I regard treaties as "permanent." (McDougal and Lans, *Treaties*, at 333.) Treaties last as long as they provide for. It is exceedingly ambiguous if not wrong to speak of "the power [of Congress] to abrogate treaties by joint resolution of both houses." (*Id.* at 241.)

85. RESEARCH IN INTERNATIONAL LAW, LAW OF TREATIES (1935) (published as 29 AM. J. INT. L. SUPP., No. 4) art. 23, p. 1029. See Comment, *id.* at 1030 *et seq.* At page 1034 Garner said: "See, in this connection, the following statement of the United States Secretary of State made with reference to the *Cutting Case*:

' . . . if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules. . . . (U. S. Foreign Relations, 1887, p. 751; 2 Moore, *Digest of International Law*, 1906, p. 235.)'

Says Hyde: "It must be clear that while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement." 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1465. See also RESEARCH IN INTERNATIONAL LAW, *supra*, at 1036.

86. 2 FOREIGN RELATIONS: 1922 at 646; 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1465. See also extracts in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 319 *et seq.*

Not so with an executive agreement. As its name indicates, it is made not in the manner alone known to the Constitution as a method of binding the United States; it is an act only of the Executive.⁸⁷ When it is spoken of as "binding" on anybody, the word is ambiguous or a misnomer.⁸⁸ If a rule is binding only so long as it suits both parties, it is not "binding" at all.⁸⁹

An illuminating correspondence on this question took place in 1894 with Brazil. Congress had just repealed the Tariff Act of 1890 under which tariff agreements for reduced duty were made with several countries, among others, Brazil. On being notified that the agreement had come to an end by the repeal of the "authorizing" statute, Brazil claimed that it should run until January 1895. Insisting, however, that the agreement had terminated instantaneously upon the repeal of the underlying statute, Secretary Gresham made the legal position abundantly clear.⁹⁰ Secretary Gresham's view is not to be explained,

87. The "many writers" who have "suggested that [executive] agreements, in assumed contrast to treaties, constitute only moral obligations or are not 'binding' " are said to do so "loosely" because they overlook "their functional operation at domestic or international law." McDougal and Lans, *Treaties*, at 307. In my original article in 53 *YALE L. J.* 664, some of these writers were cited and quoted. The supporting reasons for this conclusion have been presented *supra*, pp. 617-23.

88. There really is no such thing as a "binding executive agreement" (McDougal and Lans, *Treaties*, at 321) binding on the United States. The United States can always withdraw. The phrase "binding effect of the executive agreement under domestic law" (*id.* at 308) is ambiguous. It could mean only that so long as it is allowed to remain in force, if otherwise valid, it is law—if it is—controlling the states.

89. See Borchard, *Political Theory and International Law* in DUNNING, *A HISTORY OF POLITICAL THEORIES, RECENT TIMES* (1924) 120, 130 n., citing Sir Henry Maine and Charles Merriam.

Vattel (see McDougal and Lans, *Treaties*, at 227) constituted a bridge between the school of natural law of the eighteenth century and the positive jurists of the nineteenth century. He shows the influence of both schools and is therefore properly characterized as belonging to both. See 1 OPPENHEIM, *INTERNATIONAL LAW* (5th ed. 1935) 92.

90. He wrote: ". . . it can not be supposed that it was intended, by the simple exchange of notes on January 31, 1891, to bind our Governments as by a treaty . . . beyond the time when the Congress of the United States might . . . repeal the legislation under which the arrangement was concluded." *FOREIGN RELATIONS: 1894* at 81.

In addition, Gresham said:

"I think it clear that the reciprocity arrangement between Brazil and the United States was terminated by the going into force of our existing tariff law, and I do not think the Executive Departments can act upon any other theory. . . .

"The so-called treaties or agreements that were entered into based upon the third section of the McKinley bill were not treaties binding upon the two Governments, and the present law is mandatory. Notice to your Government that the arrangement would terminate as provided by its terms would have no force, as the arrangement actually exists no longer." *Id.* at 77.

"The Constitution of the United States, like the constitution of Brazil, points out the way in which treaties may be made and the faith of the nation duly pledged. . . . Of such provisions in each other's constitutions governments are assumed to take notice. 'The municipal constitution of every particular state,' says Wheaton,

as the authors undertake to do,⁹¹ by the fact that Brazil was charged with knowledge of the vulnerability of the executive agreement or that the Act of 1890 was a special act. All acts of Congress have a special character. The statute was like all similar acts conferring power on the Executive to make agreements in execution of the act.

As the Department of State said in its answer to Mr. Simpson in 1934,

"Executive agreements . . . entered into under one President continue to remain in force under his successors *unless* and until . . . notice of a desire to terminate is given by one side or the other."⁹²

That is, one side can at any time withdraw,⁹³ which is not true of a treaty; and it is believed that this is true in law whether the executive agreement allegedly runs for a given time or provides for a notice of

'determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation;' . . . (Elements of International Law, Dana's ed., pp. 337, 338)." *Id.* at 81.

The same position was taken by the Department of State in connection with the abrogation of the executive agreement with France made under the Tariff Act of 1897. It "would [said the Department], in the absence of enabling legislation by Congress, have been terminated ipso facto on the going into force of the tariff act of the United States approved August 5, 1909, which has changed the bases on which these agreements were negotiated." Congress had, by Section 4 of the new act, considerably allowed the executive agreement to remain in force for six months after repeal of the old act. Said the Department: The "President" is "obliged to follow implicitly the prescriptions of the new tariff act." 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 429.

91. McDougal and Lans, *Treaties*, at 349.

92. Quoted in Simpson, *Legal Aspects of Executive Agreements* (1938) 24 IOWA L. REV. 67, 86.

93. Notice of the termination of an executive agreement does not involve its being "rescinded by negotiation" (McDougal and Lans, *Treaties*, at 346). No negotiation is necessary, as the authors seem to believe; it is automatically terminated. If Congress can terminate at pleasure and will an executive agreement concluded under "authority of Congress" (see WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 236; Todd, *The President's Power to Make International Agreements* (1927) 11 CONST'L REV. 160, 167), Congress could presumably also repeal its *ex post facto* approval. But this conflicts with the law governing treaties and would indicate another difference from the executive agreement. Foreign countries might resent this precariousness of American agreements.

The authors' view (McDougal and Lans, *Treaties*, at 346, note 173) that a new President has *power* to terminate or abrogate a treaty, like an executive agreement, at any time, involves a serious misapprehension. Apart from the admission that a new President may terminate an executive agreement, it is not true that a new President has *power*, or any right, to terminate a treaty, if it is still in force. It can only be terminated as its terms provide. It binds the nation and the President. Otherwise, a treaty would have force only as it suits *both* parties, like an executive agreement. It would be a voluntary "obligation." The President has, I think, not even *power* to *nullify* a treaty, which is all that a purported Presidential termination prior to expiration would usually amount to.

The statement is made (*id.* at 346) that "Congressional-Executive agreements remain in force unless the act of Congress . . . by which they were ratified is repealed." There is

termination. The successor cannot be bound by the executive agreements of his predecessor.⁹⁴ While it is perhaps a moral obligation of the signing President to observe the executive agreement during his administration, no such obligation, moral or legal, rests upon his successor. If the successor or successors perchance continue to observe its terms, it is because they choose to leave it unaltered, and not because they cannot cancel the obligation at will.

One significant difference between the two instruments lies in the power of Congress to repeal an executive agreement, whether made in pursuance of an act of Congress or independently thereof.⁹⁵ We have

no provision for ratification by act of Congress. The statement represents a theory only, not a practice.

The authors assume that the President has an option to make his instrument of agreement with a foreign country a treaty or an executive agreement to be ratified "by the Senate or by Congress." It is submitted that there is no such alternative, and that the suggestion involves a change in this form of government. The treaty clause was well considered and is not a thoughtless compromise (see note 157 *infra*).

If the control of foreign relations cannot be shared by 97 men (*id.* at 553), how can it be shared by 97 plus 435?

94. Todd, *The President's Power to Make International Agreements* (1927) 11 *CONSR. REV.* 160, 162, 164, citing Secretary Hughes, seems to doubt whether a President can bind his successor. Todd speaks of "agreements" not amounting to treaties. *Id.* at 163.

95. The authors say (McDougal and Lans, *Treaties*, at 338): "Clearly any President has power to terminate the internal status of such agreements as the law of the land." How can this be done if it binds the nation? Either the authors agree with my thesis that the executive agreement is not binding on the nation, or Congress alone may terminate. If the President has the power to terminate he must also have the power to terminate the external status. If this is so, the authors thereby admit the vulnerability of the executive agreement made under the President's independent power.

He cannot do that with a treaty. If so, why has this not been done, except under legislative direction or acquiescence, and never *contra*?

The executive agreement also may be terminated, the authors admit, "indirectly, by the enactment of conflicting or inconsistent legislation." *Id.* at 336; applied to executive agreements, *id.* at 337-8; see also *id.* at 199 (agreements "made pursuant to the President's authority alone, when within the scope of his independent powers, have . . . substantially the same status as treaties . . . except in some cases where there is contradictory legislation"), 348 (" . . . when it becomes necessary or appropriate because of the enactment of contrary legislation to terminate an executive agreement . . ."; and, ". . . an executive agreement (like a treaty) is superseded domestically as a general rule, by enactment of contrary legislation . . ."). Not so if a treaty. "But where [agreements negotiated by the President] are predicated upon the President's independent constitutional powers, such as in the field of foreign relations, under the separation of powers doctrine, Congressional action might not affect either the domestic effect of the agreement or its status as an international contract." *Id.* at 338. This would appear to qualify what has just been admitted. But it cannot be qualified.

If the President has entire control of the executive agreement and can make it alternatively with a treaty, why does he need any authority from Congress, as in the case of the tariff treaties and *Field v. Clark*? By hypothesis he had that power before, so that the Congressional direction or request would seem to be superfluous.

already seen that the former is automatically terminated by repeal of the underlying statute.⁹⁶ That repeal of an executive agreement by act of Congress is equally applicable to those made under the President's independent powers is illustrated by the so-called Gentlemen's Agreement of 1907⁹⁷ permitting limited Japanese immigration, which was abrogated by the passage of the Oriental Exclusion Act of 1924.⁹⁸ If further evidence of the vulnerability of an executive agreement is desired, it may be found in the note appended by the Secretary of State to the Air Transport Services Agreement with Sweden and Denmark,⁹⁹ reading:

"You will, of course, understand that this agreement may be affected by subsequent legislation enacted by the Congress of the United States."¹⁰⁰

In the Surplus Property Act of 1944¹⁰¹ there is an express provision exempting from abrogation prior contracts, construed to cover executive agreements, like the Canol Project,¹⁰² made in contravention of its provisions for priorities in disposition. Obviously, all future agreements must be made in conformity with the provisions of the Act. The American Federation of Labor is reported¹⁰³ to have objected to

96. *Supra*, pp. 639-40.

97. See BUELL, *INTERNATIONAL RELATIONS* (rev. ed. 1929) 68, 736, 741.

98. Immigration Act, 43 STAT. 153 (1924), 8 U. S. C. § 201 (1940). The authors (McDougal and Lans, *Treaties*, at 348) incorrectly report this episode and inadvertently misrepresent Hyde (see *ibid.*, note 186). It led to no negotiation.

99. U. S. EXEC. AGREEM'T SER. Nos. 430 (1944) 4 and 431 (1944) 4.

100. See also agreement of Feb. 10, 1925, with Poland, providing that if either party is prevented by its legislature from carrying out the agreement, "the obligations thereof shall thereupon lapse." Quoted in Todd, *The President's Power to Make International Agreements* (1927) 11 CONST'L REV. 160, 167. See also Fleming, an avowed believer in executive agreements, who says: ". . . Congress, or either branch of it, could take the responsibility of nullifying an executive agreement." FLEMING, *THE UNITED STATES AND THE WORLD COURT* (1945) 182.

101. Pub. L. No. 457, 78th Cong., 2d Sess. (Oct. 3, 1944) § 34(c).

102. U. S. EXEC. AGREEM'T SER. Nos. 386 (1942), 387 (1942), 388 (1942), 389 (1943), 416 (1944), 444 (1944).

103. N. Y. Times, May 19, 1945, p. 20, col. 3. See AFL Report of Committee on "Freedom of the Air," approved by Executive Council May 4, 1945. Arne C. Wiprud, Special Assistant to the Attorney General, in *Some Aspects of Public International Air Law* (1945) 13 GEO. WASH. L. REV. 247, 264, maintains that bilateral executive agreements have been entered into for temporary purposes only, until a treaty could be concluded, that multilateral agreements should be incorporated in treaty form, that the Executive should not purport to fix, much less violate the policy of Congress, and that treaties would be much less vulnerable to constitutional attack. He says (*id.* at 266):

"The Executive may act in these matters in one of three ways: he may enter into executive agreements as an emergency matter to protect and further the interests of the nation; he may enter into particular agreements pursuant to a special or general authorization by Congress; or he may conclude treaties subject to the approval of the Senate."

three of the aviation agreements concluded at Chicago because, purporting to change the provisions of the Civil Aeronautics law, this should be done by treaty only and not by executive agreement. It is perhaps superfluous to remark that executive agreements on any subject are superseded by subsequent treaties inconsistent therewith.¹⁰⁴

5. *Effect on Statute.* That the Department of State is fully aware of the distinction between an executive agreement and a treaty in its effect on a statute is indicated by the following extract:¹⁰⁵

" . . . it may be desirable to point out here the well recognized distinction between an executive agreement and a treaty. In brief, it is that the former cannot alter the existing law and must conform to all statutory enactments, whereas a treaty, if ratified by and with the advice and consent of two-thirds of the Senate, as required by the Constitution, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments."¹⁰⁵

The attempt is made to show that the executive agreement made under the President's independent power prevails over an earlier act of Congress, just as a treaty does.¹⁰⁷ The evidence used to sustain this extraordinary proposition is the Washington Territory case of *Watts v. United States*.¹⁰⁸ It is frequently invoked by the authors as conclusive

The Department of State is "of the strong opinion, . . . that nothing done or provided for under the three agreements exceeds the authority contained in existing legislation." (1945) 12 DEP'T OF STATE BULL., No. 312, p. 1103. Cf. article by Latchford, *id.* at 1104. See also SEN. DOC. No. 56, 79th Cong., 1st Sess. (1945) 16-8.

104. See, e.g., the Lansing-Ishii Agreement of 1917, abrogated by the inconsistent Washington Treaty in 1923, discussed in 53 YALE L. J. 664, at 677.

When the Four-Power Pact (not the Nine-Power Treaty), drawn up at the Washington Conference, was before the Senate, President Harding said:

"The negotiation of this treaty is in itself the most formal declaration of the policy of the Executive in relation to China, and supercedes any Executive understanding or declaration that could possibly be asserted to have any contrary import. . . . the so-called Lansing-Ishii agreement has no binding effect whatever. . . ."

62 CONG. REC. 3559 (1922); see also 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 431.

105. From Current Information Series No. 1, July 3, 1934, quoted in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 425-6.

106. That Norway also considers a treaty to prevail over an inconsistent executive agreement is evident in the note of the Norwegian Minister to Secretary Hull, U. S. EXEC. AGREEMENT SER. No. 319 (Dec. 23, 1942) 4.

107. McDougal and Lans, *Treaties*, at 317: "A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation. . . . [But] if the subject of the agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power."

108. 1 Wash. Terr. (N. S.) 288 (1870).

of the President's power to supersede an act of Congress. There the question was whether by virtue of a military agreement between Great Britain and the United States the sole jurisdiction of Washington Territory over a murder committed on San Juan Island had not been temporarily replaced by the joint jurisdiction of the two Powers, under agreement, pending an arbitral award, which later assigned the territory to the United States. The Washington court held that during the administration of the two Powers sole jurisdiction of Washington Territory could not be claimed. But since the statute of the Territory, prior to statehood, was actually an act of Congress, the authors use the case many times to prove, against a consistent record, that an executive agreement sets aside an act of Congress. The court did not suggest such an idea. The gentlemen prove too much. If this esoteric case established the proposition for which it is used, it would prove that the President alone, by an executive agreement, can set aside all acts of Congress at will. Who could take any stock in such a proposition?¹⁰⁹

6. "*Law of the Land.*" A treaty by the Constitution is the "supreme law of the land"; an executive agreement, with minor exceptions, is not.¹¹⁰ It seems unusual to conclude that the unmentioned executive agreement has become so omnipotent that it has made the treaty-making power of the Senate not only obsolete and a useless encumbrance, but that by usage the executive agreement has displaced the treaty in the exalted place the treaty used to occupy. What has been said and what is still to be said should dissipate any such illusion.

The *Altman* case¹¹¹ involved solely the question whether the Supreme Court had jurisdiction over the interpretation of an executive tariff agreement made pursuant to act of Congress, analogous to its jurisdiction over treaties. The Court decided to consider the agreement like a treaty, while pointing out that it was not a treaty. In the cases involving the postal "convention" the courts could not agree whether it was a treaty, a law, or an executive regulation or agreement.

109. Those members of Congress who in the debate of May 1 to 9, 1945, advocated a constitutional amendment, shared no such theory. They deplored the abuses of the executive agreement and maintained that these might continue unless the amendment were adopted. The authors' concession that the effect of the executive agreement could be tempered by having Congress approve the executive agreement in what they call a Congressional-Executive agreement, is now unknown and would probably require an amendment to the Constitution. The authors assert (McDougal and Lans, *Treaties*, at 317, 338, 346) that the President "might" disregard acts of Congress and make his own agreements within his unstated constitutional powers, claimed on various pages to be in effect unlimited (see *supra*, p. 620). This would make him literally omnipotent. And if he has power to make his independent executive agreements prevail over acts of Congress, they must also prevail over treaties.

110. See BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (1902) 370.

111. *B. Altman & Co. v. United States*, 224 U. S. 583 (1912).

It actually is an administrative regulation carrying out a mandate from Congress, which has left the power to conclude such agreements to the Postmaster General and the President. Since it involves no vital private interest, but at most an administrative matter, it seems proper to leave the question of reciprocal postal arrangements for letters and parcels and money orders to an executive official qualified to pass upon such questions.

That brings up the tariff agreements concluded pursuant to the Acts of 1890, 1897, 1909, 1922, 1930. In all these cases Congress had indicated the rates that it wished to apply if the President found certain facts to exist or if he made a reciprocal agreement with a foreign country. The constitutionality of the delegation of power in such cases has been readily sustained in *Field v. Clark*, *Hampton v. United States*, and other federal cases.

But in the Trade Agreements Act a different question is involved. Here, analogous to the postal cases, Congress delegated the rate-making power to the Executive within a limit of 50%; the question raised is the same as in the *Panama Refining* and *Schechter* cases, whether Congress can delegate that much legislative power to the Executive.¹¹² While an argument can be made on both sides, it seems somewhat unusual to characterize as "ludicrous"¹¹³ the suggestion of those distinguished Senators and scholars who consider such delegation to be too great and therefore unconstitutional. So far as the writer is aware, the Government has not aided the effort to find a justiciable case which would place that issue before the courts.

The principal court cases involving the executive agreement made under the President's independent power—aside from the *Walls* case in Washington Territory—arose out of the Litvinov assignment of Russian Government assets in the United States. There Justice Sutherland in a dictum in the *Belmont* case had considered the assignment to be "one transaction" with the recognition of the Soviets,¹¹⁴ an obviously Presidential function. He mentioned this only in connection with the view that the executive agreement, which was a letter signed

112. Sayre, *The Constitutionality of the Trade Agreements Act (1939)* 39 COL. L. REV. 751, argues that an "intelligible principle" has been laid down in the Act, and that the trade agreements are like other tariff executive agreements concluded under other acts. The issue turns on the extent of congressional standard or principle and, conversely, of Presidential discretion. Sayre defines the executive agreement as "embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature." These "usually take the form of executive agreements." *Id.* at 755.

113. McDougal and Lans, *Treaties*, at 275.

114. "The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction. . . ." *United States v. Belmont*, 301 U. S. 324, 330 (1937).

by Litvinov accepted by the President,¹¹⁵ prevailed over state laws.¹¹⁶ He admitted the assignment was not a treaty. The case arose only on the motion to dismiss the complaint of the United States, without regard to the Fifth Amendment or the policy of New York disapproving extraterritorial confiscations of property in New York. The case is dangerous and poorly decided because it seems to infer that the President, alone, without legislative support, can change the rights of private property in the United States.

In the following case, *United States v. Pink*,¹¹⁷ decided on the authority of the dictum in the *Belmont* case, Douglas, J., held, for the majority, over a vigorous dissent of Stone, C. J., and Roberts, J.,¹¹⁸ that the Soviets had confiscated the property owed by Americans to Russian citizens in New York and had so intended, that the Litvinov assignment had assigned this property to the President for the United States, that the Fifth Amendment protecting the foreign stockholder and creditor from confiscation could be disregarded by the United States,¹¹⁹ and that New York policy opposing extraterritorial confiscation was overruled by the assignment. In spite of the fact that no other foreign country has given to Russian confiscations applied to foreign-situs

115. The letter provides, inter alia, that the "Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals. . . ." *United States v. Pink*, 315 U. S. 203, 212 (1942). No one present apparently thought that this included anything but Russian Government assets or that it included American private property not owed to the Russian Government. Otherwise, the Solicitor General would hardly have argued that the reason the Russian Government could seize the money was because the credit had a "locus" in Russia. The assignment related only to assets to collect which the Soviets could bring suit here. Would anyone have thought that the Soviets could get a judgment confiscating American-held property?

116. The superiority of treaties over state laws extend to "all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not *and cannot be subject to any curtailment or interference on the part of the several states.*" *United States v. Belmont*, 301 U. S. 324, 331 (1937) (emphasis supplied). There is no suggestion here that a treaty and an executive agreement are "entirely upon a par," as the authors claim. McDougal and Lans, *Treaties*, at 261.

117. 315 U. S. 203 (1942).

118. Stone, C. J., dissenting, said (*id.* at 242): "As my brethren are content to rest their decision on the authority of the dictum in *United States v. Belmont* . . . without the aid of any pertinent decision of this Court, I think a word should be said of the authority and reasoning of the *Belmont* case and of the principles which I think are controlling here."

119. Yet the authors say, as to treaties: "It can be taken for granted that the due process clause of the Fifth Amendment and other specific substantive provisions of the Constitution constitute limitations on the provisions which can be enforced as parts of approved and ratified treaties." McDougal and Lans, *Treaties*, at 315. I agree with the authors rather than with the Court, for the executive agreement can hardly afford the Executive more discretion than a treaty. As to the binding force of the Fifth Amendment on the treaty or agreement see Littauer, *The Unfreezing of Foreign Funds* (1945) 45 COL. L. REV. 132, 162 *et seq.*

property extraterritorial effect, and that Russian lawyers assure me that the Soviet law did not purport to confiscate foreign-held property, the Court held that the agreement, as an incident of recognition and the settlement of claims, had "a similar dignity" as a treaty.¹²⁰ Never in American history has such a conclusion as to extraterritorial confiscations or a simple executive agreement been reached, but on its foundation the gentlemen's thesis rests. The fact that the executive agreement had "a similar dignity" only so far as concerns its effect on recognition and in overruling state policy is not emphasized. The *Belmont* case had used the analogy of protocols, *modi vivendi*, tariff agreements, etc.,—all "routine" in character or made under act of Congress; the citation of John Bassett Moore's article shows that no wide extension of the analogy was intended. The *Pink* case held the assignment not to be a treaty, but so far as concerned New York policy to have the same overriding effect.¹²¹

The *Pink* decision raises several questions. If this was a settlement of claims, why was about \$5 millions accepted and \$300 millions practically sacrificed? The \$300 millions of unpaid American claims arising out of confiscations in Russia was the ostensible reason for non-recognition. Russian confiscations of property in New York were not mentioned. The settlement of the \$300 millions of claims arising out of Russian confiscations in Russia, instead of being made a condition precedent, was made only a condition or promise subsequent, and the Soviets have never gotten around to making a settlement. If the claims are regarded as valid in international law, they have been jeopardized by the unfounded dictum, repeated unwisely since the *Oetjen* case,¹²² that recognition "validates" the acts of the revolution from the beginning of its existence. "Validates" doubtless was intended to mean "authenticates." If debts owed by Americans to Russians in New York have been confiscated, why has not Russian privately-

120. That *United States v. Pink* was confined to the effect of an assignment coincident with recognition and its effect on local laws contrary thereto, see Note (1945) 58 HARV. L. REV. 612, 614. Douglas, J., says (315 U. S. at 230): "Recognition and the Litvinov Assignment were interdependent." He is still referring to recognition when he says (*ibid.*): "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." By referring to John Bassett Moore's article on *Treaties and Executive Agreements* (1902) 20 POL. SCI. Q. 385, he indicates that the executive agreement has limited functions to perform and is not, as the authors would have it, on a "par in every respect" with the treaty. In the next paragraph he refers, as the *Belmont* case did, to the fact that the Litvinov assignment prevails over New York public policy.

121. It was not "squarely held" (McDougal and Lans, *Treaties*, at 311) in the *Belmont* and *Pink* cases that "agreements made under the President's independent constitutional authority were binding on all courts. . . ." *Ibid.* Only one, the Litvinov assignment, was upheld, because that was an incident of recognition, an executive function.

122. See *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302 (1918); *United States v. Pink*, 315 U. S. 203, 233 (1942).

owned property in New York been confiscated? If the Russian confiscations in Russia are deemed invalid, how is it that the confiscations in New York are deemed valid, or at least condoned, since the United States becomes the beneficiary? The New York courts still seem to hold that foreign confiscations are invalid in New York when the United States does not become the beneficiary.¹²³ From the slender authority of the *Pink* case, criticized as erroneous by the Chief Justice and by numerous students of the subject,¹²⁴ no such far-reaching conclusion as the interchangeability of treaty and executive agreement can be inferred.

The *Curtiss-Wright* decision¹²⁵ involved a Presidential embargo laid under the provisions of an act of Congress. A dictum as to the scope of federal power admitted that the President was bound by the Constitution,¹²⁶ and said nothing to promote the prestige of the executive agreement. In so far as the dictum related to the case before the Court, it extolled only the President's unlimited power of "negotiation" and "inquiry," which would hardly be denied. For the rest, historians have challenged the Justice's views of the "inherent power" of the Federal Government over foreign affairs. In his Blumenthal Lectures at Columbia University in 1918 he himself had plainly stated that he considered the executive agreement as carrying only a "moral" obligation, administrative in nature.¹²⁷

The authors' opus under reply criticizes my view that the executive agreement was only a supplementary device designed to accomplish minor arrangements within the limited powers of the Executive to deal with diplomatic affairs and as Commander-in-Chief¹²⁸—leaving aside his delegated functions carrying out an act of Congress. The nature of what the President could do was quite well understood up to the time of the studies published before 1930. To be sure, the military powers opened the door to armistices and the war of 1917 led to the Lansing-Ishii Agreement of that year, with its secret clause. The only way to account for the few important agreements concluded without the Senate is to assume that the Senate tacitly or by implementing legislation acquiesced in them.

123. *Bollack v. Société Générale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (1st Dep't 1942).

124. See Borchard, *Extraterritorial Confiscations* (1942) 36 AM. J. INT. L. 275 and citations in 53 YALE L. J. 664, 682, n. 67.

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

126. Sutherland, J.: "For his conduct [the President] is responsible to the Constitution." *Id.* at 319, quoting from a report of the Senate Committee on Foreign Relations, 1816. ". . . which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. "It was not within the power of the President to repeal the Joint Resolution. . . . Congress alone could do that." *Id.* at 331-2.

127. See SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919) 120.

128. See in support of this view Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, 351, and *passim*.

Since 1933 there has been a considerable extension in the use of the executive agreement, and it has been employed for purposes never contemplated by statesmen or writers before 1930. This movement was accelerated since the *Curtiss-Wright* decision in 1937, avowing a wide inherent power of the Federal Government to deal with foreign affairs. But these examples of the expanded employment of the executive agreement instead of treaty are not evidence of approved practice but of the encroachment of the Executive on the Senate prerogative. They are not "usage," but "abuse of power." As remarked before the Senate Committee on Commerce,¹²⁹ which was primarily interested in this question of encroachment by the Executive, if the Senate acquiesces often enough in this invasion of its rights, even under the guise of the war power, they may ultimately lose in practice, though not in law, their constitutional power. They are now earnestly engaged in restoring the treaty power to its constitutional status and it seems that the Constitution will not be further upset. The movement had gone so far that an official of the Treaty Division actually wrote a large volume in 1941, adopting the thesis that anything that could be done by treaty could now be done by executive agreement. In reviewing that book I ventured to question the validity of the thesis.¹³⁰ The authors under reply adopt the same argument, but temper the thesis by requiring the approval of Congress instead of the Senate two-thirds rule, thus proposing a solution devoid of practical merit.

Important cases in which the Congress has "authorized" the Executive to act,¹³¹ such as joining the ILO and other international bodies, settling the war debts or entering into reciprocal tariff agreements, both to be approved by Congress, do not demonstrate that the executive agreement is a constitutional compact or is like a treaty. The Atlantic Charter,¹³² ostensibly recorded on scraps of paper, can hardly be called the "supreme law of the land." The President's agreements to submit claims in favor of the United States to international arbitration have not been so designated. Even his pledge not to make separate peace in so-called World War II has not been so characterized. We all know that he has wide authority as a diplomatic officer and Commander-in-Chief to make certain agreements on his own responsibility with foreign Powers. But no authority (except the *Pink* case, as to the Litvinov assignment, and other cases where Congress directed

129. *Hearings before a Subcommittee of the Committee on Commerce on S. 1385, 78th Cong., 2d Sess. (1944) 151.*

130. Book Review [of McClure, *INTERNATIONAL EXECUTIVE AGREEMENTS (1941)*] (1942) 42 *COL. L. REV.* 887.

131. See McDougal and Lans, *Treaties*, at 205, 238-44.

132. U. S. EXEC. AGREEMENT SER. No. 236 (1941) 4; it is incorporated by reference in the agreement on war aims made by the executive with Soviet Russia, U. S. EXEC. AGREEMENT SER. No. 253 (1942).

the making of the agreement) has ventured to raise any of these to the category of constitutional treaties or the "law of the land." The same is true of the agreements, published and unpublished, made at Yalta,¹³³ Casablanca, Teheran and other foreign parts. Indeed, the "destroyer deal," whose legal validity I have questioned¹³⁴ as an act of war, gives rise to the question whether the power as Commander-in-Chief has not been unduly employed and should not be restricted by Congress.¹³⁵

7. *Modification.* It is blandly asserted by the gentlemen that "It has long been established that the President may modify a previously ratified treaty by an executive agreement with the obligee nation if the

133. "President Truman . . . can place his own interpretations on the Yalta understandings." Crawford, *The Double Talk of the Liberals* (May 1945) COMMON SENSE 6, 9.

134. Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases* (1940) 34 AM. J. INT. L. 690; 53 YALE L. J. 664, 676, n. 41. Professor Corwin also challenges it as a misconstruction of two acts of Congress. Corwin, *Dumbarton Oaks and the Constitution—An Interview* in MONEY AND THE LAW (N. Y. U. L. Q. SUPP. 1945) 131, 138.

135. It should be noted that practically all the cases mentioned by the authors in Part IV are executive agreements made pursuant to act of Congress. The Senate Committee is now withholding its assent to the aviation treaty, pending an explanation as to why four other Chicago agreements were concluded as executive agreements. The oil and the St. Lawrence agreements have been mentioned. The wheat agreement should have been adopted as a treaty.

The first part of the authors' Part IV (McDougal and Lans, *Treaties*, at 262-8) deals with acquisition of territory and shows not the interchangeability of executive agreements and of treaties, but of acts of Congress and treaties in certain matters. By italicizing President Tyler's justification of any means for accomplishing a desired result (" . . . *The great question is not as to the manner in which it shall be done . . .* ", *id.* at 263), the authors may suggest their approval of the philosophy that the end justifies the means.

Justice White in the *Insular* cases (*id.* at 267) held that an act of Congress was necessary to "incorporate" territory after a treaty was signed to annex it. The United States has never been squeamish as to the particular devices used, treaty or joint resolution, in annexing territory. The "series of trade agreements . . . negotiated in the 1820-1840 period" (*id.* at 273) were local arrangements alleged to have been made by naval officers or merchant vessel captains with native chieftains in Tahiti and Sulu. The *Allman* case (cited *id.* at 274) involved only a question of the Supreme Court's jurisdiction, not the validity of trade agreements.

The Texas and Hawaii annexations are characterized as accomplished by Congressional-Executive agreement as a method of annexation (McDougal and Lans, *Treaties*, at 308). This seems unjustified. It was done by joint resolution of Congress alone. See WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 275. Texas and Hawaii were both absorbed so that there was no one to question the annexation by Congress. The exchange of joint resolutions or a supposed "offer and acceptance" is only figuratively an executive agreement. No mention is made of the fact that the slavery issue, Mexico's threat to make the treaty a *casus belli*, and Congressional dislike of Tyler, had anything to do with the defeat of the treaty. See MOORE, *THE PRINCIPLES OF AMERICAN DIPLOMACY* (1918) 350.

No executive agreement has ever been declared invalid because few have been considered and those few have been tariff and postal agreements, embargoes, etc., under "authority" of Congress, with the principal exception of the Litvinov assignment. Possibly the *Watts* case and *Tucker v. Alexandroff* exemplify simple executive agreements under the President's power.

agreement is within his constitutional powers." ¹³⁵ Again, it is said that "executive agreements have not infrequently been utilized as a method of altering treaties." ¹³⁷ This would be a startling proposition if true. It would mean that after a treaty has had the formal approval of the Senate, the President alone could modify or alter the treaty and by executive agreement change its tenor, its character and its terms. To announce such a proposition is to answer the assertion. It is in fact contradicted by a uniform practice, ¹³⁸ in which this government has repeatedly disavowed the power of the Executive to waive, alter or modify treaties concluded with the vote of the Senate.

In response to a request from Cuba to waive the preferential tariff on sugar, as provided under the Treaty of 1902, the Department of State took the position that "the Department of State has no power to waive the American tariff preference on sugar or any other article included in the treaty with Cuba. Such waiver would be a partial abrogation of that treaty, which would require the concurrence of the legislative branch of the Government." ¹³⁹

The United States enjoyed extraterritorial rights in Morocco under a treaty of 1836. France gradually took over the administration of the country and asked the United States to adhere to an agreement between France and Germany of 1910. The Department of State replied that:

" . . . as the adherence of this Government to such an agreement would seem to imply the modification of certain of its existing treaty rights, the consent to such adherence on the part of the United States involves the conjoint action of the treaty-making powers of this Government and our acceptance of the agreement in question could therefore be made only by and with the advice and consent of the Senate." ¹⁴⁰

Again, when France in 1919 wished to extend the treaty of 1822 by tacit renewal until it was replaced by a new treaty, the Department replied:

136. McDougal and Lans, *Treaties*, at 317.

137. *Id.* at 334. See also *id.* at 209 ("numerous precedents sanction use of a simple executive agreement to alter a treaty or any other international compact"), 248 (the President has "authority to enter into agreements which supplement or modify treaties"), 316 ("executive agreements have been frequently used to modify or clarify treaties").

138. Recorded in 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1943) 333-8. The Franklin episode involved an interpretation by Franklin of the Treaty with France of 1778, under instruction from the Continental Congress. See McCURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941) 37.

139. *FOREIGN RELATIONS: 1911* at 106. See also HACKWORTH, *op. cit. supra* note 138, at 333.

140. *FOREIGN RELATIONS: 1911* at 622. See also HACKWORTH, *op. cit. supra* note 138, at 333.

" . . . the Government of the United States is not in a position to agree to the proposal. . . . The suggestion of the French Government amounts . . . , in my opinion, to a proposal to modify the terms of a provision of the treaty, a proposal which is not susceptible of execution on the part of the Government of the United States in the manner suggested. . . ." ¹⁴¹

Even Congress cannot modify a treaty. In an opinion of the Solicitor for the Department of State in 1920 he advised the Secretary:

" . . . Congress may pass an act violative of a treaty. It may express its sense that a treaty should be terminated. But it cannot in effect undertake legally to modify a treaty no matter what methods it may employ. In doing that it, in effect, attempts to conduct diplomatic negotiations and to encroach on the treaty-making power composed of the President and the Senate." ¹⁴²

This is not to say that the President has not occasionally interpreted the meaning of treaties by exchange of notes,¹⁴³ suspended the operation of a treaty temporarily,¹⁴⁴ or extended its duration temporarily.¹⁴⁵ On occasion he has even been considered the societal agent of the United States who could give notice of the termination of a treaty, but rarely has he done even this without assuring himself of the support of the House or Senate or both.¹⁴⁶

On the other hand, he feels free to bring about a change in executive agreements concluded within his powers without consulting the Senate. This can be done by a new agreement or unilateral withdrawal from an old one.

8. *Submission.* A treaty is submitted to the Senate in a formal procedure for its full and free consideration. The Senate may consent to it,¹⁴⁷ reject it, amend it and make reservations. There is no provi-

141. 2 FOREIGN RELATIONS: 1919 at 229-30. See also HACKWORTH, *op. cit. supra* note 138, at 334.

In answer to a request to modify the tariff treaty with Muscat, the Department replied: ". . . In view of constitutional requirements, however, the United States is not in a position to enter into an exchange of notes the purpose of which is to amend an existing treaty." Quoted in HACKWORTH, *op. cit. supra* note 138, at 335. There are numerous other notes to the same effect printed in HACKWORTH.

142. Quoted in HACKWORTH, *op. cit. supra* note 138, at 324.

143. Protocol of Sept. 2, 1937, interpreting Art. I of the Extradition Treaty with Greece, 51 STAT. 357 (1931); *cf.* agreement with France, Feb. 23 and March 4, 1933, 48 STAT. 1769, interpreting Art. 7 of the Consular Convention of 1853.

144. See HACKWORTH, *op. cit. supra* note 138, at 338.

145. See WILSON, HANDBOOK OF INTERNATIONAL LAW (3d ed. 1939) 225-6; 32 STAT. 1839 (1899); HERSHEY, INTERNATIONAL LAW AND DIPLOMACY OF THE RUSSO-JAPANESE WAR (1906) 318 n. (tacit acquiescence in continuance of expiring Hague Declaration on Projectiles during the Russo-Japanese War). *Cf.* 50 STAT. 1433 (1936).

146. See HACKWORTH, *op. cit. supra* note 138, at 319 *et seq.*, 329; 2 HAYNES, THE SENATE OF THE UNITED STATES (1938) 671.

147. Up to 1928, only 234 out of 820 treaties had been in any way "tampered" with, *i.e.*, not approved as submitted. See DANGERFIELD, IN DEFENSE OF THE SENATE (1933) 256-7. This includes amendment, rejections, reservations or omission to approve.

sion for the submission of an executive agreement, as its name indicates, to either house. The "Congressional-Executive" agreement proposed by the gentlemen is only possible within those limits circumscribing the power of Congress in Article I, Section 8, whereupon the Executive may make such an agreement as Congress provides for. In spite of the persuasive use by the gentlemen, repeated many times, of the phrase "authorization or sanction," the practice of submitting to the Congress executive agreements of either type, authorized or independent, for ratification or approval, is unknown to the Constitution. It would at once give rise to a conflict with the Senate, as did the Aiken St. Lawrence bill designed to carry into effect the commitments made in the independently concluded executive agreement of March 19, 1941, with Canada. That was the nearest approach of which the writer is aware to what the gentlemen have in mind.

But far from winning the approval of the Senate Committee on Commerce, it seems to have met their overwhelming disapproval. The reason is not far to seek. Instead of "submitting" the agreement to the Congress—it replaced a similar treaty defeated in 1934—it was sent to the Congress merely for its "information." The instrument differed, however, from the usual executive agreement, which goes into force on signature, in that it was made subject to the approval of Congress. Yet Congress had no opportunity to consider the agreement, to amend it or make reservations. The only request upon Congress was embodied in the Aiken bill, introduced nearly four years after the agreement. The bill may be deemed to have incorporated the agreement by reference and provided by its passage for approval, and by its defeat for disapproval. But the agreement itself was not officially before Congress, and of course it could not be changed. The Senate on December 12, 1944, rejected the Aiken bill by a vote of 25 to 56, 14 not voting,¹⁴⁸ in part owing to the novelty of the procedure, since there is much support for the merits of the project. Assistant Secretary Berle made the suggestion that the reason for sending the agreement for the "information" of both houses to be approved by a separate bill instead of submitting it as a treaty to the Senate, was premised on the belief that the matter was so important that it seemed preferable to let both houses pass upon it instead of merely one, where a minority might defeat it. The explanation did not seem to strike the Senate Commerce Committee as very convincing.¹⁴⁹

Let us assume that the Aiken bill could have been amended as Congress desired, and in the end have differed considerably from the agree-

148. 90 Cong. Rec., Dec. 12, 1944, at 9382.

149. See *Hearings before the Committee on Rivers and Harbors on the Subject of the Improvement of the Great Lakes-St. Lawrence Seaway and Power Project*, 77th Cong., 1st Sess. (1941) 45; *Hearings before a Subcommittee of the Committee on Commerce on S. 1385*, 78th Cong., 2d Sess. (1944) 199.

ment of 1941. The gentlemen under reply say that "there is no procedure by which the President can be compelled to resubmit a modified agreement to the other nations concerned for further negotiations."¹⁵⁰ And yet this seems to be constitutional in the authors' view. It would be interesting to find out which instrument controls the United States—the agreement or the Aiken bill which modifies it—and which instrument controls Canada. The authors explain this as the President's power "in many situations . . . to disregard the Senatorial or Congressional veto and consummate agreements on his own responsibility." Thus the President, according to the gentlemen and their novel proposal, is able to defy Congress. This is hardly a persuasive argument for scotching the Senate.

Reference may here be made to the repeated assertion of the gentlemen that the House by its power over appropriations has the power to object to treaties¹⁵¹ and leave them presumably without force. Apart from the fact that the House has never failed to implement a treaty by appropriating the funds called for, they have no such right, though they might have the power to *violate* the obligation of the United States. The treaty is a binding obligation of the United States as soon as it has been ratified by the President, after submission to and approval by the Senate. After that the House is under a duty to carry out the treaty by making the necessary appropriation, though individual members have occasionally asserted in debate that the House had the constitutional power to refuse an appropriation.¹⁵² If they exercised this power, they would violate an obligation of the United States which the country must vindicate as best it may. The late Senator Burton of Ohio was perhaps the last student of the subject to analyze this problem.¹⁵³ Ex-President Taft has expressed himself as follows upon it:

". . . Congress . . . is bound in honor [to make appropriations required by treaty, and when it refuses] it is merely violating the plighted faith of the government. Just so, it may abrogate a treaty obligation by statute, but it does not annul the obligation."¹⁵⁴

150. McDougal and Lans, *Treaties*, at 209.

151. *Id.* at 210, 240, 336, 344.

152. Mr. Henry Tucker, a Member of the House in 1922, seemed to think so. 62 CONG. REC. 7064 (1922).

153. *Id.* at 7069 *et seq.*, and in a separate pamphlet, *THE TREATY-MAKING POWER—CONFERENCE ON THE LIMITATION OF ARMAMENT* (1922).

154. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* (1925) 115. See also Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, 343. Such failure might "nullify" an executive agreement. See CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* (2d ed. 1916) 177. Failure of Congress to make an implementing appropriation does not "nullify" the treaty (McDougal and Lans, *Treaties*, at 336) but *violates* it.

Congress is rarely called on to make an appropriation to carry into effect an executive agreement. It was indirectly done in making appropriations to build a lighthouse on Horseshoe Reef and for the naval bases in 1941, months after the "destroyer deal" of 1940. It is believed that this may be considered a Congressional approval of these transactions, though ratification or consent of Congress was not sought. The Panama transaction of 1942 was justified as an implementation of the treaties of 1903 and 1936, though Professor Briggs says it really involved the execution of the unpublished second executive agreement of May 18, 1942.¹⁵⁵ Appropriations have been and will be required to carry out the UNRRA. Large appropriations would have been required for the unratified St. Lawrence project. In all those cases the critic may find an effort to circumvent the Senate, as was occasionally charged on the floor, but there is a natural tendency, when an appropriation is needed, to avoid approaching Congress twice. In the execution of an executive agreement, it is believed, the House of Representatives has a genuine discretion which they do not have in the case of appropriations executing a treaty.¹⁵⁶

Much criticism has been levelled by the authors against the two-thirds constitutional rule.¹⁵⁷ The two-thirds rule has defeated very

155. See 53 YALE L. J. 664, 675.

156. In the recent executive agreement with Peru for anthropological research and investigation, U. S. EXEC. AGREEMENT SER. No. 438 (1944) there is a provision that it shall not continue in effect if "the Congress of either country shall fail to make available the funds necessary for its execution." Such a clause is not found, so far as I am aware, in any of the treaties of the United States. It occurs, however, in several executive agreements. Where the President wishes to avoid committing the Congress to make appropriations, he avoids making a treaty but substitutes a message to Congress recommending an appropriation. See Karlin, *The Indemnification of Aliens Injured by Mob Violence* (1945) 25 S. W. Soc. Sci. Q. 235.

The arbitration treaties submitted to the Senate between 1897 and 1911 (McDougal and Lans, *Treaties*, Part II, at 558) were merely promises to arbitrate legal questions—excepting all those which are likely to be important. It was fashionable at this period to favor general arbitration treaties. While the Senate may have been overcautious in substituting the word "treaty" for the word "special agreement," implying that the agreement to arbitrate must be submitted to their supervision in each case, they cannot be said to have interfered with any particular arbitration. To justify the criticism made by the authors it would be necessary to show that the State Department has desired to arbitrate a case which the Senate has frustrated. No such evidence can be shown. Secretary Root had no difficulty in acceding to the Senate's wishes in 1908, and thereupon two important arbitrations with Great Britain were held.

157. McDougal and Lans, *Treaties*, Part II, at 558. To show that it is not unusual to require a two-thirds vote for important decisions, as treaty-making was conceived to be (cf. McDougal and Lans, *Treaties*, at 190), a paragraph from the Dumbarton Oaks proposals for two-thirds vote of the Assembly on certain important matters may be quoted:

"2. Important decisions of the General Assembly, including recommendations with respect to the maintenance of international peace and security; election of members of the Security Council; election of members of the Economic and Social Council; admission of members, suspension of the exercise of the rights and privi-

few treaties. Fleming notes seven and Quincy Wright says less than a dozen. Representative Adams, in a table published in the debate on May 9, 1945,¹⁵⁸ maintains that the constitutional amendment proposed by Representative Schwabe, ultimately adopted, requiring a majority of the membership, 218 in the House and 49 in the Senate, would have defeated all the treaties except 3. While offered as a compromise when it was apparent to the Chairman, Representative Hatton Sumners, that a two-thirds vote on his original resolution¹⁵⁹ for majority vote of those *present* could not be obtained, it is open to doubt, if the amendment is ever approved, whether 218 and 49 will be easier to obtain than a two-thirds Senate vote of those present.

Quincy Wright offers different statistics of some 1,000 formal treaties, indicating that a quarter were never perfected, and that of these 250

leges of members, and expulsion of members; and budgetary questions, should be made by a two-thirds majority of those present and voting. On other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, the decisions of the General Assembly should be made by a simply majority vote."

Dumbarton Oaks Draft, c. V, § C (1944) 11 DEP'T OF STATE BULL., No. 276, p. 369. See Art. 18 of San Francisco Charter for somewhat similar provision.

It is common in all constitutions of which I am aware to make important matters subject to a decisive vote, and there were special historical reasons for making two-thirds of the Senators present an essential part of the treaty-making power.

Senator Oscar Underwood, whose resolution for adoption of the Versailles Treaty without reservation was overwhelmingly defeated, is quoted (91 Cong. Rec., May 2, 1945, at 4114) as having said:

"The makers of the Constitution were so careful that a treaty should reflect the mature sentiment of the people of the United States that they required that its ratification should receive a vote of two-thirds of the membership of this body."

It would be a curious evolution if the President, who was brought into the treaty-making procedure only in the last days of the Convention, on September 7, 1787, should now submerge the Senate, whose power he was directed to share. That the agreement was not the ill-considered device it is occasionally represented to be, we quote from Alexander Hamilton's account in the Camillus Papers, 7 WORKS OF ALEXANDER HAMILTON (John C. Hamilton, ed., 1850-51) 518:

"As to the sense of the convention, the secrecy with which their deliberations were conducted, does not permit any formal proof of the opinions and views which prevailed in digesting the power of treaty. But from the *best opportunity of knowing the fact*, I aver, that it was understood *by all*, to be the intent of the provision to give to that power the most ample latitude—to render it competent to all the stipulations, which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations; and competent, in the course of its exercise for these purposes, to control and bind the legislative power of Congress. And it was emphatically for this reason, that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever. I appeal for this, with confidence, to every member of the convention—particularly to those in the two houses of Congress."

158. 91 Cong. Rec., May 9, 1945, at 4423.

159. H. J. Res. 60, 79th Cong., 1st Sess.

unperfected treaties, some 50 were withdrawn or not ratified by the President, some 75 were killed by Senate amendments unacceptable to the President or to the other Power, and about 125 were killed by Senate rejection or inaction.¹⁶⁰ In exercising its power of intervention in approximately one-quarter of the treaties submitted, the Senate exercised its constitutional duty only. It is understood that John T. Flynn will shortly publish a pamphlet on the subject showing that the two-thirds rule defeated very few treaties and improved many. It seems extraordinary to base objections to the Senate on the rejection of the Treaty of Versailles, since no Senator lost his seat by reason of his vote. I have already stated that Woodrow Wilson was responsible for the defeat by not accepting the reservations which were perfectly agreeable to the British and others.¹⁶¹

9. *Durability.* A treaty lasts just as long as its terms provide—with minor exceptions too unusual to notice.¹⁶² The term is occasionally unstated and left indefinite, subject to termination by a specific notice of a given number of months, usually six or twelve. As a rule, the notice is given by the President after joint resolution of Congress or resolution of the Senate. On rare occasions, the President has taken the initiative, either notifying Congress or assuming their acquiescence. Haynes says:

“Denunciation of treaties has usually been by Joint Resolution, originating sometimes in the House, sometimes in the Senate.”¹⁶³

President Wilson declined to enforce Section 34 of the Jones Act, requiring him to abrogate thirty-two commercial treaties prohibiting discriminatory duties, not because he considered that the Executive was superior to Congress or that Congress was impinging on the separation of powers doctrine, as the authors suggest,¹⁶⁴ but because he did

160. Wright, *The United States and International Agreements* (1944) 33 AM. J. INT. L. 341, 353.

161. 53 YALE L. J. 650, 665.

The authors' inferential laudation of the Treaty of Versailles (McDougal and Lans, *Treaties*, at 191-2) we can safely leave to history. In the meantime, numerous distinguished authorities, like Ambassador Bullitt and Mr. Herridge, formerly Canadian Minister to the United States, have expressed themselves in print. One may quote from the work of John Bassett Moore the remark that

“In a current volume on China, a Chinese sage is reported to have declared that the Versailles Treaty was ‘the most uncivilized paper written since men knew how to record thought’ and to have prophesied that it would ‘not only upset the economic balance of the world but lead to more wars.’ ”

6 COLLECTED PAPERS OF JOHN BASSETT MOORE (1944) 432. See also commentary from KEYNES, *THE ECONOMIC CONSEQUENCES OF THE PEACE* (1920) 37-55, reprinted in 91 Cong. Rec., May 2, 1945, at 4132 *et seq.*

162. It is impossible for me to see why the authors devote so many pages to *rebus sic stantibus* and other doctrines of treaty law (McDougal and Lans, *Treaties*, at 339-343).

163. 2 HAYNES, *THE SENATE OF THE UNITED STATES* (1938) 670. See also 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1943) 319 *et seq.*

164. See McDougal and Lans, *Treaties*, at 347-8. See also *id.* at 317, 333.

not think they could or really intended to require him to breach and violate, not legally terminate, thirty-two commercial treaties.¹⁶⁵ The treaties concerning deserters were lawfully terminated under the direction given in the Seamen's Act of 1915.¹⁶⁶

An executive agreement, on the other hand, is terminable at any time at the unilateral wish of one of the parties.¹⁶⁷ This is said despite the fact that it is now becoming customary to make trade agreements for two or three years, subject to termination or mutual extension, health and sanitation agreements for a specific time, usually short, naval and military mission agreements up to four years, and agricultural experiment station agreements up to ten years. They frequently provide "unless terminated or extended," sometimes without stating how this shall be done. Sometimes the executive agreement runs for a given period, expressly terminable by notice.

But it is believed that none of these agreements legally binds the nation, because unratified by the Senate. It seems to me that any future President is completely unbound and perfectly free to cancel the agreement if he so desires.¹⁶⁸ The fact that numerous *modi vivendi*

165. 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 323. See also Dep't of State, Press Release, Sept. 24, 1920, reprinted *ibid.*:

"... the President was directed within ninety days after the Act became law, to notify the several Governments, with whom the United States had entered into commercial treaties, that this country elected to terminate so much of said treaties, as restricted the right of the United States to impose discriminating customs duties on imports and discriminatory tonnage dues, according as the carrier vessels were domestic or foreign, quite regardless of the fact that these restrictions are mutual, operating equally upon the other Governments which are parties to the treaties, and quite regardless also of the further fact that the treaties contain no provisions for their termination in the manner contemplated by Congress.

"The President, therefore, considers it misleading to speak of the 'termination' of the restrictive clauses of such treaties. The action sought to be imposed upon the Executive would amount to nothing less than the breach or violation of said treaties. . . . Such a course would be wholly irreconcilable with the historical respect which the United States has shown for its international engagements, and would falsify every profession of our belief in the binding force and the reciprocal obligation of treaties in general."

Congress acquiesced in this policy.

President Wilson did not decline "to terminate the Congressionally proscribed provisions of . . . executive agreements" (McDougal and Lans, *Treaties*, at 347), because there were none. Congress said nothing about executive agreements in 41 STAT. 988. McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941) 23-4, the authors' source of authority, makes no mention of any executive agreement.

166. See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 328.

167. See Todd, *The President's Power to Make International Agreements* (1927) 11 CONST'L REV. 160, 167; WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922) 236; COLEGROVE, THE AMERICAN SENATE AND WORLD PEACE (1944) 105. See correspondence *in re* "Taft Agreement" with Panama, abrogated in 1923, in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 432.

168. See COLEGROVE, THE AMERICAN SENATE AND WORLD PEACE (1944) 105.

and other agreements have been permitted by succeeding Presidents to stand unaltered by renewal or otherwise, such as the provisions of the unratified Bayard-Chamberlain Treaty of 1888, which was kept alive by *modi vivendi* until 1912, is no evidence at all of the fact that it was not necessary to renew it by *modi vivendi* or keep it alive by consent. It may be unilaterally terminated at any time.¹⁶⁹

Quite different is the status of a treaty. That cannot in the absence of express agreement be terminated at the will of one of the parties. The very fact that it is a binding international obligation precludes a country from escaping that obligation prematurely. Even an act of Congress departing from the treaty does not relieve the country of its liability thereunder. The difference from the executive agreement is fundamental. It is the same as between a tenancy for life or a fixed term and a tenancy at will.

10. *Secrecy.* One of the major objections to the extension of the use of executive agreements is the opportunity they afford for secrecy. The Roosevelt-Katsura Agreement of 1905 was not known until 1924, when Tyler Dennett disclosed it; the Lansing-Ishii Agreement had a secret clause unknown until 1922; the Yalta agreement secretly provided for three votes for Soviet republics. These agreements are now known. How many unknown agreements have thus been entered into we may not know for the indefinite future.

No such opportunity is available in the case of treaties. We have never had a secret treaty or secret clause of a treaty, as is common to European diplomacy. The provision for publicity as a condition of its binding character preclude such secrecy, and not only the practice but the theory of treaty-making forecloses the possibility of secrecy. That is an asset to be appreciated, not deprecated.

This analysis of some of the principal differences between the treaty and the executive agreement will have served as a sufficient commentary upon the authors' allegations concerning "the identical legal consequences of treaties and executive agreements."¹⁷⁰

IV

If it is true that the limitations on the powers of Congress deal only with its power to legislate on domestic affairs and not with its power to authorize or sanction agreements with foreign Powers, then Congress can arrogate to itself by the same majorities that enact legislation the power to control all subjects which could become the subject of executive agreements with foreign Powers. As will presently be observed, they could thus acquire jurisdiction over all state matters.

169. See authorities cited *supra* note 167.

170. McDougal and Lans, *Treaties*, at 307.

The only difference between a treaty and a statute would be that in one case the President signs first and in the second case the President signs last. Nor is this all. If Congress could acquire control over the matters in question because they become the subject of international agreement, it could also enact legislation to carry out the international agreement and thus acquire domestic jurisdiction over the subject, as *Missouri v. Holland* clearly indicates. At least in requiring two-thirds vote of the Senate some check upon an ambitious President was provided. Under the new proposal, there are to be no checks, as will presently appear, if the President is of the same party as the majority in both houses; and a treaty becomes practically the equivalent of a statute. In the fact that the President and a subservient majority of the party in control could by the simple device employed in a statute (omitting the gentlemen's suggestion that the President could disregard the action of Congress and make his own agreements¹⁷¹) assume federal control of any matter we find an exotic method of changing the Constitution. Little more need be said to show the impropriety of the Congressional-Executive agreement which the gentlemen advocate.

It is the writer's belief that if the gentlemen's proposal or the constitutional amendment for majority vote were ever to be adopted, voting on treaties might become more political whenever one or both houses were *not* in the control of the President's party.¹⁷² It may be true that occasionally politics has entered into the consideration of the question. This is not necessarily reprehensible and cannot be foreclosed in a popular government. Politics has in fact played a minor role since most treaties are adopted with relative speed and not on party considerations. From 1899 to 1909 the Democrats controlled less than one-third of the Senate. From 1932 to 1942 the Republicans had the same experience. While the role of politics is minor, antagonism to a particular President or Secretary of State accounts for some votes. If the Constitution should now be changed making bare majorities adequate, politics would be likely to become a much more important factor in the consideration of treaties. If the two houses or the President did not all owe allegiance to the same party, the chances are that the defeat of the President's treaties would become a political issue, a fact which might defeat many treaties. The assumption that ratification would by the amendment become much easier may be mistaken.¹⁷³

171. *Id.* at 317, 338, 346.

172. The condition of my remark, that one or both houses be *not* under the control of the President's party, was essential to my statement. It is misrepresented by the gentlemen, doubtless unwittingly, by the omission of the condition. McDougal and Lans, *Treaties*, at 190. See also, in debate, Mr. Baldwin (91 Cong. Rec., May 2, 1945, at 4129); Mr. Springer (91 Cong. Rec., May 8, 1945, at 4399); Mr. Ludlow and Mr. Robsion (91 Cong. Rec., May 8, 1945, at 4407). Miss Summer stated that the five-minute rule prohibited real debate in the House (91 Cong. Rec., May 2, 1945, at 4131).

173. See Mr. Reed of Illinois, who believes that the new rule might slow up the consideration of treaties, *id.* at 4138. See also Miss Summer, *id.* at 4131.

Representative Ludlow of Indiana, in his address to the House of Representatives, May 1, 1945,¹⁷⁴ demonstrated that majority vote in the two houses, when they are of the same party as the President, is no check upon him at all. He showed how Mr. Farley, Postmaster General in the second administration of Franklin Delano Roosevelt, was able by telephone to muster sufficient Democratic votes to defeat by a narrow margin the Ludlow Resolution calling for a popular referendum as a condition of declaring war. The administration usually has at its disposal sufficient instruments of pressure to make a majority under their party control subservient to its wishes. Much more difficult is it to control two-thirds of the Senate, some of which must generally be recruited from the minority party, even if partisan politics played such an important role as Mr. Holt believes.¹⁷⁵

Representative Ludlow had shown in an earlier speech¹⁷⁶ that the President's control of a majority in House and Senate by patronage and other forms of influence is sufficient to disable these majorities from furnishing the necessary checks to his executive power, so that mere majority vote dispenses with that necessity for checks and balances which the Founders sought to insure. Others showed that, far from increasing legislative control, the substitution of a majority for the two-thirds rule would decrease it.¹⁷⁷ If now it should be contended that the President alone has the power to make executive agreements of all types in the entire field of foreign relations¹⁷⁸ and that an executive agreement is interchangeable with a treaty, he alone can not only change the statutes of Congress but amend the Constitution if he finds a favorably disposed government, in Canada or Mexico or elsewhere, to make an agreement to that effect.

If, on the other hand, we can conceive of the effectuation of the plan for a Congressional-Executive agreement,¹⁷⁹ as proposed by the gentle-

174. 91 Cong. Rec., May 1, 1945, at 4099. Representative Fellows said: "Treaty ratification must not become a political football to be kicked around by a majority whether that majority be Democratic or Republican. With the two-thirds rule for consent it becomes necessary not only that a majority party concur but that a substantial number of the minority also concur, and thus the treaty represents the desires of both major political parties." 91 Cong. Rec., May 2, 1945, at 4115.

175. See FARLEY, *BEHIND THE BALLOTS* (1938) 361, 362, quoted in 91 Cong. Rec., May 1, 1945, at 4100.

176. 91 Cong. Rec., March 2, 1945, app., at 1009.

177. Mr. Robson, for example, said that the resolution "adds greatly to the power of the President and proportionately weakens the power of Congress." 91 Cong. Rec., May 2, 1945, at 4119.

178. Attorney General Jackson in his opinion on the destroyer deal, August 27, 1940, remarked that the President's power over foreign relations was "not unlimited" since commitments "as to the future" would impair powers vested in Congress. Such obligations "are customarily" committed to treaty form "before the future legislative power is committed." 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, 405-6.

179. Mr. Hinshaw of California has introduced a resolution, ruled out of order in the

men, constitutional amendments could be made with no greater difficulty than are statutes, except that a foreign country must be found to serve as a lay figure for an agreement. All the difficulty of amending the Constitution could thus be avoided by the simple device of finding a country willing to make an agreement and then adopting a joint resolution by majority vote in both houses.

As it happened, there was under discussion on the floor of the House of Representatives on May 1, 2, 7, 8 and 9, 1945, the constitutional amendment proposed by the House Judiciary Committee last December, making the House a participant in treaty-making by majority vote of both houses. Few members appear to have attended the long debate, a fact which *The New York Times* deplored.¹⁸⁰ Apparently not one speaker advanced the thesis of the gentlemen under reply that a Congressional-Executive agreement is already within the power of Congress and that a constitutional amendment is not needed. Possibly on account of the opposition, which includes an overwhelmingly adverse vote of the New York State Bar Association,¹⁸¹ the House resolution was not brought to a vote. Instead, a compromise resolution of Mr. Schwabe, making necessary the approval of a majority of the *membership* of both houses, 218 in the House and 49 in the Senate, was adopted 288 to 88, 56 not voting.¹⁸² If the new rule should ever be adopted, absence or nonvoting would be counted as a negative vote.

But what condemns to sterility the suggestion of a Congressional-Executive agreement by which the Congress purportedly acts in approval of the President's agreement, and what makes it a dangerous device for changing the form of the American Government, is that majorities in Congress could thus, by the same majorities as are required for any statute, arrogate to themselves and drain away all state power on any subject they felt disposed to control. Negotiable instruments, commercial law, the law of contracts and torts, business units and personal status could thus readily become federal powers by the simple enactment of a joint resolution with Presidential cooperation. Thus, the states could lose all their power whenever a favorable Congress could be found. Can it really be supposed that three-quarters of the states would ratify such a proposed amendment or that a favorable majority in the Senate could be found, let alone the two-thirds necessary for the proposal of a constitutional amendment? Or that it can

recent debate on the constitutional amendment, providing that, if a treaty is approved by the Senate, it shall be sent to the House for passage if it deals with a subject within the power of Congress. This is a novel idea which has not received any committee support. See 91 Cong. Rec., May 9, 1945, at 4438-40.

180. N. Y. Times, Editorial, May 9, 1945, p. 22, col. 2.

181. See *Id.* Jan. 20, 1945, p. 12, col. 6.

182. 91 Cong. Rec., May 9, 1945, at 4440.

become a traditional practice without amendment? It seems inconceivable.

No one would deny that the Constitution grows by gradual evolution, least of all a student of constitutional law. That is one reason it has continued to exist with only a few amendments. But to admit this is far from conceding the authors' thesis. Not only is there a difference in the substantive and procedural clauses of the Constitution, but the fact that some clauses have expanded, like the due process and interstate commerce clauses and others, is no reason why the treaty-making clause has become obsolete and a new device, the executive agreement, unmentioned in the Constitution, with or without Congress, has become the overpowering instrumentality represented.

The last-ditch argument of those who oppose a constitutional practice they would improve upon is that the constitutional provision is not "democratic." That is supposed to convince the doubter. If that had anything to do with the issue, I suppose the whole Constitution could be attacked as undemocratic, because the Founders did not too much favor control by the general mass of the people, only some of whom were voters in the separate states. But without using chameleonic terms, there is no reason why important questions should not be decided by more than a simple majority. Until lately this argument and the appeal to "democracy" in treaty-making, as in any other matter requiring a two-thirds vote, was rarely heard. As several of the House members suggested on May 1 and 2, 1945, if a voice for the House in treaty-making is desired, why not require that two-thirds of the House be added to the Senate two-thirds?¹⁸³ Until then, the Constitution is not likely in this respect to be changed.

Charles Cheney Hyde, in discussing the recurrent proposals to strip the Senate of its treaty-making power by substituting majorities, has expressed himself as follows:

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

"At the time of the adoption of the Constitution treaties, themselves distinguishable under the then existing practice from arrangements of lesser dignity, were the usual settings that were employed in the making of compacts of largest import and longest endurance. This circumstance strengthens the view that the exact

183. The Springer amendment to this effect was voted down, 103 to 61. 91 Cong. Rec., May 9, 1945, at 4415.

provisions of the Constitution concerning the making of treaties did more than prescribe the manner in which they were to be concluded. The declaration that the President 'shall have Power by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,' sustains the conclusion that it was not to be rendered abortive by recourse to a different procedure for the use of which no provision was made, and that there were to be found tests of improper evasion in the character of what was sought to be achieved despite the absence of a specific textual prohibition. Otherwise, the scheme for the co-operative action of the President and the Senate would have been a relatively valueless injunction, and the solitary constitutional guide for contracting would have been of slight worth."¹⁸⁴

John Bassett Moore, the greatest authority in the field, authorized the writer to say in a review of McClure's book, where the gentlemen's thesis was first advocated, that Mr. Moore

"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."¹⁸⁵

We may conclude by another quotation from this wisest of statesmen. Speaking of the so-called *intelligentsia* of the country, which he holds largely responsible for foisting on the American people the theory of "peace by force," collective punishment of "aggressors," and Executive control or "leadership" in foreign affairs, John Bassett Moore says, referring to the popular faith in the Kellogg Pact:

"The Pact no doubt makes a strong appeal to our *intelligentsia*, easily the most emotional and most voluble and, as I often think, so far as concerns the realities of international life, the most uninformed, the most injudicious and the most susceptible to propaganda."¹⁸⁶

184. 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1416-7.

185. Quoted in Borchard, Book Review [of McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941)] (1942) 42 COL. L. REV. 887, 890.

186. 7 COLLECTED PAPERS OF JOHN BASSETT MOORE (1944) 22.