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CONSTITUTIONAL LAW-TERMINATION OF TREATIES

COMMENTS

CONSTITUTIONAL LAW—TERMINATION OF TREATIES—The treaty power clause [1] in the Constitution is more difficult to supplement by construction than most parts of that document because the mechanism set up was an innovation—a compromise between the tradition of executive treaty-making and the Colonial feeling that powers of government should be given to representative assemblies.[2] There was no recognized institution to serve as a guide for interpretation as, for example, in the case of the jury trial clause. Furthermore, the dual nature of a

[1] "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." Art. II, sec. 2, paragraph 2.

[2] For a very good discussion of the arguments in the Constitutional Convention over disposition of the treaty power, see FLEMING, THE TREATY VETO OF THE AMERICAN SENATE 3-16 (1930).

treaty—it is a compact with the foreign power and also part of the municipal law—is a fruitful source of confusion. So it is not surprising that the absence of express language in the Constitution concerning termination of treaties left doubts which even today have not been very satisfactorily settled.

If anything is settled about termination of treaties, it is that Congress by legislation can render one ineffective so far as its being part of the municipal law is concerned. In *Foster v. Neilson*[3] it was pointed out that while a treaty is in its nature a contract, in this country it is also part of the municipal law by virtue of Article VI of the Constitution.[4] In *Taylor v. Morton*,[5] Justice Curtis took the next step, holding that Congress could render a treaty ineffective as part of the municipal law, because nothing in the Constitution made a treaty superior to an act of Congress as law; and because if Congress could not repeal a treaty as municipal law, the only means left would be the action of the President and the Senate and the foreign power in making a new treaty revoking the old one. He felt that it was not intended that our government should be made so dependent upon the consent of a foreign power.

It is clear that Justice Curtis considered the effect on the treaty only as part of the municipal law because he said, "In commencing this inquiry I think it material to observe, that it is solely a question of municipal, as distinguished from public law." [6] And farther on in the opinion he says that if Congress departs from the treaty, any complaint should be made to the executive or legislative departments—thus implying that a treaty still exists as a binding compact between the nations after it has been repealed by subsequent act of Congress.

The question was reconsidered in the *Head Money Cases*,[7] where the reasoning and decision in *Taylor v. Morton* were adopted by the Supreme Court. Since that time the ruling has been reaffirmed many times, the most recent occasion being in *Pigeon River Improvement Slide & Boom Co. v. Cox*,[8] where the Court said that the subsequent act of Congress "would control in our courts as the later expression of our municipal law, even though it conflicted with the provision of the treaty and the international obligation remained unaffected." [9]

[3] 2 Pet. (27 U. S.) 253 (1829).

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

[5] (C. C. Mass. 1855) 23 Fed. Cas. No. 13, 799, p. 784, affirmed 2 Black (67 U. S.) 481 (1862).

[6] (C. C. Mass. 1855) 23 Fed. Cas. 784 at 785.

[7] 112 U. S. 580, 5 S. Ct. 247 (1884).

[8] 291 U. S. 138, 54 S. Ct. 361 (1933).

[9] 291 U. S. 138 at 160, 54 S. Ct. 361 (1933).

The termination of a treaty as an international compact is an entirely different matter, but still an important one for the courts of this country because when a treaty ceases to be a treaty, it also ceases to be a part of the supreme law of the land. Unfortunately, the law is not clear as to when a treaty ceases to be a treaty.

It is said so many times that a treaty is a contract, that it would seem natural to assimilate it to contract law. This approach would lead to the view that treaty, as well as other contract, obligations cannot be terminated without consent of the other party or such conduct as would justify repudiation. Looking at treaties in the light of contract law would also compel recognition of the difference between terminating a treaty obligation and announcing an intention not to fulfill it. But, although Justice Curtis in *Taylor v. Morton* clearly felt that a treaty obligation could not be terminated unilaterally, subsequent discussion of the matter has not been clear. This uncertainty as to what is termination of a treaty has resulted in confusion as to who may terminate a treaty.

As one considers the matter de novo, it would seem reasonable that a treaty be terminated by the same power that made it—the President by and with the consent of the Senate. It is not doing great violence to the letter of the Constitution to say that a grant of power to make includes the power to unmake—especially since there is no express provision for termination. This construction is also supported by policy—since the same sort of skill and experience in international negotiation is needed in terminating a treaty as in making it, both powers should be given to the same agency. It might even be said that termination requires the diplomatic skill of the executive department to an even greater degree than does the making of treaties, because termination is most likely to be considered when relations with the other power are more or less strained.

There is judicial recognition of the President's power to terminate a treaty obligation. In *Charlton v. Kelly*,[10] the Court said, "The executive department having thus elected to waive any right to free itself from the obligation . . . it is the plain duty of this court to recognize the obligation . . . as one imposed by a treaty as the supreme law of the land. . . . "[11] This language shows by implication at least the Court's feeling that the President has the power to terminate a treaty contract, a view which is supported by text-writers [12] and expressions of contemporary opinion.[13]

[10] 229 U. S. 447, 33 S. Ct. 945 (1913).

[11] 229 U. S. 447 at 476, 33 S. Ct. 945 (1913).

[12] CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 461 (1916); 1 WILLOUGHBY, CONSTITUTION 585 (1929).

[13] "That the contracting powers can annul the treaty cannot, I presume, be ques-

The President on one occasion at least has terminated a treaty contract securing only the approval of the Senate, his action being pursuant to a provision in the treaty for termination by notice.[14] The question of power was raised at the time and referred to the Senate Committee of Foreign Relations which made a careful study of the matter and reported:

> "The President and Senate could certainly terminate this treaty or any other, with the consent of the opposite contracting party, by the negotiation of a new treaty in terms annulling it. And what is the present case but such consent, providing in advance for its termination on a contingency and without further negotiations.
>
> "The committee are thus satisfied that the notice authorized by the Senate, and given by the President to Denmark, was a proper exercise of the right reserved in the treaty, and that its effect will be to annul the treaty at the expiration of the time limited, both as regards the two Governments and the citizens and subjects of either." [15]

It is interesting to note that both in *Charlton v. Kelly* and the case considered by the Senate committee, the situation was such that the obligation would be terminable under principles of ordinary contract law; so that these two instances fit in with the view expressed by Justice Curtis in *Taylor v. Morton* that a treaty obligation could not be terminated at the will of one party to it. So far, it seems sensible on the basis of reason and policy to say that a treaty in its international aspect can be terminated only as any contract can, and that such termination should be effected only by the President by and with the consent of the Senate.

But things are not so simple as that—at least on the basis of what has been said and done. At the very beginning Congress passed a law declaring the treaties with France to be not legally obligatory upon the United States.[16] On two occasions lower federal courts have said that

tioned, the same authority, precisely, being exercised in annulling as in making a treaty." From a private letter written by Madison, 1 MADISON, LETTERS AND OTHER WRITINGS 524 (1865). And see 5 MOORE, INTERNATIONAL LAW DIGEST 321 (1906).

"They [treaty obligations] 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, J. C. Hamilton ed., No. 64, p. 488 (1788).

[14] 5 MOORE, INTERNATIONAL LAW DIGEST 322 (1906).

[15] S. REP. 97, 34th Congress, 1st Sess., 8 Compilation of Reports of the Committee on Foreign Relations 107 at 111 (1901).

[16] 1 Stat. L. 578 (1798).

Congress can abrogate a treaty.[17] President Grant in a message to Congress said:

> "It is for the wisdom of Congress to determine whether the article of the treaty . . . is to be any longer regarded as obligatory on the Government of the United States."[18]

President Hayes in a later Congressional message said:

> "The authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate. . . ."[19]

And finally, Professor Corwin has also emphatically taken the position that the power to terminate treaty contracts is in Congress in the following statement:

> "All in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is a party belongs, as a prerogative of sovereignty, to Congress alone. This result no doubt transgresses the general principle of the residual

[17] "There are three modes in which congress may practically yet efficiently annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, in cases in which, like the present, such a notice was provided for; or, if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once, by express terms; and even where, as in this case, there is a provision for the notice, I think the government of the United States may disregard even that, and declare that 'the treaty shall be, from and after this date, at an end,' and meet the consequences of their responsibility for a breach of faith with the Russian government. And yet, while I state that as my judgment of the legal proposition, I am not thereby intimating that it is a thing proper to be done, or that such a proposition can be presumed to be entertained by our government, or, if at all, except upon exigencies and under the pressure of considerations of state, of such importance and necessity as compels a departure from good faith. But, as a legal proposition, I suppose it is possible in that way to destroy the legal operation of a treaty." Ropes v. Clinch, (C. C. N. Y. 1871) 20 Fed. Cas. No. 12,041, p. 1171 at 1174.

"This treaty is the supreme law of the land, which Congress alone may abrogate, and the courts of the United States must respect and enforce it." Teti v. Consolidated Coal Co., (D. C. N. Y. 1914) 217 F. 443 at 450.

[18] FOREIGN RELATIONS 255 (1876).

[19] 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 518 (1898).

power of the Executive in foreign relations, but it flows naturally, if not inevitably, from the power of Congress over treaty provisions in their quality as 'law of the land.' Furthermore, by Article I, Section 8, Paragraph 10 of the Constitution, Congress has the power to 'define and punish . . . offenses against the Law of Nations,' and so, it has been generally held, the power to define International Law is general for the United States." [20]

These opinions and precedents do obscure the analysis made above, but they can be explained away with some degree of effectiveness. The Act of 1798 terminating the treaties with France was explained by the Committee of Foreign Relations as an exercise by Congress of its power to declare war [21]—a view supported by the attitude of the Supreme Court in *Bas v. Tingy*.[22] The statements in the two federal cases mentioned were very oblique dicta.[23] If Presidents Grant and Hayes can be said to have laid down an executive precedent, they are "overruled" by President Wilson who flatly refused to denounce treaty obligations when directed to do so by Congress in the Merchant Marine Act of 1920 on the ground that this direction of Congress was an unconstitutional interference with the treaty-making power.[24] And Professor Corwin's contention that the power to terminate treaty obligations flows "naturally, if not inevitably" from the power to repeal the treaty as the law of the land is refuted by the language quoted above from the opinion in the *Pigeon River Improvement* case.[25] All in all, one could still say with some assurance that the power to terminate a treaty rests only with the President and the Senate, if it were not for the recent case of *Van der Weyde v. Ocean Transport Co.*[26]

In that case the Circuit Court of Appeals had said that the federal courts did not have jurisdiction over a foreign seaman's claim against his vessel because of articles 13 and 14 of the Treaty of 1827 with Norway and Sweden.[27] The Supreme Court reversed this decision on the ground that the treaty provisions in question had been abrogated. Section 16 of the Seamen's Act of 1915 [28] directed the President to terminate such treaty provisions as were inconsistent with the act. Pursuant to this direction notice was given to terminate the treaty accord-

[20] CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 115 (1917).

[21] 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS 107 at 110 (1901).

[22] 4 Dall. (4 U. S.) 37 (1800).

[23] See note 17, above.

[24] N. Y. TIMES, p. 1:1 (Sept. 25, 1920).

[25] See text at note 9, above.

[26] 297 U. S. 114, 56 S. Ct. 392 (1936).

[27] 8 Stat. L. 346 at 352 (1827).

[28] 38 Stat. L. 1164 at 1184 (1915); 22 U. S. C. § 258 n. (1915).

ing to its terms, but after negotiation this notice was withdrawn as to all of the treaty except articles 13 and 14.[29] The significant part of the Court's opinion can be set forth in a very short space:

> "we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to articles 13 and 14 was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway agreed to the termination of articles 13 and 14 and her consul cannot be heard to question it." [30]

The Court could have decided the case by saying that the direction to the President indicates a clear intent on the part of Congress that the treaties be repealed as part of our municipal law, and it was not necessary to decide what had happened to the international obligation. But the theory of the decision seems to be that the treaty is no longer law because it is no longer a treaty. The President's action cannot be interpreted as an exercise of the treaty power because the Court says that he was bound to follow the direction of Congress, and because no consent by the Senate is indicated. So this case seems to be a clear holding by the Supreme Court that Congress can terminate a treaty obligation.

The Court in giving its decision cited no cases and made no careful analysis of the principles involved, and the result is not consonant with the most reasonable construction of the treaty power clause. It is unfortunate that the Court missed this opportunity to clarify doctrines which have been so long obscure.

C. R. H.

[29] This action was taken by the State Department during the administration of President Wilson who in 1920 so vigorously resisted a similar direction by Congress (see text above at note 24). The writer has searched unsuccessfully for some expression of personal opinion by President Wilson in connection with the Seamen's Act of 1915.

[30] U. S. 114 at 117-118, 56 S. Ct. 392 (1936).