Michigan Law Review

Volume 51 | Issue 8

1953

EXECUTIVE AGREEMENTS AND THE PROPOSED CONSTITUTIONAL AMENDMENTS TO THE TREATY POWER

John F. Spindler S.Ed.
University of Michigan Law School

EXECUTIVE AGREEMENTS AND THE PROPOSED CONSTITUTIONAL AMENDMENTS TO THE TREATY POWER—The advent of the present administration has brought into full bloom a hardy perennial among the annual crop of proposed constitutional amendments. The emergence of the United States from World War II as the leader of the free nations of the world and distrust of the rapid expansion of executive power under the Roosevelt Administration have given impetus to a movement to check any further expansion of the presidential power to conduct our foreign relations. In addition, many people are alarmed by the possibility that this country might become a party to international agreements which would operate to alter or destroy rights guaranteed to our citizens by the Constitution. The result has been the re-introduction in the Senate this year of two proposals to amend the Constitution in order to limit the power of the executive in making treaties and executive agreements. One of these is the Bricker amendment, sponsored by Senator Bricker of Ohio and some sixty-three other Senators.[1] The other is the briefer but more drastic proposal authored by the Amer-

[1] S.J. Res. 1, 83d Cong., 1st sess. (1953), S.J. Res. 130 as amended, 82d Cong., 2d sess. (1952):

"Section 1. A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

"Section 2. No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.

"Section 3. A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

"Section 4. All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article."

Sections 5 and 6 contain an enabling clause and a ratification clause, respectively.

S.J. Res. 1 was amended in the Senate Committee on the Judiciary and, as amended, reported out on June 15, 1953. As reported, the provisions of the measure are substantially identical to the provisions contained in §1 of S.J. Res. 43, quoted infra note 2.

ican Bar Association.[2] Both of these amendments, if adopted, would effect a substantial change in the present power to make treaties and executive agreements and would shift the balance of power in the conduct of foreign relations from the executive to the legislative branch of government. It is proposed in this comment to discuss only the effect of the amendments on agreements other than treaties, but inasmuch as both amendments provide that executive agreements shall be subject to the same limitations as are imposed on treaties,[3] it is necessary before focusing on the executive agreement aspect of the amendments to give some consideration to their effect on the executive's foreign relations power as a whole.[4]

The Constitution places all power to conduct our affairs with other nations in one agency, the federal government.[5] The foreign relations power is not spelled out in any one clause of the Constitution, but most of the relevant clauses are found in Article II, and place primary responsibility for this task upon the President. He is the Executive[6] and the Commander-in-Chief of the army and navy.[7] He is given the power to make treaties by and with the advice and consent of the Senate.[8] He is given the power to appoint and to receive ambassadors and other ministers.[9] Accordingly, it is his responsibility to manage the daily conduct of our foreign affairs, for he is "the sole organ of the federal government in the field of international relations."[10]

Both directly and indirectly Congress also plays an important role in international affairs. Although all direct negotiations with foreign governments are conducted solely by the President,[11] the Constitution requires the concurrence of two-thirds of the Senators present before

[2] S.J. Res. 43, 83d Cong., 1st sess. (1953):

"Section 1. A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty. Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."

Sections 2 and 3 contain an enabling clause and a ratification clause, respectively.

[3] Id., §1, third sentence, and §4 of S.J. Res. 1, supra note 1.

[4] See generally, Bishop, "Structure of Federal Power over Foreign Affairs," 36 MINN. L. REV. 299 (1952).

[5] The states have no power to engage in international relations. U.S. CONST., art. I, §10.

[6] Id., art. II, §1, cl. 1.

[7] Id., art. II, §2, cl. 1.

[8] Id., art. II, §2, cl. 2.

[9] Id., art. II, §2, cl. 2, and §3.

[10] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216 (1936).

[11] McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I," 54 YALE L.J. 181 at 203 (1945).

a treaty can be made.[12] In addition to senatorial participation in the making of treaties, however, Congress as a whole is given a number of very effective indirect controls over our foreign policy. It has the power to legislate in many areas which, while primarily of domestic concern, nevertheless may be of substantial importance internationally. Among the foremost of these is the congressional power over the purse. The House of Representatives has always insisted on its right to discuss the merits of a treaty before voting on any appropriations which may be necessary to carry it into effect.[13] Indeed, it requires little imagination to see the international complications that may arise in respect to almost every grant of legislative power in Article I, section 8, of the Constitution. Furthermore, in the celebrated case of *Missouri v. Holland*,[14] it was held that Congress has the power through the "necessary and proper" clause[15] to enact legislation for the purpose of effectuating treaties even though, in the absence of a treaty, it would have no delegated power over the subject matter of the legislation. The so-called "which" clause of the American Bar Association amendment[16] is designed to nullify the rule of *Missouri v. Holland*. This, of course, is an effort to preserve states rights from being whittled away by means of the treaty power. Its effect is to leave an area in which, as a practical matter, the United States can have no international dealings which would have internal effects.[17] In order to make an international agreement providing for reciprocal internal legislation of a nature which under our Constitution could not be passed by Congress in the absence of a treaty, it would be necessary to persuade the legislatures of all forty-eight states to enact the contemplated legislation—a rather difficult undertaking for any Secretary of State.

Aside from the "which" clause of the A.B.A. amendment and section 2 of the Bricker amendment, which limits the scope of certain types of treaties with or without congressional approval, the amendments contain essentially the same provisions. They both start with a general

[12] U.S. CONST., art. II, §2, cl. 2.

[13] This has been the practice since the Jay Treaty in 1795. See McDougal and Lans, in 54 YALE L.J. 181 at 240 (1945), supra note 11.

[14] 252 U.S. 416, 40 S.Ct. 382 (1920).

[15] U.S. CONST., art. I, §8, cl. 18.

[16] ". . . which would be valid in the absence of treaty." See note 2 supra.

[17] "This would create a No-Man's Land in foreign affairs. It would require the concurrence of all 48 States to make effective such common treaties as treaties of Friendship, Commerce, and Navigation, extradition, reciprocal inheritance taxation, migratory birds, collection of foreign debts, and status of foreign troops. In this field of foreign affairs our country would not speak with one voice but with 49." Statement by the Secretary of State Before the Senate Judiciary Committee 7 (April 6, 1953), Dept. of State Press Release 174 of April 6, 1953.

prohibition against any treaty which conflicts with the Constitution or abridges any rights enumerated in it.[18] There seems little doubt but that this is the law as it stands today without such a provision,[19] so there is no serious objection to it except that it is unnecessary. Both amendments would also eliminate the possibility of having self-executing treaties, for they provide that "A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress."[20] Under the supremacy clause of Article VI of the Constitution, treaties are the supreme law of the land and binding upon our courts. Some treaties are not intended to have any effect on the internal law of the contracting nations until appropriate legislation is enacted for that purpose. These are styled "non-self-executing" treaties. Others are intended to have immediate effect domestically as well as internationally and in this country would become the law of the land as soon as they were ratified. While it is not always easy to tell from the treaty whether it is intended to be self-executing or not, the amendment, to say the least, is a drastic way of making certain. Moreover, as has often been pointed out, if it is desirable to have congressional surveillance over treaties, that power is already available under the Constitution and has been used, for there is a substantial body of case law to the effect that wherever a treaty conflicts with an act of Congress, the one which is later in time prevails.[21] Thus Congress may abrogate the internal effect of any treaty merely by enacting legislation so providing. The proposed elimination of self-executing treaties might secure additional congressional control over foreign relations, but only at the expense of a great deal of inconvenience and delay, both because of the time it would take to get the necessary legislation through Congress and because of the distrust other nations might have of the ability of our executive to secure the appro-

[18] S.J. Res. 1, §1, supra note 1. Cf. S.J. Res. 43, §1, supra note 2.

[19] The Supreme Court has never declared a treaty unconstitutional. Dicta to the effect that treaties may not conflict with the Constitution are plentiful, however. Geofroy v. Riggs, 133 U.S. 258 at 267, 10 S.Ct. 295 (1890); Downes v. Bidwell, 182 U.S. 244 at 277, 21 S.Ct. 770 (1901); Missouri v. Holland, 252 U.S. 416 at 433, 40 S.Ct. 382 (1920); United States v. Minnesota, 270 U.S. 181 at 207, 46 S.Ct. 298 (1926); Burnet v. Brooks, 288 U.S. 378 at 400, 53 S.Ct. 457 (1933). See also Chafee, "Federal and State Powers under the U.N. Covenant on Human Rights," 1951 WIS. L. REV. 389 at 433-453; 3 SYRACUSE L. REV. 315 (1952).

[20] S.J. Res. 1, §3, supra note 1, is quoted. Cf. S.J. Res. 43, supra note 2.

[21] The leading cases are Alvarez y Sanchez v. United States, 216 U.S. 167, 30 S.Ct. 361 (1910); The Chinese Exclusion Cases, Chae Chan Ping v. United States, 130 U.S. 581, 9 S.Ct. 623 (1889); and The Head Money Cases, Edye v. Robertson, 112 U.S. 580, 5 S.Ct. 247 (1884).

priate congressional action.[22] At no time in our history has it been so necessary that we be able to move surely and swiftly in conducting our foreign affairs. The risk of harm from overly rigid constitutional provisions may be far greater than the risk of harm from any possible abuse of the foreign relations power which the proposed amendments might eliminate.[23] Yet if rigid provisions are inconvenient in the making of treaties, they are doubly so with respect to international agreements other than treaties. To appraise the effect of the amendments on the executive agreement aspect of our foreign relations, it is necessary to attempt some characterization of the executive agreement under the present constitutional provisions.

I. *Executive Agreements*

The Constitution provides that the President shall have power by and with the advice and consent of the Senate to make treaties with other governments. This has never been interpreted to mean that a treaty is the only kind of agreement the United States may make with a foreign power. It is only a permissive grant, for it does not preclude the making of agreements which are not treaties, but which are equally binding in international law.[24] These agreements other than treaties are usually called executive agreements because their chief, but by no means exclusive, use is in the daily conduct of foreign affairs by the executive branch of government. Such agreements have been used from the earliest days of our government but, as has frequently been pointed out, their use has increased greatly as our country has grown in importance internationally.

> "During the first fifty years of government under the Constitution the President is known to have entered into some 27 international acts without invoking the consent of the Senate, while 60 became law as treaties; for the second half-century the figures appear to be 238 executive agreements and 215 treaties; and for the third similar period 917 executive agreements and 524 treaties."[25]

In an annex to the statement of Secretary of State Dulles before the Senate Judiciary Committee in its hearings on the proposed constitutional amendments, it is said that since 1928 there have been listed in

[22] Statement of the Department of State before the Senate Judiciary Committee, annexed to Dept. of State Press Release 174 of April 6, 1953, p. 9.

[23] Statement of the Secretary of State before the Senate Judiciary Committee, supra note 17 at p. 7.

[24] 5 HACKWORTH, INTERNATIONAL LAW 397 (1943).

[25] MCCLURE, EXECUTIVE AGREEMENTS 4 (1941).

State Department publications some 1527 executive agreements compared to 299 treaties.[26] These figures have frequently been cited as evidence that we are abandoning the method which the Constitution provides for handling international relations. The figures are very misleading, however, unless some analysis is made of the subject matter of the agreements. While it is not true that the executive agreement has been and can only be used for relatively minor matters of international concern, it is clear that the great bulk of the daily work of the State Department is conducted through executive agreements. Every exchange of notes with a foreign government which results in an understanding would be an executive agreement under a strict construction of the proposed amendments, but while executive agreements may be loosely defined as any international agreements other than treaties, the term usually refers to a transaction of a somewhat formal nature.[27] The point where ordinary correspondence stops and executive agreements begin is a difficult one to fix. The term executive agreement itself is misleading in that it does not suggest the important part which Congress plays in the making of most of the more important ones. There are really three types of executive agreements: (1) agreements entered into under prior authorization of Congress; (2) agreements entered into by the President alone but subsequently sanctioned or implemented by Congress; and (3) agreements entered into by the President alone under his own constitutional powers.[28] Although no executive agreement has ever been held unconstitutional, there is much disagreement as to the constitutional limitations on the use of this power by the executive.[29]

The basis of the President's power to make agreements with other nations is said to stem from three sources, his power as executive, as Commander-in-Chief, and as the sole diplomatic representative of the United States.[30] It must be pointed out at the beginning that the

[26] Statement of the Department of State, supra note 22, Annex D at p. 16. The publications referred to are the Executive Agreement Series (E.A.S.), Treaty Series (T.S.), and the Treaties and Other International Acts Series (T.I.A.S.).

[27] Moore, "Treaties and Executive Agreements," 20 POL. SCI. Q. 385 at 389 (1905).

[28] Statement of the Department of State, supra note 22, Annex D at 3; McDougal and Lans, in 54 YALE L.J. 181 at 204, 205 (1945), supra note 11. Perlman, "On Amending the Treaty Power," 52 COL. L. REV. 825 (1952).

[29] See McDougal and Lans, in 54 YALE L.J. 181 (1945), supra note 11, and Borchard, "Treaties and Executive Agreements—A Reply," 54 YALE L.J. 616 (1945), for 300 pages of pitched professorial battle. See also Fraser, "Treaties and Executive Agreements," S. Doc. No. 244, 78th Cong., 2d sess. (1944), a rather restrictive view of the power to make executive agreements.

[30] McDougal and Lans, in 54 YALE L.J. 181 at 245 (1945), supra note 11. Not all writers would agree with the inclusion of executive powers as such. See Borchard, in 45

President as sole diplomatic representative of the United States has the power to bind this country under international law in matters over which he has no constitutional authority.[31] It is the position of most nations, including this one,[32] that when the diplomatic representative gives assurances of the validity of his action, the foreign nation is entitled to rely on that and may consider the agreement binding. It is of no concern to the foreign nation what domestic processes the executive must go through in order to legalize the agreement under his own constitution. It is sometimes suggested that because as a matter of international law the executive has the power to bind his government, the right to make such agreements is inherent in our President's power as executive.[33] This is a dangerous assumption to make, for it does not necessarily follow from the fact that the President has the power to bind us internationally that it is not unconstitutional for him to do so. It is true, however, that there are a number of executive agreements which have been upheld by the Supreme Court that cannot be attributed either to the President's power as Commander-in-Chief or as the sole diplomatic representative of the United States,[34] and which therefore must either have been made under an inherent executive power or through some delegation of power by Congress. Attempts have been made to justify certain types of executive agreements on the theory of congressional delegation of power because perhaps the largest and most important group of these agreements arises from acts of Congress requesting that agreements be made with foreign powers and/or providing legislation which is to take effect when, as, and if such agreements are made by the President.[35] The argument is made that since it is generally agreed that all of the power over international affairs is located in the national government, it must be given either to Congress

YALE L.J. 616 at 618 (1945), supra note 29. Fraser, "Treaties and Executive Agreements," S. Doc. No. 244, 78th Cong., 2d sess., 15, 16 (1944).

[31] The Claim of the United States and Venezuela Co., 5 HACKWORTH, INTERNATIONAL LAW 156 (1943).

[32] Ibid.

[33] This notion stems from the broad obiter of Justice Sutherland in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 at 318, 57 S.Ct. 216 (1936), ". . . the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."

[34] Some examples cited in Fraser, "Treaties and Executive Agreements," S. Doc. No. 244, 78th Cong., 2d sess. (1944), include quarantine inspection, load line certificates, issuance of licenses to pilots, civil aircraft, waiver of visa fees, debt funding, exchange of information on narcotics, trade marks, and copyrights.

[35] For a statistical compilation of these agreements according to number and subject matter see Statement of the Department of State, supra note 22, Annex D at 5-12. Of 1527 executive agreements made in the past 25 years, 1139 fall into this category.

or to the President.[36] Any powers which are not given to the President must have been left in Congress. When, therefore, Congress enacts such a statute, it "authorizes" the President to make the agreement. How Congress, which has no power of its own to make an international agreement, can authorize the President to make one is not entirely clear. It has been suggested that the power to make an executive agreement may be separated into several powers, and while the President undoubtedly has the power to conduct all negotiations with a foreign government and to conclude the agreement, Congress has the power to determine foreign policy and to authorize the President to make agreements pursuant to its determination of the proper policy.[37] Assuming that Congress has this power to authorize the President to make agreements, it should be an unlawful act for the President to make such an agreement without prior authorization unless the agreement was within his own exclusive powers. Even though Congress could make the agreement binding internally as the law of the land by a subsequent ratification, that would not make the presidential action any more lawful in the first instance. Yet if this practice is unconstitutional it is surprising that there has not been more furor in its recent use in agreements regarding our participation in various United Nations and other international agreements.[38]

A closer examination of the nature of this power of Congress to authorize presidential agreements only increases the doubts as to its existence. There is, of course, no question but that Congress exercises such a power politically. If Congress indicates its desire that the President make a certain agreement and enacts legislation which is to take effect when he does, it will often be politically inexpedient for the President to refuse to negotiate the agreement. Likewise, if the President makes an agreement, it is within the power of Congress to frustrate it completely either by refusing to enact any necessary implementing legislation in the nature of appropriations or otherwise, or by enacting legislation inconsistent with the agreement. In the latter case there seems little doubt but that the act of Congress would prevail over the

[36] "What is completely certain is that the powers of Congress can be superadded to those of the President, and that the two sets of powers taken together are plenary." McDougal and Lans, in 54 YALE L.J. 181 at 246 (1945), supra note 11.

[37] Id. at 202, 203.

[38] Statement of the Department of State, supra note 22, Annex D at 12, 13, lists nine such approvals since 1944. The furor has not been over the method of joining the organizations but over the possibility that we might become a party to future international agreements which the organizations are considering.

agreement.[39] Although it does not follow from the existence of Congress's indirect methods of control over foreign affairs that whenever Congress gives the President a political go-ahead by "authorizing" the making of an agreement it also confers upon him the constitutional right to do so, it is inescapable that such agreements have been upheld.[40] Even if it is accepted, however, that Congress may authorize the President to make agreements and that the President and Congress together have plenary power in foreign affairs, that does not mean that Congress can authorize the President to make any agreement which he cannot make under his own powers. For example, as has already been pointed out, a treaty operating through the "necessary and proper" clause will permit Congress to enact legislation over which it would otherwise have no delegated power.[41] While not all would agree,[42] this is probably also true in some cases of an executive agreement, for the "necessary and proper" clause gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[43] It is to be noted that it would be a condition precedent to this sort of action that the President have the power under the Constitution to make the agreement in question. It would be reasoning in a tight little circle indeed to say that the President got this power through congressional authorization of the agreement. Congress's power to authorize agreements must, therefore, be limited to situations in which it could act under its delegated legislative powers. Thus even under the view that Congress can authorize executive agreements there will be instances in which the subject matter is not within a power delegated to Congress, nor within the President's own power as Commander-in-Chief or as diplomatic representative. Such a situation has never come before the courts. It would squarely present the problem of whether or not the executive has an inherent power to make agreements which are either to operate in the fashion of a self-executing treaty or to serve as the basis for congressonal action as in *Missouri v. Holland,* for it could be upheld only on that theory. If the President has no such inherent power, then this sort of agreement can be made only by treaty.

[39] Even if the agreement is accorded the status of a treaty this would be so. See note 21 supra.

[40] See note 34 supra.

[41] Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920).

[42] Borchard, in 54 YALE L.J. 616 at 632-636 (1945), supra note 29.

[43] U.S. CONST., art. I, §8, cl. 18.

Closely related to the problem of the exact constitutional basis of the various types of executive agreements which have been made by this country is the question of the extent to which the executive agreement is interchangeable with the treaty as an instrument of foreign policy. Assertions that the two are completely interchangeable[44] and that in fact the executive agreement is the more preferable of the two because it avoids minority control by one third of the Senate and permits the more "democratic" process of authorization by a simple majority of both Houses of Congress[45] have no doubt played their part in creating the present fear of the treaty power. In terms of international law whether we choose to submit an agreement to the Senate for approval and call it a treaty has little effect upon the binding nature of the agreement. That is determined in general by the subject matter of the agreement and the contemplations of the contracting parties. An executive agreement may be intended to be just as permanent as many treaties.[46] In terms of the domestic effect of the agreement upon the United States, however, there may be a substantial difference. As has been noted, a treaty is the supreme law of the land and has been placed by the Supreme Court on a par with an act of Congress. In addition, it is clear under *Missouri v. Holland* that it can have the effect of authorizing congressional action otherwise impossible. Whether the same is true of the executive agreement is a matter of much speculation. There are very few decisions discussing the question of whether an executive agreement is a treaty within the meaning of the supremacy clause of the Constitution. It is apparent, of course, that it would be difficult to get a clear decision in any case where the agreement was authorized or ratified by act of Congress because the act of Congress would be the law of the land in its own right. In that situation the question would probably arise only if Congress had delegated too much power to the President and the agreement had to stand or fall on the basis of the executive's own authority.[47] Accordingly we have only a few decisions dealing with the executive agreements made by the President solely on his own authority. The most notable of these are the decisions of the Supreme Court in *United States v.*

[44] This is the thesis of McDougal and Lans, in 54 YALE L.J. 181 (1945), supra note 11, and of MCCLURE, EXECUTIVE AGREEMENTS (1941).

[45] McDougal and Lans, in 54 YALE L.J. 181, 534 at 535 (1945), supra note 11.

[46] Perlman, "On Amending the Treaty Power," 52 COL. L. REV. 825 at 863 (1952).

[47] Cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216 (1936), which involved not an executive agreement, but an executive order embargoing arms shipments issued pursuant to authority delegated by Congress.

Belmont[48] and *United States v. Pink*[49] dealing with the validity and effect of the Litvinov Assignment.

The Litvinov Agreement was an assignment of certain Russian claims against American nationals including corporations and other business associations which was made in connection with diplomatic recognition of the Soviet Union by the United States.[50] The *Belmont* case was an action brought by the United States in a federal district court to recover one of the claims assigned. The Supreme Court held that an executive agreement made by the President alone under his exclusive power to grant diplomatic recognition to foreign states was valid without the assent of the Senate.[51] The court said that the external powers of the United States were to be exercised without regard for state laws or policies.[52] It was not until the *Pink* case, however, that there was a clear and unequivocal holding that the state policy must yield to the federal policy as announced in the executive agreement. In that case the New York Court of Appeals had held that the law of the situs governed the ownership of the property and that under New York law the Russian nationalization decrees had not been effective to alter property rights in New York and that therefore the United States had received no title through the assignment. The Supreme Court held that our national policy, which they inferred from the agreement, was to recognize the validity of the Russian nationalization decrees and that national policy in the field of foreign affairs overrode any state policies to the contrary.[53] The court did not have to decide that an executive agreement was, like a treaty, the law of the land for all purposes, but the dicta in both the *Pink* and *Belmont* cases were fully that broad.[54] We have no decision holding that an executive agreement takes precedence over a state statute. Any generalizations as to whether executive agreements can override either state or federal statutes is at best a matter

[48] 301 U.S. 324, 57 S.Ct. 758 (1937).

[49] 315 U.S. 203, 62 S.Ct. 552 (1942).

[50] For the series of notes culminating on November 16, 1933 in the Litvinov Assignment, see 1933 DOCUMENTS ON INTERNATIONAL AFFAIRS 460-472 (1934).

[51] United States v. Belmont, 301 U.S. 324 at 330, 57 S.Ct. 758 (1937).

[52] Id. at 331.

[53] United States v. Pink, 315 U.S. 203 at 231, 62 S.Ct. 552 (1942).

[54] "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." Id. at 230. "Plainly the external powers of the United States are to be exercised without regard to state laws or policies. . . . And while this rule in respect to treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to curtailment or interference on the part of the several states." United States v. Belmont, 301 U.S. 324 at 331, 57 S.Ct. 758 (1937).

of speculation because of the limited number of decisions in this field. Most writers seem to agree, however, that an executive agreement will not prevail over a conflicting federal statute.[55] If a subsequent statute is involved, the rule whereby a subsequent act of Congress prevails over a treaty would govern. Where, however, the conflict is between an agreement and a prior act of Congress, if the agreement must yield, it cannot be said that executive agreements are the equivalent of treaties for all purposes because a treaty would prevail over a prior act of Congress.[56] A recent case in the Court of Claims seems to have taken the plunge and held that an executive agreement is the law of the land and will prevail even over a federal statute.[57] The court was there concerned with the Byrnes-Blum Agreement under which all claims against the United States arising from the Moroccan campaign were to be submitted to a French commission and paid by the French Government. Plaintiff submitted his claim but rejected the award which was made and brought an action in the Court of Claims. The court in dismissing his petition said:

> "The Byrnes-Blum Agreement between the United States and France is the type of agreement which has been recognized as a treaty within the meaning of Article VI, Clause 2, of the Constitution and thus is a part of the 'supreme Law of the Land.' [citing the *Pink* and *Belmont* cases] . . . This court has recently had occasion to consider the effect of treaties and international agreements upon the consent of the United States to be sued in the case of Hannevig v. United States, 84 F. Supp. 743, 114 Ct.Cl. 410. . . ."[58]

In the *Hannevig* case the court had held that a treaty providing for the settlement of the claim had the effect of withdrawing the claim from the court's jurisdiction "as effectually as if this had been accomplished by a statute enacted by both Houses of Congress and approved by the President."[59] The court clearly implies that the agreement was just as effective to divest the court of its statutory jurisdiction as a treaty would be, but their concluding statement to the effect that the plaintiff's submission of the claim to the French commission was an election of remedies considerably weakens the decision.

There is no question but that the executive agreement has become

[55] Borchard, in 54 YALE L.J. 616 at 643, 644 (1945), supra note 29; McDougal and Lans, id., 181 at 317, supra note 11.

[56] Supra note 21.

[57] Etlimar Société Anonyme v. United States, (Ct. Cl. 1952) 106 F. Supp. 191.

[58] Id. at 195, 196.

[59] Hannevig v. United States, (Ct. Cl. 1949) 84 F. Supp. 743 at 744.

an extremely important instrument in the conduct of our foreign relations. Our present preeminence in world affairs promises to make it even more important. Yet no one has been able to give an exact exposition of its constitutional nature. Nor can anyone say with certainty what things the President or the President and Congress together may do with an executive agreement and what things they may not do. Supreme Court decisions on the question are rare, largely because of procedural difficulties in raising the constitutional issue.[60] That there should be as yet no precise or even general limitations on the exercise of such an important power is remarkable in a constitutional system which professes limitation of powers as its keystone. It is hardly surprising, therefore, that the present pressure for a constitutional amendment placing limitations on the executive agreement should exist. Nevertheless, the absence of judicial limitations to date gives some testimony of the difficulty in imposing any limitations on the power to make these agreements which would still preserve enough freedom for the executive to be able to conduct our foreign relations in a manner commensurate with our internal and international responsibilities. Accordingly, any proposals to limit this power by constitutional amendment must be carefully considered to determine whether they do in fact achieve the limitations desired and at what cost in loss of ability to conduct our foreign affairs they are achieved.

II. *The Proposed Constitutional Amendments*

Both the Bricker and A.B.A. amendments provide for congressional regulation of executive agreements and subject them to the same limitations as are imposed on treaties.[61] Of the latter limitations the prohibition against self-executing agreements is the most important. By giving to Congress the power to regulate the manner and extent to which executive agreements may be made, they transfer from the President to Congress a large measure of the ultimate responsibility for the conduct of our foreign relations. This has been criticized as a violation of the doctrine of separation of powers, and the charge contains some measure of truth. For while the doctrine of separation of powers is still maintained, the amendments do draw a new line of separation. The wisdom of this depends upon whether there is a present imbalance

[60] Constitutional guarantees may not cover persons or property outside the United States though they may be affected by agreements. Cf. In re Ross, 140 U.S. 453, 11 S.Ct. 897 (1891); United States v. Belmont, 301 U.S. 324 at 332, 57 S.Ct. 758 (1937). Agreements having an internal effect such as the Litvinov Assignment are rare.

[61] S.J. Res. 1, §4, supra note 1, and S.J. Res. 43, §1, supra note 2.

between presidential and congressional powers in this area and upon whether the amendments achieve such checks on presidential power as are necessary. As to the former, no answer will be essayed, but as to the latter some observations must be made.

It is quite clear that adoption of the amendments, thereby giving Congress the power to prescribe limitations on the making of executive agreements, will in no way affect the need of this country to have broad areas of power in which the President may make international agreements. It must be assumed that the sponsors of the amendments contemplate that Congress will meet this necessity with rather broad enabling acts giving the President these powers. Otherwise the effect would be to cripple us dangerously in the field of foreign affairs at a time when the world requires a United States that can move swiftly and decisively in its dealings with other nations. If the result which the amendments wish to achieve is to prevent presidential abuse of power and at the same time to give to the President enough power to permit him to carry out his executive duties, then the task placed upon Congress is one which has thus far proved impossible. Much of the pressure for these amendments arises from public dissatisfaction with agreements such as Yalta and Potsdam, yet try to phrase an enabling act which would permit the President to make the agreements with allies and co-belligerents necessary in the successful conduct of a war and which would still prevent the making of a Yalta or a Potsdam agreement. The question of what is and what is not the proper subject matter for an executive agreement has not yet been answered, nor can it be. Senator Bricker himself has admitted that he cannot draw the line.[62] Secretary of State Dulles told the Senate Judiciary Committee that he had tried to draft an amendment which would eliminate the risk of abuse of power without incurring risks far greater but found it impossible to do so.[63] The plain fact of the matter is that Congress cannot grant the President power to make those agreements which are necessary without incurring the risk of agreements which might prove undesirable, unless Congress undertakes to make a separate evaluation of each agreement which is proposed. It goes without saying that in the areas where executive agreements are most necessary, the need for speed and sometimes secrecy will be essential, and the requirement of independent congressional analysis of each agreement would be ruinous. It seems probable, if not certain, that transferring to Congress the job

[62] 98 CONG. REC. 923 (Feb. 7, 1952).

[63] Statement of the Secretary of State before the Senate Judiciary Committee, supra note 17, at 3.

of regulating executive agreements cannot achieve the desired check on the occasional presidential abuse of power unless it does so at the expense of damaging restrictions on the President's power to conduct the daily business of his office.

Both amendments require that an executive agreement become effective as internal law only through appropriate legislation by Congress.[64] Secretary Dulles has suggested that under our present constitutional provisions an executive agreement cannot become the law of the land without congressional action,[65] but the *Pink* case and the dicta in other decisions cast some doubt upon his assertion.[66] Where Congress has authorized or implemented an agreement, the act of Congress would be the law of the land in its own right. A treaty, which is also the law of the land, requires the assent of two thirds of the Senate. In both cases our legislative branch or a part of it has the power to determine what shall be the law of the land. If the *Pink* case means that an agreement made by the President alone is the law of the land, then it is the only case where the President has of his own right the power to make laws for the country. Making law is a legislative function. It is submitted that while the elimination of self-executing treaties is probably unwarranted, the elimination of self-executing executive agreements having an internal effect on the laws of this country would be desirable. It is quite possible that the Supreme Court may yet decide that executive agreements in themselves are not the law of the land, but if that does not happen, a constitutional amendment so providing would be worthy of support. If the President makes an executive agreement under his own powers as Commander-in-Chief or as diplomatic representative, then Congress should and does have the power to enact any necessary internal legislation under the "necessary and proper" clause in the same manner as was sustained by the Supreme Court in *Missouri v. Holland* in the case of a treaty.[67] The President may make the agreement, but Congress ought to give it any internal effects as the law of the land. This is the only worth-while restraint on presidential power suggested by the proposed amendments which would not seem to involve a serious risk of hampering the conduct of our foreign relations.

[64] S.J. Res. 1, §§3 and 4, supra note 1, and S.J. Res. 43, §1, supra note 2.

[65] Statement of the Secretary of State before the Senate Judiciary Committee, supra note 17, at 6.

[66] See supra note 54.

[67] U.S. CONST., art. II, §2, cl. 2.

III. *Conclusions*

It is often said that our Constitution by its system of legal checks on the discretionary powers given to our officials ensures a government of law and not of men. The power to conduct our foreign affairs is unusual because of the absence of any express limitations on presidential discretion. Few would object to constitutional limitations which would prevent abuse of that discretion without eliminating the discretion itself. But the very subject matter of the power bespeaks the difficulty of saying what those limitations shall be, for our foreign relations are essentially a matter of domestic and international politics. It is true that the effects of international agreements are often legal as well as political and that where there is the power to make law there should also be legal limitations on that power, but in the past the most effective checks on presidential abuse of discretion in this field have been political, not legal. Enough has been said about the indirect political controls of Congress. To them must be added the power of public opinion and of the ballot box. These have proved reasonably effective in the past, and it is submitted that even if the proposed amendments were adopted, the political checks and not the amendments would prove to be the only effective limitations on presidential discretion. Our present system has served us well up to now. A step as serious as constitutional amendment should not be undertaken on the mere speculation that abuses will occur. The proponents of the amendments without doubt have good cause to feel that political pressure is too slow and that to wait until abuses occur is to advocate locking the barn after the horse has been stolen. In this they would be unanswerable were it not for the fact that the amendments they propose cannot achieve the limitations they desire without seriously crippling our ability to conduct ourselves in foreign affairs as a sovereign nation and as the leader of the free world.

John F. Spindler, S.Ed.