AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*Christopher Schroeder*, **Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations under an Existing Treaty** (1996)[[1]](#footnote-1)

*Republicans in Congress contemplated including in the Defense Authorization Act for Fiscal Year 1997 a provision that would prohibit the United States from being bound by any international agreement that would substantively modify the Treaty on the Limitation of Anti-Ballistic Missile Systems unless made by treaty and ratified by the Senate. In anticipation of this move, President Bill Clinton asked the Office of Legal Counsel in the Department of Justice to examine whether Congress can authorize an executive agreement that significantly modifies American obligations under an existing treaty or whether such changes can only be made by use of the treaty ratification process running through the Senate. The OLC advised that Congress had the authority to make such changes in American treaty obligations without the necessity of a new treaty. Congress can constitutionally modify American treaty obligations by statute.*

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Under the Supremacy Clause of the Constitution, treaties, like Acts of Congress, are made “supreme Law.” Accordingly, “treaty provisions, which are self-executing in the sense that they require no additional legislation to make them effective, are equivalent to and of like obligation with an act of Congress.” Further, insofar as a treaty incorporates a rule of domestic law, the Supreme Court has long held that it may be modified or repealed by a later Act of Congress. *Head Money Cases* (1884). . . .

The rationale for this rule was set forth in 1855 by Justice Curtis, sitting as a Circuit Justice. Justice Curtis wrote:

. . . . I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible. *Taylor v. Morton* (Cir. Ct. D. Mass. 1855).

Accordingly, it lies within the power of Congress to modify the substantive obligations that a treaty imposes upon the United States, or to authorize the President to modify those obligations, insofar as those treaty obligations are binding as a matter of domestic or municipal law. The advice and consent of the Senate are necessary to achieve that outcome.

The unilateral modification or repeal or a provision of a treaty by Act of Congress, although effective as a matter of domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision. . . . “[W]e are bound to observe [a treaty] with the most scrupulous good faith . . . [O]ur Government could not violate [it], without disgrace.” “The foreign sovereign between whom and United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith. . . .” *Taylor v. Morton*. . . .

As with contracts of other kinds, however, the parties to a treaty may agree to modify the obligations to which the treaty gives rise. It is “a general principle of [international] law recognized by civilized nations” that “[a]ny legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination.” . . .

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“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” *Youngstown Sheet & Tube Co. v. Sawyer* (1952). The Supreme Court has repeatedly emphasized the sweeping authority of the President in the field of foreign affairs, particularly when his own considerable inherent powers in that area are augmented by those of Congress. *Dames & More v. Regan* (1981). . . . We believe that the inherent powers of the President over foreign affairs, coupled with whatever powers Congress can and does delegate to him in this area, are constitutionally sufficient to enable the President to make an executive agreement that substantially modifies the international legal obligations of the United States under a prior treaty.

The Constitution makes the President the Nation’s “guiding organ in the conduct of our foreign affairs. . . . He . . . was entrusted with . . . vast powers in relation to the outside world. . . .” *Ludecke v. Watkins* (1948). Pursuant to his inherent powers, the President has made executive agreements with other countries, not submitted to the Senate for its advice and consent or to Congress for its approval, including agreements that regulated the use of military forces. Congress too – as distinct from the Senate under its treaty-making power – has some power to vary the international legal obligations of the United States. . . . It can reasonably be maintained that, if Congress may effect the *abrogation* of international obligations, it has some power to authorize the President to *modify* them.

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The constitutionality of such “Congressional-Executive agreements” is firmly established. The Supreme Court long ago rejected arguments that such agreements constitute an invalid delegation of power to the President or the House of Representatives, or an improper invasion of the Senate’s treaty-making power. *J.W. Hampton, Jr. & Co. v. United States* (1928). . . .

Of particularly relevance here, the practice of the political branches underscores that the President has the authority to make Congressional-Executive agreements with our treaty partners that substantially modify the United States’ rights or obligations under those treaties.

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1. Excerpt taken from Christopher Schroeder, “Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations under an Existing Treating” 20 *Op. O.L.C*. 389 (1996) [↑](#footnote-ref-1)