AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government/Treaty Power

*Walter Dellinger*, **Whether Uruguay Round Agreements Required Ratification as a Treaty** (1994)[[1]](#footnote-1)

*The General Agreement on Tariffs and Trade (GATT) was the primary multilateral trade agreement that defined trade relations for much of the world in the postwar period. It was renegotiated and modified in several rounds from the 1940s through the 1980s and had the effect of dramatically reducing tariff barriers between participating countries. The regime of free trade and economic globalization that was launched by the GATT began with some two dozen countries in the immediate aftermath of the World War II, but ultimately included over a hundred countries.*

*The Uruguay Round Agreement in 1994 effectively replaced the GATT with the World Trade Organization (WTO). The WTO is an intergovernmental organization empowered to regulate international trade with its own framework for dispute resolution among member nations. The changes launched by the Uruguay Round raised questions about whether it required a new approach to its adoption by the United States in order to be constitutionally valid.*

*In 1994, Congress passed the Uruguay Round Agreements Act which gave legal force to the agreement in the United States and brought the United States into the World Trade Organization. Statutes require a simple majority vote in both chambers of Congress, whereas treaties require a two-thirds vote in the Senate alone. Ultimately, the Uruguay Round Agreements Act was approved as statute with votes in both chambers, but the margin of approval in the Senate was more than the two-thirds that would have been needed for treaty ratification. As these issues were being debated, the Office of Legal Counsel produced an opinion concluding that the Uruguay Round Agreement did not have to be acted on as a treaty under the U.S. Constitution, in keeping with long congressional custom to finalize many international agreements affecting trade through statute rather than through treaty ratification.*

. . . .

[W]e find that neither the text of the Constitution, nor the materials surrounding its drafting and ratification, nor subsequent Supreme Court case law interpreting it, provide clear-cut tests for deciding when an international agreement must be regarded as a “treaty” in the constitutional sense, and submitted to the Senate for its “Advice and Consent” under the Treaty Clause. In such circumstances, a significant guide to the interpretation of the Constitution’s requirements is the practical construction placed on it by the executive and legislative branches acting together. . . .

Such practical construction has long established . . . that “there are m any classes of agreements with foreign countries which are not required to be formulated as treaties” for constitutional purposes. Most perti­nently here, practice under the Constitution has established that the United States can assume major international trade obligations such as those found in the Uru­guay Round Agreements when they are negotiated by the President and approved and implemented by Act of Congress. . . . Congress acts un­der its broad Foreign Commerce Clause powers," and the President acts pursuant to his constitutional responsibility for conducting the Nation’s foreign affairs. The use of these procedures, in which both political branches deploy sweeping constitutional powers, fully satisfies the Constitution’s requirements; the Treaty Clause’s provision for concurrence by two-thirds of the Senators present is not constitutionally mandatory for international agreements of this kind.

. . . .

One recurring kind of dispute over the Treaty Clause has been whether interna­tional agreements could be given effect by Executive action alone, or whether they required submission to the Senate for its concurrence. . . . A second type of recurring dispute, more pertinent here, centered on the respective powers of the Senate and the House of Representatives in such areas as the regulation of foreign trade, where different clauses of the Constitution assign responsibilities either to one House alone or to both Houses together. . . .

. . . .

. . . . [T]he Constitution on its face permits for­eign commerce to be regulated either through the Treaty Clause or through the Foreign Commerce Clause. Nothing in the language of the Constitution privileges the Treaty Clause as the “sole” or “exclusive” means of regulating such activity. In actual practice, Congress and the President, understanding that nothing in the Constitution constrained them to choose one procedure rather than the other, have followed different procedures on different occasions.

In general, these inter- and intra-branch disputes over the scope of the Treaty Clause have been resolved through the political process, occasionally with marked departures from prior practices. For example, after the House of Representatives objected to the concentration of power over Indian affairs in the hands of the Senate through the Treaty Clause, Congress in 1871 enacted a rider to an Indian appropriation bill declaring that no fresh treaties were to be made with the Indian nations. Although the United States had been making Indian treaties for almost a century before that enactment, after 1871 “the federal government continued to make agreements with Indian tribes, many similar to treaties, that were approved by both Senate and House,” but “the House’s action sounded the death knell for treaty making.” The policy of the 1871 enactment remains in effect. . . .

The existence of such recurring disputes over the scope and meaning of the Treaty Clause undermines any dogmatic claim that a major trade agreement such as the Uruguay Round Agreements, which stands at the intersection of the foreign affairs, revenue raising and commerce powers, must be ratified as a treaty and can­not be implemented by the action of both Houses of Congress. The distinctions between the Federal government’s treaty power and the other constitutional powers in play are sim ply too fluid and dynamic to dictate the conclusion that one method must be followed to the complete exclusion of the other. Here, if anywhere, is an area where the sound judgment of the political branches, acting in concert and ac­commodating the interests and prerogatives of one another, should be respected. It is simply mistaken to suggest that this established practice of mutual adjustment and cooperation on a constitutional question of inherent uncertainty reflects mere “political convenience rather than constitutional commitment.” None of the three political branches involved in working out the procedure for Congressional-Executive agreements has abdicated its constitutional responsibility; none has endangered the basic, structural provisions of Articles I and II.

. . . .

[G]iven the breadth of the joint authority of Congress and the Presi­dent in the field of foreign relations, it would be the truly extraordinary case indeed in which Presidential action in that area, when supported by an Act of Congress, could amount to an unconstitutional invasion of State sovereignty. The Supreme Court has held that even unilateral Executive action, relying on the President’s inherent con­stitutional powers alone, may constitute a “treaty” for purposes of the Supremacy Clause, and hence supersede contrary State law. Thus, in *United States v. Belmont* (1937), the Court upheld a unilateral Executive agreement in the face of contrary State law, declaring 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.” . . .

. . . . Against the massive powers of Congress and the President, acting together, to control the Nation’s foreign policy and commerce, the claims of State sover­eignty have little force.

. . . .

1. Excerpt taken from Walter Dellinger, “Whether Uruguay Round Agreements Required Ratification as a Treaty” 18 *Op. O.L.C*. 232 (1994) [↑](#footnote-ref-1)