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Effect of Executive Agreements on Acts of Congress

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NOTES

EFFECT OF EXECUTIVE AGREEMENTS ON ACTS OF CONGRESS

On February 7, 1955, in *United States v. Guy W. Capps, Inc.*,[1] the United States Supreme Court had its first opportunity to rule on the effect of executive agreements on prior acts of Congress.[2] The Court also had the opportunity to clear up some of the unsolved questions batted so glibly back and forth by proponents and opponents of the Bricker Amendment,[3] questions about which much has been written by theorists but upon which there has been little or no adjudication by the courts.[4] First a quick look will be taken at the *Capps* case, then at the present law and theory concerning treaties and executive agreements, and last at the possible opinions the Court could have written clarifying the law if it had not affirmed the *Capps* decision on other grounds.

In December of 1948 Guy W. Capps, Inc., defendant corporation, purchased 48,544 sacks of potatoes from a Canadian exporter. The defendant inserted a clause in the contract stating that the potatoes were purchased "for planting in Florida and Georgia." The clause was inserted in order to comply with an embargo on table potatoes initiated by an executive agreement between the United States and Canada for the purpose of bolstering the price support program on potatoes. Later the defendant sold the potatoes to a subsidiary corporation of the Great Atlantic and Pacific Tea Company. The United States claimed that the contract was breached, and sued as third party beneficiary for the value of the potatoes it was thereby forced to purchase under the price support program. The defendant, by motion to dismiss, challenged the validity of the executive agreement upon which the United States based its claim as third party

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[1]75 Sup. Ct. 326 (1955).

[2]See Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes,* 67 HARV. L. REV. 281, 291 (1953).

[3]See Hatch, *The Treaty Power and the Constitution: The Case for Amendment,* 40 A.B.A.J. 207 (1954); MacChesney, *The Treaty Power and the Constitution: The Case Against Amendment,* 40 A.B.A.J. 203 (1954); Pepper, *Observations on the Policy of the Bricker Amendment,* 7 U. FLA. L. REV. 58 (1954).

[4]See Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States,* 35 ILL. L. REV. 365 (1941).

beneficiary, contending that the agreement did not comply with the provisions of the Agricultural Act of 1948 and thus was a nullity.

The district court denied the motion, Judge Bryan stating unequivocally: "Though not a treaty, the United States-Canada agreement nevertheless had the force of law. It was an Executive Agreement."[5] Judge Bryan supported his statement by the ratio decidendi in *United States v. Pink*,[6] which declared that treaties and executive agreements are of similar dignity.[7] The verdict was nevertheless directed for the defendant because there was insufficient evidence of breach of contract or of damages.

The court of appeals affirmed the denial by the lower court of the motion to dismiss but refused to accept the reasoning of Judge Bryan. The court, speaking through Chief Judge Parker, found evidence both of breach of contract and of damages resulting to the government and rejected the argument that an executive agreement could prevail over a prior act of Congress:[8]

> "We think, however, that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason. . . . The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements . . . ."

Judge Parker quoted from *Youngstown Sheet & Tube Co. v. Sawyer*[9] as follows: " 'In the framework of our Constitution, the president's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.' "[10] He also quoted from Mr. Justice Jackson's concurring opinion:[11]

> " 'When the President takes measures incompatible with

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[5]United States v. Guy W. Capps, Inc., 100 F. Supp. 30, 32 (E.D. Va. 1951).
[6]315 U.S. 203 (1942).
[7]*Id.* at 230.
[8]United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953).
[9]343 U.S. 579 (1952).
[10]United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953).
[11]*Ibid.*

> the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.' "

In short, the court of appeals held that an executive agreement cannot validly contravene the provisions of a prior law. The court's ratio decidendi was that no executive agreement can be made on a subject in the realm of the power of Congress unless the authority for making the agreement is expressly delegated by Congress, thus denying concurrent power to the President in such situations. A further conclusion from the opinion is that the President has inherent power to make executive agreements only if they are made within the scope of his powers over foreign affairs or the armed forces.[12]

The court of appeals set forth an additional basis for its decision — that the United States could not sue in its sovereign capacity as a third party beneficiary, since Congress had not created such a right of action.[13]

The Supreme Court, Mr. Justice Burton writing the opinion, affirmed solely on the question of breach of contract. The Court agreed with Judge Bryan that there was not sufficiently clear evidence of a breach and refused to consider the question of whether the executive agreement was a valid exercise of presidential power.[14]

The present status of the law on treaties and executive agreements is not at all clear; perhaps there are a few areas of the law that should be reviewed. Generally a treaty and an act of Congress are considered equivalents, and in case of conflict the later one in point of time controls.[15] "[M]oreover, if there be a conflict between such a treaty and the provisions of a state constitution or statutory enactment, whether enacted prior or subsequent to the making of the treaty, the treaty will control."[16] According to the doctrine of *Missouri v. Holland*[17] the treaty will control even if it deals with a subject reserved

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[12]For support of this conclusion see Fraser, *The Constitutional Scope of Treaties and Executive Agreements*, 31 A.B.A.J. 287 (1945).

[13]United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953). On this point see United States v. Carpenter, 113 F. Supp. 327 (E.D.N.Y. 1949), commented on in 7 U. FLA. L. REV. 108 (1954).

[14]United States v. Guy W. Capps, Inc., 75 Sup. Ct. 326 (1955).

[15]Moser v. United States, 341 U.S. 41, 45 (1951) (dictum).

[16]State v. Arthur, 261 P.2d 135, 138 (Idaho 1953).

[17]252 U.S. 416 (1920).

to the states, that is, a subject upon which Congress would not otherwise be authorized to legislate.

It is doubtful that a treaty could ever be declared unconstitutional, unless, of course, the formal prerequisites of ratification are not met. There is a dictum[18] to the effect that the treaty-making power, though not limited by express provision of the Constitution,[19] cannot be extended so far as to authorize what the Constitution forbids. No treaty has been held unconstitutional,[20] however, and under the present trend of liberal constitutional interpretation there are no prospects of such an event in the foreseeable future. Also it should be remembered that there were dicta existing in earlier cases contrary to the holding in *Missouri v. Holland.*[21]

A treaty may be self-executing or nonself-executing, depending upon the intent of the negotiators as to the need for implementing legislation.[22] A treaty that is merely a statement of policy[23] or that requires the appropriation of money is nonself-executing.

The above principles deal only with the internal effects of treaties. The courts of the United States cannot enforce a treaty on the international level;[24] it is only a moral obligation.[25]

It is evident that externally a treaty is outside the control of the judicial system and theoretically, if not always practically, outside congressional control. Internally a treaty, or its executing legislation, is on the level of an act of Congress; but even then the internal effects are probably limited only by the provisions of the treaty itself and not by the Constitution.

The present status of an executive agreement is even more nebulous. The only mention in the Constitution of anything that might resemble an executive agreement is the statement that "No State shall . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."[26] An executive agreement is most easily defined as any completed negotiation by the executive branch of the United

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[18]Asakura v. Seattle, 265 U.S. 332, 341 (1924).

[19]Treaties are made "under the Authority of the United States" as opposed to law made "in Pursuance" of the Constitution, U.S. CONST. art. VI.

[20]Hatch, *The Treaty Power and the Constitution: The Case for Amendment,* 40 A.B.A.J. 207, 209-10 (1954).

[21]*E.g.,* People *ex rel.* Att'y Gen. v. Naglee, 1 Cal. 232, 234 (1850).

[22]Sei Fujii v. State, 242 P.2d 617 (Cal. 1952).

[23]*Ibid.*

[24]Head Money Cases, 112 U.S. 580 (1884).

[25]Jay, THE FEDERALIST No. 64.

[26]U.S. CONST. art. I, §10.

States Government with a foreign power that does not go through the formal process of being ratified by the Senate. It is often referred to as "compact," "convention," "protocol," or "modus vivendi," but the effect is the same regardless of the appellation.[27]

There are four types of executive agreements:[28] (1) those independent of legislation, (2) those implementing policy statements of Congress, (3) those expressly implementing a statute,[29] and (4) those subject to subsequent approval of both houses of Congress. This discussion will be confined to the type of agreement involved in the *Capps* case unless otherwise stated.

The question that immediately arises is: To what extent are treaties and executive agreements interchangeable? Or, stated in another way: Are any results possible through treaty that cannot be achieved by executive agreement?[30] The only decisions on this question prior to the *Capps* case upheld the view that treaties and executive agreements are interchangeable.

The first case in point, *B. Altman Co. v. United States*,[31] held that for purposes of review a commercial agreement is a treaty.

United States v. Curtiss-Wright Export Corp.[32] dealt with an executive proclamation implementing a statute but by its dicta gave the President wide latitude to enter into executive agreements of any type when dealing with foreign affairs, subject to no constitutional or congressional limitations. The Court made no distinction between treaties and executive agreements in the latter respect.

United States v. Belmont[33] and *United States v. Pink*[34] dealt with the effect of the Litvinov Assignment on the internal law of the State of New York. The Litvinov Assignment was an executive agreement made in 1933 upon recognition of the U. S. S. R. by the United States. It provided, in return for relinquishment by the United States of certain claims against the Soviet Government, for the assign-

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[27]United States v. Belmont, 301 U.S. 324, 330-31 (1937).

[28]Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure*, 10 GEO. WASH. L. REV. 653, 656 (1942).

[29]*E.g.*, postal conventions or reciprocal trade agreements.

[30]This note does not consider the other major question: Which agreements made by the executive need to be ratified by the Senate to become effective and which do not? For discussion see Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944).

[31]224 U.S. 583 (1912).

[32]299 U.S. 304 (1936).

[33]301 U.S. 324 (1937).

[34]315 U.S. 203 (1942).

ment to the United States of all property in this country nationalized extraterritorially by the Communist confiscation decrees of 1918 and 1919. The Court held in both cases, although Chief Justice Stone stated that it was only dictum in *United States v. Belmont,* that an executive agreement may prevail over state constitutions and statutes, even if it concerns a matter otherwise reserved exclusively to the states. Thus the doctrine of *Missouri v. Holland* was extended to the field of executive agreements. The dicta in the two cases place executive agreements on a par with acts of Congress and treaties as the "supreme law of the land."

The Court in *United States v. Belmont* stated:[35]

> "And while this rule [treaties are the supreme law of the land] in respect of treaties is established [expressly] . . . 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 . . . ."

United States v. Pink reiterates the doctrine even more forcefully:[36]

> "A treaty is a 'Law of the Land' under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

Mr. Justice Frankfurter's concurring opinion contends that the reserved powers of the states are nonexistent in such situations:[37]

> "In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."

The Court, in ruling on the separate question present in both cases, did some neat footwork in avoiding a direct ruling that an executive agreement prevails over the Fifth Amendment. Its holding nevertheless has this effect. The Court evaded the issue by stating

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[35]301 U.S. 324, 331 (1937).
[36]315 U.S. 203, 230 (1942).
[37]*Id.* at 242.

that the nationalization decree was operative in the Soviet Union as to all Soviet property, wherever situated, and that therefore the United States Constitution, which has no extraterritorial effect except as to its own citizens, could not possibly apply to it. On its face this section of the opinion resembles a flight into the realm of the fanciful.

In the *Pink* case there was a strong dissent by Chief Justice Stone, concurred in by Mr. Justice Roberts.[38] The dissenting justices refused to repose in the executive agreement the power given it by the majority. The holding in this case, decided during World War II, was undoubtedly influenced by the necessity for friendship with our most powerful ally. Even though the United States was the beneficiary of the money collected, it would have seemed unfriendly to declare the Soviet decrees null and void.

If the dicta in the above cases are to be taken at their face value as placing an executive agreement on a par with a treaty, the following conclusions may be drawn:

(1) An executive agreement is equivalent to an act of Congress, and the later in point of time will control. This means that the President could nullify an act of Congress simply by making an agreement to the contrary with a foreign power.
(2) It is probable that an executive agreement could never be declared unconstitutional.
(3) The President could make an executive agreement on any subject, with or without authorization from Congress.
(4) An executive agreement could open the field for legislation by Congress in fields previously reserved to the states. This would, of course, apply only to nonself-executing agreements.

Reverting to the *Capps* case, Chief Judge Parker expressly rejected points (1) and (2) above and, by his ratio decidendi, point (3). Carried to their logical conclusions, the *Capps* and *Youngstown* decisions, by denying the President's power to be a lawmaker, seem to render of questionable value the holding in the *Pink* case that the President can alter state laws. It would be possible, although inconsistent, for the Court to say that the President may override powers reserved to the states but not those delegated to Congress. Thus three

[38] *Id.* at 242-56.

alternative theories that the Supreme Court could have used to decide the *Capps* case become apparent: (1) upholding the decision and dicta of Judge Parker's opinion by overruling *United States v. Pink,* at least impliedly; (2) upholding the decisions in both the *Capps* and *Pink* cases but modifying the dicta; and (3) reversing the *Capps* case by upholding the *Pink* case in its entirety.

If the Court had upheld Chief Judge Parker's decision in its entirety, it would have been a fitting blow on behalf of common sense interpretation of the Constitution. The President would have absolute power only in the areas of foreign affairs — remembering that foreign commerce is constitutionally excluded from this area — and the military, which are the two fields in which he is given such power by the Constitution. A reading of the *Youngstown* case would seem to uphold this result. The only trouble with this theory arises from the problem noted by Mr. Justice Frankfurter in the *Pink* case, the fact that a situation may often be either one of foreign affairs or of internal law, depending upon the point of view. A decision upholding Judge Parker would have gone a long way toward satisfying the demands of the advocates of the Bricker Amendment. The *Missouri v. Holland* doctrine is much more objectionable when extended to executive agreements, since a treaty must have the approval of at least two thirds of the Senate.[39] The main objection to this view is that it finds little support in any previous Supreme Court decision with the exception of the *Youngstown* case, which presents an entirely different factual situation and is against the modern trend of liberality in interpreting the President's foreign relations powers.

The second view, that an executive agreement is superior to state laws but not to acts of Congress, is the one most frequently expressed by commentators. These commentators, however, have been hard pressed to explain the inconsistency of holding the President all powerful in areas of state internal law and practically powerless in matters of internal law delegated to Congress either exclusively or concurrently with the states.[40] Professor Wagner does so by categorizing executive agreements in the hierarchy of laws just below

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[39]U.S. CONST. art. II, §2, cl. 2; for discussion see Levitan, *supra* note 4, at 394.

[40]A further distinction can be made here. In the intermediate view, Judge Parker's statement that the President has no power in the delegated area even if Congress has not acted could be upheld, or it could be contended that the President does have power to make executive agreements in these situations if Congress has not acted.

treaties and acts of Congress but just above state constitutions.[41] Thus executive agreements would be on the same level as treasury department regulations and the like. This would be plausible except for the fact that all other regulations of this nature are statutory delegations by Congress or the executive and are within the constitutionally delegated powers of Congress or the President. Professor Sutherland contends that an executive agreement is "the supreme law of the land" as to inconsistent state legislation but is not supreme as to prior inconsistent federal statutes. He justifies this by saying that a subsequent act of Congress can nullify a treaty, while a subsequent act of a state legislature cannot even nullify a prior executive agreement.[42] In the first place, under the Parker dicta a state legislature would not need to knock out an executive agreement in the reserved powers field, since it would be invalid anyway. If the power were one that the states held concurrently with Congress, it would be the delegating statute and not the executive agreement that would keep the act of the state legislature from being effective. If the Parker dicta are invalid, it is only as to the nullification – not the prohibition – of a treaty or executive agreement that an act of Congress is in a position superior to that of a state law. The two situations can certainly be distinguished. Despite its inherent inconsistency, which is prejudicial in favor of national over state rights, a decision along these lines is the least upsetting to precedent.

The third alternative theory that could have been used by the Court is that of the interchangeability of treaties and executive agreements. Under this theory, Judge Parker's reasoning in the *Capps* case would of necessity be rejected and executive agreements could override prior acts of Congress. The Court need have done nothing more than recite the *Pink, Curtiss-Wright,* and *Belmont* cases to come to this conclusion. Except for the sake of consistency, there appears to be no merit in this theory. It would give the President the near-dictatorial power so recently denied him by the *Youngstown* case. Anything could be classified as "of international interest" to bring it within the scope of the executive power. The one benefit that would accrue from such a decision would be increased support for the passage of section three of the Bricker Amendment or some suitable substitute that would regulate executive agreements.

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[41]Wagner, *Treaties and Executive Agreements: Historical Development and Constitutional Interpretation,* 4 CATHOLIC U.L. REV. 95, 109 (1954).

[42]Sutherland, *supra* note 2, at 287.