Common Interpretation

ARTICLE II, SECTION 2: TREATY POWER AND APPOINTMENTS

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I. *Treaty Power*

The Constitution provides, in the second paragraph of Article II, Section 2, that "the President shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." Thus, treaty making is a power shared between the President and the Senate. In general, the weight of practice has been to confine the Senate's authority to that of disapproval or approval, with approval including the power to attach conditions or reservations to the treaty.

For instance, the authority to negotiate treaties has been assigned to the President alone as part of a general authority to control diplomatic communications. Thus, since the early Republic, the Clause has not been interpreted to give the Senate a constitutionally mandated role in advising the President before the conclusion of the treaty.

Also of substantial vintage is the practice by which the Senate puts reservations on treaties, in which it modifies or excludes the legal effect of the treaty. The President then has the choice, as with all treaties to which the Senate has assented, to ratify the treaty or not, as he sees fit.

The question of whether the President may terminate treaties without Senate consent is more contested. In 1978, President Carter gave notice to Taiwan of the termination of our mutual defense treaty. The U.S. Court of Appeals for the District of Columbia held that the President did have authority to terminate the treaty, but the Supreme Court in *Goldwater v. Carter* (1979), vacated the judgment without reaching the merits. The treaty termination in *Goldwater* accorded with the terms of the treaty itself. A presidential decision to terminate a treaty in violation of its terms would raise additional questions under the Supremacy Clause, which makes treaties, along with statutes and the Constitution itself, the "supreme Law of the Land."
There remains the question of how the Treaty Clause comports with the rest of the system of enumerated and separated powers. *Missouri v. Holland* (1920) suggests that the Treaty Clause permits treaties to be made on subjects that would go beyond the powers otherwise enumerated for the federal government in the Constitution. In *Reid v. Covert* (1957), however, the Court held that treaties may not violate the individual rights provisions of the Constitution.

A still-debated question is the extent to which the Treaty Clause is the sole permissible mechanism for making substantial agreements with other nations. In fact, the majority of U.S. pacts with other nations are not formal "treaties," but are sometimes adopted pursuant to statutory authority and sometimes by the President acting unilaterally. The Supreme Court has endorsed unilateral executive agreements by the President in some limited circumstances. For instance, in *United States v. Belmont* (1937), the Court upheld an agreement to settle property claims of the government and U.S. citizens in the context of diplomatic recognition of the Soviet Union. In *Dames & Moore v. Regan* (1981), the Court upheld President Carter's agreement with Iran, again concerning property claims of citizens, in the context of releasing U.S. diplomats held hostage by Iran. The Court has never made clear the exact scope of executive agreements, but permissible

ones appear to include one-shot claim settlements and agreements attendant to diplomatic recognition.

With so-called congressional-executive agreements, Congress has also on occasion enacted legislation that authorizes agreements with other nations. For instance, trade agreements, like the North America Free Trade Agreement (NAFTA), have often been enacted by statute. In contrast, the Senate objected strenuously when President Jimmy Carter appeared intent on seeking statutory approval, rather than Senate concurrence (which would have required a two-thirds vote) for the Strategic Arms Limitation Talks II (SALT II) treaty. It is sometimes argued in favor of the substantial interchangeability of treaties with so-called congressional-executive agreements that Congress enjoys enumerated powers that touch on foreign affairs, like the authority to regulate commerce with foreign nations. But, unlike legislation, international agreements establish binding agreements with foreign nations, potentially setting up entanglements that mere legislation does not.

Since Chief Justice John Marshall's opinion in *Foster & Elam v. Neilson* (1829), the Supreme Court has distinguished between treaties that are now called self-executing and treaties that are non-self-executing. Self-executing treaties have domestic force in U.S. courts without further legislation. Non-self-executing treaties require additional legislation before the treaty has such domestic force.
In *Medellín v. Texas* (2008), the Court suggested there may be a presumption against finding treaties self-executing unless the treaty text in which the Senate concurred clearly indicated its self-executing status.

II. *Appointments*

The remainder of Paragraphs 2 and 3 of Article II deals with the subject of official appointments. With regard to diplomatic officials,

judges and other officers of the United States, Article II lays out four modes of appointment. The default option allows appointment following nomination by the President and the Senate's "advice and consent." With regard to "inferior officers," Congress may, within its discretion, vest their appointment "in the President alone, in the courts of law, or in the heads of departments." The Supreme Court has not drawn a bright line distinguishing between inferior officers who might be appointed within the executive branch and inferior officers Congress may allow courts to appoint, provided only that, for judicial appointees, there be no "'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint." *Morrison v. Olson* (1988).

Buckley v. Valeo (1976) confirms that the Article II variations are Congress's sole options in providing for the appointment of officers of the United States. The text, however, raises the questions: Who counts as an "officer" of the United States, as opposed to a mere employee? And what characterizes an officer's status as "inferior," as opposed to "superior" or "principal?"

The Court's definition of "officer" in *Buckley* entails a degree of circularity. In general, "any appointee exercising significant authority pursuant to the laws of the United States" is an "officer of the United States." By contrast, a federal employee is not an "officer" if performing "duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" A later case, *INS v. Chadha* (1983), may implicitly have given the *Buckley* formulation more substance. *Chadha*held that the enactment of legislation is Congress's only permissible means of taking action that has the "purposes and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." Importing *Chadha*'s holding into the *Buckley* holding implies

that, at a minimum, any administrator Congress vests with authority to alter the legal rights, duties and relations of persons outside the legislative branch would have to be an "officer," and not an employee, of the United States because that officer would be performing a function forbidden to Congress acting alone.

Distinguishing inferior from principal officers has also sometimes proved puzzling. *Morrison v. Olson*, which upheld the judicial appointment of independent counsel under the Ethics in Government Act of 1978, applied a balancing test focused on the breadth of the officer's mandate, length of tenure, and limited independent policymaking. A later decision, however, provided an additional or perhaps substitute bright-line test, defining "inferior officers" as "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States* (1997).

Perhaps the greatest source of controversy regarding the Appointments Clause, however, surrounds its implications, if any, for the removal of federal officers. The Supreme Court has held that Congress may not condition the removal of a federal official on Senate "advice and consent," *Myers v. United States* (1926), and, indeed, may not reserve for itself any direct role in the removal of officers other than through impeachment, *Bowsher v. Synar* (1986).

Those cases do not determine, however, whether Congress may limit the President's own removal power, for example, by conditioning an officer's removal on some level of "good cause." The Supreme Court first gave an affirmative answer to that question in *Humphrey's Executor v. United States* (1935), which limited the President's discretion in discharging members of the Federal Trade Commission to cases of "inefficiency, neglect of duty, or malfeasance in office." *Morrison v. Olson* reaffirmed the permissibility of creating federal administrators protected from at-will presidential discharge, so

long any restrictions on removal do "not impermissibly interfere with the President's exercise of his constitutionally appointed functions." Although this formulation falls short of a bright-line test for identifying those officers for whom presidents must have at-will removal authority, the doctrine at least implies that presidents must have some degree of removal power for all officers. That is, presidents must be able at least to secure an officer's discharge for good cause, lest the President not be able to take care that the laws be faithfully executed. The Court has since held, in that vein, that officers of the United States may not be shielded from presidential removal by multiple layers of restrictions on removal. Thus, inferior officers appointed by heads of departments who are not themselves removable at will by the President must be removable at will by the officers who appoint them. *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (2010).

The Recess Appointments Clause was included in Article II in the apparent anticipation that government must operate year-round, but Congress would typically be away from the capital for months at a time. Over the ensuing decades—and extending to modern times when Congress itself sits nearly year-round—the somewhat awkward wording of the Clause seemed to pose two issues that the Supreme Court decided for the first time in 2014. First, does the power of recess appointments extend to vacancies that initially occurred while the Senate was not in recess? Second, may a period of Senate adjournment trigger the President's recess appointment power even if that period of adjournment occurs during a Senate session, rather than between the adjournment of one session sine die and the convening of the next? Finding the text ambiguous, the Court answered both questions affirmatively, provided that the relevant "intra-session" recess lasted ten days or longer. (As a result, in the particular case, the Court ruled against the President, because the relevant recess was too short.) The majority rested its analysis on what it took to be a relatively consistent pattern of behavior by Congress and the executive

branch, effectively ratifying the President's power as thus construed. *NLRB v. Noel Canning* (2014).