



Panel: International Treaties in U.S. Practice

Honorable John M. Rogers

Discussion Outline

Treaties as the Law of the Land Under the United States Constitution

- I. The Constitutional language and purpose.
  - A. U.S. Const. art. VI, cl. 2: “ all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”
  - B. Separation of powers justification
  - C. Federalism justification
- II. Only “ self-executing” provisions of treaties are ipso facto law to be applied in court.
  - A. Rationale for the limit: a necessary concomitant of the power of the United States to reserve significant discretion in determining how to comply with treaty obligations that the nation enters into.
  - B. A domestic law doctrine that, per United States law, turns at least in part on the nature of the particular international obligation. (But does not depend on whether obligation is self-executing in the law of the treaty partner state.)
  - C. Cases drawing the distinction:
    1. Foster and Elam v. Neilson, 27 U.S. 253 (1829)
    2. United States v. Percheman, 32 U.S. 51 (1833)

3. Sei Fujii v. State, 242 P.2d 617 (1952) (Calif. 1952)
  4. Asakura v. Seattle, 265 U.S. 332 (1924)
  5. Clark v. Allen, 331 U.S. 503 (1947)
  6. Hauenstein v. Lynham, 100 U.S. 483 (1879)
  7. Neilsen v. Johnson, 279 U.S. 47 (1929)
- D. Doctrine is fully consistent with U.S. respect for its international obligations. A treaty partner (e.g., arguably, the pre-EU United Kingdom) could have none of its treaty obligations be self-executing, and still be a respected participant in the international legal system.
- E. Doctrine applies to provisions, not necessarily whole treaties. Some parts of treaties may be self-executing and some not.
- F. Doctrine should not be confused with whether a private right of action is created. A treaty provision may be self-executing but not create a private right of action (e.g., diplomatic immunity under the Vienna Convention on Diplomatic Relations).
- G. Doctrine should not be confused with the U.S.-Constitutional distinction between Treaties and Executive Agreements (either of which could contain provisions that are self-executing or not self-executing).

### III. The later-in-time rule

- A. Self-executing treaty provisions, in their domestic legislative aspect, may be superseded by subsequent legislation, just as statutes may be superseded.
- B. Separation of powers rationale.

- C. Consistency of the principle with U.S. respect for its international legal obligations.
  - D. *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987).
- IV. Constitutional limits on the treaty power.
- A. A separate source of federal power (*Missouri v. Holland*, 252 U.S. 416 (1920))
  - B. But under U.S. law, treaties must conform to the U.S. Constitution (*Reid v. Covert*, 354 U.S. 1, 1957).
  - C. Any federalism limit on the treaty power? (A newly relevant issue now that Commerce Clause power is not unlimited.)
- V. Executive agreements
- A. A purely domestic-law category. Internationally equally binding as a treaty.
  - B. Some executive agreements a practical necessity (e.g., a military exchange visit).
  - C. Whether to structure an international agreement as Treaty or Executive Agreement subject to the political interplay of President and Senate.
  - D. Source of executive-agreement power is not the treaty power, but either a listed source of federal legislative power (e.g., the Commerce Clause) (in which case the agreement must be statutorily authorized or approved—sometimes called a “congressional-executive agreement” ) or an inherent Presidential power (e.g., to determine what foreign governments to

recognize diplomatically, *United States v. Pink*, 315 U.S. 203 (1942)).

- E. If valid under such federal legislative or executive power, executive agreements are the law of the land in the same way that treaties are, *Pink*, and presumably subject to similar limitations (e.g., must be self-executing to be domestic law, although the statute authorizing or approving a “ congressional-executive agreement” may also serve as implementing legislation).