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NORTH CAROLINA LAW REVIEW

Volume 35 | Number 4

Article 1

6-1-1957

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Recommended Citation

Arthur S. Miller, *Japanese Textiles: Some Legal Problems in the Area Where Constitutional Law Meets International Law*, 35 N.C. L. REV. 457 (1957).

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JAPANESE TEXTILES: SOME LEGAL PROBLEMS IN THE AREA WHERE CONSTITUTIONAL LAW MEETS INTERNATIONAL LAW

ARTHUR S. MILLER*

INTRODUCTION

"In all of the complex of cross-currents of economic and political forces that must be dealt with in the establishment of a sound foreign economic policy for this country, there is no single problem that is more baffling and yet more urgent than that of what to do about Japan."¹ So spoke the chairman of the President's Commission on Foreign Economic Policy in 1954. Three years later the problem is no closer to solution and is still as urgent as it was. The latest chapter in the history of Japanese-American commercial relations is being written today in a controversy which involves important problems cutting across law and policy.

For many years the question of what to do about imports of Japanese manufactured goods into the United States has been a source of serious concern. Periodically, a cry has gone up against "cheap goods manufactured by low-wage labor." World War II and the post-war occupation years stilled the clamor for a time, but promulgation of the commercial treaty between the United States and Japan in 1953 has provided a springboard for more outcries.² The context today is the Southeastern United States where in two states, Alabama and South Carolina, legislation has been enacted directed toward Japanese textile imports.³ In turn, a recent announcement by the federal government discloses that Japan will "voluntarily" limit its exports of textiles to the United States to 235 million square yards annually.⁴

Two important legal questions are involved in this context, questions which exist in the penumbra where constitutional law and international law meet. In the first place, the validity of the state statutes can be questioned. Specifically, are these statutes invalid as being in contravention

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¹ RANDALL, *A FOREIGN ECONOMIC POLICY FOR THE UNITED STATES* 55 (1954).

² This is the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, effective October 30, 1953, T.I.A.S. No. 2863.

³ So. Car. Code § 66-8 (Supp. 1956); Ala. Sess. Laws 1956, No. 120, § 46. Georgia's legislature considered but rejected similar legislation in its 1957 session.

⁴ The announcement took the form of a press release dated January 16, 1957, issued by the Departments of State, Commerce, and Agriculture. See *N. Y. Times*, Feb. 10, 1957, § F, p. 1, for a discussion of the Japanese program.

of the 1953 treaty with Japan? Are they a regulation of foreign commerce which might fall as being in conflict with the power of Congress to regulate both interstate and foreign commerce? And in the second place, the legal nature of the agreement of export limitation, and the power of the executive branch to arrange for it, is open to conjecture and question. What form did the arrangement take? Was it an executive agreement? If so, had it been authorized by Congress? Did it need prior congressional authorization? These questions are of importance both in American external relations and domestically: externally, for it may well be that the United States will be violating the treaty (and thus be in violation of international law) and yet be unable, because of its municipal constitutional structure, to do anything about it; domestically, because the questions throw in sharp focus the important constitutional issues posed by the perennial efforts to enact the so-called Bricker Amendment.⁵

STATUTE VERSUS TREATY

Validity of the state statutes of Alabama and South Carolina depends in the first instance on whether their terms are inconsistent with the 1953 Japanese-American treaty. Since 1797 it has been clear that state laws must give way before the terms of a treaty;⁶ this doctrine of course merely articulates in the courts what the Constitution itself makes express.⁷

Both of the statutes require the same thing. Merchants must post signs informing the public that they sell Japanese textiles, with provisions made for criminal penalties for violations. South Carolina's has been codified in the following terms:

§ 66-8: *Sellers of Japanese textiles to display sign to that effect.* Every person operating a wholesale or retail establishment in the State which sells Japanese textile goods, or garments made therefrom, shall display in a conspicuous place upon the doors of such establishment, in letters not less than four inches high, a sign reading as follows: "Japanese Textiles Sold Here." Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than

⁵ The latest of the efforts of the indefatigable Senator Bricker came in early 1957 when he introduced S. J. Res. 3, 85th Cong., 1st Sess. (1957). Under this version, Senator Bricker has seemed to revert back to the substance of his initial effort.

⁶ *Ware v. Hylton*, 3 U. S. (3 Dallas) 199 (1797).

⁷ Article VI of the U. S. CONSTITUTION reads in part as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

one hundred dollars or imprisoned for not more than thirty days.⁸

The treaty is rather lengthy, but the sections which might be considered to deal with the same subject matter as the South Carolina law are the following:

ARTICLE XV

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to . . . requirements and restrictions on imports and exports, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner.

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage, and use.

ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.⁹

Two questions must be answered before a determination of validity of the statute under the treaty can be made: (1) Is the treaty self-executing? (2) If so, is it inconsistent with the statute? Under existing constitutional interpretation, a treaty may be formally binding internationally but it does not become the "Law of the Land," *i.e.*, municipal law, under Article VI of the Constitution unless it is self-executing. The test for determining whether a treaty is self-executing was early set out by Chief Justice John Marshall in *Foster v. Neilson*:¹⁰ a treaty requires subsequent congressional action, that is to say, is not self-executing, ". . . when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act. . . ." If it is so found,

⁸ So. Car. Code, § 66-8 (Supp. 1956).

⁹ Japanese-American Treaty, *supra* note 2.

¹⁰ 27 U. S. (2 Peters) 253, 314 (1829). In the Head Money Cases, 112 U. S. 589, 598 (1884), Justice Miller said: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."

then the treaty is not the "Law of the Land" unless and until Congress acts to make it so. Here, it would appear that Article XV of the Japanese-American treaty requires subsequent legislative action, for it calls for each party promptly publishing "laws, regulations and administrative rulings . . . pertaining to . . . requirements and restrictions on imports and exports, or *affecting their sale, distribution or use. . .*" (Emphasis added.) On the other hand, Article XVI seems to be self-executing; it calls for "national treatment" for the products of the other nation in all matters including sale, distribution and use. No requirement for legislative action is indicated. Thus, it would seem that part of the treaty is self-executing, and part not.

If it is assumed, for purposes of exposition, that the treaty is self-executing, then the question of the validity of South Carolina's law turns on the issue of whether it affords "national treatment" to the products of Japan. And national treatment, by definition, means the treatment which South Carolina must give to the products manufactured in other states of the United States. The law requiring the posting of signs would seem to be an obvious instance of discrimination, and hence, would be invalid if directed at, say, textiles produced in Massachusetts.¹¹ Accordingly, national treatment means treatment without discrimination. The South Carolina (and Alabama, since it is identical) law, thus, would be invalid as being in contravention of the treaty. An independent ground, not involving the treaty, for possibly invalidating the laws is the so-called negative implication of the commerce clause in the Constitution.¹²

¹¹ The commerce clause of the Constitution was directed, among other things, toward the chaotic conditions of restriction and discrimination existing under the Articles of Confederation. The steady flow of Supreme Court doctrine has been in the direction of preventing the "Balkanization" of the American economy. See, e.g., *Hood & Sons v. DuMond*, 336 U. S. 525 (1949).

¹² States may not discriminate against interstate commerce, the justification being, in the words of Justice Cardozo, that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Further, that "neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. . . . What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523, 527 (1935).

But obviously these same underlying, fundamental policy considerations are not present when the commerce in question is "foreign" as distinguished from "interstate." It would not lead to "Balkanization" of the American economy for a state in the United States to attempt to inhibit the sale of foreign-made goods. But it would conflict with the national purpose, the purpose of Congress as expressed in the treaty, and would be in derogation of American international responsibilities. And even if it is argued that Congress has not legislated and has not expressed a policy, nevertheless the subject matter under question here would appear to fall within the proscriptions of the doctrine of the *Coolley* case; that is to say,

Suppose, however, that no one in either South Carolina or Alabama disobeys the statutory mandate. No one then would arise to challenge the validity of the laws when under trial for the violation. Could anything be done about the matter? Under the Constitution, could anyone in the federal government contest the statutes? This question became pertinent in early 1957 when Secretary of State John Foster Dulles announced that he had asked the Department of Justice to test the legality of the state laws.¹³ There appears, however, to be no way for the Attorney General to do this. The Supreme Court has power to decide only "cases" and "controversies" and does not render advisory opinions. Other than a merchant alleged to be in violation of the state laws there does not appear to be anyone who can fulfill the case or controversy jurisdictional requisite. Certainly the federal government, its officials or agencies, does not have a general right to test the legality of state laws.¹⁴ It could well be, accordingly, that a situation which was true under the Articles of Confederation is, despite the language of Article VI of the Constitution, also true today.¹⁵

The upshot would be that the United States would be in the embarrassing position of being in violation of international law for failing to live up to a treaty obligation while at the same time being unable to do anything about it. This is essentially the position in which the United States finds itself today. Even outside the grave policy questions involved, this is hardly a desirable posture for this country to hold with regard to our external relations. It is not likely to win many friends for the United States among the other nations of the world. But it seems to be an oft-times unavoidable result of the the American system of federalism, a system which operates to insulate a great deal of the activities of Americans generally from the reach of the central governmental

this is a subject matter which "imperatively demands a single uniform rule throughout the nation." See *Cooley v. Board of Wardens*, 53 U. S. (12 Howard) 299 (1851). Cf. *Brown v. Maryland*, 25 U. S. (12 Wheaton) 419 (1827).

¹³ The announcement came in a press conference held by the Secretary of State on March 5, 1957. The Department of Justice, when queried about the request from Dulles, replied that the question is still under study.

The following statement by Representative Hale Boggs of Louisiana may be found at 103 Congressional Record 3187 (March 13, 1957): "In the spring of 1956 the States of South Carolina and Alabama passed legislation requiring the posting of signs in retail stores selling Japanese textile products. The Secretary of State publicly deplored these enactments. He pointed out that these laws appeared to be contrary to the treaty of friendship, commerce and navigation between the United States and Japan which had been ratified by the Senate."

¹⁴ In addition, it would be of doubtful political feasibility.

¹⁵ One of the chief reasons for calling the Constitutional Convention of 1787 was the inability of the Continental Congress under the Articles of Confederation to compel state governments to comply with treaty obligations of the United States. See I FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 164, 316 (1937); 3 *id.* 113, 548. It was one of the treaty problems which culminated in the litigation resulting in *Martin v. Hunter's Lessee*, 14 U. S. (1 Wheaton) 304 (1816), one of the key cases in constitutional history.

power. And it would seem to be clear beyond doubt that the United States could not invoke its municipal law or Constitution in order to be relieved from its international obligation. "Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system."¹⁶

This situation points up what often is the great difficulty of conducting international relations in a federal system and in a nation where sectional interests can, through the pull and tug of normal politics, often prevail over what would be a different position had the Secretary of State a free hand. The position is undesirable. A nation, particularly one of the present stature of the United States, can ill afford to have its external posture undercut by parochial domestic politics. As Walter Lippmann has pointed out, the *public* interest must prevail.¹⁷ This is a problem which, under the Constitution, has not been resolved even though experience under the Articles of Confederation with treaties and state laws was one of the principal reasons for calling the Constitutional Convention.¹⁸ It is a problem which could well occur with increasing frequency in the future, as American concern with and commitment in the world political process becomes more and more intensive and extensive. In the past, the United States, as with the League of Nations, has been placed in the awkward position of making promises and then having to break them because of the exigencies of domestic politics. It may well have been for this reason—the fact that other nations know that the President's word in international affairs cannot always be taken at face value because he may be "vetoed" by Congress or some fact of American politics—that President Eisenhower, in promulgating the "Eisenhower Doctrine" for the Middle East, chose to ask Congress for military authority he already had under the Constitution. This problem of authority to speak for the United States in its foreign relations is also involved in the Japanese textile situation and will be taken up below.

Dealing as it does with matters which are primarily local, some question may be raised about the validity of the treaty. However, the decision in *Missouri v. Holland*¹⁹ doubtless would govern the matter and the treaty would be upheld as a proper exercise of federal power; the Tenth Amendment, in other words, would not operate to strike down the treaty. Furthermore, under present-day interpretation of congressional power under the commerce clause, it would seem that Congress

¹⁶ Harvard Research in International Law, 29 AM. J. INT'L LAW SUPP. 1029-1044 (1935).

¹⁷ See LIPPMANN, *THE PUBLIC PHILOSOPHY passim* (1955).

¹⁸ See note 15 *supra*.

¹⁹ 252 U. S. 416 (1920).

does have power to deal with the same local matters dealt with in the treaty.²⁰ If that be true, then Congress could legislate and make such practices as are required by the South Carolina law illegal by federal statute. Certainly, if the commerce clause cannot be stretched that far, Congress would have power to do so by terms of the treaty. Even so, this would not alter the situation noted above: Unless and until some merchant violated the statute, no case or controversy would be present so as to give the federal courts jurisdiction to decide the question of legality. Moreover, it probably would be politically impossible or infeasible for the executive branch of the national government to attempt to get such legislation through Congress. Easily bruised feelings of parochial pride, as well as the laments of constituents, could well rise in strong opposition among members of the powerful Southern delegations in Congress.

The problem of executive-legislative relations in the conduct of American foreign affairs is one of long-simmering controversy. Periodically it erupts, the latest example being in the battle over the Bricker Amendment. Furthermore, the Japanese textile situation itself has precipitated another skirmish in the pull-and-tug between Congress and the President.

THE AGREEMENT OF LIMITATION

In January 1957 a press release issued jointly by the Departments of State, Commerce, and Agriculture announced the Japanese program for control of exports of cotton textiles to the United States.²¹ An annual over-all ceiling of 235 million square yards of all types of Japanese cotton cloth and cotton manufactures was instituted, beginning in January 1957. Apparently the limitation was the result of a series of discussions and notes between representatives of the two governments. However, it is not entirely clear whether an international agreement was concluded or what the federal departments considered their legal authority to be to arrange such an agreement of limitation. The State Department, however, takes the position that the Japanese action was entirely unilateral and that the question of federal authority is, therefore, irrelevant.²²

²⁰ The principle which will validate congressional regulation of the sale of bottles on the shelves of the local drugstore would seem to be broad enough to cover the situation of the sale of Japanese textiles, even in the absence of any treaty obligation. See *United States v. Sullivan*, 332 U. S. 689 (1948). Cf. *Wickard v. Filburn*, 317 U. S. 111 (1942); *United States v. Darby*, 312 U. S. 100 (1941).

²¹ See note 4, *supra*. In the press release, the Departments of State, Commerce, and Agriculture made a joint statement, including the following: "The action taken by Japan is a major step forward in the development of orderly and mutually beneficial trade between the United States and Japan. It is a constructive measure aimed at forestalling possible future injury to the United States cotton textile industry. It recognizes the problem faced by various segments of the domestic industry and meets this problem through the voluntary exercise of restraint on exports of cotton textiles to the American market."

²² A request by letter was addressed to the State Department on March 1, 1957, asking the following questions: "(a) Were the discussions between the United

An immediate reaction took place in Congress. Representative Henderson Lanham of Georgia introduced a resolution calling for an investigation of the Japanese program "for the purpose of determining whether or to what extent the authority of the Congress to regulate the foreign commerce of the United States has been usurped, disregarded or misused by the executive branch of this Government in entering into the arrangement with Japan. . . ."²³ Thrown, thus, into sharp focus was the as yet unsettled scope of authority of the President and the executive branch to conclude international agreements other than treaties.

Although the Constitution is silent as to their use, in fact executive

States Government Departments with representatives of the Japanese Government formalized in a document? (b) If no formal document was drawn up, was a series of notes exchanged with the Japanese Government? (c) Was the action of the Japanese Government entirely unilateral? (d) What does the State Department consider to be the legal authority for entering this type of program?"

By letter dated May 9, 1957, the Chief, Public Services Division, Department of State, replied as follows:

"The discussions between representatives of the United States Government and the Japanese Government were not formalized in a document. The Japanese Government issued a paper which provided the details of its program for the control of cotton textile exports to the United States. . . .

"The action taken by the Japanese was transmitted in a note from the Japanese Government on January 16, 1957. At the request of the Japanese Government this note has not been released publicly. The United States merely acknowledged the receipt of the Japanese note.

"The action of the Japanese Government was entirely unilateral. In view of the unilateral nature of the action taken by the Japanese the question of legal authority on the part of the United States is not relevant. This question would arise only if a bilateral arrangement had been entered into."

It is not believed that this letter satisfactorily explains the legal basis for the action. Technically, of course, the Japanese action was unilateral, but it was a bilateral arrangement if one looks not to the Japanese note alone, but to the total context out of which it arose.

The executive agreement in the *Capps* case, *infra* note 31, is in the form of an exchange of notes between the United States and Canada. These notes are printed as an appendix to the *Capps* case in the Supreme Court Reporter. See *United States v. Guy W. Capps, Inc.*, 348 U. S. 296 (1955).

²³ This is *Congressional Record*, H. Res. 145, 85th Cong., 1st Sess., CONG. REC. 1340-45 (daily ed. Feb. 4, 1957). An inquiry by the present writer to Representative Lanham as to what action had been taken under H. Res. 145 brought a reply which read in part as follows: "There was put into the [Congressional] Record by Congressman Hale Boggs of Louisiana a brief statement of the so-called agreement by Japan to limit exports of textiles to the United States. The Department of Commerce sent one of the Under Secretaries over to explain how the arrangement was worked out. For these reasons, I have not pushed for action on the resolution." Letter dated May 8, 1957, from Representative Henderson Lanham to the present writer.

The statement by Representative Boggs may be found at 103 *Congressional Record* 3185-88 (March 13, 1957). Of particular interest is a quotation from a note from the Japanese government to the United States dated September 27, 1956: "The action [the agreement to limit exports] now contemplated by Japan is based on the condition that all feasible steps will be taken by the United States Government to solve the problem of discriminatory State textile legislation and to prevent further restrictive action with regard to the importation of Japanese textiles into the United States." *Ibid.*, at 3187.

agreements have been negotiated and entered into throughout American history. Most of them are made pursuant to some legislative enactment; they represent the products of a cooperative endeavor by executive and legislature. Relatively little litigation has developed over either the legal effect of executive and other agreements or the respective powers of the two branches of government. The problems involved in such matters seldom involve justiciable issues and seldom end up in litigation. It was not until 1951 that a judicial decision was reached on the question of whether an executive agreement could supersede a prior inconsistent federal statute. The result of this paucity of cases is that what constitutional law as does exist consists mainly of some broad pronouncements made in a few recent Supreme Court opinions. These cases, notably *United States v. Pink*,²⁴ *United States v. Belmont*,²⁵ and *United States v. Curtiss-Wright Export Corp.*,²⁶ are ones in which the Court painted with a broad brush, leaving a number of murky areas. One of these is the power of the President to conclude an agreement involving a subject matter on which Congress has express authority under the Constitution to legislate. This is the broad situation in the Japanese agreement of limitation: Congress has constitutional power to regulate foreign and interstate commerce; what, then, may the President do in the field of foreign commerce? Does he, because he is the sole organ of our government in the conduct of American external relations, possess an independent power co-equal or superior to that of Congress?

The powers of the executive under the Constitution have never been spelled out with precision, either in the basic document itself or in Supreme Court interpretation.²⁷ This is particularly true of his powers as Commander in Chief of the armed forces and also as the American spokesman in foreign relations. As a recent commentator has put it, "The scope of the President's power to conclude international agreements has . . . never been clearly defined, and can only be indicated approximately by an estimate of the requirements of modern international relations guided by the various exercises of presidential power which have been recognized as constitutional during the course of our history."²⁸

²⁴ 315 U. S. 203 (1942).

²⁵ 301 U. S. 324 (1937).

²⁶ 299 U. S. 304 (1936). See also *Altman & Co. v. United States*, 224 U. S. 583 (1912).

²⁷ This is but another way of saying that the office of the presidency is one in which the job—the exigencies facing each President—creates its own special requirements which are met by the President, not on the basis of legal prescription, but on broad policy considerations. The matters dealt with by the President are normally nonjusticiable and answer cannot be delineated in advance. When a particular matter does get to court, the tendency for the judiciary is to avoid making a decision. See SCHUBERT, *THE PRESIDENCY IN THE COURTS passim* (1957).

²⁸ Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 *YALE L. J.* 345, 379 (1955).

Justice Sutherland's statement in the *Curtiss-Wright* case, that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution,"²⁹ does not clarify the question of the President's power vis-à-vis Congress. What can be said, in the absence of definitive Court statement, is that the constitutional prescription is one for shared power. The President may be the sole organ of government for external affairs, but he cannot effectively pursue policies unless Congress is willing to appropriate funds; he can commit American troops as Commander in Chief, but first Congress must "raise and support" them; and so on. Normally, few controversies arise because of this power-sharing, it having been found politically expedient to cooperate closely. In addition to shared power, there is doubtless an overlap of power, but it is an overlap which has not yet been given exact definition. "The great ordinances of the Constitution," Justice Holmes once observed, "do not establish and divide fields of black and white."³⁰ For better or for worse, the President and Congress have a dual responsibility in foreign affairs. Cooperation has been the rule; conflict, while it has taken place, has been rare.

Only two cases, both of very recent vintage, have dealt directly with the question of which branch of the federal government, President or Congress, prevails in the event of conflict. Both, moreover, are decisions of lower federal courts. In *United States v. Guy W. Capps, Inc.*,³¹ the Fourth Circuit Court of Appeals had before it a situation where an executive agreement had been concluded with Canada which was inconsistent with a prior congressional statute. Meeting the constitutional issue squarely, the court held the agreement void as a matter of municipal law because it was not authorized by Congress and contravened a prior act of Congress.³² The Supreme Court, however, chose to dodge the constitutional question and decided the case on other grounds; in so doing, the highest Court expressly repudiated the Circuit Court's holding.³³ In 1955, the Court of Claims decided *Seery v. United States*,³⁴ a case which, if it ever reaches the Supreme Court, could settle a number of constitutional questions in addition to the respective priorities of President and Congress. There, the question arose as to whether an Ameri-

²⁹ 299 U. S. 304, at 318.

³⁰ *Springer v. Philippine Islands*, 277 U. S. 189, 209 (1928) (dissenting opinion).

³¹ 204 F. 2d 655 (4th Cir. 1953), affirmed on other grounds, 348 U. S. 296 (1955). See Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953).

³² 49 STAT. 773 (1935), 7 U. S. C. § 624 (1952).

³³ "In view of the foregoing, there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision in this case does not rest upon them." 348 U. S. at 305.

³⁴ 127 F. Supp. 601 (Ct. Cl. 1955). See Sutherland, *The Flag, The Constitution, and International Agreements*, 68 HARV. L. REV. 1374 (1955).

can whose property, located in Austria, had been confiscated by the Army after the war, could bring suit against the federal government under the Tucker Act.³⁵ In 1947, an executive agreement had been concluded with Austria in full settlement of all obligations. The government argued that this agreement acted to extinguish not only the plaintiff's constitutional rights which might have been available but also that part of the Tucker Act which had consented to suit. The Court of Claims gave short shrift to this argument, stating: "It would indeed be incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional rights of a citizen."³⁶ *Capps* and *Seery*, taken together, are too little authority on which to build doctrine, but they do display a rather significant tendency on the part of the judiciary to view with extreme caution assertions of the unfettered power of the President to conclude executive agreements when those agreements have a direct effect on American citizens. Furthermore, the cases do indicate a tendency to interdict the President when his executive agreements run into conflict with powers of Congress, as compared with the relatively free hand accorded him when the conflict is with state law.

Absence of authoritative statement from the judiciary leaves the technical constitutional situation clouded in doubt. It may be that more litigation will take place in the future, as the United States becomes even more immersed in international affairs. "In international legal affairs perhaps the most prominent development of the twentieth century has been the amazing number, complexity and variety of international agreements."³⁷ That being so, perhaps the next few years will bring resolution of some of the present problem areas. But even without definitive doctrine, a number of statements can be made about the Japanese agreement of self-limitation.

First, the agreement of course operates as an international consensual obligation and thus binds the Japanese government under well-known doctrines of international law.³⁸ Of course, operating as a powerful

³⁵ 62 STAT. 940 (1948), 28 U. S. C. § 1491 (1952). It is worth mentioning, perhaps, that the commentators have been generally critical of the *Seery* decision. See Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 AM. J. INT'L L. 362 (1955); Note, 43 CALIF. L. REV. 525 (1955). In Note, 55 COLUM. L. REV. 926 (1955) the decision is criticized because it "hampers the executive's ability to make final settlement of claims," a criticism which at best begs the real questions in the case and which at worst pays far too much obeisance to the concept of efficiency, as distinguished from fairness, in government.

³⁶ *Seery v. United States*, 127 F. Supp. 601, 607 (Ct. Cl. 1955).

³⁷ BISHOP, Foreword to HENDRY, *TREATIES AND FEDERAL CONSTITUTIONS* iii (1955).

³⁸ See BRIGGS, *THE LAW OF NATIONS* 836 (2d ed. 1952).

sanction behind that obligation is the fact that the United States can cut off imports of Japanese textiles whenever it wishes. This would be done through the normal use of import quotas and control over imports. But it would probably have to be done by Congress. The other side of the coin is the fact that Japan can take retaliatory action against goods being imported by that nation from the United States.

Second, it is possible that a statutory basis for the "agreement" exists in a section of the Agriculture Act, the same section which was involved in the *Capps* case. Under this section, the President has authority to place limitations on imports when he finds that they will "render or tend to render ineffective, or materially interfere with, any program or operation undertaken" under the Agriculture Act and similar statutes.³⁹ The Act applies to agricultural commodities and also to products processed from such commodities. But if this is relied upon as a source of presidential authority, it is scarcely tenable for the reason that the President has not followed the statutory procedure. Furthermore, the same section of the Act goes on to say that "No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section."⁴⁰ Although it may well be that no litigant can or will arise to challenge the validity of the agreement of limitation, it would seem fairly certain that the Agriculture Act does not give congressional authority for the agreement.

Third, if the statutory basis for the agreement is nonexistent, is there any other possible legal hook on which it could be hung? Does the President possess independent, *i.e.*, "inherent," authority to conclude such an arrangement? Can he act in the teeth of an Act of Congress which appears to be contrary to his method of operation? That the President does have authority as President to enter into international executive agreements (that is, presidential agreements as distinguished from congressional-executive agreements) is obvious. He has exercised that authority numerous times. For example, the Litvinov Assignment, the executive agreement at issue in the *Pink* case, had no statutory warrant.⁴¹ Whether, however, he has it when the agreement is concerned with a subject matter on which Congress has express authority to legislate, and has legislated, is an entirely different matter. That question, while unsettled, would seem to call for an answer that the President's authority is doubtful at best. As the late Justice Jackson said in his concurring opinion in the *Steel Seizure* case, "When the President

³⁹ 49 STAT. 773 (1935), 7 U. S. C. § 624 (1952).

⁴⁰ *Id.* § (f).

⁴¹ Mathews, *supra* note 28, has a thorough discussion of this and other relevant cases.

takes measures incompatible with 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. . . . Presidential claim to [such] a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."⁴² However, the *Steel Seizure* case involved domestic affairs and relative powers over domestic matters, while here the conflict is one between the power of Congress to regulate foreign commerce and the power of the President as sole organ of the government for external affairs. He is not the "messenger boy" of Congress in American foreign relations; he is at least co-equal and perhaps superior in power. "Any meaningful answer to the problem of the scope of the President's agreement power must be framed in terms of the necessities of national survival in the modern world."⁴³ The problem is one only incidentally "legal." As with all constitutional questions, large considerations of policy are involved—of what should be good national policy in the atomic age. The dilemma—and dilemma it is—is basic: On the one hand, the President should have unfettered power in the delicate day-by-day relations with the other nations; on the other, the whole spirit of our history and legal system is against unfettered power residing in any one organ of government.

Finally, if the position of the State Department is adopted and the agreement is viewed as being purely "unilateral" in nature, the question may still be raised as to legal authority. When the total factual situation is taken into consideration, it is readily perceivable that the limitation on foreign commerce came about at the instance of the executive branch of the federal government. It is, therefore, a clear intervention by the executive into the regulation of foreign commerce, a power given by the Constitution only to Congress.

THE FUNDAMENTAL ISSUE

At stake in the factual situation of Japanese textiles is more than legalism and abstract arguments over constitutional powers, whether federal or state, presidential or congressional. The effective conduct of American foreign relations is at issue. As the commitment of the United States in foreign affairs becomes more intensive as well as more extensive, this type of situation—where sectional interests operate to handicap the conduct of external relations—can be expected to arise with increasing frequency. This means that not only will the international posture of the United States be affected, for better or worse, as new conflicts take place, but also the internal constitutional structure will

⁴² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637, 638 (1952).

⁴³ Mathews, *supra* note 28, at 374.

undergo searching re-examination. This is a situation which is fraught with danger, one which without much exaggeration could well become the Achilles Heel of American democracy.⁴⁴ Unless the responsible leaders of American government are allowed to exercise their seasoned judgment on proper policy and to follow through with measures executing that policy, the international position of the United States could—will—deteriorate. Japan, to take the specific instance here, must trade—or die. Trade she will—if not with this country, then with others. And those others include Red China and Soviet Russia.⁴⁵ That is the size of the dilemma facing the United States. That is the problem which makes resort to legalisms by parochial interests seem petty, short-sighted, and dangerous.

This is, it should be emphasized, a situation which calls for a national effort to help make a reasonable adjustment to problems raised when foreign competition becomes significant. The local industry and community should not be required to bear the full brunt of that competition. It is true that, as the Commission on Foreign Economic Policy said in 1954, "our foreign policy is aimed basically at improving the security and the well-being of the United States. Our foreign trade policy is an adjunct of our total foreign policy; its objectives are those of the total policy."⁴⁶ But if that be true—if foreign policy is for the *national* well-being—then internal adjustments necessary because of the operation of that policy should be shouldered nationally. The Commission on Foreign Economic Policy considered this problem, but decided not to recommend any positive action by the federal government, because they felt that dislocations because of tariff reductions and foreign competition was "but one phase of a much broader problem" and that "it was not appropriate to propose such a plan in the tariff area only."⁴⁷ However, one member of the Commission, David J. McDonald, stated his view that the federal government should take the lead in helping make adjustments.

⁴⁴ See LIPPMANN, *THE PUBLIC PHILOSOPHY passim* (1955); ROPKE, *THE SOCIAL CRISIS OF OUR TIME* (1950).

⁴⁵ See, Cohn, *Southern Cotton and Japan*, *ATLANTIC MONTHLY* 55 (August 1956).

The facts of Japan's problem need not be iterated here, other than to sum them up in Cohn's words by saying that "Japan has too many people, too little land, too few resources." She has 90 million people existing in a land area less than that of Montana.

It is vital to the security of the United States that Japan not join the Soviet orbit. That would be a disaster. "The paramount aim of the Communist effort is to detach Japan from the United States, then to neutralize her and eventually win her to the Communist camp. Thus our situation is closely analogous to that of West Germany. The fate of Europe will be decided by the disposition of the German question; the destiny of Asia will depend upon the orientation of Japan." Toshikazu Kase, *Japan's New Role in East Asia*, 34 *FOREIGN AFF.* 40, 44 (1955).

⁴⁶ Comm'n on Foreign Economic Policy, Staff Papers 250 (1954).

⁴⁷ Comm'n on Foreign Economic Policy, Report to the President and the Congress 54 (1954).

"It is proposed," he said, "that a policy be adopted by the Congress to assist and promote necessary adjustments by companies, workers, and communities whenever injury results from increases in imports traceable to tariff changes."⁴⁸ With *national* power to make tariff reductions and to provide for the national well-being by aiding the economies of friendly nations should go *national* responsibility for alleviating the adverse effects of such policies.

In either event, it would seem that the national interest is involved, the interest of the American public taken as a whole. In the one case, national security is at issue and must be protected; in the other, the economic viability of important parts of the national economy is involved and should also get protection. There is no real need for the two aspects of national interest to be in conflict. Neither the State Department nor Congress has faced up to the full problem; nor, for that matter, did the Commission on Foreign Economic Policy. Our foreign aid programs operate, to a large extent, as subsidies to American export industries. Is it fair or realistic to expect the textile industry of the United States, an industry in relatively weak condition, to shoulder the bulk of the burden of solving the Japanese problem? Admitting that Japan must trade and trade with the United States is not a solution to a problem: It is, rather, an invitation to the responsible authorities of the federal government to tackle all aspects of the question of international trade.

⁴⁸ *Ibid.*, at 55.