The Proposed WHO Treaty Must be Sent to The Senate for Ratification

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The reaches of the President's power to make executive agreements remain highly uncertain as a matter of constitutional law, which might tempt activist Presidents into far-reaching understandings.

–Louis Henkin[2]

I

Background

On March 29, 2021, 23 heads of government,[3] including the Prime Minister of the United Kingdom, the President of France, and the Chancellor of Germany, together with the President of the European Council, and the Director-General

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[1] J.D., Gonzaga University, (1976); LL.M. University of London (2011) (Public International Law).

[2] Louis Henken, *Foreign Affairs and the US Constitution, Second Edition,* Oxford University Press, New York (1996), p. 224.

[3] The full list:
J. V. Bainimarama, Prime Minister of Fiji
António Luís Santos da Costa, Prime Minister of Portugal
Klaus Iohannis, President of Romania
Boris Johnson, Prime Minister of the United Kingdom
Paul Kagame, President of Rwanda
Uhuru Kenyatta, President of Kenya
Emmanuel Macron, President of France
Angela Merkel, Chancellor of Germany
Charles Michel, President of the European Council
Kyriakos Mitsotakis, Prime Minister of Greece
Moon Jae-in, President of the Republic of Korea
Sebastián Piñera, President of Chile
Carlos Alvarado Quesada, President of Costa Rica
Edi Rama, Prime Minister of Albania
Cyril Ramaphosa, President of South Africa
Keith Rowley, Prime Minister of Trinidad and Tobago
Mark Rutte, Prime Minister of the Netherlands
Kais Saied, President of Tunisia
Macky Sall, President of Senegal
Pedro Sánchez, Prime Minister of Spain
Erna Solberg, Prime Minister of Norway
Aleksandar Vučić, President of Serbia
Joko Widodo, President of Indonesia
Volodymyr Zelensky, President of Ukraine
Dr Tedros Adhanom Ghebreyesus, Director-General of the World Health Organisation

of the World Health Organisation, issued a call for “a new international treaty for pandemic preparedness and response.”[4]

The main goal of this treaty:

> would be to foster an all of government and all of society approach, strengthening national, regional and global capacities and resilience to future pandemics. This includes greatly enhancing international co-operation to improve, for example, alert systems, data-sharing, research and local, regional and global production and distribution of medical and public health counter-measures such as vaccines, medicines, diagnostics and personal protective equipment.
>
> It would also include recognition of a “One Health” approach that connects the health of humans, animals and our planet. And such a treaty should lead to more mutual accountability and shared responsibility, transparency and co-operation within the international system and with its rules and norms.[5]

The initial draft of the treaty (called the Zero Draft) was published on February 1, 2023. The collaborators intend to present the final version of the treaty at the 77th World Health Assembly in May 2024.[6] The most recent publicly available draft is dated October 30, 2023.[7]

The draft text consists of 36 articles organized into three chapters:

I. Introduction

II. The world together equitably: Achieving equity in, for and through pandemic prevention, preparedness and response

III. Institutional arrangements and final provisions

Even though the title page of the “negotiating text” uses a variety of possible nomenclature,[8] there is absolutely no doubt that this instrument proposes an

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[4] https://www.gov.uk/government/speeches/no-government-can-address-the-threat-of-pandemics-alone-we-must-come-together

[5] *Id.*

[6] *Id.*

[7] Attached as Exhibit 1.

[8] SEVENTH MEETING OF THE INTERGOVERNMENTAL NEGOTIATING BODY TO DRAFT AND NEGOTIATE A WHO CONVENTION, AGREEMENT OR OTHER INTERNATIONAL INSTRUMENT ON PANDEMIC PREVENTION, PREPAREDNESS AND RESPONSE.

international treaty. The Vienna Convention of the Law of Treaties has established a settled, worldwide definition of the term "treaty":

> "[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation

VCLT Art. 2(a).[9]

The structure of the draft WHO Treaty is familiar to those acquainted with other UN multilateral treaties.

As the accompanying appendix[10] demonstrates, UN human rights treaties[11] commonly possess several common elements. The latest draft of the WHO treaty demonstrates that it possesses each of these elements:

- A statement of purpose
    - Art. 2
- Definitions
    - Art. 1
- Statement of general principles
    - Art. 3
- Substantive provisions
    - Art. 4-20
- Creation of governing entities for the ongoing implementation and management of the treaty

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[9] Even though the United States has not ratified the VCLT, the Supreme Court has cited this provision of the VCLT as an authoritative definition of "treaty" for international law purposes. *Weinberger v. Rossi*, 456 U.S. 25, 30, fn. 5. (1982).

Additionally, the Court has, on several occasions, used the rules of the VCLT as an authoritative source for the rules of international law with respect to treaties. See, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 191 (1993) (a treaty must first be construed according to its "ordinary meaning") citing VCLT Art. 31.1; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations) citing VCLT Art. 27; *Abbott v. Abbott*, 560 U.S. 1, 40 (2010) ("Recourse may be had to supplementary means of interpretation ... when the interpretation ... (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable") quoting VCLT Art. 32; Art. 56(1), *New York v. New Jersey*, 598 U.S. 218, 228 (2023) (although "nations generally may not withdraw from a treaty absent express authorization, the Convention acknowledges that the nature of the treaty may nonetheless imply a right of withdrawal") citing VCLT Art. 56(1).

[10] See Appendix 2.

[11] It should be remembered that health and health care are repeatedly recognized as protected human rights within the UN human rights treaty regime. See e.g., U.N. Convention on the Rights of the Child, Art. 24; U.N. Convention to Eliminate all form of Discrimination Against Women, Art. 11(f); International Covenant on Economic, Social, and Cultural Rights, Art. 12.

    - Art. 21-22 (Conference of the Parties)
    - Art. 24 (Secretariat)
- Periodic reporting requirements for each of the state parties
    - Art. 23
- Provisions concerning ratification or accession
    - Art. 31-32
- Provisions concerning reservations
    - Art. 26 (Reservations are prohibited by the WHO Treaty)
- Provisions concerning amendments, protocols
    - Art. 28-30
- Provisions concerning entry into force
    - Art. 33
- Provisions concerning withdrawal or denunciation
    - Art. 27
- Provisions concerning deposits of instruments
    - Art. 35
- Provisions concerning authentic texts (languages)
    - Art. 36

In light of the undisputed and indisputable fact that the WHO Treaty is a treaty for international law purposes, it would acquire the following attributes once it enters into force:

- It would be legally binding. ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith." (*Pacta sunt servanda*). VCLT Art. 26.
- "A state party may not invoke internal law as a justification for its failure to perform" the duties and obligations arising from the treaty. VCLT Art. 27.
- The United States would lose the right to claim that the treaty was adopted by an improper process. VCLT Art. 46.[12]

The provisions of Article 27 have significant implications for our constitutional system. Specifically, once the U.S. enters into this treaty, the failure of state governments within the United States to enact legislation to implement its provisions will not justify any failure of the U.S. to perform its duties under the treaty. Our Constitution's reservation of non-delegated powers to the states is a rule of our internal law that is overridden by treaties. "What is within the domestic jurisdiction of a state in the absence of a treaty ceases to be so when

[12] One treatise opines that Article 46 "might have been included in the VCLT with the U.S. in mind." Mary Ellen O'Connell, Richard F. Scott, Naomi Roht-Arriaza, Daniel D. Bradlow, *The International Legal System, Seventh Edition,* Thompson Reuters/Foundation Press, St. Paul, Minn. (2015) p. 1025.

that state enters into an international agreement on the subject."[13] Once the U.S. enters this treaty, Congress would acquire the corresponding legislative authority to enact implementing legislation through the Necessary and Proper Clause. *Missouri v. Holland.*[14] See also, *Restatement (Third) of Foreign Relations Law of the United States* § 207 (Comment a) (Am. Law. Inst. 1987): ("A federal state is bound to carry out its obligations regardless of the degree of autonomy which its constituent states, provinces, *Laender*, or other subdivisions enjoy under the constitutional system....")

While Executive Agreements have been employed since the early days of the Republic, there is no doubt that the frequency of their use is rapidly escalating.

A 2001 Congressional Research Report revealed the following numbers of international agreements by category.

	Treaties	Exec. Ag.
1789-1839......................................	60	27
1839-1889......................................	215	238
1889-1939......................................	524	917
1939-1989......................................	702	11,698

Total......................................	1,501	12,880

Currently, the United States enters into about 200 treaties (using the VCLT definition) per year;[15] but in the 12-year period from 2011-2022, the Senate

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[13] Louis Henken, *Foreign Affairs and the US Constitution, Second Edition,* Oxford University Press, New York (1996), p. 473.

[14] "To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *State of Missouri v. Holland*, 252 U.S. 416, 432 (1920).

[15] https://www.state.gov/policy-issues/treaties-and-international-agreements/#:~:text=The%20United%20States%20enters%20into,environmental%20matters%2C%20and%20many%20others.

only ratified a total of 63 treaties.[16] Thus, only about 2.6% of all U.S.-adopted treaties have been sent to the U.S. Senate for ratification in the last 12 years.

II

Should the WHO Treaty Require Senate Ratification?

A. Current Supreme Court Case Law Narrowly Limits the Classification of "Executive Agreements" that Do Not Require Senate Ratification

The Supreme Court has adopted an approach allowed for two classes of treaties within our constitutional system:

> The word "treaty" has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word "treaty" has a far more restrictive meaning. Article II, § 2, *30 cl. 2, of that instrument provides 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.

Weinberger v. Rossi, 456 U.S. 25, 29–30 (1982) (Internal citations omitted.)

There is no authoritative answer to the question: What kinds of instruments must be considered "treaties" requiring Senate ratification under Article II? But there are many voices which have recognized this lacuna in our constitutional law and have suggested, sometimes strongly, that it is time to obtain an authoritative answer.

> One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *United States v. Belmont*, 301 U.S. 324 (1937)] nor any one else has told us which are which. L. Henkin, *Foreign Affairs and the United States Constitution* 222 (2d ed.1996).

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[16] https://www.congress.gov/quick-search/treaty-documents?wordsPhrases=ratified&wordVariants=on&searchIn=anyField&congresses%5B%5D=all&treatyNumbers=&executiveReportNumbers=&treatyTypes%5B%5D=Any+Topic&q=%7B%22treaty-status%22%3A%22Approved%22%2C%22congress%22%3A%5B%22118%22%2C%22117%22%2C%22116%22%2C%22115%22%2C%22114%22%2C%22113%22%2C%22112%22%5D%7D

Quoted by *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 436, fn. 3 (2003) (Dissent by Ginsburg, joined by Scalia, Thomas, and Stevens).

> While the Supreme Court has made clear that some executive agreements are constitutional, no court has held that executive agreements are fully interchangeable with treaties. Nor have courts articulated standards to determine what types of agreements must be submitted to the Senate as treaties and what types of agreements the President can conclude as executive agreements.

"International Law and Agreements: Their Effect Upon U.S. Law," Congressional Research Service, July 23, 2023, p. 9.

This gap in our law has been apparent for a very long time.

> It will not be pretended by any one that the president can make any and every kind of an international agreement without the co- operation of the Senate, for the constitution expressly requires that "treaties" shall be made by him "by and with the advice and consent" of that body, signified by the approving vote of two-thirds of the senators present. On the other hand, it can easily be demonstrated that the word "treaties," as used in the constitutional law of the United States, does not embrace any and every kind of international agreement.

John Bassett Moore 20 POL.SC.Q. 385, 388 (1905).

But the importance of filling the gap by protecting the requirement that treaties should be sent to the Senate for ratification has likewise been defended by important and knowledgeable voices for many decades. Edwin Borchard, the longtime Sterling Professor of International Law at Yale Law School, (quoting another professor) concluded a seminal law review article on Executive Agreements by declaring:

> the Senate's treaty power is probably the last remaining bulwark of our national safety—even more, perhaps, than our armed forces—and it should be fought for and maintained at all costs.

Edwin Borchard, "Shall the Executive Agreement Replace the Treaty?", 53 YALE L.J. 664, 683 (1944).

In a handful of cases, the Supreme Court has sanctioned the idea that although Executive Agreements are treaties under international law, they are valid and peremptory even without Senate ratification.

This line of cases began with *United States v. Belmont*, 301 U.S. 324 (1937). Justice Ginsburg, in her dissent in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 396–97 (2003) summarizes the factual context and the rationale of that case.

> In *United States v. Belmont*, 301 U.S. 324 (1937), the Court addressed the Litvinov Assignment, an executive agreement incidental to the United States' recognition of the Soviet Union. Under the terms of the agreement, the Soviet Union assigned to the United States all its claims against American nationals, including claims against New York banks holding accounts of Russian nationals that the Soviet Government had earlier nationalized. The Federal Government sued to recover the accounts thus assigned to it. Applying New York law, the lower courts refused to enforce the assignment; those courts held that the account-nationalization upon which the assignment rested contravened public policy. *Id.*, at 325–327. This Court reversed, concluding that "no state policy can prevail against the international compact here involved." *Id.*, at 327. The Litvinov Assignment clearly assigned to the United States the claims in issue; the enforceability of that assignment, the Court stressed, "is not and cannot be subject to any curtailment or interference on the part of the several states." *Id.*, at 331.

The Litvinov Agreement was subsequently challenged in *United States v. Pink*, 315 U.S. 203 (1942). This agreement, which settled reparations claims between the two nations and their respective citizens, was again upheld. New York courts had held that the Soviet decree of nationalization of private property held in New York was violative of its public policy. The Supreme Court swiftly rejected that state's involvement in foreign policy and scuttled the argument that the Litvinov Agreement was invalid without Senate ratification.

> The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.

Id., 315 U.S. at 229.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court again was confronted with a challenge to an Executive Agreement which had settled international financial claims between the United States and Iran, and our citizens. The essence of the agreement, which was sustained by the Court, was that all claims by American nationals would be determined through binding arbitration before an Iran-United States Tribunal.

The Court cautioned that its decision in *Dames & Moore* should not be read too broadly. "We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." 453 U.S. at 661.

The Court described the scope of its approval of Executive Agreements as having been, heretofore, confined to agreements settling international financial claims.

> Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. *United States v. Pink*, 315 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.
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> Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.

Id., 453 U.S. at 679.

There is only one case in which the Supreme Court has upheld an Executive Agreement outside the context of the settlement of international financial claims. It followed one year after *Dames & Moore.*

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court faced a challenge to a 1968 executive agreement that the President had entered into with the Philippines giving preference to Filipino citizens for civilian jobs on American military bases located in that country. This Agreement clashed with a 1971 act of Congress (§ 106 of Pub.L. 92–129) which prohibited discrimination against American citizens for such jobs except when permitted by *treaty.* The issue was whether an executive agreement should be construed to constitute a "treaty" within the meaning of that statute. As quoted-above, the Court held that there were two classes of international treaties for constitutional purposes. While the executive agreement before the Court (which was clearly a treaty under international law) should be construed to be a "treaty" within this statute, it was not within the class of treaties requiring Senate confirmation. 456 U.S. at 30.

The Court noted that prior to the enactment of the statute in question, there were 12 similar agreements with other nations hosting our military bases. In addition, subsequent to its enactment there were four more such agreements in place. In none of these 16 instances, were the agreements sent to the Senate for ratification. The Court reasoned, as a matter of statutory interpretation, that Congress intended to include executive agreements—which are treaties under international law—within the scope of the statute governing employment preferences on military bases. *Id.* at 32.

The Court returned to the context of the settlement of international financial claims for its fifth and final decision upholding the use of executive agreements. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court dealt with a challenge to a California law which sought to deal with the failure of German insurance companies to settle claims with the descendants of Jewish policyholders whose policies were confiscated or voided during the reign of the Third Reich. As a condition of doing business in California, the State required extensive public disclosures by these insurance companies in a manner that attempted to strong-arm the companies into settlements satisfactory to the State.

President Clinton had entered into an executive agreement that provided a framework for the settlement of such claims, but the process was slow-moving and had, as of the date of the decision, provided scant relief.

The Court held that California's law was preempted by the federal action providing a method of settling these German insurance claims.

A fair reading of the case suggests that the Court did not give talisman-like effect to an executive agreement. Instead, taking the situation as a whole, the Court found that California was inserting itself into an international dispute where the nation needed to speak with one voice.

Standing in contrast to these five cases where the Court approved of the use of executive agreements, there are two decisions of the Supreme Court which declined to give effect to unilateral actions of the President by executive agreement or by executive action.

In *Reid v. Covert*, 354 U.S. 1 (1957), the Court invalidated, as applied to the Appellee, an executive agreement between the United States and the United Kingdom. That agreement provided that all criminal charges against American citizens committed in the U.K. would be tried by U.S. military tribunals. The Court held that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. A jury trial in a civilian court was deemed constitutionally necessary.

Importantly, the Court expressed strong limitations on the power of the federal government even when the Senate acts in cooperation with the President. Accordingly *Reid* established the rule that treaties may not be used to result in *de facto* constitutional changes. Removing the right to a jury trial in a criminal case was held to be such a prohibited change.

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. **The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.**

354 U.S. at 17. (Emphasis added).

At a minimum, *Reid* stands for the proposition that treaties cannot be used to bargain the constitutional rights of citizens. However, it is possible to read its sweeping language to suggest that changes in the structures of federalism are also impermissible. If so, *Reid* may be read to undermine *Missouri v. Holland.* But, such a conclusion is probably premature. Moreover, reversing *Missouri v. Holland* is not necessary in this situation. The Senate is not being asked to ratify the WHO agreement. If it was ratified, and, a state challenged the power of the President and Senate to effect this kind of constitutional-level change, revisiting that case on migratory birds would be unavoidable.

The power of the President to unilaterally change our law was again rejected by the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008).

In order to comply with a decision of the International Court of Justice, President Bush issued a Memorandum directing the State of Texas to put aside our domestic law concerning a procedural bar to successive habeas corpus petitions. Describing *Dames & Moore, Pink, and Belmont* as "our claims settlement cases,"[17] the Court held:

> The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.

Id., at 532.

Thus, the most recent decision of the Supreme Court on executive agreements clearly holds that the power of the President to act in foreign policy is not so broad as to grant him the authority to make sweeping changes to our domestic

[17] 552 U.S. at 531.

law via his sole act in fashioning international agreements. Outside of the area of settlements of claims and employment agreements for military bases, there is no Supreme Court precedent approving the use of executive agreements for the adoption of documents that are treaties under international law.

B. Fashioning A Standard for Determining Which Treaties Must Be Ratified

The Supreme Court has repeatedly noted that executive agreements have been used since the earliest days of the Republic.[18] In the first fifty years of governance under the Constitution, 68.9% of our international agreements were sent to the Senate for ratification.[19] However, as we previously demonstrated, the percentage of international agreements which have avoided Senate ratification has escalated to the point where, since 2011, over 97% of our international treaties (using the VCLT definition) are finalized by a single signature.[20]

Given the Supreme Court's reliance on the early practice of our nation for permitting exceptions to the textual rule requiring Senate ratification, it seems abundantly self-evident that the standard used by the founding generation should be the starting point for fashioning a constitutionally-compliant rule.

Given the importance of this history, we quote at length the scholarship of Professor Edwin Borchard of Yale in one of the leading articles on this topic, "Shall the Executive Agreement Replace the Treaty?", 53 YALE L.J. 664, 667-670 (1944) (footnotes omitted):

> The Constitution refers only to treaties, giving to them legal effect as the supreme law of the land, and says nothing about Presidential executive agreements. Yet it is apparent that, in dealing with the powers of the states, the Founders were cognizant of the distinction between treaties—which states were prohibited from making—and mere "agreements" or "compacts" with other states or foreign powers, which they were permitted to conclude, provided they obtained the consent of Congress.
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> That the Founders were well aware of this distinction has been further demonstrated by Mr. A. C. Weinfeld, who has convincingly shown that the framers of both the Articles of Confederation of 1777 and the Constitution of 1787 were under the influence of the great Swiss natural-

[18] CITES

[19] See fn. 13 and accompanying text.

[20] See fn. 14 and accompanying text.

law jurist and positivist, Emmerich de Vattel. In his classic work, Le Droit des Gens, Vattel made the following distinctions:

> "Section 152. Treaties of Alliance and other public treaties A treaty, in Latin foedus, is a pact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time.
>
> Section 153. Compacts, agreements or conventions. Pacts which have for their object matters of temporary interest are called agreements, conventions, compacts. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these pacts are executed once for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty exists.
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> Section 192. Treaties executed by an act done once for all. Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless indeed we prefer to give them another name (see Sec. 153), those conventions, those pacts which are executed by an act done once for all and not by successive acts, are, when once carried out, fully and definitely consummated. If valid, they naturally bring about a permanent and irrevocable state of things."

Vattel thus distinguished between agreements embracing continuous executory obligations of projected future duration, which he considered the proper subject of treaties, and pacts having for their object matters of temporary interest or a single act. The latter he considered, though somewhat ambiguously, the appropriate subject of "compacts, agreements or conventions." It is further apparent that Vattel believed that many permanent transactions— such as a cession of territory or peace agreement—should be accomplished by treaty even though consummated by a single act. Mr. Levitan agrees with Mr. Weinfeld that the term "agreement or compact" referred to in the Constitution of the United States is derived from the "agreement, convention, compact", or the original French "accords, conventions, pactions," discussed by Vattel.

The "Founding Fathers" formulated this distinction in terms of "important" matters, which were to be the subject only of formal federal treaties—known to the Founders as "treaties of peace, of amity and commerce, consular conventions, treaties of navigation"—and "routine" or unimportant questions, which the States were left free to conclude between themselves by mere agreements.

Thus, there are two rules which can be derived from this analysis. First, all agreements which "embrac[e] continuous executory obligations of projected future duration" should be considered to be "treaties" within the meaning of Article II requiring Senate ratification.

Some, perhaps most, "pacts having for their object matters of temporary interest or a single act" are the proper subject for international agreements that do not rise to the level of requiring Senate ratification. However, some agreements within this category are so intrinsically important that they also require Senate ratification.

These standards (transitory vs. continuous executory obligations) reveal that the very structure of the WHO Treaty places it within the category requiring Senate ratification. Of particular import is the presence of the creation of a Conference of the Parties which provides an ongoing governance structure that clearly evidences "continuous executory obligations of projected future duration." This is in addition to the ongoing requirements of the United States to comply with the treaty, submit regular reports for review, and much more.

The powers of the Conference of Parties are of particular relevance. The Conference is given a great number of particular powers. Reference to five items are sufficient to demonstrate that the treaty contemplates continuous executory obligations. The Conference has the power to:

- Adopt a budget. Art. 21(6).
- Regularly review the implementation of the treaty and "take the decisions necessary to promote its effective implementation." Art. 21(7)
- Consider reports of the parties designed to ensure their compliance with the treaty. Art. 21(7)(a).
- Oversee subsidiary bodies. Art. 21(7)(b).
- Adopt amendments to the treaty by a three-fourths majority vote. Article 28(3).

This last article is of particular note. The normal rules of the law of treaties are to the contrary. Article 39 of the VCLT provides: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

The rules of Part II are the rules for making treaties in the first place. Article 9(1) is the most pertinent. "The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2."

While paragraph 2 of the VCLT allows a treaty to be adopted at an international conference by a two-thirds majority vote, no State is bound by the treaty until it explicitly consents. See Articles 11-15.

But under the WHO Treaty, amendments can be adopted without the consent of each State. An Amendment adopted by a two-thirds majority is adopted.[21]

Thus, if President Biden purports to unilaterally ratify the WHO Treaty, he will not only bind our nation to the Treaty as written at the time he signs it, but will bind us to unknown future amendments of the text, which may grant the WHO greater and greater power to ensure compliance by all State parties.

This treaty contemplates far more than an agreement to a text. By his single act, President Biden proposes committing the United States to a governance structure with the authority to augment its power over our objection.

The unconstitutionality of such an agreement approved only by the unilateral action of any President is beyond debate.

III

Executive Agreements Cannot Be Used to Fundamentally Restructure Our Federal System

Notwithstanding *Missouri v. Holland's* holding that Senate-ratified treaties override reserved 10th Amendment powers, the power to restructure our constitutional system's allocation of powers between the federal and state governments has not and should not be approved through the mechanism of a mere executive agreement.

The recent experience of this nation's effort to respond to the Covid-19 pandemic is so well known that nearly every America understands that states,

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[21] This same approach to amendments of a treaty is also found in the Law of the Sea Treaty. It is one of the reasons President Reagan cited for refusing to support the adoption of the treaty.

"President Reagan rejected the Law of the Sea Convention in 1982 and cited several major deficiencies, none of which have been remedied. Reagan was concerned that the U.S., though a major naval power, would have little influence at the International Seabed Authority that the convention created. Although the Authority is supposed to make decisions by consensus, nothing prevents the rest of the "international community" from consistently voting against the United States, as regularly occurs in similar U.N. bodies, such as the General Assembly. In addition, President Reagan was troubled by the fact that the International Seabed Authority has the power to amend the convention without U.S. consent. That concern has also not been remedied in the intervening years." *The Top Five Reasons Why Conservatives Should Oppose the U.N. Convention on the Law of the Sea,* Heritage Foundation (2007) https://www.heritage.org/report/the-top-five-reasons-why-conservatives-should-oppose-the-unconvention-the-law-the-sea and not the Federal Government, have primary jurisdiction over public health matters, including pandemics. This general knowledge is strongly reinforced by the Supreme Court's jurisprudence.

The seminal case on this point is Jacobsen v. Massachusetts, 197 U.S. 11 (1905). In rejecting a constitutional challenge to a compulsory vaccination law, the Court explained:

> The authority of the State to enact this statute is to be referred to what is commonly called the police power – a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[22]

The Court went on to find, "The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take…"[23]

Recent court pronouncements in litigation surrounding COVID-19 have affirmed this principle. The Supreme Court has recognized the state's interest in stemming the COVID-19 pandemic as "unquestionably a compelling interest."[24] In his concurring opinion in the denial of an application for injunctive relief against Governor Newsom's pandemic-related restrictions Chief Justice Roberts cited Jacobsen v. Massachusetts for the proposition that "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"[25]

Three of the Supreme Court's cases which approved the use of executive agreements involved a determination that state laws to the contrary had to give

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[22] 197 U.S. at 24-25.

[23] *Id.* at 38.

[24] *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

[25] *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

way to the international commitments of the President. But in every one of these cases, the state's efforts were aimed at issues that were obviously international in character.

In both *Belmont* and *Pink,* the New York legislature and state courts took aim at the legitimacy of the nationalization decrees of the Soviet Union. In both cases, it was argued that it was contrary to the public policy of New York to give recognition to such confiscations of public property. The Supreme Court expressly rejected this contention.

> [T]he power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.

United States v. Pink, 315 U.S. at 231. See also, *United States v. Belmont*, 301 U.S. at 327.

Likewise in *Garamendi*, California's legislature inserted itself into an international issue aimed at applying pressure on German insurance companies to resolve claims arising from participation with the Nazi regime in denial of rights to Jewish policyholders.

The WHO Treaty presents the exact opposite of such cases—international actors are seeking to expand their jurisdiction into an area historically reserved for local governance. As previously established, our law has been clear since the beginning of the Republic. The principal authority for protecting public health and regulating the treatment of communicable diseases has always fallen within the police power of the states. COVID-19 was far from the first global pandemic. Some examples include:

- Spanish Flu 1918-1919 - 675,000 American fatalities[26]
- HIV 1981-present - ~700,000 American fatalities[27]
- 1968 Pandemic (Hong Kong Flu) - 100,000 American fatalities[28]

None of these global pandemics were deemed to justify a structural change in our governance of communicable diseases. Moreover, there is reason to doubt

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[26] https://web.archive.org/web/20160927210422/http://www.flu.gov/pandemic/history/1918/the_pandemic/index.html

[27] https://www.kff.org/hivaids/fact-sheet/the-hivaids-epidemic-in-the-united-states-the-basics/

[28] https://archive.cdc.gov/#/details?url=https://www.cdc.gov/flu/pandemic-resources/1968-pandemic.html

that the Founders would have believed that the treaty power in Article II would authorize such action even with ratification by the Senate.

Jefferson's Manual, created for the U.S. Senate, enumerates four limitations on the treaty making ability for that body.

> By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. To what subjects this power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. 1. It is admitted that it must concern the foreign nation party to the contract, or it would be a mere nullity, *res inter alias acta*. 2. **By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and can not be otherwise regulated.** 3. It must have meant to except out of these the rights reserved to the States; for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation to the House.[29]

Consistent with Jefferson's approach, for the vast majority of human history treaties were never employed for the purpose of dictating how a nation would govern itself internally. "International law is a law between sovereign states: municipal law applies within a state and regulates the relationship of its citizens with each other and with the executive." Ian Brownlie, *Principles of International Law (Seventh Edition),* Oxford University Press, Oxford, England (2008) p. 32.

While the advent of human rights treaties in the post-World War II era has dramatically changed that practice, nothing in the Supreme Court's jurisprudence suggests that Executive Agreements should be permitted to have the same power over domestic policy as properly ratified treaties. In other words, the controversial, but controlling, rule of *Missouri v. Holland*, *supra,* should not be extended to Executive Agreements. Moreover, a better reading of the Court's cases strongly suggests that Court's proclamation in *Reid v.*

[29] Jefferson's Manual at 310 (emphasis added).

Covert[30] together with the Court's decision in *Bond v. United States,*[31] represents a limitation on *Missouri v. Holland.* But the question of whether Senate-ratified treaties may effect a fundamental restructuring of federalism need not be decided for now. The WHO Treaty seeks to accomplish that objective without bothering to seek Senate ratification.

Like all treaties, the WHO Treaty is legally binding and imposes upon any party that accedes to it the duty to comply with its provisions.[32] International law dictates that the federal government would have the duty to comply with the legal obligations it imposes.[33] And *Missouri v. Holland, supra,* arguably holds that the Necessary and Proper Clause gives the federal government the constitutional authority to do so. Moreover, those obligations can be increased by a two-thirds majority vote of the Conference of State Parties over our objection and without our consent.[34]

All of this amounts to a dramatic restructuring of our Constitution's allocation of the primary authority to regulate communicable diseases—transferring power from the states to the federal government operating under the broad supervision of the World Health Organization.

Our Constitution does not permit the President to unilaterally effect such a dramatic restructuring of our law.

IV

United States Senators Have Standing to Challenge

The WHO Treaty's Adoption by Executive Agreement

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[30]"It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." 354 U.S. 1 at 17.

[31] "The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government..." 564 U.S. at 225.

[32]See pages 4-5 discussing the legal rules for treaties from the Vienna Convention on the Law of Treaties.

[33] See, fn. 11-12 and accompanying text.

[34] WHO Treaty (third draft) Article 28(3).

If the United States House of Representatives passed a budget bill that was amenable to the President, but it faced a certain defeat in the Senate, what would happen if the President simply signed the House measure and declared it to be law?

To refine this example a bit more, assume that the Senate had brought the budget bill to the floor but it was subjected to a filibuster. If a motion for cloture received 55 votes, but failed by five votes, the budget bill would fail.

Even if the President, citing the cloture vote, claimed that a majority of the Senate favored the budget, and thus he was justified in doing an end run, the result should be the same. A President cannot unilaterally decide that a bill may become law without actually obtaining the approval of the Senate.

Even though it is obvious that such an action would be unconstitutional, the question is: Who would have standing to challenge such an action?

It is submitted that any member of the Senate or any number of the members of the Senate would have standing to sue in such a situation. The Constitution demands that the Senate vote before such measures become law, and the President simply ignored their right and duty under the Constitution. Each Senator was denied the right to vote on the measure in question.

An early leading case on legislative standing is *Coleman v. Miller* 307 U.S. 433 (1939). It arose from questions arising out of the attempt of the Kansas legislature to ratify the Child Labor Amendment. The case was brought by twenty-one members of the Kansas Senate, and three members of the House of Representatives. The Senate had split 20-20 on the question of passage, but the measure was deemed to have passed because the Lieutenant Governor broke the tie by voting in favor of it. The Kansas House subsequently voted in favor of ratification by a simple majority. Their standing to bring the action was challenged, but the Court held in favor of plaintiffs' standing:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege.

Coleman, supra at 438.

Accordingly, there is little doubt that if 34 Senators bring an action to challenge the constitutionality of adopting the WHO Treaty without the consent of the Senate, they would clearly have standing. Their votes would be sufficient to defeat its ratification if it had been properly submitted.

However, the D.C. Circuit held that nine U.S. Senators who challenged the constitutionality of the revocation of the Mutual Defense Treaty with China (Taiwan) without approval of the Senate, had standing to sue. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (*en banc*) (*vacated on other grounds*, 444 U.S. 996 (1979).

The D.C. Circuit Court, sitting *en banc*, held that under the Senators' theory that they had a constitutional right to vote on termination, the Senators had standing. They had suffered an injury in fact in being denied the opportunity to prevent termination of the treaty. The court stated, "By excluding the Senate from the treaty termination process, the President has **deprived each individual Senator of his alleged right to cast a vote** that will have binding effect on whether the Treaty can be terminated. The President has thus nullified the right that each appellee Senator claims under the Constitution to be able to block the termination of this treaty by voting, in conjunction with one-third of his colleagues, against it." 617 F.2d at 702 (emphasis added).

Both *Coleman* and *Goldwater* addressed the constitutionality of the measure directly before the court because their votes *on that very measure* were not dealt with in a constitutional manner. Such a situation stands in clear contrast with *Raines v. Byrd,* 521 U.S. 811 (1997).

In *Raines*, six members of Congress filed suit against the Director of the Office of Management and Budget (Raines), challenging the constitutionality of the Line Item Veto Act. They claimed standing based on their loss of political power. The essence of this claim that their power and meaning of their votes on future legislation would be diminished by the prospect that these future measures would be modified by the use of the line item veto. The U.S. District Court for the District of Columbia found that they had standing,[35] but the Supreme Court reversed.

The Court in *Raines* distinguished the asserted injury from that recognized as sufficient in *Coleman v. Miller*. The Court summarized *Coleman* as standing for the proposition that legislators whose votes would have been sufficient to defeat legislation have standing to sue if it goes into effect anyway, on the ground that their votes have been completely nullified. In *Raines,* on the other hand, the legislators' votes on the Line Item Veto Act had been given full effect;

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[35] *Byrd v. Raines,* 956 F.Supp. 25 (D.D.C. 1997).

they just lost the vote. The Court also noted that the lack of standing did not deprive these legislators of an adequate remedy, since they could simply repeal the law. In summary, the Court characterized the institutional injury alleged by the legislators as "wholly abstract and widely dispersed."

But the Court described an alternative scenario where individual legislators *would* have standing:

> Thus, they were seeking to overturn a law that they voted against. *They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated*. In the vote on the Act, their votes were given full effect. They simply lost that vote.

Raines, supra at 824. (Emphasis added).

This passage from *Raines* identifies a general principle. The hypothetical proffered by the Court is the reverse of *Coleman.* Whether the vote should have resulted in passage or defeat, a legislator has standing to claim that his or her vote was not properly counted with regard to the measure before the Court. This is consistent with the D.C. Circuit's holding on standing in *Goldwater.* The failure to count votes correctly or the failure to take a vote when one is required gives individual legislators standing to challenge an improper process that denies their right to have their votes treated properly on that very measure.

Conclusion

The Supreme Court has addressed the power of the President to unilaterally commit our nation to legally binding treaties only in limited circumstances, mostly with regard to the settlement of financial disputes. The Constitution requires that the Senate ratify treaties by a two-thirds majority vote. Senate confirmation should be understood to be the general rule and not the exception.

International law both classes of documents are treaties. However, the time has come for the Supreme Court to clarify the constitutional line between "executive agreements" that may proceed by the unilateral action of the President and treaties which must be sent to the Senate for ratification. Whatever line the Court draws, the WHO Treaty clearly falls on the side requiring ratification.

Senators have standing to challenge this action. Ideally, 34 or more Senators would agree to do so. But, the best reading of the case law clearly suggests that individual Senators have standing to challenge the constitutionality of denying them the right to vote on a treaty of such consequence.

Respectfully submitted,

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