INTERNATIONAL AGREEMENTS, WITHOUT THE ADVICE AND CONSENT OF THE SENATE

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International Agreements without the Advice and Consent of the Senate.

The Constitution of the United States [1] 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." Judge Story, in his work on the Constitution, in commenting on this passage, says: "The power to make treaties is by the Constitution general, and, of course, it embraces all sorts of treaties for peace or war; for commerce or territory; for alliance or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." [2]

From this it might be supposed that an agreement with a foreign state, to which the approbation of the Senate has not been given, is a thing unknown to our constitutional practice. This is, however, not the fact, and it will be the purpose of this article to point out that there are certain classes of international agreements, in the making of which the Senate does not have a share.

The Constitution itself recognizes certain international agreements which are not treaties. While the States are forbidden to enter into "any treaty, alliance or confederation," they may, with the consent of Congress, make agreements and compacts with each other or with foreign powers. [3] The discussion therefore resolves itself into two parts, the first of which is,

I.

AGREEMENTS BY THE STATES.

The Articles of Confederation forbade the States, without the consent of Congress, to "enter into any conference, agreement, alliance or treaty with any king, prince or state," or, without the same assent, "to enter into any treaty, confederation or alliance" with each

1. Constitution Art. II, Sec. 2.
2. Commentaries on the Constitution § 1508.
3. Constitution, Art. I, Sec. 10, cl. 1 and 3.

other.[4] The omission of "agreement" from the second list was apparently construed by certain States to permit agreements between members of the Confederation. Thus, Virginia and North Carolina, in 1779, and Pennsylvania and Virginia in 1784, made agreements with reference to their common boundaries. In 1783, Pennsylvania and New Jersey came to an agreement as to the jurisdiction of the two States over the river Delaware and its islands. New York and Massachusetts, in 1786 made an agreement for the surrender by the latter of its land claims in Western New York.[5] In 1785, Maryland and Virginia entered into a compact respecting navigation and jurisdiction in Chesapeake bay, Pocomoke sound and the Potomac river, and also as to port regulations and fisheries in these waters. It was expressly held by the Supreme Court, in *Wharton v. Wise*, that the last mentioned agreement was not a "treaty, alliance or confederation" within the meaning of Article VI, paragraph 2 of the Articles of Confederation.[6] It should also be noted that the Articles of Confederation provided that "differences between two or more States concerning boundaries, jurisdiction, or *any other cause whatever*," might, on petition to Congress by one of the parties, be referred for settlement to a commission to be established under the direction of Congress, and that the decision thereof should be final.[7] Reference to Congress was, therefore, optional, and the provision manifestly contemplated an attempted settlement by the States involved before appeal was made to Congress.

The practice in this matter under the Confederation[8] evidently lead the framers of the Constitution to prohibit agreements or compacts, except with the consent of Congress. Since the adoption of the Constitution, numerous agreements or compacts, relating principally to boundaries, have been made between States, but all, so far as known, with congressional assent.

Judge Story, writing in 1833, considered that the precise distinction between the words, "treaty," "agreement," and "compact" was not clear. He seemed inclined, however, to assign to the first term

4. Articles of Confederation, Art. VI, Secs. 1 and 2.

5. Gannett, Boundaries of the United States, 97, 86, 83, 84, 69. *Poole v. Fleeger*, 11, Pet. 185.

6. *Wharton v. Wise*, 153 U. S., 163.

7. Articles of Confederation, Art. IX, Sec. 2.

8. Madison in his "Notes on Proceeding of the Federal Convention," referred to the above agreements between Virginia and Maryland and Pennsylvania and New Jersey as "compacts without previous application or subsequent apology." Doc. Hist. of the Const., III, 155.

engagements of a political character. The other two, he thought, might apply to "what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land, situated in the territory of each other, and other internal regulations for the mutual comfort and convenience of states, bordering on each other."[9]

The meaning of the words "treaty," "agreement" and "compact," as applied in international relations was discussed by Chief Justice Taney in the case of *Holmes v. Jennison*, in the year 1840.[10] The question here involved was the right of a State (Vermont) to surrender a fugitive from justice, on the request of a foreign government (Lower Canada), and it was there held that the surrender might not lawfully be made, because it necessarily involved an agreement between a State and a foreign power, to which the assent of Congress had not been given. In considering the meaning of the words "treaty," "agreement" and "compact" as used in Article I, Section 10 of the Constitution, Chief Justice Taney observed that "the words 'agreement' and 'compact' cannot be construed as synonymous with one another, and still less can either of them be held to mean the same thing with the word 'treaty,' in the preceding clause." . . . "Undoubtedly in the sense in which the word is generally used, there is no treaty between Vermont and Canada. For when we speak of a 'treaty' we mean an instrument written and executed with the formalities customary among nations; and as no clause in the Constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the State of Vermont." He then quotes the definition of these words as given by Vattal who says:

"A treaty, in Latin, *foedus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time."

"The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act and not by repeated acts. These compacts

9. Story on the Constitution §§ 1402, 1403.

10. *Holmes v. Jennison*, 14 Pet. 540.

11. Ibid, 571, 572, 573, and Vattel, Law of Nations, II, §§ 152, 153.

For the reliance placed by our early statesmen and farmers of the Constitution on Vattel, see Wharton's Diplomatic Correspondence of the Revolution, II, 64; Documentary History of the Constitution, III, 225; Madison's Letters and other writings, Vols. I, 124, 614, 634, 651; II, 249; IV, 446.