# Chapter 7 - The Domestic Effect of International Law

## How did Chief Justice John Jay characterize the legal status of treaties in 1793?

## The Making and Interpretation of Treaties

### What are the four factors that determine whether an agreement is a treaty under international law?

### What are the two steps to making a treaty under the US Constitution?

### Are there other ways the president can make international agreements?

### What does Jay say in the federalist about the role of the senate in negotiating a treaty?

### Can the Senate alone, or Congress give the president a legally enforceable order to negotiate a treaty?

## The ABM Treaty Reinterpretation Controversy

### What did Regan want to do that affected the ABM treaty?

### How did Regan argue that this would not abrogate the ABM treaty?

### When opponents pointed out that the ratification hearings on the Treaty did not support this reinterpretation, what did the White House cite to support their case?

### What did the White House say is really treaty?

### How does this affect the notion of treaty as contact?

### What is Biden addressing in this report?

### If these deliberations were intended to be a binding part of the treaty, what could the Senate do to make them binding?

### Eventually, the Senate added a variant of the Biden resolution as a condition to approval of the Intermediate Range Nuclear Forces (INF) Treaty – is this really the law of the land, as Senator Nunn claimed?

### What is the negotiating record?

### Why does this limit its use as documentation of what the treaty means?

### Is the senate entitled to the full negotiating record for the treaty? Why or why not?

No, only the treaty.

### What factors govern the president’s reinterpretation of treaties?

### Whose representations should count in construing a treaty?

### Why is president's role more important in international law?

### What can the senators do if they believe that a provision in the treaty is ambiguous?

## Abrogating Treaties - Goldwater v. Carter, 617 F.2d 697 (1979)

### Only dicta, vacated by United States Supreme Court as non-justiciable

### Does the Constitution provide for abrogating treaties?

### Symmetry - if the senate has to approve a treaty, does this mean they have to approve its abrogation?

### What are other things the senate has to approve?

### Do they have to approve firing them?

### What does the Supremacy clause mean?

### What are the limits on treaties - what happens if conditions change, say an ally goes communist?

### Who evaluates these changes?

### What would be the problem if he had to go the senate to get the treaty modified?

### Who has final authority to send in troops when there is a mutual defense treaty?

### When do modifications amount to abrogating the treaty?

### What about the termination clause in this treaty?

### Who gets to make that decision?

### Does the treaty say who makes it for the US?

### What is the dissent's argument that once a treaty becomes the law of the land, it can only be changed like other laws?

### Does this mean that congress has to pass a law that the president signs?

## Executive and Other Agreements

### Until I started looking at this a few years ago, I assumed, as most conlaw students do, that treaties are the only binding agreements with foreign governments.

### Turns out that we sign very few treaties, preferring to do everything with executive agreements

### Types of Executive agreements

#### Congressional-executive agreements

##### Congress either approves them or delegates approval to the president

#### Agreements made pursuant to treaty

##### Probably implicitly authorized by the treaty

#### Pure executive agreements, such as the Iran hostage settlement

### What did United States v. Pink, 315 U.S. 203, 230 (1942) tell us about the legal status of international compacts and agreements?

### American Insurance Ass’n v. Garamendi, 539 U.S. 396 (2003)

#### What does this tells us about sole executive agreements and state law?

#### How might the analysis of the effect on federal law differ?

## Made in USA Foundation v. US, 242 F3d 1300 (2000)

### This is a fight over what can be the subject of a treaty versus an executive agreement

### Does the constitution give any guidance?

### Was the court able to find any bright line?

### Case-Zablocki Act: Congressional limits on agreements

#### What does the Case-Zablocki Act require?

#### What if the president does not comply?

#### Does that make the agreements void?

#### Has congress successfully limited the president's ability to make secret deals?

## The Domestic Legal Effect Of Treaties And Executive Agreements

### Reid v. Covert, 354 US 1 (1957)

#### What are the facts?

#### Where did the crimes take place?

#### Why are they being tried by military courts?

#### Is the defendant active duty military?

#### What constitutional provision do the defendants say was violated?

#### What does the treaty provide?

#### May treaties override the constitution?

#### What did the court say about a subsequent statute overriding a treaty?

#### Must the statute obey the constitution?

#### What did the court decide about trying these women in military courts?

#### Why can soldiers be tried in military courts?

### Committee of US Citizens living in Nicaragua v. Reagan, 859 F2d 929 (1988)

#### What did the International Court of Justice find?

#### What did the US do to avoid this judgment?

#### What are the plaintiffs seeking?

#### The first issue is whether Congress may override a treaty by statute

#### What does this tell us about Congress' ability to control executive agreements?

#### Why is it hard to do?

#### Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972)

##### The UN Security Council required an economic boycott of Rhodesia

##### What does that tell us about the US president's position at the time on the resolution?

##### Senator Byrd amended a statute to block the boycott

##### Why an amendment, not a separate law?

##### Did the court find that this abrogated our treaty obligations?

##### Are we still part of the UN?

##### Since this is a subsequent statute, it overrides - what about its violation of international law?

#### What do the Head Money Cases, 112 U.S. 580 (1884), tell us about the role of the courts in enforcing foreign treaty obligations?

#### What do treaties depend on for enforcement?

#### Does international law count?

#### How do we tell if a treaty is self-executing, i.e., if individuals can enforce it without additional statutes?

#### Who can be a party in the International court of Justice?

#### Does this create individual standing?

### Missouri v. Holland, 252 U.S. 416 (1920)

#### What was at issue in this case?

#### Do you think that this United States Supreme Court would accept that a treaty can give the executive powers denied under the Constitution?

### What is a self-executing treaty?

### What are limits on self-executing treaties?

### Treaties that require congressional action

#### Many treaties are really agreements that congress pass laws to accomplish a certain goal.

#### Abrogating the treaty does not repeal these laws

#### What do you have to do to abrogate the effect of these treaties?

### Review of congressional limits

#### Does making an agreement give the president the power to carry it out if congress disagrees?

#### What can he do without congressional support?

## Statutory Incorporation of International Law

### Al-Bihani v. Obama, 619 F.3d 1 ((DCC) 2010)

#### (Al-Bihani v. Obama is a post-habeas challenge to indefinite detention of Ghaleb Nassar Al-Bihani, a citizen of Yemen held at Guantánamo for nine years without charge or trial. )

#### What is the constitutional authorization for congress to recognize international law?

#### What are some of the laws Congress has passed that rely on international national law definitions of crimes?

## The domestic legal effect of customary international law and jus cogens

### What is jus cogens?

### Does the court accept that there are instances of jus cogens?

### What are examples?

### What do you have to establish to show that an international norm has become jus cogens?

### Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

#### We will revisit these issues in the Guantanamo detention cases

#### What are the facts?

#### What is the FTCA and what does it provide?

#### Does he have a claim under the FTCA?

#### Would he if this happened in the US?

#### What claim would you use in the US?

#### What is the Constitutional basis for the Alien Tort Statute?

#### What was the congressional intent in passing the Alien Tort Statute (ATS)

#### Given this narrow intent, what is the court looking for to support Sosa's claim?

#### Is there indication of whether congress wants the court to allow torts claims to enforce international human rights law?

#### What does Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) tell us about whether the court can enforce international law?

#### What does Scalia think of this in the concurrence?

#### Does the Court find a jus cogens principle to support Sosa's claim?

#### What if he had been tortured?

#### How does Scalia describe the history of the ATS?

#### How well defined is customary international law?

#### Is there a generally agreed to codification?

#### What is the chief argument for executive power to override customary international law?

#### Who overrode customary international law in Ferrer- Mazorra v. Meese, 479 U.S. 889 (1986)?

#### Did the court indicate that any executive branch official could do this?

#### Can Congress ban the United States Supreme Court from considering international law as a precedent in US law cases?