

# INTERNATIONAL ADJUDICATORS AND JUDICIAL INDEPENDENCE

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What are the consequences to the United States legal system of the decisions of adjudicatory tribunals acting pursuant to treaties and other international agreements to which the United States is a party? This question and its variants are likely to increase in importance as the number and significance of international adjudicatory tribunals will probably continue to increase.

This Article will advance one argument supporting the position that adjudicatory tribunal decisions, including, for example, those of the International Court of Justice (“ICJ”), have, of their own force, no effect in domestic law, even when they are made pursuant to international agreements to which the United States is a party. I will thus be supporting the dualistic position adopted by Professor Curtis Bradley, who maintains that, as a general matter, treaty-empowered international bodies can bind the United States only as a matter of international, not domestic, law.<sup>1</sup> My argument is less general than Professor Bradley’s in that it applies specifically to treaty-empowered adjudicatory bodies. Although this argument is thus somewhat specialized, I believe that the structural feature of the Constitution on which it rests is both fundamental and of substantial interest.

The Supreme Court’s most recent decision concerning ICJ opinions, *Sanchez-Llamas v. Oregon*,<sup>2</sup> follows another case,

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1. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1591 (2003). Professor Bradley was another participant on the panel from which this essay is derived. Because of the brevity of this piece, I will not undertake to comment systematically on the important recent work on international delegations, of which Professor Bradley’s article is a leading example.

2. 126 S. Ct. 2669 (2006). Along with *Sanchez-Llamas*, the Court also decided *Bustillo v. Johnson*, in which I was one of the amici on an amicus curiae brief.

*Medellín v. Dretke*,<sup>3</sup> in which it granted certiorari only to avoid a decision. *Medellín* is of more interest in this context, because it involved a Mexican national who had been the specific subject of a decision by the ICJ.<sup>4</sup> In that decision, the ICJ directed the United States to provide individuals like *Medellín* with a forum in which to raise their claims under the Vienna Convention on Consular Relations.<sup>5</sup> Unlike *Medellín*, *Sanchez-Llamas* was not the subject of an ICJ decision.<sup>6</sup> In terms familiar to American lawyers, *Medellín* involved the domestic legal effect of both a precedent and a judgment of an international tribunal. *Sanchez-Llamas* involved only the precedential authority of the international court, which is an important topic but not the one I am addressing.

The argument in favor of treating the ICJ's decision as binding in cases like *Medellín* is straightforward. The President, with the advice and consent of the Senate, ratified both the Vienna Convention on Consular Relations<sup>7</sup> and the Optional Protocol under which states may accept the jurisdiction of the ICJ.<sup>8</sup> At the times relevant to that case, the United States was a party to both treaties.<sup>9</sup> Article VI of the U.S. Constitution says that treaties are the supreme law of the land.<sup>10</sup> The Vienna Convention's Optional Protocol authorizes the ICJ to resolve conclusively disputes regarding it.<sup>11</sup> Hence the ICJ's decision creates a binding obligation under the treaty, the treaty is U.S. law, and the ICJ therefore binds all United States courts, both state and federal. The ICJ's decision is just as binding as the treaty from which it takes its force, just as a regulation duly promulgated by a federal agency is just as binding as the law of the United States that authorizes the regulation.

The trouble with that argument is that it is schematically almost identical to the following argument: Congress passes a statute providing that disputes about the meaning of the Clean

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3. 544 U.S. 660, 666–67 (2005).

4. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

5. *Id.*

6. *See Sanchez-Llamas*, 126 S. Ct. at 2669.

7. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

8. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 324, 326, 596 U.N.T.S. 487, 488 [hereinafter *Optional Protocol*].

9. *See Medellín*, 544 U.S. at 682 (O'Connor, J., dissenting).

10. U.S. CONST. art. VI, cl. 2.

11. *Optional Protocol*, *supra* note 8, art. 1.

Air Act are to be conclusively resolved by a panel consisting of officers of the Environmental Law Section of the Association of American Law Schools. Such a statute is the supreme law of the land, and therefore authorizes that panel to conclusively resolve disputes.

The hypothetical statute would be clearly unconstitutional. Any debate would be more about the rationale for that conclusion than its substance. Formalists likely would say that such a grant of adjudicatory authority was inconsistent with the Appointments Clause of Article II, the Vesting Clause of Article III, and possibly the Vesting Clause of Article II.<sup>12</sup> Non-formalists would appeal to constitutional standards concerning separation of powers and the independence of the judiciary, rather than to constitutional rules, but nearly all of them would agree that the statute would be unconstitutional.

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12. Article II provides that officers of the United States are to be appointed by the President with the advice and consent of the Senate, or, pursuant to statute with respect to inferior officers, by the President alone, the heads of departments, or the courts of law. U.S. CONST. art. II, § 2, cl. 2. Article II does not provide for appointment by Congress or agents thereof. *Buckley v. Valeo*, 424 U.S. 1 (1976). According to the Supreme Court, the Appointments Clause imposes a real constraint on Congress's choice of agents, because it implies that significant government authority may be exercised on behalf of the United States only by officers appointed pursuant to the clause. *Id.* at 125–26. While there is debate about how far that principle reaches, and specifically about whether and when it reaches to grants of power to international bodies, it clearly would forbid the domestic example discussed here.

Granting adjudicatory authority to such a body, with no involvement by the Article III courts, also almost certainly would violate the first sentence of Article III, which vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. As the second sentence says, the judges of those courts are to serve during good behavior, which the adjudicators in the example do not. *Id.* While the power of Congress to give limited adjudicatory authority to so-called non-Article III tribunals that it may create is the subject of a famously difficult doctrine, *see, e.g., CFTC v. Schor*, 478 U.S. 833, 847 (1986) (observing that “our precedents in this area do not admit of easy synthesis”), that doctrine almost certainly would not permit, and the text of Article III would not permit, a grant of final adjudicatory power that provided for no involvement of the Article III judiciary. *Schor*, for example, approved a system of administrative adjudication in which legal issues were reviewed *de novo* by an Article III tribunal. *Id.* at 852–53.

Given that the hypothesized body could not qualify as an Article III court and is not Congress, most formalists would say that the only power of government it even conceivably could exercise would be the executive power. But that power is vested in the President by the first sentence of Article II, and the President's power to supervise and guide that body would not satisfy even the latitudinarian reading adopted by the majority in *Morrison v. Olson*, 487 U.S. 654 (1988), let alone that propounded by Justice Scalia in dissent. *See id.* at 705 (Scalia, J., dissenting).

As a formalist myself, I would be satisfied with the invocation of rules, uneasy with much reliance on the reasons for those rules, and hostile to the replacement of a textual rule with a standard abstracted from it. But the understanding of the more general principles that explain and justify the Constitution's formalities is of interest to everyone. For formalists, that understanding is at least illuminating, and for non-formalists it may be the law itself.

No general principle is more fundamental to the Constitution's structure than separation of powers. Along with federalism, it defines the American polity in any topology of free governments. Judicial independence from the legislature means that the adjudicators are not, and do not simply work for, the legislators.<sup>13</sup> The U.S. Constitution implements the principle of adjudicatory independence by setting out the basic features of the institutions in rules that are hierarchically superior to ordinary law and may not be altered by the ordinary law-maker, which is usually Congress. The Constitution vests the judicial power in Article III courts and no one else, thereby severely restricting Congress's ability to choose the individuals and kind of institutions by which its laws will be applied.<sup>14</sup>

To be sure, the Constitution hardly contemplates that all adjudication will be done by the federal courts, or even that all adjudication concerning questions of federal law will be done by the Article III judiciary. On the contrary, the Supremacy Clause of Article VI is quite clear that state courts not only may apply the Constitution, federal statutes, and United States treaties, but must do so in preference over state law when the two conflict.<sup>15</sup> Indeed, state courts are so central to the system that Henry Hart himself pointed to them as the primary, and sometimes the final, vindicators of the Constitution's supremacy over acts of Congress.<sup>16</sup>

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13. A standard justification for judicial independence from the legislature is that such independence is necessary to facilitate judicial enforcement of constitutional restrictions on the legislature. See THE FEDERALIST NO. 78 (Alexander Hamilton). It is also possible to believe that independent courts are valuable even when they are merely applying the legislature's own laws. For present purposes, the important point is not that judicial independence from the legislature is simply good, but that it is a basic premise of the Constitution's structure.

14. U.S. CONST. art. III, § 1.

15. Federal law is supreme: "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

16. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

Congress has only limited power with respect to the structure of the federal courts, and it has only limited power, and some would say no power at all, with respect to the structure of the state courts. Congress does not create state courts nor does it decide on the selection and tenure of state judges, any more than it does with respect to federal judges. It has no express power to do any of these things, except insofar as the structure of the state judiciaries bears on the republican character of the state governments.<sup>17</sup> Whether it may use any of its powers to legislate on state court structure is highly doubtful; the structural independence of the state governments is a basic principle of the Constitution.<sup>18</sup> State courts thus represent another adjudicatory institution that is charged with deciding cases under the laws that Congress institutes but whose make-up is not chosen by Congress. Together, the state and federal courts are the basic judicial system contemplated by the Constitution.<sup>19</sup>

Foreign tribunals represent another adjudicatory institution whose decisions may have some effect in the United States, but

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17. "Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts . . . . In short, subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power, and the States are as free from control by Congress in establishing state systems of litigation as is Congress free from state control in establishing a federal system for litigation." *Brown v. Gerdes*, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring). The Court has subsequently found that Congress may regulate the procedures of the state courts when they entertain federal claims, but has indicated that this congressional power derives from the authority to create the relevant substantive federal right, not from any free-standing congressional power over the structure and procedure of the state courts. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 918–19 (1997) (holding that a statute governing federal procedures that Congress adopted for procedural reasons does not apply when a state court entertains a federal cause of action).

18. The main doctrine that protects the state governments from federal control as such is the ban on commandeering of the states, which is to say, the ban on the mandatory recruitment of state instrumentalities to administer federal law. The leading precedent is *Printz v. United States*, 521 U.S. 898 (1997), which held that Congress could not require state and local law enforcement officers to implement a federal gun control statute.

19. The territorial courts, of which few remain, are an exception to the general principle I have suggested. As Gary Lawson has explained, as a general matter it is hard to reconcile much of what Congress has done with respect to territorial governments with the constitutional structure that applies within the states. *See Gary Lawson, Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853 (1990).

over whom Congress has no control. Under principles of comity, American courts may treat as final the judgments of foreign tribunals, such as the courts of Canada.<sup>20</sup> Comity, of course, is in general somewhat weaker than the full faith and credit that States of the Union must accord certain acts of other states under Article IV of the Constitution and its implementing statutes.<sup>21</sup> It can, however, make foreign judgments binding in this country without significant review of their substantive correctness.<sup>22</sup> The important point here, however, is that comity is accorded to the courts of other countries—countries that are sovereigns independent of Congress. Federal courts are, in a sense, close to Congress, but their independence is explicitly protected by the Constitution; state courts are farther from the federal legislature, and their independence is protected more implicitly; foreign courts are farthest of all, and their independence is protected by the simple fact that there are independent sovereigns elsewhere in the world. The overarching pattern is that Congress may not simply choose the structure and powers of the adjudicatory bodies that have final authority in this country.

International organizations, of course, are made up of sovereigns. One might think, then, that decisions of international tribunals can be given as much domestic legal effect as principles of comity allow to be given to decisions of foreign courts, which is considerable. To put it crudely, if foreign courts are not treated as potential stooges for Congress because foreign countries are independent of Congress, why should organizations made up of the United States and foreign countries be treated as potential stooges for the President and Senate as treaty-makers? The answer is that foreign countries have strong reasons not to allow their domestic adjudicators to be suborned by a foreign power such as the United States. Those are, after all, their own courts. But an international organization may make decisions, including adjudicatory decisions, that have little or no effect on some of the member states. If the President and Senate wanted to create a reliable international

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20. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4473 n.9 (2d ed. 2002).

21. *Id.* § 4473.

22. The requirements of comity are not as strong or as clear as those of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”), and so comity grants only quite limited final decisional authority to foreign courts.

adjudicatory body, it is not hard to imagine how they could put one together with the assistance of a few otherwise uninterested and pliable countries.<sup>23</sup>

This problem may seem far removed from the standard criticism of delegations to international organizations, which is that such delegations subordinate American sovereignty to the interests of foreigners. By contrast, I am saying that the constitutionally significant point, or at least a constitutionally significant point, is that the foreigners may be fronts for American power.

It may be true that, in general, international organizations will not follow the wishes of the President and Senate of the United States in the way in which a court dependent on the legislature might follow the wishes of the legislature in an inappropriate fashion. But generalizations are not dispositive here. The power to create an adjudicatory body, be it international or domestic, means that the adjudicator can be specifically designed to be responsive to the power that created it. A Congress subject to no constitutional rules about the structure of the federal courts could provide that their judges would be elected by Congress and would serve at its pleasure, thereby creating adjudicators thoroughly dependent on the legislature. In similar fashion, American treaty-makers, if given the power to confer adjudicatory power on a treaty-created body, would not have to confer that power on NATO and the UN; they could make a pliant organization that would have little or no political autonomy.

Maybe the possibility I have raised is far-fetched, so that one could argue that when the United States enters into a treaty that gives adjudicatory power to a dependent body, the courts can refuse to enforce its decisions. Until that happens, perhaps anyone with any sense can regard these fears as the product of a fevered imagination. Certainly the non-Article III tribunals created by Congress so far have, in general, an exemplary record of impartiality. As Justice Brennan explained, however, the Framers' strategy in Article III was not so trusting either of

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23. The International Whaling Commission accepts as members states that have no interest in whaling, and that therefore may be willing to trade their votes on the commission for favors from other countries that care strongly about whaling. Japan recently won support for its pro-whaling position in part by encouraging some non-whaling countries, including some from the Caribbean and West Africa, to join and vote with Japan. See Juliet Eilperin, *U.S. Joins Anti-Whaling Effort*, WASH. POST, June 26, 2006, at A3.

Congress or of the people who would be interpreting the Framers' work.<sup>24</sup> Article III is a prophylactic rule. Its relatively clear and sometimes frustratingly restrictive terms forbid many perfectly benign arrangements in order to make sure that they forbid those arrangements that are malign, and do so without placing too much pressure on the wisdom and uprightness of government officers, including judges, however insulated they may be from ordinary politics. That may or may not be a good strategy. Like the separation of legislative and judicial power, however, it is the Constitution's strategy.

My argument so far has likened the treaty power to the legislative power, and has suggested that both operate within a framework that provides for independence in the conclusive application of law. It is possible, however, that the treaty power is unlike the law-making power. David Golove has powerfully argued that the treaty power, especially as understood in this country in the 1780s, included the authority to enter into confederations, as through articles of confederation.<sup>25</sup> And confederations could create international entities that would then make decisions on behalf of the confederated states by majority vote—that is, without unanimous consent—with such decisions having automatic domestic legal effect.<sup>26</sup>

If the federal treaty-making power includes the power to enter into the kind of confederation described by Golove, then it can be used to confer adjudicative authority, with domestic legal effect, on confederations and their organs. On the reading suggested by Golove, the treaty power is substantially stronger than the domestic legislative power because it can be used to make grants of power, international delegations as they are often called today, of which the legislative power is incapable.

Curtis Bradley has suggested a general solution to the contest between broad readings of the treaty power and the limitations on legislative authority to delegate that prevail in the domestic context. His solution is founded on a fundamental feature of American public law: the distinction between the rights and obligations of states under international law and rights and obligations under domestic law. Bradley argues that

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24. *CFTC v. Schor*, 478 U.S. 833, 863–64 (1986) (Brennan, J., dissenting) (noting that Article III's structural requirements are prophylactic).

25. See David Golove, *The New Federalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *STAN. L. REV.* 1697, 1706–10 (2003).

26. *Id.* at 1706 (asserting that the Articles of Confederation were understood by many Framers as a treaty or as much like a treaty).



the United States may grant to international organizations the power to bind this country with respect to its international law obligations, but that such grants may not of their own force flow through to the internal United States legal system.<sup>27</sup>

It is plausible that the treaty power that makes possible international law but not domestic law delegations. This understanding would avoid the difficulties I have raised and fit into the system Bradley describes. Such an understanding is based on an important feature of the treaty power created by the Constitution: it did not duplicate any existing model. First, it differed importantly, and in a way that is crucial here, from its main source, the British constitution. English monarchs made treaties without the advice and consent of Parliament, but the price of that executive independence was non-self-execution. British treaties had no domestic legal consequences and required parliamentary acts to be implemented internally.<sup>28</sup> The United States, by contrast, received in the Constitution the power to make treaties that would be the supreme law of the land and could be self-executing, a power the central government may have lacked under the Articles of Confederation.<sup>29</sup> The ability to make domestic law through a treaty was a departure from British practice. If the treaty power did enable the new government to grant domestic law-making power to international bodies, it did not follow British practice.

Second, there was no well established treaty structure shared by the state constitutions that could naturally be imputed to the new, federal system. Nothing about the state constitutions was really well established, because the constitutions had been put together within the fifteen years preceding 1787. As for treaty

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27. See Bradley, *supra* note 1, at 1591.

28. Professors Franck and Glennon have argued:

This concept [in Article VI] of treaties as 'self-executing' is not widely adopted in other legal systems. Great Britain and the older nations of the Commonwealth, for example, do not permit treaties, which they regard as binding in international law only, to become part of the domestic fabric of law until germane parts of the treaty have been incorporated in legislation duly enacted by parliament.

THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 342 (2d ed. 1993). At the Federal Convention, the king's need to persuade Parliament to implement treaties domestically figured in the debate over the wording of the Supremacy Clause. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 393 (Max Farrand ed., rev. ed. 1966).

29. See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 *AM. J. INT'L L.* 695, 698-99 (1995).

making and the formation of confederations, the states had not settled on a uniform practice. For example, the first post-independence constitutions of two states, Delaware and Georgia, did not mention the power to make treaties or to enter into confederations.<sup>30</sup> Moreover, a treaty power lodged in an independently, but indirectly, elected executive and an upper chamber of the legislature composed of an equal number of representatives of each state was importantly different from any state system. Those new features of the federal treaty power might well have been thought to have implications for its domestic law scope, and, in particular, for whether it could be used to grant adjudicatory authority in ways in which even the primary legislative power could not; the lower house, with the people's direct representatives, participated in the creation of ordinary legislation, which had to fit into the new scheme of separated powers with its implications for adjudication.

Like so much else in the Constitution, it is reasonable to think that the treaty-making power would be like, but not identical to, what had previously existed. The existence of a power potentially held by the states to authorize international bodies to adjudicate with domestic law effect does not compel the conclusion that the United States held and holds the same power. The power to bind the United States to confederations for international law but not domestic law purposes would fit neatly into the new structure. That structure indicates that treaties may not empower international bodies to resolve disputes for purposes of the internal law of the United States.

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30. DEL. CONST. OF 1776, *reprinted in* 1 DEL. CODE ANN. 113–18 (1975); GA. CONST. OF 1777, *reprinted in* DAVID LEE RUSSELL, OGLETHORPE AND COLONIAL GEORGIA: A HISTORY 1733–1783, at 183–88 (2006). Perhaps the drafters of these constitutions believed that making treaties was included in the executive or the legislative power.