

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

Clause. Thus, of itself, Congress would have had no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.³⁴⁶ Congress could not confer judicial power upon American consuls abroad to be exercised over American citizens abroad, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements, and the Supreme Court has upheld such legislation.³⁴⁷

Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.³⁴⁸ And Congress could not ordinarily penalize private acts of violence within a state, but it can punish such acts if they deprive aliens of their rights under a treaty.³⁴⁹ Referring to such legislation, the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power."³⁵⁰ In a word, the treaty-power cannot purport to amend the Constitution by adding to the list of Congress's enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures that inde-

³⁴⁶ Acts of March 2, 1829, 4 Stat. 359 and of February 24, 1855, 10 Stat. 614.

³⁴⁷ See *In re Ross*, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. 4083–4091, was repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the *Ross* case was subsequently questioned. See *Reid v. Covert*, 354 U.S. 1, 12, 64, 75 (1957).

³⁴⁸ 18 U.S.C. §§ 3181–3195.

³⁴⁹ *Baldwin v. Franks*, 120 U.S. 678, 683 (1887).

³⁵⁰ *Neely v. Henkel*, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842): "Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties." *Id.* at 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. *Id.* at 618–19. However, the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Art. I, § 8, cl. 18.