

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

Treaties and Congress.—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected.³¹² But the years since have seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the “law of the land” or whether there are some types of treaty provisions that only a subsequent act of Congress can put into effect. The language quoted above³¹³ from *Foster v. Neilson*³¹⁴ early established that not all treaties are self-executing, for, as Marshall said in that decision, a treaty is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.”³¹⁵

Leaving aside the question of when a treaty is and is not self-executing,³¹⁶ the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty,³¹⁷ certain provisions of which required appropriations to carry them into effect. In view of Article I, § 9, clause 7, which says that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .,” it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed.³¹⁸ A bill was introduced in the House to appropriate the needed funds, and its supporters, within and without Congress, argued that, because the treaty was the law of the land, the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Albert Gallatin contended that the House had complete discretion whether

³¹² 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 392–394 (rev. ed. 1937).

³¹³ “Treaties as Law of the Land,” *supra*.

³¹⁴ 27 U.S. (2 Pet.) 253, 314 (1829).

³¹⁵ Cf. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888): “When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.” See S. Crandall, *supra*, chs. 11–15.

³¹⁶ See *infra*, “When Is a Treaty Self-Executing.”

³¹⁷ 8 Stat. 116 (1794).

³¹⁸ The story is told in numerous sources, including S. Crandall, *supra*, at 165–171. For Washington’s message refusing to submit papers relating to the treaty to the House, see J. Richardson, *supra*, at 123.