Professor Stefan Albrecht Riesenfeld, Tribute: Introduction

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Introduction

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I write not to evaluate the substance of Stefan Riesenfeld's two articles, but to place them in the context of his biography. Half a century separates them, but nothing is further from the seventy-five-year-old scholar's mind than to reflect back on the work of his twenty-five-year-old self. Each paper, the late as well as the early one, is driven by the concerns of the day. This, as much as the depth of his scholarship and learning, is what always defined Stefan Riesenfeld: He brought his vast learning and analytical skill to important current affairs, but it is those affairs that motivated him to apply the former. As learned as his writings may be, and the younger Riesenfeld's article is the more learned of the two, neither displays learning for its own sake; each utilizes its considerable intellectual and judgmental artillery for a clear and expressed purpose.

At the same time, it is interesting to notice the different levels of engagement with the three Supreme Court decisions that are the bases of the 1937 paper: Van Der Weyde v. Ocean Transport Co., Ltd.,2 United States v. Curtiss-Wright Export Corp., and United States v. Belmont.4 Not only today, but undoubtedly even then, the first case elicited relatively little notice, certainly not the level of political interest that the latter two drew from commentators beyond the legal world. Yet it is the first, with its more knotty tangle of doctrinal as well as political issues, that draws Riesenfeld's interest. It does so exactly because here, more than in the two overtly political cases, legal issues are more than an epiphenomenon, to stay on that page of the dictionary. The case concerns the division of powers among the federal branches as this bears on the question of treaty termination, a matter the Constitution does not regulate, contrary to its careful delineation of this division of powers when it comes to the making of treaties.

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1. At least, not his learning in the law. One might suspect that a writer who three years earlier (allegedly) knew no English and now notes the epic of Justice Sutherland created, see Stefan A. Riesenfeld, The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions, 25 CALIF. L. REV. 643, 668 (1937), and the equiparation of treaties to executive agreements, see id. at 674, is showing off some learning. If only Justice Sutherland had been an eponym. . . .

2. 297 U.S. 114 (1936).
For those of us familiar only with the mature Riesenfeld, it is, first of all, fascinating to find his pungent style and his impatience with "mashed-potatoes" reasoning already in full flower here. The Chief Justice's formulation is "vague;" his critical sentence "mysterious;" it is extremely difficult to gather the ratio decidendi; "Professor Corwin's reasoning from legislative precedent is doubtful, and his other arguments are of little weight;"5 even a minor belletristic essay of Mark Twain is invoked.6 Then there is the clarity of the doctrinal formulations, achieved by disaggregating what to the Court seemed to be one single doctrine into its constituent and, to an extent, incompatible parts. The treaty-termination problem provides a wonderful opportunity for this exercise, and Riesenfeld makes the most of it: "It seems that a great many questions are here involved which unfortunately have not been kept distinct; and these deserve a further analysis."7

And that analysis in turn delves into a range of subjects that in their scope alone, let alone in the depth to which they are driven, would have sufficed for a tenure article. The citations are not for effect but buttress a closely reasoned argument. They range from Framing-era documentation such as Rawle and Farrand through the latest decisions of the Privy Council, and from English through French, German, and Italian sources. Demonstrating again his fidelity to facts on the ground, Riesenfeld spends almost an equal amount of time on state practice, ranging there from the Jay Treaty through modern Friendship, Commerce, and Navigation Treaty practice. And he arrives at a well-grounded, openly argued conclusion about the location of the treaty-termination power, and about the congressional (legislative), as distinct from the senatorial, treaty-advice power. Well-grounded, and to this day not a but the definitive word on the subject.

To the Riesenfeld of 1937, the scope of the "Executive-Agreement" track paralleling the Treaty track and, above all, the power of the President, was a more explicitly political issue and therefore less amenable to legal analysis.8 To the Riesenfeld of 1987, the role of the War Powers Clause in the division of powers among the three political branches9 was, in an analogous context, too important a matter to be left to politicians. His view

5. Riesenfeld, supra note 1, at 659.
6. "With all . . . respect to the Supreme Tribunal, the reader is inclined to feel like the reader in Mark Twain's famous [?] Mr. Bloke's Item. The more often one reads the statement the more confused does it appear." Id. at 647.
7. Id. at 648.
8. "The decision itself [in Curtiss-Wright Export], even though of great political importance, does not, from a legal point of view, deserve so much interest as the Van Der Weyde case. . . ." Id. at 665.
9. "The number two [in addition to the President] is employed advisedly. Without the power of the judiciary to enforce a Congressional prohibition the Congressional action would be a lex minus quam perfecta." Stefan A. Riesenfeld, The Powers of Congress and the President in International Relations: Revisited, 75 CALIF. L. REV. 405, 411 (1987).
that the Framers purposely refrained from deciding whether, in the field of foreign relations, the President is vested “with some core powers”\textsuperscript{10} led him to go beyond the conventional discussion about the collision between the Spending Power and the Executive Power. Riesenfeld went further, to discuss the possibility of judicial enforcement of customary international law against a presidential directive, even in the absence of a conflicting congressional directive. His conclusion was based not on exhaustive research, for the straightforward reason that there was essentially no prior learning or practice about the effect of international law on this issue. Riesenfeld came to an essentially functionalist but structurally sound recommendation against that possibility, for “[o]therwise the doctrine of separation of powers would be converted into one of absolute judicial supremacy.”\textsuperscript{11} A half-century of direct exposure to the temptations and tragedies of unbridled executive power did not, to Stefan Riesenfeld, justify abandonment of this enduring legacy of the foundational premises of our democracy. That may be a hard, and to some a contestable, lesson but he came to it with a depth of understanding of the reciprocal influences of law and politics that was as thought through as it was hard-earned.

For those coming to this work for the first time, reading these two articles and seeing them as brackets for a half-century (and, thereafter, for another decade) of a scholarly life as passionate as it was rigorous is a wonderful way to become acquainted with Stefan Riesenfeld.

\textsuperscript{10} Id.
\textsuperscript{11} Id. at 413. “Essentially the problem involves the extent to which the Constitution adheres to the doctrine of the separation of powers, a matter so much on the minds of the framers of the document.” Id. at 413-14.