TREATIES AND EXECUTIVE AGREEMENTS

(Report on the February-April, 1953, Hearings Before The Senate Judiciary Committee on The Bricker Amendment (S.J.Res. 1) and the American Bar Association Amendment, S. J. Res. 43).

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Note: The writer is Chairman of the American Bar Association's Committee on Peace and Law, which has had these subjects under intensive study for almost four years. Except insofar as it refers to official resolutions of the American Bar Association, or reflects the opinions of the Committee on Peace and Law as embodied in its several printed reports, this paper represents the writer's own views, and is not to be considered as the views of the American Bar Association, which speaks only through official resolutions of its House of Delegates, and between meetings of that House, of its Board of Governors.

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"Treaty law can override the Constitution * * * They [Treaties] can cut across the rights given the people by the constitutional Bill of Rights."

--JOHN FOSTER DULLES,
before Regional Meeting
American Bar Association,
Louisville, Kentucky,
April 12, 1952.

"The history of liberty is a history of the limitation of governmental power, not the increase of it."

--WOODROW WILSON

"In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

--JOHN W. DAVIS,
quoting Thomas Jefferson
in the argument in the
Steel Seizure Cases,
343 U.S. 579.

TREATIES AND EXECUTIVE AGREEMENTS

I

THE BASIC ISSUE

The proposals of Senator Bricker of Ohio and of the American Bar Association to amend the Constitution of the United States respecting treaties and executive agreements raise great questions of constitutional law, and not, as may be inferred from Mr. John Foster Dulles' testimony, questions of temporary State Department policy.

The issue has been described by that distinguished lawyer and scholar, Dr. George A. Finch, of Washington, D. C., editor-and-chief of the American Journal of International Law, as the greatest constitutional issue since the controversy over the Bill of Rights, -- involving as it does the question of subversion of the Constitution and the Bill of Rights by the treaty method. Dean Clarence Manion, of South Bend, Indiana, now retired from the Law School of Notre Dame University, and for many years Professor of Constitutional Law, and a strong proponent of the amendment, has characterized it as the "hottest constitutional issue" since the Civil War.

II

MR. DULLES' POSITION AT LOUISVILLE, APRIL 12, 1952

Mr. John Foster Dulles, now Secretary of State, before the Regional Meeting, American Bar Association, Louisville, Kentucky, April 12, 1952, made an address entitled "The Negotiation of Treaties." (American Bar Association Journal, June, 1952, p. 487). In the course of this address he made the following remarks:

> "The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the Federal Government or to some international body and they can cut across the rights given the people by the constitutional Bill of Rights."

This address was carefully prepared in writing and released to the press in advance, and expressed his considered judgment before a competent audience of distinguished lawyers and judges, (1) that the treaty power is "an extraordinary power liable to abuse;" (2) that "treaty law can override the Constitution;" and (3) that "treaties can cut across the rights given the people by the constitutional Bill of Rights."

III

MR. DULLES' SWITCH, AT WASHINGTON, D. C., APRIL 6, 1953

In the hearing on April 6, 1953, before the United States Senate Judiciary Committee, on the so-called Bricker and American Bar Association proposals to amend the Constitution (respectively S. J. Res. 1 embodying the Bricker Amendment, and S. J. Res. 43, by Senator Watkins of Utah, embodying substantially the American Bar Association Amendment), he took the view that he had checked the dangerous trend of the State Department in the treaty field; and that now an amendment to the Constitution was "unnecessary" and itself "dangerous."

Mr. Dulles made in the same Judiciary Committee hearing, again in writing, such statements as "I believe the concern was then a legitimate one" (p.2); that "I have been sympathetic to the point of view reflected in S. J. Resolution 1, and I have so expressed myself" (p.3); that "I have" indulged "in independent drafting efforts of my own" (p.3); that "this whole matter needs further study" (p.3); that "the fears are hypothetical" (p.7); and that "an amendment to the constitution is unnecessary" (p.7).

To all of which, one may counter:

(a) How can "legitimate concern" in the space of five pages of carefully prepared written testimony so rapidly become "hypothetical fears" and then the "amendment unnecessary"?

(b) Why should we have further study if "an amendment is unnecessary"?

(c) If the "concern" was "legitimate" -- a good word, meaning "grounded on a sound legal foundation" -- how can a sudden change in policy, good, at most, for only his administration, make the "concern" less "legitimate"?

(d) Is not the "legitimate concern" the very reason for the sudden change in treaty-making policy?

(e) Is not the statement that "the fears are hypothetical" flatly contradicted by the sudden and drastic change in policy - a change which could, under pressure, at some time be reversed overnight?

(f) In the light of his own public statements - at Louisville, on April 12, 1952, when he was not in office, and at Washington D. C., on April 6, 1953, when he was in office - how can he, on the latter date, consistently assert that now "the fears are hypothetical," and that "an amendment to the constitution is unnecessary"?

(g) Is it not a fact that two days later, on April 8, 1953, Mr. Herman Phleger, his legal adviser (who undoubtedly approved Mr. Dulles' written statement of April 6, 1953) appeared before the United States Senate Foreign Relations Committee and advocated ratification of a treaty waiving constitutional rights and immunities of American citizens, civilian and military, in Europe? (See Chicago Tribune, April 9, 1952.)

(h) Does not that very treaty "override the Constitution" and "cut across rights given the people by the constitutional Bill of Rights"?

(i) Is it not a fact that in that treaty which waives constitutional rights and immunities of American citizens, no corresponding or reciprocal jurisdiction is obtained over the nationals of the other treaty countries when they are in the United States?

(j) Is the real reason for opposition to a constitutional amendment, a desire to continue this policy?

(k) Has there, in fact, been a clean-cut change of policy?

It will be apparent from the foregoing that the prepared statement of the Secretary of State is studded with contradictions and non-sequiturs. Starting with the concept that our "concern" was "legitimate" and ending with the concepts that "the fears are hypothetical" and that "no amendment is necessary," his reasoning has come full circle.

His reasoning was inconsistent, and he befogged an issue of constitutional law with one of temporary State Department policy. Indeed he offered no hope to those many millions who have a "legitimate concern" to protect the Constitution of the United States against subversion by treaty law, for themselves, their children, and their children's children.

In substance, Mr. Dulles' argument was that we should trust his, and all succeeding administrations. His argument is a negation of the theory of constitutional limitations on which our government rests. The American people have confidence in constitutional restraints, enforceable by an independent judiciary, above all confidence in men. (See Thomas Jefferson's statement on Page 1.)

The American Bar Association and Senator Bricker desire an amendment that will protect the United States Constitution and the

American system of government established in the Constitution, including the Bill of Rights, that will prevent treaties from becoming internal law within the United States, except to the extent made so by Congress, just as in the case of any other federal statute; and that will set a positive standard or limitation that will enable the courts to hold invalid treaties that violate the Constitution.

Nothing that Mr. Dulles has said before the Senate Judiciary Committee will deter these proponents from their firm purpose of getting this amendment before the American people for adoption.

The proposal of a constitutional amendment to keep treaties and executive agreements within proper constitutional bounds has the support of Senator Bricker and 64 other senators as cosponsors.

In addition to the favorable resolutions of the American Bar Association, which represents, as nearly as may be, the entire organized legal profession of the United States, and which started this movement (See acknowledgment of Senator Bricker on the floor of the Senate in Congressional Record, February 7, 1952, P. 923), the proposal of a constitutional amendment was approved in December of 1952, by the National Association of Attorneys General of the United States, comprising the heads of the legal departments of each of the 48 states.

Similar resolutions have been adopted by many nation-wide organizations, including among others, such well-known organizations as the American Legion, Veterans of Foreign Wars, Marine Corps League, Catholic War Veterans, Kiwanis International, Sons of the American Revolution, Daughters of the American Revolution, and the Women's Patriotic Conference on National Defense, representing twenty-nine leading women's organizations throughout the United States with a membership of millions.

IV

THE ROOT OF THE CONSTITUTIONAL PROBLEM

There is very grave doubt indeed whether the Supreme Court can ever hold unconstitutional any treaty made "under the authority of the United States," which is the only requirement concerning a treaty in the Constitution. (Art. VI; Art. III.) "It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." (Mr. Justice Holmes, in Missouri v. Holland, 252 U. S. 416, 423 (1920)). If a treaty is made "under the authority of the United States," it becomes, by express language of the Constitution, "the supreme law of the land."

Obviously, it is Mr. Dulles' opinion (or was at Louisville, and he did repudiate it in the recent Senate hearing) that there is no constitutional limitation on the treaty-making power, which is justiciable in any court, as evidenced by his Louisville statement that "treaty law can

override the Constitution;" and that treaties "can cut across the rights given the people by the constitutional Bill of Rights." He was talking about what treaties can lawfully do under the Constitution.

A like view as to what can be done under the treaty-making power by way of "overriding the Constitution" is advocated by the Hon. John J. Parker, Chief Judge of the U. S. Court of Appeals for the Fourth Circuit, in the August, 1952, issue of the American Bar Association Journal, (pp. 641, 643), in an article entitled "An International Criminal Court: The Case for its Adoption." He says such a court, ignoring American constitutional rights, can be set up under the treaty-making power.

Similarly, the Section on International Law of the American Bar Association, comprising many international lawyers, says in its Section Report presented to the House of Delegates of the American Bar Association at the Midwinter Meeting, February 25-26, 1952:

> "So far as the requirement of indictment by grand jury and trial by jury are concerned, these apply only to trials in the federal courts, and can have no application to an international court set up by a group of nations in the exercise of their treaty-making power .....there is no reason why such courts may not be created in the exercise of the treaty-making power."

In other words, it is claimed that the United States government can provide under the treaty-making power for the trial of American citizens abroad, for offenses committed here, by methods and in places (see Sixth Amendment) which the Constitution forbids.

There is thus a large body of legal opinion, including that of Mr. Dulles, that "treaty law can override the Constitution;" and that treaties "can cut across the rights given the people by the constitutional Bill of Rights."

Parenthetically, it is most interesting that the very people who claim that treaty can take away American rights protected by the Constitution and the Bill of Rights -- Secretary Dulles, Judge Parker, and the Section on International Law -- are the very people who insist that no constitutional amendment is necessary.

But let us further examine the legal problem.

While there are some venerable Supreme Court dicta, in cases where the point was not involved, such as Doe v. Braden, 16 How. 635, 657 (1853); The Cherokee Tobacco, 11 Wall. 616, 620-1 (1870); Holden v. Joy, (1872) 17 Wall. 211, 243; Geofroy v. Riggs, 133 U. S. 258, 267 (1889) that a treaty cannot violate the Constitution, nor "authorize what the

Constitution forbids," or change "the nature of the government of the United States or the relation between the States and the United States," no treaty has ever been held invalid (U. S. v. Thompson, 258 Fed. 257, 260; Professor Zechariah Chafee, Jr., in Harvard Law School Record, February 21, 1952); and there are contrary judicial expressions such as that what the President and Senate do in foreign relations is a political question "not subject to judicial inquiry or decision." (Oetjen v. Central Leather Company, 246 U. S. 297, 302 (1918); U. S. v. Curtiss-Wright Corp. 299 U. S. 304, 319 (1936); U. S. v. Sandoval, 167 U. S. 278; U. S. v. Domestic Fuel Corporation, 71 F. (2d) 424, 430-1; Banco de Espana v. Federal Reserve Bank, 114 F (2d) 439, 442; Z. & F. Assets Corporation v. Hall, 114 F (2d) 464, 468.

Then there are other judicial expressions, beginning with Mr. Justice Chase of the Supreme Court in Ware v. Hylton (1796), 3 Dall. 199, 237, to the decision of the Ninth Circuit Court of Appeals in U. S. v. Reid (1934) 73 F (2d) 153, that "it is doubtful whether the courts have the power to declare the plain terms of a treaty unconstitutional."

Then there is the statement of the late Chief Justice Charles Evans Hughes in 1929 before the American Society of International Law that the treaty power "has no explicit limitation attached to it," and that "I should not care to voice an opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such; that is, the doubt has been expressed in one of its opinions." (Proceedings of American Society of International Law, 1929, pp. 194-196).

Then there is most recently the report (June, 1952) of the distinguished Committee of the New York State Bar Association (consisting of the Honorable William D. Mitchell, former Attorney General of the United States, John W. Davis, Lewis R. Gulick, John J. Mackrell, and Harrison Tweed), opposing the proposed International Covenant on Human Rights in its present form, but expressing a genuine fear that the Supreme Court of the United States might uphold it, because "it would place a heavy strain on the Supreme Court to hold that the treaty is invalid."

As above noted, the problem is very grave because under the Constitution a statute, to be valid, must be made "in pursuance" of the Constitution (Art. VI.) Chief Justice Marshall so held in the last two paragraphs of the great decision in Marbury v. Madison, 1 Cranch 137, 180 (1803). But there is no requirement whatever concerning a treaty except that it be made "under the authority of the United States" (Art. VI, Art. III), a distinction expressly noted by Mr. Justice Holmes in Missouri v. Holland (1920) 252 U. S. 416, 433. Because the Constitution sets no standard for treaties except that they must be made "under the authority of the United States," no one can know, when the great question finally comes up for direct decision, whether the Supreme Court will not say:

"We are limited to considering whether this treaty was made 'under the authority of the United States,' that is, whether it was regularly made by the President, with advice and consent of two-thirds of the Senators present; and if we find that it was so made, then the Constitution makes it 'the supreme law of the land,' to be applied by the courts as written, state constitutions and laws to the contrary notwithstanding as well as federal laws and constitutional provisions."

In other cases the Supreme Court has said that the treaty power extends "to all proper subjects of negotiation between our government and foreign nations," or otherwise stated, "to all proper subjects of international concern." Asakara v. Seattle, 265 U. S. 332, 341, and cases cited. However, these cases again end us in a cul de sac, for the following reasons:

1. The court has said that what the President does in the field of foreign relations, with the advice and consent of the Senate, is "not subject to judicial inquiry or decision" (Oetjen v. Central Leather Company, 246 U. S. 297, 302; U. S. v. Curtiss-Wright Corporation 299 U. S. 304, 319), because these are political questions which the Constitution delegates to the discretion of the President, with the advice and consent of the Senate, who is most competent to judge what is required in the foreign field "to strengthen friendly relations between the two nations" (Asakara v. Seattle, supra), whereas the courts have no competence in this field and are without jurisdiction.

2. We encounter the asserted rule that any subject whatever that is dealt with in a treaty between two or more nations becomes, by virtue of that fact, a "matter of international concern." (Report of American Bar Association Committee on Peace and Law, February 1, 1952, p. 5.)

3. The State Department in 1950 issued an official bulletin, with a foreword by President Truman, stating its position that "there is no longer any real distinction between 'domestic' and 'foreign' affairs." (Opening sentence of State Department Publication 3972, Foreign Affairs Policy Series 26, released September, 1950). Under this doctrine any subject otherwise domestic can be seized and by treaty made "a matter of international concern," presently beyond the jurisdiction of the courts.

If it is correct, and it appears indisputable, that the President has the exclusive and absolute discretion "to determine when, how and upon what subjects negotiation may be urged" (U. S. v. Curtiss-Wright Corp., 299 U. S. 304, 319, approving a Senate Foreign Relations Committee Report made in 1816), conditioned only by the power of the Senate upon completion of the President's negotiations to ratify or not, then the

subject matter of treaties is solely a political matter, beyond the jurisdiction of the courts; and the judiciary has no jurisdiction in the treaty field except (1) to determine whether the treaty was made "under the authority of the United States," i.e. regularly made by the President with the advice and consent of the Senate, (2) to determine what the treaty means, i.e., how its language is to be fairly construed, and (3) to apply it as written, in the light of such fair construction. Thus we end up with the result that the President, by reason of his preserved peculiar knowledge of foreign relations and of what is needed to promote friendly intercourse between nations -- a field in which the courts are not competent to deal -- he determines, in his discretion, what shall become "the supreme law of the land" under Article VI, if the Senate concurs. Thus there is neither an express, nor an implied, limitation on the treaty-making power. (See Mr. Chief Justice Hughes' statement ante, p. 7.)

Thus there is a formidable body of law on which Mr. Dulles, Judge Parker, the Section on International Law, and others, undoubtedly predicate the opinion that "treaty law can override the Constitution," and that "treaties can cut across the rights given the people by the constitutional Bill of Rights." And who will say them nay, unless the people do it by a constitutional amendment.

Hence, it would seem most appropriate that the ancient judicial dicta concerning the existence of possible limitations on the treaty power (such as, that "no treaty can violate the Constitution," nor "authorize what the Constitution forbids,") nor change "the nature of the government of the United States, or of the relation between the states and the United States," which undoubtedly expressed the current belief of the judges who wrote them, be firmly fixed in a constitutional amendment, so that the independent courts will have jurisdiction to protect us "the people of the United States" from treaties that violate the Constitution or undertake to change the nature of our government.

While the expressions in some of the cases mentioned above concerning lack of jurisdiction of the courts as to what is done in the field of foreign relations are now disturbing, this would not have been so except for the bete noir in this entire field, namely, Missouri v. Holland, 252 U. S. 416. That case removed a constitutional limitation, to wit, the Tenth Amendment, which up to that time was supposed to exist as a limitation and to provide the courts with jurisdiction to protect the constitutional balance between federal and state power. In no prior case had this question been expressly raised, unless in New Orleans v. United States, 10 Pet. 292 (1836), hereafter referred to.

In Missouri v. Holland, which is the famous migratory bird case, The Supreme Court in 1920 decided for the first time, in an opinion by Mr. Justice Holmes, that Congress could acquire legislative power under a treaty, even though in the absence of treaty Congress had no constitutional

power to legislate on the subject matter, which was otherwise reserved to the states and to the people under the Tenth Amendment. The court said it was interpreting the Constitution "in the light of our whole experience and not merely in that of what was said one hundred years ago." The court thus rejected the view, urged in the briefs, maintained by Thomas Jefferson in his Manual of Parliamentary Practice as follows:

> "By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated.
>
> "It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way."

The first edition of Jefferson's book expressing this view came out in 1801, ten years after the first ten amendments were adopted in 1791. It had a wide circulation and went through six editions prior to Jefferson's death in 1825, and many more afterward, and expressed the commonly held view of founding fathers that the Tenth Amendment of 1791 had blocked any real possibility of a court's holding that the treaty power could invade the reserved rights of the states.

At the time the adoption of the original Constitution was under debate, Patrick Henry and Richard Henry Lee contended that the treaty power as set up was unlimited and might be used to take away the people's rights, with reference to which Jefferson commented, "If the treaty power is unlimited, then we have no Constitution."

Jefferson's view, widely circulated for decades, was held by many public men and scholars. It found expression in the decision of the Supreme Court in New Orleans v. United States, 10 Pet. 662, 736 (1836) that "Congress cannot by legislation enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." More fully, the court said:

> "Under this treaty Louisiana was ceded to the United States in full sovereignty, and in every respect, with all its rights and appurtenances, as it was held by the Republic of France, and as it was received by that republic from Spain. And it is insisted that the same rights of jurisdiction and property which appertained to the sovereign of Spain, under its laws and regulations, were, by the treaty transferred to the United States . . ." (p. 732).
>
> "But if the King of Spain . . . only possessed a limited jurisdiction over it (the land), principally, if not exclusively,

for police purposes, was that right passed to the United States under the treaty? . . . Can the federal government exercise this power?" (p. 736)

"The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power . . . .

"It is very clear that, as the treaty cannot give this power to the federal government, we must look for it in the Constitution . . .

"All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and to the people."

The court, on the above reasoning, concluded that the United States had acquired no police jurisdiction over these lands in Louisiana, but that the police control was within the state of Louisiana.

But Mr. Justice Holmes in Missouri v. Holland held that the federal jurisdiction could be enlarged by the treaty-making power, and that Congress could acquire legislative power, if a treaty was first made, that Congress would not otherwise have under the Constitution.

It is arguable that New Orleans v. United States, held a treaty invalid at least in part, in that the treaty, implemented by several acts of Congress, could not pass to the United States police control over certain lands in Louisiana, although perhaps the case can be explained on the ground that even if the police control over the lands passed from Spain and France to the United States, this police power was somehow lost when Louisiana became a state on the same footing as other states. In any event, the reasoning follows the view of Jefferson and the Founding Fathers and conflicts with Missouri v. Holland, which holds that police authority over migratory birds in Missouri could be obtained by a treaty with Great Britain, and that Congress could acquire legislative power under the treaty that it did not otherwise have under the Constitution.

In Holmes v. Jennison, 14 Pet. 540, 569 (1840), the Supreme Court, in almost Jefferson's language, said that the exercise of the treaty power included those subjects which "had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments." (Italics supplied). In Holden v. Joy, 17 Wall. 211, 243 (1872) an almost identical statement was made.

But Missouri v. Holland, refusing to be bound by Jefferson's view, held that the case must not be considered merely in the light "of what was said one hundred years ago."

The Committee on Peace and Law of the American Bar Association believes that Jefferson and his generation, and those who followed, were right in their construction of the treaty power in the Constitution after the adoption of the first ten amendments in 1791, and that the Constitution should be restored to the meaning which it had in the view of Jefferson and other writers prior to 1920, when Missouri v. Holland was decided; and that the traditional constitutional balance between federal and state power should be re-established.

The logical end of the lovers of Missouri v. Holland is the establishment of a federal government of unlimited powers by the treaty method, pushing aside state constitutions and laws and federal laws and constitutional provisions -- a result that would have sent the Founding Fathers to an early grave. This is the logical end result, notwithstanding a few dicta of possible limitations in Missouri v. Holland not necessary to the decision, and probably not justiciable in any court. As soon as Missouri v. Holland came down, the probable need of a constitutional amendment in the near future was almost immediately predicted. L. L. Thompson, "State Sovereignty in the Treaty-Making Power," 11 Cal. Law Review, 242 (1922).

As against the claim of Mr. Dulles that we now have no bad treaties, one could cite several, such as the Warsaw Convention on international aircraft disasters, limiting liability for death to $8,300.00, a grossly inadequate sum. But attention will be directed to the legal consequences of Articles 55 and 56 of the United Nations Charter covering, and intended to cover, in the broadest terms, civil, political, economic, social and cultural matters -- the whole gamut of human activity -- and binding the United States to take appropriate action -- a commitment which under Foster v. Neilson, 2 Pet. 253, 314 (1825), (decided by Chief Justice Marshall) is directed to Congress. Under Missouri v. Holland, these clauses in the United Nations Charter create a federal government of unlimited powers, with complete authority in Congress to legislate on any subject of human endeavor, pushing state laws and constitutions out of the way willy-nilly, and leaving us, in Jefferson's words, with "no constitution."

Hereafter, every time an Act of Congress comes before the courts for a test of its validity, the court must first examine the validity of the legislation under the Constitution, and, failing there to find an adequate constitutional basis for the legislation, must then examine the statute under the provisions of the United Nations Charter; and if the court finds that the statute falls somewhere within the whole gamut of

human activity embraced in the Charter, the court will doubtless say that under Missouri v. Holland, the statute is valid, even though in the absence of the Charter it would have no constitutional basis. In other words, it is impossible to assume that hereafter any act of Congress in the entire field of human relations can be held unconstitutional.

The same situation exists under the Charter of the Organization of American States, which came out of the Bogota Conference in 1948. That treaty was ratified in August 1950, with a reservation that will not prevent the Congress from exercising legislative power in virtually the whole gamut of human activity, pushing aside state laws.

We believe that Missouri v. Holland should be set aside by a constitutional amendment, restoring to the Constitution the construction believed by Jefferson and many others to be the correct one, and preventing the federal government, in a "bootstrap operation," from making itself, by a treaty of its own design and choosing, a government of unlimited powers, setting aside state and federal laws and constitutional provisions at will.

I am satisfied from my researches into the thinking of that time, as reflected in its literature, that the Founding Fathers would have summarily rejected the doctrine of Missouri v. Holland by an immediate constitutional amendment, just as they sharply rejected, as an invasion of state sovereignty, the doctrine of Chisholm v. Georgia, 2 Dall. 419 (1793), by the Eleventh Amendment, which was proposed by Congress in 1794 and was adopted by three-fourths of the States shortly thereafter. The Founding Fathers would have rejected Missouri v. Holland by a constitutional amendment, both because it conflicted with their political principles, and because they would have considered unwholesome and unsound the "bootstrap doctrine" which it announces, namely, that the federal government can increase its power almost without limit, at the expense of the States, by its own voluntary act of making a treaty with some other nation or nations. The statement of the Supreme Court in New Orleans v. United States, referred to above, made in 1836, confirms that view, namely, that the Founding Fathers believed that the federal jurisdiction cannot "be enlarged under the treaty-making power."

V

THE AMERICAN BAR ASSOCIATION PROPOSAL

The American Bar Association and Senator Bricker desire an amendment that will protect the United States Constitution and the American system of government established in the Constitution, including the Bill of Rights; that will prevent treaties from becoming internal law within the United States, except to the extent made so by Congress, just as in the case of any other federal statute; and that will set a positive

standard or limitation that will enable the courts to hold invalid treaties that violate the Constitution.

The American Bar Association proposal embodies the following ideas:

(1) A provision of a treaty which conflicts with the Constitution of the United States is void.

(2) A treaty shall not be effective as internal law in the United States unless made so by legislation - thus putting us on a parity with other leading nations, in which a ratified treaty, while effective as an international agreement under international law, does not become domestic law within the country binding on the individual citizens thereof, unless, and to the extent, made so by legislative action.

(3) It will prevent Congress from acquiring legislative power under a treaty that it does not otherwise have under the Constitution.

(4) As a corollary to the treaty proposal, in order to remove any possible doubt, and in order to embody a complete express statement in the Constitution respecting all international agreements, the proposal merely declares expressly the power of Congress to regulate executive agreements, which is believed by many already to exist under the "necessary and proper" clause of the Constitution.

Senator Bricker's proposal has the same general objectives, but differs in text.

(a) Treaties

The American Bar Association believes, with respect to treaties, that they shall not violate the Constitution, and the amendment so stating will set a positive standard that will enable the courts to enforce this limitation.

The American Bar Association and Senator Bricker also have recommended that the amendment provide that treaties shall not be automatically effective as internal law within the United States, displacing state and federal law, under the "supreme law of the land" clause; but that treaties shall be effective as internal law in the United States only if made so by Congress. A treaty becomes binding as an agreement between nations under the rules of international law, and not by virtue of the supreme law clause. As said by Mr. Justice Curtis of the Supreme Court of the United States 100 years ago in Taylor v. Morton (1855), 2 Curtis 454, 2 Black 481:

"If the people of the United States were to repeal so much of their Constitution as makes treaties, their municipal (domestic) law, no foreign sovereign with whom a treaty exists could justly complain for it is not a matter with which he has any concern."

We believe that examination and approval by the Senate of every treaty, negotiated by the President, before it becomes binding on the United States as an international agreement under the law of nations, is an extremely valuable protection; and this view was shared by the Founding Fathers. See The Federalist, No. 75. And we further believe, in modern times, and especially with the vast barrage of new treaties in the social, economic and political field now being developed in the United Nations and its affiliated organizations (reported to be in excess of 200 treaties), that a treaty that has become binding on the United States under the law of nations, should again be examined for its appropriateness as domestic law by both houses of Congress before any part of it is made binding as domestic law within the United States, just as in the case of any other statute.

We also believe that so far as the domestic effect within the United States of a treaty is concerned, Congress should not acquire legislative power under treaties that it does not have in the absence of treaty, and that therefore, as we have pointed out earlier, Missouri v. Holland should be set aside by a constitutional amendment.

If Missouri v. Holland is set aside by a constitutional amendment -- one that the Founding Fathers would have resoundingly supported, -- Congress will be limited to legislating in respect of treaties under its otherwise delegated powers. As shown in the recent Senate hearings, any objection to this concept is founded on the untenable assumption that the President and Senate acting as the treaty-making power have broader legislative power over the people of the United States than the Congress itself, in which the people by express grant in the first Article of the Constitution vested "all legislative power." This very expression clearly shows that the Founding Fathers, as so ably expounded by Jefferson, viewed the treaty power merely in the traditional sense of treaties as then understood (see Hamilton in the Seventy-Fifth Federalist Paper), and not as a device for legislating generally for the people within the United States. That power was lodged solely in Congress, and to the extent not delegated, was reserved to the several states in the Tenth Amendment.

It has been amply demonstrated in the Senate hearings by various witnesses, and notably in the testimony of Mr. George A. Finch, of Washington, D. C., editor-in-chief of the American Journal of International Law, and one of the great international lawyers and scholars in this country, or anywhere else, that Congress already has, under the war, foreign

commerce and other clauses of the Constitution, delegated power to enact legislation to make effective as internal law in the United States treaties on the important subjects of external regulation with respect to which the federal government is empowered to act. (See also Finch, "The Treaty-Clause Amendment: The Case For the Association", American Bar Association Journal, June, 1952, p. 467, Deutsch, "The Need for a Treaty Amendment: A Restatement and a Reply", American Bar Association Journal, September, 1952, p. 735). If there is any minor area left in which Congress cannot legislate under treaties for internal law purposes (the treaty is always effective as an international obligation under the law of nations), then it will be required, in the case of the United States, just as pointed out by the Judicial Committee of the Privy Council in Canada v. Ontario, (Law Reports, A. C. (1937), pages 326, 348, 353-4), that, in order to become internal law, such treaties be dealt with by cooperation between Congress and the state legislatures.

Until Missouri v. Holland, this was more or less standard practice in the State Department. With respect to Geofroy v. Riggs, 133 U. S. 258 (1889), for example, a case of which our opponents are so fond for certain purposes, we pointed out, to their surprise and discomfiture, that the treaty with France there involved was one, portions of which were expressly made dependent on the consent of the several states. In the light of the view of the Founding Fathers concerning the traditional scope of the treaty power, and the separation of powers as confirmed by the Tenth Amendment, this was deemed the appropriate procedure. It is Missouri v. Holland which is responsible for the modern State Department policy of riding rough shod, if need be, over what were always deemed to be the reserved rights of the states.

As for the insinuated suggestion that the American Bar Association's proposed amendment would prevent treaties outlawing aggressive war such as the Kellogg-Briand Pact or a mutual security treaty, such as the North Atlantic Pact, Mr. George A. Finch answered this at the hearing on April 11, 1953, with a resounding "No." History, reason, and consititutional law join in his answer.

(b) Executive Agreements

As to executive agreements, it seems clear that the abuse of that power should be regulated by Congress. The Committee on Peace and Law believes that Congress now has power to regulate executive agreements under the "necessary and proper" clause of the Constitution, which gives to Congress the power to make "all laws necessary and proper" to carry into effect all powers vested by the Constitution "in the government of the United States or any Department or officer thereof," including the President. (See Report, Committee on Peace and Law, September 1, 1952; "Treaties and Executive Agreements", Government Printing Office, 540 pp., Report of May-June, 1952 Hearings on S. J. Res. 130, pp. 44-5). This has been held by the Supreme Court in ex Parte Quirin 317 U. S. 1, 25-27, 29, and in the Steel Seizure Cases, 343 U. S. 579 (Jan. 1952), of recent memory. In the Quirin Case, in a situation within the commander-in-chief area, the court, expounding the "necessary and proper" clause, held that where there was an Act of Congress on the subject, it was unnecessary to determine what might be the powers of the President in the absence of an Act of Congress. In the Steel Seizure Cases, the court held that under the "necessary and proper" clause, all legislative power was in

Congress, and that Congress alone had the power to determine how the executive power, with respect to labor disputes should be exercised. The court twice emphasized that the power to pass "necessary and proper" legislation extended to the President of the United States as being an "officer of the United States" within the meaning of that clause. And in his concurring opinion Mr. Justice Jackson pointed out that the court had "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress."

The President's duty faithfully to execute the laws would certainly seem to extend to a law imposing reasonable regulations on the making of executive agreements and preventing any abuses in that practice.

Under the Constitution, there is no "untouchable" area in which Congress cannot pass reasonable regulations, including the area of the Chief Executive, and particularly legislation to prevent abuses of power.

The "necessary and proper" clause received a classic exposition by Chief Justice Marshall in McCullough v. Maryland, (1819) 4 Wheat. 316, 425 et seq. Even so Olympian an area as the original jurisdiction of the Supreme Court is not immune. The Judiciary Act of 1789, provided for the oath, the process and the sessions of the Supreme Court. 1 Stat. 76, 80, 93; Wayman v. Southard, 10 Wheat. 1 (1825); Bank of U. S. v. Halstead, 10 Wheat. 51 (1825) And Congress has power, under the "necessary and proper" clause, to prescribe the procedure whereby the original jurisdiction of the Supreme Court may be exercised. Florida v. Georgia, 14 How. 478, 492 (1854). As pointed out in the Quirin case, supra, the Commander-in-chief area is not immune from reasonable Congressional regulations, except perhaps "the command of the armed forces and the conduct of campaigns." (Separate opinion of Chief Justice Chase, and Justices Wayne, Swayne, and Miller, in Ex parte Milligan, 4 Wall. 2, 139 (1866). If Congress can prescribe the procedure for the exercise of the original jurisdiction of the Supreme Court, it would seem axiomatic that Congress can prescribe "necessary and proper" laws for the making of executive agreements and preventing the abuse of the power; and that if Congress passes an appropriate act regulating executive agreements, the President may not "act contrary to an act of Congress."

The Committee on Peace and Law, however, has recommended if there is any doubt on this point, created by some broad judicial dicta in cases where the point was not involved (U. S. v. Curtiss-Wright Corporation, 299 U. S. 304; Pink v. U. S., 315 U. S. 203), and especially if the Constitution is to be amended with respect to treaties, then it would be appropriate to have an express constitutional provision covering all international agreements whatsoever, including both treaties and executive agreements. We have, therefore, urged that Congress should expressly be declared to have the power to regulate executive agreements,

which we believe is merely a specific reassertion of the "necessary and proper" clause.

We believe, moreover, that Congress will reasonably exercise this power, just like its other powers, and confine itself to prevention of abuses in the field of executive agreements, by requiring that executive agreements in certain major policy areas, such as those calling for legislation, or for appropriations, or for transferring territory of the United States or of other countries, should either be made as treaties, or, in any event, not be binding unless approved by one or both houses of Congress.

Parenthetically, both the Secretary of State and his legal adviser made a serious legal error in Mr. Dulles' statement. Mr. Dulles stated that executive agreements, without either Senate or Congressional action "cannot constitutionally become 'the law of the land.'" (p. 6 of Mr. Dulles' written statement). They completely overlooked that the Supreme Court has made executive agreements the supreme law of the land in Belmont v. U. S., 301 U. S. 324 and U. S. v. Pink, 315 U. S. 203, holding that the executive agreement entered into by President F. D. Roosevelt with Mr. Litvinov, the Russian foreign minister, without Senate approval, was, just like a treaty, the supreme law of the land, superseding the law of the State of New York.

INADEQUACY OF ALTERNATIVE REMEDIES

(a) Reservations

Reservations are inadequate, among other things, (1) because they depend on human factors and the political complexion of each Senate, (2) because they are specifically deprecated in modern treaties such as the new International Copyright Convention, which says in Article 20 that "Reservations to this Convention shall not be permitted," and (3) because, as the result of Missouri v. Holland,

> "An international treaty cannot be safeguarded by a clause in the treaty or by reservation or understanding against the expansion of the limited power of the Federal Congress in the United States to such extent as necessary to fulfill the obligation under the treaty if Congress determines to exercise such power."

The third reason just given embodies the agreed opinion of the Section of International and Comparative Law of American Bar Association and that Association's Committee on Peace and Law. (Report of Committee on Peace and Law, September 1, 1951, p. 36).

Incidentally, Mr. Harold Stassen, Mutual Security Director, who on April 9, 1953, testified against any constitutional amendment in the Senate Judiciary hearing, personally signed the foregoing agreed opinion as Section Delegate.

(b) Subsequent Legislation

Subsequent legislation (under the authority of such cases as Head Money Cases, 112 U. S. 590, 597-99 (1884) and Sanchez v. U. S., 216 U. S. 167 (1911) is wholly inadequate, because it submits the protection of basic rights of the people to such human factors as, evenly divided political parties, variant political control of either house, and presidential vetoes requiring a two-thirds majority to override. The basic rights of the people should not be left to the vagaries of politics, but should be protected in advance by a suitable constitutional limitation, enforceable by each citizen before an independent judiciary.

This was the case with the first Ten Amendments, which were adopted to prevent in advance possible abuses of federal power, and which, under the surveillance of a vigilant independent judiciary, have proved to be an impregnable bulwark against the abuse of executive and legislative power.

Such subsequent legislation by Congress may cause international complications of a major character. Please note the extreme care with which Mr. Dulles framed the congressional resolution on the Yalta, Teheran, and Potsdam agreements, in order to avoid repudiation.

It would seem unwise to rely extensively on this Congressional power of repudiation, but much wiser to adopt a constitutional limitation preventing all of these difficulties in advance.

The first ten amendments were added to the Constitution in 1791, to protect the states and the people in advance against misuse of federal power.

While the exercise of the power of Congress to set aside or cut down existing treaties may on rare occasions be useful, a constitutional amendment dealing with the whole problem in advance is far preferable.

(c) Senate Vigilance

The fact that some sixty (60) Senators themselves propose consideration of a constitutional amendment affecting the Senate's powers in the treaty field to approve treaties and make domestic law, regardless of state constitutions and laws, is a sufficient refutation of the argument that the Senate can be counted on to protect the American people against bad treaties becoming the supreme law of the land.

The Senators are keenly aware that various matters have escaped them in the consideration of some recent treaties that they would now like to reconsider or recant. They are deeply conscious of the pressure put on them to ratify certain treaties, even though they entertain some serious doubts, because the State Department and others urge that it is immediately necessary for our foreign relations to approve these treaties,

notwithstanding reasonable doubts, lest our foreign relations be impaired.

In fact, it is believed that the Senate, as well as the State Department, will be greatly aided in the avoidance of inadvertences or doubtful provisions, and in obviating the necessity of trying to solve in advance difficult questions as to the self-executing character of treaty clauses, by the proposed provision making all treaties non-self-executing as internal law until the whole Congress acts by separate legislation.

VII

HISTORY OF THE AMERICAN BAR ASSOCIATION PROPOSAL

It was the extremely dangerous and doubtful situation as to treaties that caused Frank E. Holman of Seattle, in 1948, while President of the American Bar Association, followed, under his suggestion, by the Association's Committee on Peace and Law, to take up the study of these problems, with a view to suggesting a possible remedy.

Following earlier progress reports, that Committee, in its September 1951 report, affirmatively advocated a constitutional amendment and outlined the contours of a desirable amendment, but did not yet advocate the wording of a specific text.

On February 7, 1952, with the co-sponsorship of 56 Senators, Senator John W. Bricker of Ohio (giving full credit to Mr. Holman and the American Bar Association Committee on Peace and Law, who had first interested him in the subject and on whose researches and opinions he expressly relied) introduced in the 82d Congress S. J. Res. 130, containing a specific text prepared by himself as a tentative version, for the purpose of bringing the subject to a head and having hearings.

At the time of introducing S. J. Res. 130, Senator Bricker said (Cong. Rec. Feb. 7, 1952, p. 923):

> "Before explaining the joint resolution section by section, I should like to pay tribute to the magnificent work of the American Bar Association and its committee on peace and law through United Nations in alerting the American people to the dangers inherent in the treaty-making power. I desire to pay a special tribute to the association's distinguished past president, Mr. Frank E. Holman, of Seattle, Wash., for his pioneer work in this field. I hope that the American Bar Association's careful study of this subject over the past 4 years

will result shortly in a proposal to amend the Constitution designed to accomplish the same objective as the resolution just introduced."

On February 26, 1952, the House of Delegates of the American Bar Association, its governing and policy-making body, (on recommendation of its Committee on Peace and Law, set out in that Committee's February 1, 1952 Report) approved a specific text as to treaties differing materially from Senator Bricker's text in language and legal implications.

Hearings held in May-June, 1952, before a subcommittee of the United States Senate Judiciary Committee (consisting of Senators McCarran, Nev., Chairman; O'Connor, Maryland; Willis Smith, North Carolina; Hendrickson, New Jersey, and Ferguson, Michigan) resulted in a 524-page volume on "Treaties and Executive Agreements" printed by the Government Printing Office; but, because of the intervention of the National elections, no sub-committee report was made.

On September 18, 1952, the House of Delegates of the American Bar Association, on recommendation of its Committee on Peace and Law, made in its September 1, 1952, Report, adopted a text on executive agreements, for consideration by Congress.

At the beginning of the 83rd Congress, in January, 1953, Senator Bricker, with co-sponsorship of 64 Senators, introduced his new S. J. Res. 1, differing substantially from his S. J. Res. 130 of the previous session, and still differing from the American Bar Association text on treaties and executive agreements. Later, in February, 1953, Senator Watkins of Utah, introduced S. J. Res. 43, embodying substantially the American Bar Association text for simultaneous consideration by the Senate Judiciary Committee.

At the February-April, 1953, hearings before a sub-committee of that committee (consisting of Senators Langer, N. D., Chairman; Dirksen, Ill.; Butler, Md.; Kefauver, Tenn., and Kilgore, W. Va.), Secretary of State Dulles, Attorney General Brownell, and other administration witnesses, opposed both S. J. Res. 1 and S. J. Res. 43, as being "unnecessary" and "dangerous" while Senator Bricker and representatives of the Committee on Peace and Law of the American Bar Association supported respectively the two resolutions.

The hearings being closed, the whole subject is now in the hands of the sub-committee for consideration.

VIII

NO CHANGE IN PRESENT METHOD OF NEGOTIATING AND RATIFYING TREATIES

The proposed constitutional amendment will not change the present method of negotiating and ratifying treaties by the United States, to-wit, by the President, with the advice and consent of two-thirds of the Senators present. (Const. Art. II; National Prohibition Cases, 253 U. S. 350; Missouri Pac. Ry. Co. v. Kansas, 248 U. S. 276,283).

IX

NO INTERFERENCE WITH UNITED STATES TREATY NEGOTIATIONS

Nor will the American Bar Association proposal in any way interfere with our negotiating treaties with foreign countries. As has been repeatedly explained in the printed Reports of the Committee on Peace and Law, and in the Senate hearings, the legal efficacy of a treaty as a binding agreement between nations depends on international law solely and alone, and is in no way dependent on the "supreme law clause" of Article VI, which relates solely to the internal effect of treaties within the United States, and with which no foreign nation, in the language of Mr. Justice Curtis in 1855, "has any concern." Taylor v. Morton, 2 Curtis 454, 2 Black. 481 (1855). A treaty when duly executed under the authority of the respective governments becomes a binding international agreement under the rules of international law, from its effective date, without any regard whatsoever to whether the treaty ever becomes also the domestic law of the signatory nations. The rules of international law are not concerned with whether a treaty ever becomes effective as domestic law or, if so, by what method or device. Throughout the civilized world, a treaty becomes binding under the law of nations in the manner stated; it does not become domestic law in the leading countries of the world, unless incorporated into that law by an Act of Parliament or other comparable legislative body.

But, says the distinguished Secretary of State, some of these other countries have a Parliamentary form of government, and it is easier for them to get subsequent legislation than it might be in the United States, where it is possible that the President might not be able to obtain a majority in Congress if it was desirable to make a treaty or some portion thereof domestic law: in fact the majority in Congress might have a different political affiliation from that of the President himself.

I suggest that this is a distinction without any substantial difference. It certainly is not a legal difference, but at most one of convenience. In fact, if it should happen that the majority in Congress should be unwilling to make a treaty domestic law, then I do not think the President with the

advice and consent of two-thirds of the Senators present (who might be of his own political affiliation) should be able to make domestic law for the people of the United States under the Supreme law clause. At the same time, I am satisfied that if a treaty should be presented in which it is widely recognized that it is important that it become domestic law within the United States, the Congress would act with the expedition which has been characteristic in comparable situations.

But I go further. If the distinction predicated on the difference between our form of government and a Parliamentary form of government does make a substantial difference, then I say that if our form of government is so sui generis, then we are entitled to make for the protection of the American people a rule that is equally sui generis.

I am not disturbed at all by the alleged difficulties of the double examination of a treaty, first by the Senate before the treaty becomes binding on the United States under the law of nations; and, second, if the treaty is to become domestic law in any part, again by both Houses of Congress. In our form of government this certainly would be an additional protection for the American people; and after all, ours is a government of the people, by the people, and for the people; and the acts of government are dependent on the consent of the governed, and not on the all wise judgment of the State Department as to what is good for the people.

I believe, on the one hand, that the initial examination by the Senate of whether a treaty shall become a binding international obligation enforceable by the methods available under the rules of international law, is valuable. Our forefathers did not like one-man government for any purpose. I believe that it is a salutary check on the Executive Department that before a treaty can bind the United States as an international obligation under international law, it must pass the scrutiny, and receive the consent, of the direct representatives of the people in the Senate of the United States. See the Federalist No. 75.

Then, before the treaty, although it has become binding on the United States under the law of nations, becomes domestic law within the United States, I think it is salutary that it shall be again examined for its appropriateness as domestic law by both Houses of Congress, just as in the case of ordinary legislation under other constitutional powers.

I am, therefore, not appalled by the bogie of the "second look" required by the proposed constitutional amendments before treaties can become domestic law. Before Missouri v. Holland, the "second look" was doubtless unnecessary, but, if state laws and constitutions are to be protected, it has now become a "must".

While the Secretary of State relies on correction of a bad treaty by "a simple subsequent Act of Congress", we have pointed out previously that in many circumstances the obtaining of such an act may not be so simple. In any event, we believe the American people are entitled to be protected

in advance against such treaties becoming domestic law under the "supreme law clause", by an appropriate constitutional amendment.

Incidentally, the distinguished Secretary's shift of emphasis is worth noting. To repeal a treaty, he says, requires only a "simple act of Congress": but this "simple act" is much too difficult to contemplate if made a condition precedent to a treaty's becoming domestic law, as we request.

The "which clause" of the American Bar Association text, which so disturbs Mr. Dulles because it limits Congress to its legislative powers in the absence of treaty, relates solely to the internal effect of treaties within the United States and has no bearing on the legal effect of a treaty of the United States which has become binding on us under the rules of international law. This point has been amply discussed above in the critique of Missouri v. Holland.

X

NO INTERFERENCE WITH UNITED NATIONS

This proposed amendment is not intended to interfere with the United Nations, but actually to protect it in the performance of its appropriate functions. The reform activities of the United Nations (which, in my judgment, ought to be advisory merely and not take treaty form) would not have stirred up such great opposition in the United States except for the fear that some of the many treaties (reported to be in excess of 200 in number) sponsored by it and its affiliated organizations might, under the "supreme law clause" of Article VI of the Constitution, automatically become the internal law of the United States, setting aside state laws and constitutions and existing federal laws.

It will be recalled that the Committee on Peace and Law has consistently condemned United Nations' draft covenants on Freedom of Information, Freedom of Speech and Press, Newsgathering and the International Right of Correction, as being much too restrictive and out of harmony with American concepts (See Reports, September 1, 1949; September 1, 1950; September 1, 1951; February 1, 1952; September 1, 1952), as well as the Genocide Convention, "as submitted", and the Draft International Covenant on Human Rights.

Dr. Charles Malik of Lenanon, last year's Chairman of the United Nations' Human Rights Commission, after the session was over, uttered the significant and ominous warning concerning the Draft International Covenant on Human Rights, which is still currently under consideration by the Commission at Geneva, "that the amendments we adopted to the old texts under examination responded for the most part more to Soviet than to Western promptings." United Nations Bulletin, September 1, 1952, p. 251.

For those who are interested in the dangers of that covenant, I suggest a reading of the reports of the Committee on Peace and Law and of the

articles by Dr. William Fleming, of Ripon College, Ripon, Wisconsin, entitled "Danger to America: The Draft Covenant on Human Rights" (American Bar Association Journal, October and November issues, 1951). They anticipated by several years Mr. Dulles' recent announcement of April 6, 1953, against signing that Covenant.

It is believed the American people are in sympathy with the United Nations as a world security organization, but they will surely oppose it by an overwhelming majority if its various reform programs, consisting of compromises with various ideologies the world over, automatically by treaty become the supreme law of the land in the United States under the present treaty clause of the Constitution.

XI

VOTING REQUIREMENTS FOR A CONSTITUTIONAL AMENDMENT

To pass a suitable form of constitutional amendment in Congress (preliminary to being "ratified by the legislatures of three-fourths of the several states") requires a vote of "two-thirds of both houses." In the National Prohibition Cases, 253 U. S. 350, 386 (1919), the Supreme Court said:

> "The two-thirds in each house which is required in proposing an amendment is a vote of two-thirds of the members present -- assuming a quorum -- and not a vote of two-thirds of the entire membership, present and absent."

Hence, if, at the time of action on the proposed amendment the full membership is present in the Senate, 64 votes, or two-thirds of 96, will be required; and similarly, in the House, two-thirds of the entire membership, if present, will be two-thirds of 435, or 290. If less than the full membership is present -- assuming at least a quorum -- it will require a vote of two-thirds of those present. The minimum necessary to pass the amendment would be two-thirds of a bare quorum of the Senate, or two-thirds of 49, which is 33, and two-thirds of a bare quorum of the House, or two-thirds of 218, which is 146.

XII

SENATOR BRICKER'S GREAT CONTRIBUTION

Senator Bricker, who has stated that his interest was originally aroused by one of Mr. Frank E. Holman's speeches, and the subsequent reports of the Committee on Peace and Law, has rendered a great service to the American people in heading up this great constitutional fight in the halls of Congress -- a service that has already resulted in an announcement of change in the treaty policy of the United States. The representatives of the American Bar Association who have been in the thick of the argument are most grateful to him for his patriotic devotion to this cause. We believe that

he deserves the undying gratitude of the American people.

XIII

CONCLUSION

The attack of the Secretary of State is leveled primarily on the text of Senator Bricker's S. J. Res. 1, and not to S. J. Res. 43, embodying substantially the ABA text. He is unable to make an effective quarrel with the first section of the American Bar Association text. Although the State Department appears to think that the ABA text states the law as set forth in Geofroy v. Riggs, the Cherokee Tobacco and other cases, the Department somehow or other conjures up a fear that it would be dangerous to embrace this satisfying concept in a constitutional amendment.

As respects Section 2 of the American Bar Association text, Mr. Dulles quarrels somewhat with the concept which would make all treaties non-self-executing. That argument is not convincing for the reasons previously given.

His principal quarrel with the American Bar Association text is with the so-called "which clause" in Section 2, which would limit Congress, in making domestic law under treaties, to its otherwise delegated constitutional powers. He says that in this particular the American Bar Association text is so strict that it would seriously cripple the government. This argument has been fully answered under the discussion of Missouri v. Holland.

His argument on executive agreements is probably the weakest of all and, in the light of a major legal error contained in his discussion, indicates inadequate study of the problem.

We sincerely appreciate the compliments of the Secretary of State that the proponents of these constitutional amendments have so enlightened public opinion as to bring about a change in the foreign policy of the United States with respect to a multitude of treaties that are now in the works in the United Nations and some of its affiliated agencies. But one such salutary change in foreign policy may at some later time be followed by another change in foreign policy in the treaty field not so salutary.

It is only when we have a government that sincerely intends to stay within its constitutional limitations that such an amendment as we propose can be obtained for the protection of future generations.

We have sincerely asked that, notwithstanding the presentation of the Secretary of State, as well as of the Attorney General, and other representatives of government departments, the U. S. Senate Judiciary Committee recommend the adoption of an appropriate constitutional amendment

in this field so that the long program incident to obtaining ratification of a constitutional amendment by legislatures of three-fourths of the states may promptly go forward.

As for the familiar argument repeated in the statements of the Secretary of State that the proposed amendment is both "unnecessary" and "dangerous," you are, of course, aware that exactly the same argument was made in the 84th Federalist Paper, as follows: "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous."

Need more be said?

Alfred J. Schweppe
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TREATIES AND EXECUTIVE AGREEMENTS

Reply
to

Mr. Bethuel M. Webster,
President of the Association
of the Bar of the City of New York

May 8, 1953

Alfred J. Schweppe
657 Colman Building
Seattle 4, Wash.

Note: The writer is Chairman of the American Bar Association's Committee on Peace and Law, which has had these subjects under intensive study for almost four years. Except insofar as it refers to official resolutions of the American Bar Association, or reflects the opinions of the Committee on Peace and Law as embodied in its several printed reports, this paper represents the writer's own views, and is not to be considered as the views of the American Bar Association, which speaks only through official resolutions of its House of Delegates, and between meetings of that House, of its Board of Governors.

"Treaty law can override the Constitution * * * * * They /Treaties/ can cut across the rights given the people by the constitutional Bill of Rights."

--JOHN FOSTER DULLES,
before Regional Meeting
American Bar Association
Louisville, Kentucky,
April 12, 1952.

"The history of liberty is a history of the limitation of governmental power, not the increase of it."

--WOODROW WILSON

"In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

--JOHN W. DAVIS
quoting Thomas Jefferson
in the argument in the
Steel Seizure Cases,
343 U.S. 579.

Treaties and Executive Agreements
by
Alfred J. Schweppe, Seattle, Washington

This statement has reference to the several constitutional amendments proposed by Senator Bricker and the American Bar Association to keep the power to make treaties and executive agreements within Constitutional bounds.

In The New York Times of Thursday, April 23, Mr. Bethuel M. Webster, President of the Association of the Bar of the City of New York, is quoted as saying to the American Newspaper Publishers' Association that "it has been repeatedly held by the courts that no treaty can impair fundamental rights guaranteed by the Constitution." And he sought to leave the impression that the subject is thus simply and axiomatically disposed of.

It is true that there have been judicial expressions in some of the old cases, such as The Cherokee Tobacco, (1870), 11 Wall. 616, 620-1, Holden v. Jay, (1872) 17 Wall. 243, Geofray v. Riggs, (1889) 133 U.S. 258, 267; Doe v. Braden, (1853), 16 How. 635, 657, that a treaty cannot violate the Constitution, nor authorize what the Constitution forbids, nor change the nature of the government of the United States or the relation between the States and the United States. There is even the one-time very comforting expression in New Orleans v. United States, (1836) 10 Pet. 662, 736, expounding the Jeffersonian view of the treaty clause, that "Congress cannot by legislation enlarge the federal jurisdiction nor can it be enlarged under the treaty-making power."

Jefferson's view, as stated in his Manual of Parliamentary Practice, which was first published in 1801, ten years after the first ten amendments were adopted in 1791, and which went through six editions in his lifetime and many more afterwards and which had a wide circulation and following among public men and scholars, was as follows:

> "By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated.
>
> "It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way."

But, as has for some years been shown in the reports of the Committee on Peace and Law of the American Bar Association, those who have intensively studied this question have long ago had to give up those otherwise satisfying old dicta of the Supreme Court, written in the Jeffersonian context. They soon had to recognize, just as the late Chief Justice Hughes recognized in 1929, and as all those who have given the subject more than a quick look recognize, that Missouri v. Holland, (1920) 252 U.S. 415 (opinion written by Mr. Justice Holmes, with two justices dissenting) has changed the whole course of the judicial stream, by indicating that there may be no limit on what can be done in treaties made "under the authority of the United States" (which is the only constitutional requirement). The decision repudiated the view of Jefferson and the Founding Fathers (Jefferson, Parliamentary Practice, p. 110, note 3; Jefferson's Works

Vol. III, p. 135 setting forth both Jefferson's and Madison's views; Hamilton's Works, Vol. IV, p. 342) as confirmed in New Orleans v. United States, above cited, and decided that Congress can acquire legislative power under treaties that it does not otherwise have under the Constitution - a doctrine which, for lack of a better epithet, I have long called the "bootstrap doctrine" of federal power. Missouri v. Holland definitely holds, contrary to New Orleans v. United States, that the federal jurisdiction can be enlarged by use of the treaty power.

Before the American Society of International Law in 1929, the distinguished late Chief Justice Charles Evans Hughes said that there was in the Constitution "no explicit limitation" on the treaty power, and that he would "not care to voice an opinion as to an implied limitation on the treaty-making power; the Supreme Court has expressed a doubt whether there could be any such," his reference being to the expression of doubt in Missouri v. Holland, page 423.

A strong doubt is also expressed by Mr. Justice Chase in Ware v. Hylton, (1796) 3 Dall. 199, 237, and by the United States Court of Appeals for the Ninth Circuit in United States v. Reid, (1934) 73 F (2d) 153.

This doubt has been further increased by U.S. v. Curtiss - Wright Corporation, (1936) 299 U.S. 304, (a case that the Committee on Peace and Law has sharply criticised in its reports of February 1, 1952, and September 1, 1952) declaring that the treaty-power does not depend on a grant in the Constitution but is an inherent power of the federal government, and indicating that the treaty-power is unlimited.

Then come into consideration such cases as Oetjen v. Central Leather Co. (1918), 246 U.S. 297, 302; U.S. v. Curtiss-Wright Corporation, supra, in this phase, at p. 319; Banco de Espana v. Federal Reserve Bank, 114 F (2d), 439, 442; Z & F Assets Corporation v. Hall, 114 F (2d) 469, 468; U.S. v. Domestic Fuel Corporation, 71 F (2d) 424, 430-1, holding that what the President and Senate do in the field of foreign relations is a political question "not subject to judicial inquiry or opinion," because the Constitution has committed the field of foreign relations to the President, with the advice and consent of the Senate, - a field in which the courts are not competent to work, and which is beyond their jurisdiction.

Under our governmental system it is the courts that finally declare unconstitutionality and determine whether a federal activity, such as a statute, regulation, or executive order (as in the recent Steel Case), is in violation of some judicially ascertainable limitation in the Constitution.

For instance, a statute to be valid must be made "in pursuance" of the Constitution, as held by Chief Justice Marshall in the last two paragraphs of the great decision in Marbury v. Madison, (1803) 1 Cranch 137, 180. But there is no requirement whatever concerning a treaty except that it be made "under the authority of the United States," - a distinction between statutes and treaties expressly noted by Mr. Justice Holmes in Missouri v. Holland, with the comment that "it is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention," namely, negotiation by the President and ratification by the Senate. That is the point to which Chief Justice Hughes was referring in his 1929 address, namely, that a court might well say "We find this treaty, whatever its contents, was made 'under the authority of the United States,' and that ends the judicial inquiry; the Constitution makes every such treaty the supreme law of the land."

If the question of constitutionality is beyond the judicial reach of the courts, either because they are limited to the question of authority, or because treaties are political matters and for that reason beyond their jurisdiction, then a treaty so authorized is the supreme law of the land; and there is nothing to be done about it except an ad hominem petition to the President or Congress please to get rid of those treaty provisions that "override the Constitution" and "that cut across the rights given the people by the Constitutional Bill of Rights." The latter is the description of the present extent of the treaty power as made by Mr. John Foster Dulles, now Secretary of State, in a prepared address before the American Bar Association at Louisville, on April 12, 1952 - a view directly contrary to that expounded by Mr. Bethuel M. Webster.

Mr. Dulles' more complete statement at Louisville was:

> "The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas Treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; -- they can take powers from the state and give them to the Federal Government or to some international body and they can cut across the rights given the people by the constitutional Bill of Rights."

It will also be noted that Professor Arthur E. Sutherland, Jr., in his article on "Restricting the Treaty Power," in the Harvard Law Review, June, 1952, p. 1319, said: "President Coolidge and the Senate evidently thought that a treaty could prevail over at least one amendment." Reference was to the 1924 treaty with Great Britain with reference to bringing into ports of the United States intoxicating liquors.

Then we find it asserted that no treaty has ever been held invalid. (U. S. v. Thompson, 258 Fed. 257, 260; Professor Zachariah Chafee, Jr. in Harvard Law School Record, February 21, 1952.)

Then there is most recently the report (June 1952) of the learned committee of the New York State Bar Association (comprised of the Honorable William D. Mitchell, former Attorney General of the United States, Chairman, and the distinguished Messrs. John W. Davis, Lewis R. Gulick, John J. Mackrell and Harrison Tweed, the latter not agreeing in part), opposing the proposed International Covenant on Human Rights in its present form, but expressing a genuine fear that the Supreme Court of the United States might uphold it, because "it would place a heavy strain on the Supreme Court to hold that the treaty is invalid."

In other cases the Supreme Court has said that the treaty power extends "to all proper subjects of negotiation between our government and foreign nations," or, otherwise stated, "to all proper subjects of international concern." Asakura v. Seattle, 265 U. S. 332, 341, and cases cited. However, these decisions again end us up in a cul de sac, for the following reasons;

1. The court has said that what the President and Senate do in the field of foreign relations is "not subject to judicial inquiry or opinion."

2. We are met with the official United Nations' view, said to be supported by all those members who voted in favor of the Universal Declaration of Human Rights /which includes the United States/:

> "Once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly, or by convention between member states at the instance of the United States, that subject ceases to be a matter being 'essentially within the domestic jurisdiction of the member states.' As a matter of fact, such a position represents the official view of the United Nations, as well as of the member states that have voted for the Universal Declaration of Human Rights." Moses Moskovitz, in American Bar Association Journal, April 1949, pp. 283, 285.

Under this official United Nations' view, freedom of speech, freedom of press, freedom of religion, and the whole gamut of human rights, -- civil, political, social, economic and cultural -- are matters of international concern within the scope of the treaty power, and beyond the jurisdiction of the courts.

3. We encounter the asserted rule of international law that any subject whatever that is dealt with in a treaty between two or more nations, becomes, by virtue of that fact, a "matter of international concern." Report of Committee on Peace and Law, February 1, 1952, p. 5. This would put the subject matter beyond the jurisdiction of the courts.

4. We face the doctrine of the former State Department as announced in 1950 in an official bulletin, with a foreword by President Truman, stating its position that "there is no longer any real distinction between 'domestic' and 'foreign' affairs." (Opening sentence of State Department Publication 3972, Foreign Affairs Policy Series 26, released September 1950). Under this doctrine which, for lack of a better description, I call "internationalism gone wild," but which must necessarily be soberly reckoned with, any subject otherwise domestic can be seized and by treaty made "a matter of international concern," presently beyond the jurisdiction of the courts.

In the last paragraph of Missouri v. Holland, Mr. Justice Holmes, in substance, said that migratory birds are a matter of international concern. But, of course, he said "yes." The real test, however, is whether a court has power to say "No." What we are concerned with is not the proneness of a court to say "yes" in the exercise of a doubtful power; what we are concerned with is the power to say "No"; and we want the latter power established beyond all doubt.

Hence the dicta of the old cases which are so soon discovered, and so confidently proclaimed, with a resounding "eureka," by "quick look" lawyers, can no longer be relied on at all. They can no more be relied on since Missouri v. Holland, than can the old commerce clause cases prior to the Jones and Laughlin Case upholding the Wagner Act.

Missouri v. Holland, in the minds of federal expansionists, has given rise to two remarkable doctrines: (1) the doctrine that the treaty power is unlimited, capable even of overriding the Constitution and the Bill of Rights, and (2) the

"bootstrap doctrine" of federal power, namely, that by its own voluntary act of making a treaty with another nation, the federal government can, apparently without limit, increase its legislative power, at the expense of the states.

Carried to its logical end, Missouri v. Holland means that, under Articles 55 and 56 of the United Nations' Charter, or under the Charter of the Organization of American States, both dealing with the entire gamut of human activity, in the civil, political, social, economic, and cultural fields, the federal government is now one of unlimited powers.

Mr. Justice Holmes said (252 U. S. 416, 434), that "no doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power."

With that remark, he opened the flood-gates!

Both of these remarkable doctrines have articulate exponents, not including the writer, who believes, in accordance with the view of Jefferson and the Founding Fathers, that such concepts as these should be forever removed from the American scene.

In fact, I am satisfied from my researches into the thinking of that time, as reflected in the writings of the Founding Fathers, that they would have summarily rejected the doctrine of Missouri v. Holland by an immediate constitutional amendment, just as they sharply rejected, as an invasion of state sovereignty, the doctrine of Chisholm v. Georgia, 2 Dall. 419 (1793), by the Eleventh Amendment, which was proposed by both Houses of Congress in 1794, and was adopted by three-fourths of the states shortly thereafter. The Founding Fathers, would in my opinion, have rejected Missouri v. Holland, by an immediate constitutional amendment, both because it conflicted with their political principles, and because they would have considered unbelievable even the intimation that the treaty-power was without limit, and that a treaty made "under the authority of the United States" might override the Constitution; and they would have considered unwholesome and unsound the "bootstrap doctrine" of federal power, namely, that the federal government can increase its legislative power, apparently without limit, at the expense of the states, by its own voluntary act of making a treaty with some other nation or nations. This view of the Founding Fathers was confirmed by the Supreme Court in New Orleans v. United States, (1836), referred to above, that the federal jurisdiction cannot "be enlarged under the treaty-making power" -- a concept that Missouri v. Holland completely destroys.

I think Missouri v. Holland should receive the same treatment that, in my opinion, would have been given it by the Founding Fathers.

If Missouri v. Holland is set aside by a constitutional amendment -- one that the Founding Fathers would have resoundingly supported, -- Congress will be limited to legislating in respect of treaties under its otherwise delegated powers. Any objection to this concept is founded on the untenable assumption that the President and Senate acting as the treaty-making power have broader legislative power over the people of the United States than the Congress itself, in which the people by express grant in the first Article of the Constitution vested "all legislative power." This very expression clearly shows that the Founding Fathers, as so ably expounded by Jefferson, viewed the treaty power merely in the traditional sense of treaties as then understood (see Hamilton in the Seventy-Fifth Federalist Paper),

and not as a scheme or device for legislating generally for the people within the United States. That "legislative power" was lodged solely in Congress, and to the extent not delegated, was reserved to the several states and to the people in the Tenth Amendment.

This point was overlooked by both counsel and the court in Missouri v. Holland.

Having made these positive and, to some persons perhaps, overenthusiastic statements, one would be derelict in not commenting on some of Holmes' other dicta in Missouri v. Holland, to which some opponents of a treaty-power amendment so avidly cling.

For instance, he said (p. 433) that "we do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way." But what can this dictum import,

1. When he had already robbed it of its strength by expressing the doubt whether there was any limit on a treaty "made under the authority" of the United States, which is the only explicit limitation in the Constitution?

2. When he carefully avoided stating in what "different way"?

3. When the question of limitation based on Jefferson's Manual of Parliamentary Practice, was before him, and he flatly rejected it, leaving the question completely at large and open to doubt whether there is any limitation?

Then there is his other statement on which some persons rely (252 U. S. 416, 433), that the migratory bird treaty "does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." This statement is comparably equivocal because of what has just been stated above, and, secondly, because it was a mere dictum in the sense that only if that treaty had violated such "prohibitory words," would the question have been squarely presented whether the treaty was invalid and whether the courts had judicial power so to declare.

The Constitution itself is, broadly speaking, both a delegation and, outside of the delegated area, a prohibition, and it contains but few "prohibitory words." But here again we run into trouble. The "prohibitory words" of the First Amendment, for example, are that "Congress" (defined in Article I as the senate and house of representatives) "shall make no law" respecting freedom of religion, freedom of speech, freedom of the press, and freedom of assembly. The "prohibitory words" are not directed to the treaty-making authorities, namely, the President and Senate, who are a separate "constitutional agency." (See The Federalist, No. 75.) Are these great rights, then, at large under the treaty-making power?

Of course, the Founding Fathers never dreamed that some day it would be seriously claimed that these fundamental rights would be dealt with by treaty as matters of international concern, which even the present State Department asserts. (Mrs. Lord, Department of State Bulletin, April 20, 1953, p. 582). If the Founding Fathers had thought so they would promptly have fenced in the treaty-making

authorities along with the Congress itself. That they thought this was unnecessary is shown by their rejection of the arguments of Patrick Henry and Richard Henry Lee of Virginia, who claimed that the treaty-making power as written was unlimited and could be used to bargain away fundamental constitutional rights. Jefferson disagreed with his illustrious compatriots, with the remark, "if the treaty power is unlimited, then we have no Constitution." He expressed his own views at various times, and particularly in his Manual of Parliamentary Practice, quoted from earlier in this article.

Until Missouri v. Holland, nobody would have supposed that an agent or agency created by the Constitution, could exceed the powers of its principal, without such action being deemed ultra vires and void, and capable of being so declared by a court of competent jurisdiction. Until then, no one would have seriously contended that a treaty could have any "supremacy" beyond the Constitution, or have any authority outside of and beyond the express and implied limitations of that instrument.

It seems remarkable, indeed, at this distance that Holmes did not undertake to sustain the federal Migratory Bird Act under the power of Congress to regulate commerce with foreign nations and among the several states, although it was suggested in the argument (252 U. S. 416, 424) of the Solicitor General. So to hold should have been easy even at that time. If Congress can regulate the movement of cattle across the Canadian border and across state lines (which it undoubtedly can), if Congress can regulate airplanes crossing the Canadian border or across state lines (which it undoubtedly can), if Congress can regulate the foreign and interstate traffic in lottery tickets, white slaves, stolen automobiles, and many other inedible and edible commodities (which it undoubtedly can), it would seem to require no greatly "strained words" (United States v. Rumely, Supreme Court, March 9, 1953) to hold that Congress can regulate what Holmes (p. 435) calls the wild bird "food supply" crossing over from Canada and across state lines. There is no doubt in my mind that it would be so held today, and that the Migratory Bird Act was and is valid under the foreign commerce clause, without any recourse whatever to the treaty-making power.

However, as appears from Holmes' opinion, and from the decision in the court below, Missouri tried to invalidate the congressional act on the theory that ferae naturae, -- the wild fowl "food supply," -- belonged exclusively to the state in trust, to be regulated under its police power, and that the invasion by Congress violated the Tenth Amendment. If Jefferson's view of the treaty clause had been accepted, this was a good argument under the Tenth Amendment, apart from a consideration of the commerce power; but it was not a good argument against the power to regulate foreign and interstate commerce in respect of "food supply"; and the result of Missouri v. Holland is best defended on that ground.

But Holmes was so zealous to sustain the act under the treaty clause and to expand the area of federal power, that he did not adopt this fairly obvious course, although it was open to him.

Missouri v. Holland is one of Holmes' most troublesome opinions, susceptible as it is to interpretations as far apart as that, on the one hand, it justifies the view that a treaty can override the Constitution, and, on the other hand, that it preserves previously indicated limitations on the treaty power. The fact is that by stringing together a series of poetically beautiful words, as only he could do, he brought into being a number of loose and inadequately considered

constitutional concepts that bedevil the succeeding generations.

As an ardent admirer of his great literary and judicial genius -- I have named them perhaps in the order of my admiration, -- I believe that if he could be aware of the uses to which his opinion has been put, he, too, along with the Founding Fathers, the American Bar Association, Senator Bricker and 64 other senators, impelled with all of his burning zeal for the truth, regardless of error, including his own, would want Missouri v. Holland permanently expunged from the books.

That would make it almost unanimous, with only Mr. Bethuel M. Webster and a few likeminded lawyers dissenting.

At any rate, from Missouri v. Holland, supported by varying theories in the other cases above cited, has grown up the doctrine accepted by many constitutional and international lawyers, in the State Department and elsewhere, including such distinguished men as Mr. John Foster Dulles and Chief Justice John J. Parker of the United States Court of Appeals for the Fourth Circuit (American Bar Association Journal, August, 1952, advocating an international criminal court without the usual safeguards of the United States Constitution), and the Section of International and Comparative Law of the American Bar Association (Section Report, February, 1952, also advocating such a court), that, as so pithily stated by Mr. Dulles at Louisville, "treaty law can override the Constitution," and "can cut across the rights given the people by the constitutional Bill of Rights."

As respects an international criminal court, for example, it is claimed by Judge Parker and the Section, that the United States government can provide under the treaty power for the trial of American citizens abroad, for offenses committed here, by methods and in places (See Sixth Amendment) which the Constitution forbids.

It is this formidable body of opinion, with the support of the court decisions above referred to, that caused the American Bar Association's Committee on Peace and Law to urge, and the Association itself to recommend to the Congress, for consideration a constitutional amendment that would forever embed the satisfying but overruled, or, shall we say, now "judicially helpless," expressions of the old cases into a constitutional amendment setting a positive standard or limitation that will enable the courts to do what is now shrouded in the gravest doubt, namely, to declare invalid a treaty that violates the Constitution of the United States.

Senator Bricker, similarly motivated, and freely acknowledging that he became interested by the pioneer work of the American Bar Association on this great issue (Congressional Record, February 7, 1952, p. 923), has offered a text of his own, and has brilliantly led the movement in the halls of Congress, to the end of already producing through his efforts, combined with those of others, an immediate change in the treaty-making policy of the United States government, to be followed, it is hoped, by an appropriate constitutional amendment that will, on the one hand, protect the Constitution and the Bill of Rights, without, on the other hand, interfering improperly with the conduct of the foreign relations of the United States.

This will finally provide a permanent constitutional remedy and remove the subject forever from the area of transitory State Department policy, where it now is.

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PHILIP B. PERLMAN
HOLMES BALDRIDGE
ELLIS LYONS
JAMES R. BROWNING

METROPOLITAN 8-2940

July Twenty-fourth
1953

Fele

The Chief Justice
Supreme Court of the United States
Washington, D. C.

Dear Mr. Chief Justice:-

Enclosed is a copy of a memorandum prepared for use in the 82nd Congress in connection with the Resolution proposed by Senator McCarran, then known as S. J. Res. 158 and now reintroduced in the 83rd Congress as S. J. Res. 3. The only difference between the one introduced last session and the pending Resolution is that the phrase "prescribed by statute law" is changed to read "prescribed by Act of Congress."

This is the Resolution which was passed by the Senate on the Consent Calendar and which is now in the House Judiciary Committee.

Sincerely yours,

Philip B. Perlman

PBP/a
enc.

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SUITE 1021, TOWER BUILDING
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ELLIS LYONS
JAMES R. BROWNING

METROPOLITAN 8-2940

July Twenty-seventh
1953

The Chief Justice
The Supreme Court
Washington, D. C.

Dear Mr. Chief Justice:-

I am enclosing a copy of Senator Lehman's discussion of the manner in which S. J. Res 3 was passed by the Senate. You will note that the Senator included a copy of the memorandum which was prepared last year.

Sincerely yours,

Philip B. Perlman

PBP/a
enc.

FOR RELEASE ON DELIVERY
JULY 18, 1953

REMARKS OF SEN. HERBERT H. LEHMAN ON INTRODUCING TWO RESOLUTIONS TO AMEND THE RUL ES TO REQUIRE A QUORUM CALL AND A ROLL CALL VOTE ON TREATIES AND CONSTITUTIONAL AMENDMENTS.

"MORE CARE IS NEEDED IN APPROVING TREATIES AND CONSTITUTIONAL AMENDMENTS-----A CASE HISTORY OF A CONSTITUTIONAL AMENDMENT ADOPTED WITHOUT ADEQUATE CONSIDERATION".

AMENDMENT TO RULE XII

Resolved, That rule XII of the Standing Rules of the Senate is amended by adding at the end thereof a new subsection as follows:

"4. No vote upon the question of engrossment and passage of any joint resolution proposing an amendment to the Constitution of the United States shall be had unless, immediately prior to such vote, it has been ascertained, by a roll call ordered for such purpose, that a quorum of the Senate is present. The question of engrossment and passage of any joint resolution proposing an amendment to the Constitution of the United States shall be determined by a yea and nay vote; and the yeas and nays shall be considered to have been ordered upon any such question."

AMENDMENT TO RULE XXXVII

Resolved, That rule XXXVII of the Standing Rules of the Senate is amended by adding at the end of the last paragraph of section 1 the following:

"No vote upon the final question to advise and consent to the ratification shall be had unless, immediately prior to such vote, it has been ascertained, by a roll call ordered for such purpose, that a quorum of the Senate is present. The final question to advise and consent to the ratification shall be determined by a yea and nay vote; and the yeas and nays shall be considered to have been ordered upon any such question."

Two highly important prerogatives of the United States Senate are, first, to advise and consent to the ratification of international treaties and, second, to act, in consort with the House, to initiate and recommend amendments to the United States Constitution.

Today I shall talk about both of these matters, and of the grave responsibilities vested in the Senate in regard to them. And I shall propose two changes in the Rules of the Senate, the better to discharge those responsibilities, and the more firmly to hold the public confidence in our manner of performing them.

I am introducing two resolutions for changes in the Rules, one: to require a prior quorum call and a roll call vote on any proposal to amend the Constitution; and two: to establish the same requirements with regard to a final vote on any treaty or international convention or protocol in the nature of a treaty.

First I shall discuss my rules proposal inconnection with amendments to the Constitution. Our power to initiate and to recommend amendments to the Constitution springs from Article V of the Constitution which says, "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution".

To one who is by no means an expert in constitutional law, the simple reading of this language might indicate that any proposal to amend the Constitution requires an affirmative vote of two-thirds of the entire membership of both Houses...in other words, a constitutional two-thirds vote. I hasten to state, however, that the Courts have consistently interpreted this language in Article V to mean not a constitutional two-thirds, but rather two-thirds of those present and voting. I ask unanimous consent to insert in the Record at this point two citations upholding this view.

CITATIONS OF SUPREME COURT DECISIONS THAT AMENDMENTS TO THE CONSTITUTION REQUIRE A TWO-THIRDS VOTE OF MEMBERS PRESENT AND VOTING

(1) Missouri Pacific Railway Co. v/ State of Kansas (248 U.S. 276)
In this case, the Court held that the language "two-thirds of the House", as applied to presidential vetoes, means two-thirds of those present and voting, and not two-thirds of the entire membership of the House.

(2) National Prohibition Cases (253 U.S. 350)
In this case, the Court ruled directly on the meaning of the words, "two-thirds of both Houses" as applied to approval of Constitutional amendments and decided, as in the Missouri Pacific Railway Case, that it meant two-thirds of those present and voting.

Now, Mr. President, I do not think that the Founding Fathers, the authors of the Constitution, had any idea that an amendment to the Constitution would ever be lightly considered or lightly passed, or that a constitutional amendment would be approved by the Congress without all the grave and sober discussion and consideration which the very idea of amending the Constitution calls for.

Ours is the oldest written constitution still in effect in the world today. It has lasted 164 years and during all that period it has had but twenty-two amendments, ten of which were adopted immediately following the ratification of the Constitution itself. In other words, in the last 150 years, twelve amendments to the Constitution have been adopted -- less than one for every decade of our national existence.

This vital and enduring Constitution has provided the skeleton of our national body through wars and insurrections, and through the years of our growth from a small, sparsely populated seaboard nation, to the mighty colossus and world power that we are today.

Shall we tamper with and amend this mighty document, this basic charter of our national existence on the basis of momentary impulse or prejudice or passion? Shall we permit amendments to our Constitution to be hastily enacted by rote and routine? Or should we so arrange our procedures that every single amendment to the Constitution must pass the most rigorous test of study, inspection and consideration by the members of the Congress?

As every lawyer knows, every line, every phrase and every word of the Constitution becomes a matter for study and for interpretation by the courts. Every clause in the Constitution becomes a possible framework for a whole body of legal construction capable of controlling the entire character of our laws and institutions.

I say, Mr. President, that amendments to the Constitution should be so safeguarded by our rules that no amendment will be passed upon by Congress without every last iota of consideration that such a momentous undertaking demands.

Now, Mr. President, I am not speaking pointlessly or in a vacuum. I have in mind a very recent and, to my mind, an incredible happening -- a case in which an amendment to the United States Constitution was recommended and approved by the Senate of the United States without a record vote, without a quorum call, practically without debate, and by unanimous consent.

This happened on June 18, only a month ago. It happened on a Calendar Day, during the reading of unobjected-to bills, and passage was effected as is required on Calendar Day, by unanimous consent.

The Daily Digest of actions taken by Congress, the Digest attached to the Congressional Record, did not even list this approval of a Constitutional amendment in its headline summary. Not a single newspaper, as far as I can determine, made a prominent note of this action.

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CITATIONS OF SUPREME COURT DECISIONS THAT AMENDMENTS TO THE CONSTITUTION REQUIRE A TWO-THIRDS VOTE OF MEMBERS PRESENT AND VOTING

(1) Missouri Pacific Railway Co. v/ State of Kansas (248 U.S. 276)
In this case, the Court held that the language "two-thirds of the House", as applied to presidential vetoes, means two-thirds of those present and voting, and not two-thirds of the entire membership of the House.

(2) National Prohibition Cases (253 U.S. 350)
In this case, the Court ruled directly on the meaning of the words, "two-thirds of both Houses" as applied to approval of Constitutional amendments and decided, as in the Missouri Pacific Railway Case, that it meant two-thirds of those present and voting.

Now, Mr. President, I do not think that the Founding Fathers, the authors of the Constitution, had any idea that an amendment to the Constitution would ever be lightly considered or lightly passed, or that a constitutional amendment would be approved by the Congress without all the grave and sober discussion and consideration which the very idea of amending the Constitution calls for.

Ours is the oldest written constitution still in effect in the world today. It has lasted 164 years and during all that period it has had but twenty-two amendments, ten of which were adopted immediately following the ratification of the Constitution itself. In other words, in the last 150 years, twelve amendments to the Constitution have been adopted -- less than one for every decade of our national existence.

This vital and enduring Constitution has provided the skeleton of our national body through wars and insurrections, and through the years of our growth from a small, sparsely populated seaboard nation, to the mighty colossus and world power that we are today.

Shall we tamper with and amend this mighty document, this basic charter of our national existence on the basis of momentary impulse or prejudice or passion? Shall we permit amendments to our Constitution to be hastily enacted by rote and routine? Or should we so arrange our procedures that every single amendment to the Constitution must pass the most rigorous test of study, inspection and consideration by the members of the Congress?

As every lawyer knows, every line, every phrase and every word of the Constitution becomes a matter for study and for interpretation by the courts. Every clause in the Constitution becomes a possible framework for a whole body of legal construction capable of controlling the entire character of our laws and institutions.

I say, Mr. President, that amendments to the Constitution should be so safeguarded by our rules that no amendment will be passed upon by Congress without every last iota of consideration that such a momentous undertaking demands.

Now, Mr. President, I am not speaking pointlessly or in a vacuum. I have in mind a very recent and, to my mind, an incredible happening -- a case in which an amendment to the United States Constitution was recommended and approved by the Senate of the United States without a record vote, without a quorum call, practically without debate, and by unanimous consent.

This happened on June 18, only a month ago. It happened on a Calendar Day, during the reading of unobjected-to bills, and passage was effected as is required on Calendar Day, by unanimous consent.

The Daily Digest of actions taken by Congress, the Digest attached to the Congressional Record, did not even list this approval of a Constitutional amendment in its headline summary. Not a single newspaper, as far as I can determine, made a prominent note of this action.

On the weekend of July 12, three weeks after the approval of this Amendment, the Washington Post made inquiries of eleven members of the Senate. Only three knew that this amendment had been considered and passed. It was ascertained by the Washington Post reporter, Mr. Robert Albright, that a maximum of seven members were on the Floor when this action was taken.

The Congressional Record of June 18 discloses that the discussion of this measure took one and a half columns of the Record; that discussion consisted of a rather desultory colloquy among Senators McCarran, Smathers and Ferguson.

I, myself, was not aware that this proposal to amend our Constitution was pending before us. I had seen no reports or comments upon it. I daresay that most of my colleagues were in a similar state of oblivion upon this matter. Perhaps it is our responsibility to be aware of such matters and to maintain a constant vigilance. But I do not believe that matters of such tremendous and historic moment as amendments to our Constitution should, as far as calling them to the attention of the Senate is concerned, be left to the chance of individual enterprise and vigilance.

This amendment to the Constitution of which I have been talking is S. J. Res. 3, proposed by the senior Senator from Nevada, Mr. McCarran. Its avowed purpose is to make it unconstitutional for the President of the United States to seize private property under any circumstances, except as prescribed by Congress. The authoroof this amendment had in mind, and so stated, that his intent was to confirm in the Constitution the substance of the Supreme Court decision in the steel seizure case of last year.

Now, Mr. President, let me refer again to the news article in the Washington Post, by Mr. Robert Albright, which appeared on page one of the editorial section on July 12.

I ask unanimous consent that this article, in its entirety, be printed in the Record at this point in my remarks.

(Article inserted in Record)

The article which I have just read into the Record is, as far as I know, accurate as well as interesting, with one prominent exception. Mr. Albright describes the McCarran Resolution, S. J. Res. 3, as a "relatively non-controversial one". Mr. Albright had no way of ascertaining it, but S. J. Res. 3, far from being non-controversial, is, as far as I am concerned---and I think a goodly number of my colleagues would agree with me---a highly explosive and debatable issue indeed.

Let me make clear that nothing I have said or am going to say should be taken to reflect on the author of this Resolution, or upon his efforts to secure its passage. I need not say what is obvious, that he was at all times within his legal rights, and there was no departure, as far as I can determine, from the established rules of the Senate. My complaint is against the rules and procedures which permit to happen that which did happen.

Mr. President, this same Resolution, this same proposal for an amendment to the Constitution was introduced last year by the senior Senator from Nevada. It was introduced on May 26, 1952, and was reported out of the Judiciary Committee on May 28, two days later.

It came up on Calendar Call on June 2, and was objected to by the then Majority Leader, Senator McFarland of Arizona, on behalf, he said, of a number of Senators. It was passed over. On June 23, last year, Senator McCarran moved to take up for consideration this Amendment to the Constitution. There was an extended debate, featured by a most persuasive speech in opposition by the senior Senator from Oregon, Mr. Morse.

Subsequently, on that day, June 23, 1952, the Majority Leader, Senator McFarland, moved to table Senator McCarran's motion. That motion by Senator McFarland carried by 42 to 32.

Is it possible then to consider S. J. Res. 3 a "non-controversial" matter? Of course not. But, in fact, no Amendment to the Constitution should ever be considered a non-controversial matter, or ever be taken up on the consent calendar.

Now this year, Mr. President, this same Constitutional Emendment was again introduced, as S. J. Res. 3. Hearings were held by the Judiciary Committee--one day of hearings---in which the testimony, as published, consisted exclusively of statements by Senator McCarran. The only other item in the hearings is a long prepared statement, filed after the hearings, by the National Association of Manufacturers.

It is on the basis of this sparse record that an Amendment to the Constitution---an amendment of far-reaching implications---was adopted, by unanimous consent, by a half-dozen Senators present on the Floor on Calendar Day.

I have studied this proposed amendment to the Constitution. It is only three lines long and states, and I quote, "The Executive power of the United States shall not be construed to extend at any time to any taking of private property other than in a manner prescribed by law".

It sounds innocent enough, but, its purpose is plainly to strip from the Executive branch of the Federal government powers which the Executive branch now has.

I have prepared my own analysis of this Amendment and I also have and shall include as part of my remarks a legal analysis, complete with citations.

I, myself, think this Amendment is a totally unwise and dangerous proposition. If it were to be adopted it would, I believe, cripple and paralyze this country in times of crisis and need. It could have all the impact of a ton of TNT, timed to explode within the structure of Government in hours of national danger and emergency.

But my whole purpose in going into detail regarding S. J. Res. 3 is to cite a horrible example of what can happen under our present rules if Constitutional Amendments can be adopted by rote and routine, without quorum calls and without a roll call vote.

The main point to be made is that S. J. Res. 3 presents a most explosive and controversial issue, possibly affecting the fate of our nation. And unlike an ordinary piece of legislation, a Constitutional Amendment, once passed, is out of our hands. It cannot be easily repealed. So we must---we dare not otherwise---we must provide that Constitutional Amendments be considered by the full Senate and voted on by formal roll call---as is now required, in fact, under the Constitution, in the case of legislation which is sought to be passed over a Presidential veto.

MY ANALYSIS OF THE EFFECTS OF S.J.RES.3

S. J. Res. 3 would forbid the Executive power---the President of the United States or any of his agents, subordinates, administrators, or Cabinet Secretaries--it would forbid the Secretary of Defense and Commanders of our armies and air forces---from taking possession of private property in the United States without specific statutory authority.

The effect of such an amendment could be cataclysmic, should there ever be an insurrection in the United States or a condition of great crisis caused by a great natural disaster or by the falling of an atomic bomb on this country.

Neither the Executive officers of the Government nor the Commanders of our armed forces could seize or preempt any property, whatever the emergency, whatever the critical need, under pain of violating the Constitution. Can anyone imagine a more dangerous prescription for paralysis than that presented by this amendment? In a time of national danger, at exactly attime when the Executive authority needs to have an inherent power to preserve the nation, when no other recourse is available and there is no other alternative---exactly at that time the Executive authority would be tied hand and foot by this amendment to the Constitution.

Of course, this does not appear on the surface. The sponsors of this Amendment speak of tying down, by Constitutional fiat, the Supreme Court decision in the steel case. Of course, if this is the only purpose of the Amendment, it is completely unnecessary. The Supreme Court has spoken. Its decision in the steel case is the supreme law of the land. But in as far as the proposed Constitutional Amendment encompases other matters, it is dubious and dangerous in the extreme.

The Judiciary Committee, in its report on this proposal, makes clear that other matters are involved. This Report, which is of less than two pages, says, in part, as follows:

> "The proposed amendment is not limited in terms to seizure of any particular type or kind of property, whether segregated by ownership or by type or by value or any other way; nor to seizure under any particular facts or conditions, actual or hypothetical. The language of the proposed Amendment would affect equally all takings of private property; and would have the effect of prohibiting any taking of private property except under authority granted by the Congress and in the manner provided for by the Congress."

Now, Mr. President, what does that language, that statement of Congressional intent mean? I do not know. It is as broad as all outdoors, and as indefinite. It can mean a prohibition against the seizing of property by the Executive branch of the Government at a time, and under circumstances, when the seizure of that property means the life or death of this country, or the life or death of hundreds of thousands of our people, under circumstances which we cannot at this time possibly foresee.

What if an atom bomb were to fall here, right here in Washington? What if such a disaster were to take place when Congress was not in Session or, if by some other disaster, it should prove impossible quickly to assemble the Congress in special Session? Should our Government be paralyzed and forestalled from any saving action?

Oh, Mr. President, we would live to regret it indeed if S. J. Res. 3 were to become part of the supreme law of the land. And, in any event, how dangerous it was to approve this proposition without careful and even microscopic consideration of every word, phrase, and possible implication!

I now append a legal analysis of S. J. Res. 3 in the form of a memorandum. This analysis was prepared by legal authorities of unchallengeable competence, and presents some of the technical implications of the proposed Constitutional Amendment.

(more)

LEGAL MEMORANDUM RE: SENATE JOINT RESOLUTION 3, 83rd CONGRESS.

This resolution, would propose an amendment to the Constitution to provide that: "The executive power of the United States shall not be construed to extend at any time to any taking of private property other than in a manner prescribed by law."

The proposal was evidently addressed primarily to the President's seizure of the steel mills. The Supreme Court has now invalidated that seizure. To the extent that the amendment would be declaratory of the steel decision, it is unnecessary. To the extent that it would go further, it is undesirable.

Thus, the proposed amendment would apparently apply in time of war as well as in peace. The Executive is "barred" at any time. At least three members of the Supreme Court majority (Justices Frankfurter, Jackson, and Burton), however, emphasized that the Steel case did not arise in time of declared war or imminently threatened invasion. Since it would seem clear from the decision that Congress can in any event control Presidential action, if it so desires, it would seem unwise to attempt by constitutional amendment to limit the power of the Executive to deal with the sudden and unforeseeable emergencies that might arise, for example, in the event of a large-scale hostile invasion or bombing of the United States.

Moreover, the proposed amendment would apply to any taking of property, whether or not related in any way to a labor dispute. In this aspect it would appear to create serious problems in two areas having nothing to do with the Steel case.

One of these concerns the powers of military officers during war. In United States v. Russell, 13 Wall. 623,a case arising during the Civil War, it was held that military officers could, without statutory authority, seize vessels needed for military transport, and that the United States was liable for just compensation in respect of such seizures. See also Mitchell v. Harmony, 13 How. 115. In United States v. Pacific Railroad, 120U.S. 234, a military commander was held empowered, without statutory authority, to destroy private property in the face of an advancing enemy, without creating liability for compensation on the part of the United States. The application of these principles is now before the Supreme Court in Calitex (Philippines) Inc. v. United States, 100 F. Supp. 970 (Ct. Cls.), certiorari granted, May 6, 1952, a case involving the seizure and destruction of property in the Philippines in 1941 and 1942. Adoption of the proposed amendment might cast serious doubt on the legal status of any comparable measures that might have to be taken in the future in the event of foreign invasion of the United States or its territories.

The other area is that presented by cases of so-called "implied taking." An example is United States v. Causby, 328 U.S. 256, which held that a landowner can recover compensation for loss of value of his property resulting from repeated flights over it of Army and Navy planes, although no statutory procedures for the taking of property had been pursued. A like result has been reached in a number of cases involving the flooding of lands, e.g., United States v. Lynah,188 U.S. 445. Compare Portsmouth Co. v. United States, 260 U.S. 327, involving repeated shooting over land, and Cities Service Co. v. McGrath, 342 U. S. 330, holding that a right to just compensation could be implied if a seizure of corporate bonds authorized by the Trading with the Enemy Act resulted in the imposition on an American corporation of liability abroad to holders of the bonds. In these cases the deprivation of plaintiff's property was not specifically intended or foreseen, so that resort to statutory condemnation procedures would have been impossible or impracticable. Thus in the circumstances of these cases, executive action which in fact results in a taking of property although condemnation procedures were not followed, is treated as a "taking" under the Fifth Amendment, so as to confer a right to sue the United States for just compensation. The proposed constitutional amendment, by declaring that private property can be taken only in the manner prescribed by statute law, would, if adopted, appear to cast serious doubt on the right to recover compensation in such cases.

It would not seem that either of these lines of authority was intended to be overruled or questioned in the Steel case. The opinion of Mr. Justice Black makes no reference to these cases and would seem to be confined to the situation actually before the Court--i.e., the power to seize industrial property in connection with a labor dispute. The opinion of Mr. Justice Douglas expressly distinguished both United States v. Russell and United States v. Causby, from the case before the Court. Justices Frankfurter and Burton would appear to have confined their opinions to the proposition that in the circumstances of the Steel case, the seizure was invalid because it contravened what they regarded as an express decision by Congress in the Taft-Hartley Act that there should not be seizures in labor dispute cases. The other Justices in the majority made no reference to the cases mentioned above.

Accordingly, the proposed constitutional amendment is undesirable and dangerous. Quite apart from its effect in the area of labor disputes, it would seem of vital importance to preserve the non-statutory powers of requisitioning or destroying property which can, in case of necessity, be exercised by military authorities in a theatre of war. Obviously, in the face of an advancing enemy it is impossible to expect the military always to resort to statutory procedures for condemning property. In addition, the amendment, if adopted, might result in a denial of an effective remedy to injured persons in the area of the so-called "implied taking" cases. In those cases, also, to require resort to statutory procedures would be self-defeating because the situation is one in which the Executive does not know in advance that there will be any taking of the property in question.

Mr. President, I am deeply shocked that any amendment----not to speak of one so pregnant with possibilities,so loaded with danger, so complex in its implications--should be so approved by the Senate of the United States without comprehensive hearings and without careful and deliberate consideration.

Mr. President, this proposal was not, as far as I can ascertain, referred to a single one of the Executive agencies of the Government for comment, not even to the Department of Justice which is routinely consulted by the Judiciary Committee in regard to all proposals pending before that Committee. Yet here is an amendment to the Constitution affecting every branch and department of the United States Government, and not one of them was given an opportunity to make a comprehensive study of this proposal, to report on it and to make recommendations to the Congress.

Mr. President, I wish there were a way in which the action that we have taken could be undone. I wish there were some way I could move to recall this resolution from the House of Representatives so that the Senate might take a second look at it. However, there is no way of which I am aware.

I hope and trust that the other House will give this matter the careful study we have failed to give it.

But we can now lock the barn door, even though one horse has escaped. And we should. Therefore, I hope my proposal to change Rule XII with regard to the procedure in considering constitutional amendments will be adopted.

Now, Mr. President, I turn to the question of treaties, an equally important question and one with which we are much more frequently concerned than with constitutional amendments.

I need not discuss at any length the importance of the Senate's role in approving international treaties and conventions. It is perhaps the greatest power this body has --- a power solely endowed in the Senate. It is from this power, as well as the power to consent to Presidential nominations, that the Senate derives its unique character and its reputation as a great deliberative body. It is for this authority that the Senate is reknowned throughout the earth.

It was in the Senate that the League of Nations was wrecked and then the World Court because the Senate insisted on attaching crippling reservations to the international agreements which would have made the United States a member of those world bodies.

Some of the greatest parliamentary battles ever fought in the United States have been fought in the Senate over the ratification of crucial treaties.

There have been complaints that the present provision of the Constitution requiring a two-thirds vote by the Senate for the ratification of treaties sets up a difficult roadblock and permits a relatively small minority to block the will of the majority. Extensive study and consideration have been given to the proposal to require a simple majority or at best a constitutional majority for the approval of treaties.

In fact, the whole burden of argument on the question of treaties, up until very recent months, has been that the process of Senatorial approval of treaties is too demanding and too severe. But lately, Mr. President, there has arisen a counter-complaint --- a complaint that the procedure for ratifying treaties is too easy and that it holds great dangers for the rights and liberties of American citizens.

The country has been told, and the Senate has been told, that two-thirds of the United States Senate cannot be trusted to protect the interests of the United States in consideration of treaties and international agreements. There has been proposed a constitutional amendment --- the so-called Bricker Amendment --- which would take from the Senate the power and the authority to judge the worth and desirability of certain kinds of treaties and would make it unconstitutional to negotiate treaties covering matters which the advocates of the Bricker Resolution believe should be beyond the power of the United States even to consider.

Mr. President, I do not intend at this time to engage in a discussion of the Bricker Amendment. That should be discussed all by itself. In my judgment, it is one of the most dangerous proposals ever made in this body.

One of the chief arguments made in support of that proposal is that sometimes, or on some occasions, treaties are passed in the United States Senate without adequate consideration. They are passed, it is said, by voice vote with only a handful of Senators on the floor. Obviously, Mr. President, such things have happened.

Last year the press, carried accounts of the fact that when the Senate approved one treaty, a consular convention with Ireland, there were only two Senators in the chamber, one of whom was the Presiding Officer. On another occasion, when the Senate approved the adherence of Greece and Turkey to the Atlantic Treaty, there were a half-dozen Senators on the floor, and there was so much public criticism of that occurrence, that this action was reconsidered by unanimous consent, and a roll call was taken.

Mr. President, I have had prepared a list of the treaties acted on by the Senate in 1952. There were twenty-five treaties so considered, of which five were acted on by roll call and twenty were acted on by voice vote. I ask unanimous consent that this table showing these actions be printed at this point in my remarks.

Date Approved By Senate	Title	Vote
February 7, 1952	A protocol to the North Atlantic Treaty on the accession of Greece and Turkey	73-2
April 1, 1952	A supplementary extradition convention between the United States of America and Canada	Voice
July 4, 1952	A convention between the United States of America and the Republic of Finland, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on estates and inheritances	Voice
July 4, 1952	A convention between the United States of America and the Republic of Finland, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income	Voice
July 4, 1952	An agreement between the United States of America and Canada, for promotion of safety on the Great Lakes by means of radio	Voice
June 13, 1952	A protocol between the United States of America and Ireland, supplementary to the consular convention.	Voice
July 4, 1952	A protocol prolonging for 1 year after Aug. 31, 1951, the international agreement regarding the regulation of production and marketing of sugar	Voice

Date Approved By Senate	Title	Vote
July 1, 1952	Convention on relations between the Three Powers and the Federal Republic of Germany	77-5
July 1, 1952	Protocol to the North Atlantic Treaty signed at Paris on May 27, 1952	72-5
July 4, 1952	An international convention for the high-seas fisheries of the North Pacific Ocean, together with a protocol relating thereto	Voice
July 4, 1952 " " "	4 conventions, formulated at the twenty-eighth (maritime) session of the International Labor Conference	R-voice S-voice Y-voice Z-voice
June 13, 1952	A consular convention between the United States of America and Ireland	Voice
July 4, 1952	A highway convention between the United States of America and the Republic of Panama	Voice
April 1, 1952	A convention between the United States of America and Canada, relating to the operation by citizens of either country of certain radio equipment or stations in the other country	Voice
July 4, 1952	A certified copy of a protocol dated in London Aug. 31, 1950, prolonging for 1 year after Aug. 31, 1950, the international agreement regarding the regulation of production and marketing of sugar	Voice
June 13, 1952	A consular convention and an accompanying protocol of signature between the United States of America and the United Kingdom of Great Britain and Northern Ireland	Voice
July 4, 1952	Convention between the United States of America and Switzerland, for the avoidance of double taxation with respect to taxes on estates and inheritances.	Voice
April 1, 1952	Texts of a proposal by the Government of Canada and a proposal by the Government of Australia relating to seasonal zones established in annex II of the international load line convention	Voice
March 20, 1952	Treaty of peace with Japan, signed at San Francisco	66-10
"	Mutual defense treaty between the United States of America and the Republic of the Philippines	Voice
"	Security treaty between Australia, New Zealand, and the United States of America	Voice
"	Security treaty between the United States of America and Japan	58-9

In my judgment, Mr. President, all the treaties acted upon were highly important ones, including the twenty that were passed by voice vote. One of these was the Security Treaty between the United States and the Philippines, and another was the Security Treaty between the United States, Australia and New Zealand. These treaties fit into the framework of our Pacific defense system. They surely were important treaties. I do not believe that they, or any of the others, should have been decided by voice vote. The country --- and history itself --- is entitled to a record of the votes of the members of the Senate when acting on such vital matters as an international treaty, with all its implications.

Now I know, Mr. President, that there might be some treaties of only minor importance. In these days, however, these are very few. Every one of the twenty-five treaties we approved last year was one affecting the national security of our country and even the fate of the world.

It seems to me, Mr. President, that we should require in the case of every treaty a roll call vote. We should require a quorum call before a vote on a treaty. The country must be assured that treaties,which become part of the supreme law of the land, are voted on by at least a majority of the Senate. There should be, further, an automatic requirement that the vote on assenting to these treaties be a recorded vote, with each member of the Senate present giving or withholding his consent to the ratification of that treaty.

And so I am proposing an amendment to Rule 37 requiring a quorum call and requiring a roll call on final passage of a treaty. With this rule in effect the public need never fear that anything so important as a treaty will slip by unnoticed and unconsidered by more than a handful of the members of the Senate.

And, as I have said, my other proposal would establish the same requirements for a resolution to amend the Constitution. It would require a quorum call preceding a vote and then the yeas and nays.

In both these cases, if my proposals were adopted, these quorum calls and the yeas and nays would be compulsory and we would not again be in a position of considering an amendment to the Constitution on the Consent Calendar or of approving treaties by the voice vote of a handful of Senators. I hope that the Rules Committee will give early and sympathetic consideration to these proposals.

BRICKER AMENDMENT

Address

by

FRANK B. OBER
OF THE BALTIMORE BAR

delivered before

JUDICIAL CONFERENCE

of the

FOURTH JUDICIAL CIRCUIT
White Sulphur Springs, West Virginia

June 26, 1953

ARTICLE VI OF THE CONSTITUTION:
(Supremacy Clause)

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;"

PROPOSED CONSTITUTIONAL AMENDMENTS AS REPORTED BY SENATE JUDICIARY COMMITTEE:

"SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SECTION 2. A treaty shall become effective as **INTERNAL LAW** in the United States only through legislation which would be valid in the absence of treaty.

SECTION 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article."

(SECTION 4 and SECTION 5 relate to formal matters)

BRICKER AMENDMENT

Address by Frank B. Ober of the Baltimore Bar, delivered before Judicial Conference of the Fourth Judicial Circuit at White Sulphur Springs, West Virginia, on June 26, 1953

Treaties, when our Constitution was adopted, governed only relations between nations and had little, if any, effect on internal law. While a few foresaw their possible abuse[1] to provide a source of power to enact domestic legislation, under the prevailing view, such danger was remote.[2] The first convincing evidence of the practical necessity of limiting the treaty making power, to prevent its use by the Federal Government to legislate in fields beyond its expressly delegated powers, came from a case in 1920. In *Missouri vs. Holland*[3] the Supreme Court held that a Federal law regulating wild fowl, previously held unconstitutional, became valid when again passed to implement a treaty on the subject. The Court reasoned that the supremacy clause of our Constitution (Art. III, Sec. 2) distinguishes between *laws,* which must be made "pursuant" to the Constitution, and *treaties,* which are only required to be made "under the authority of the United States"; that under Art. I, Sec. 8, Cl. 18, Congress is specifically empowered to "make all laws, necessary and proper, for carrying into execution . . . all . . . powers vested by the Constitution in the Government of the United States, or any Department or officer thereof". Since the treaty making power is vested in the President and Senate, Congress can therefore, under this clause, pass laws to implement treaties free from its limitations in ordinary legislation. Thus the Court by-passed the fact that Congress would, except in implementing a treaty under the necessary and proper clause, be bound to stay within its delegated powers under Section 8, and not violate the express limitations on its powers contained in Section 9 and the Bill of Rights. The powers supposed to be reserved to the

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[1] e.g., Richard Henry Lee & Patrick Henry, A.B.A. J. Sept. 1951, p. 662; see Tucker Limitations on Treaty Power (1915) who characterized the Treaty clause as a "Trojan Horse".

[2] Jefferson Manual of Parliamentary Practice, quoted in A.B.A. J. Sept. 1952, p. 736; Hamilton Federalist No. 75; *New Orleans vs. U. S.*, 10 Pet. 662, 736 (1836).

[3] 252 U.S. 416.

States, under the 10th Amendment, were blithely brushed aside. This reasoning means that the President and one house of Congress can thus enlarge the powers of the whole Congress. In substance, it means an agent can enlarge his own powers — or lift himself, by his own bootstraps.[3a]

A reference in the case to a vague possibility of some implied limitation does not alter, nor has any subsequent case overruled, that doctrine — under which a treaty can form a basis for Federal domestic legislation supreme over all Federal or State Constitutions and laws. On the contrary, the Court's later opinions, as in the *Curtiss-Wright* and other cases,[4] have said the treaty power is an inherent sovereign power not derived from the Constitution at all. Venerable dicta, that treaties should be consistent with the Constitution, have become manifestly meaningless, since *Missouri vs. Holland* and the later Supreme Court cases.

Coinciding with this revolutionary change in constitutional doctrine, which afforded such a temptation to those who favored an all supreme national government, came the great drive for a supreme world organization. The League of Nations and United Nations each grew out of a world-wide desire to prevent another World War. The United Nations Charter in 1945 did not, however, confine itself to collective action to secure peace.

By Articles 55 and 56 of the Charter, every member nation pledges itself to take "action" which "shall promote: higher standards of living, full employment and conditions of economic and social progress . . . solutions of social health and related problems", among many others. While Article 2(7) provides that nothing in the Charter "shall authorize the *United Nations* to intervene in matters which are essentially within the domestic jurisdiction of any state", this of course does not prevent *Congress* from passing statutes to carry out the objectives of Articles 55 and 56 of the Charter, which under the *Missouri vs. Holland* doctrine will be supreme.[5] If this be true, then

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[3a] The control of migratory wild fowl would probably be upheld without any treaty today under the present day interpretation of the commerce clause.

[4] *U. S. vs. Curtiss-Wright* (1936), 229 U.S. 304, 316-319; *U. S. vs. Belmont*, 301 U.S. 324, 330; *U. S. vs. Pink*, 315 U.S. 203, 230-1, 233-4.

[5] See testimony on hearings before Subcommittee of the Judiciary Committee of the Senate on S.J. Res. 1 (hereinafter called Senate Hearings) Phillips 998, Rix 1025, Schweppe 1238, 1263; Deutsch, A.B.A. J. Sept. 1952, 796.

we already have a Federal Government of almost unlimited powers.[6] But whether Articles 55 and 56 of the Charter already thus authorize changing us into a socialist or welfare state by *statute,* there is and can be no doubt that the State Department policy is attempting to carry out these objectives and make domestic law by *treaty* because, first, it has officially stated in the first sentence of its 1950 bulletin, with a foreword by President Truman, "There is no longer any real distinction between domestic and foreign affairs."[7] and, more importantly, there are already reported to be in the draft stage, under the aegis of the United Nations, over 200 proposed treaties, some of them already in definitive form.[8] Here are some examples:

First, there is the Covenant of Human Rights, which is divided into two parts. The first part contains the so-called guarantees of freedom of religion, of speech and press, and other political rights, subject to such restrictions as are "prescribed by law" or necessary to protect "public safety, order, health and morals" and subject also to any declaration of emergency officially proclaimed, in which cases a state may take measures derogating from its obligations with respect to most of those freedoms.[9] Pious platitudes guaranteeing human freedom, coupled with escape clauses permitting denial of such freedoms because of alleged emergencies or security requirements, are but the usual pattern of totalitarian governments. The past president of the last Human Rights Commission has clearly warned us to beware the Soviet hand in this.[10] That treaties guaranteeing free speech, free press and the like are meaningless to totalitarian countries has been proved beyond question by our peace treaties with Hungary, Bulgaria

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[6] While Secretary Dulles testified that in his opinion Arts. 55 & 56 were restricted by Art. 2(7) (Sen. Hearings 898), as noted in the text that article merely prevents intervention by the U.N. and does not seem to restrict Congress from using this *existing* treaty as a basis for treaty law. Furthermore, the context does not support his construction of Art. 2(7).

[7] State Dept. Bull. Pub. 3872, Foreign Affairs Policy Ser. 26, released Sept. 1950. This view is supported by the President's Commission on Civil Rights (Sen. Hearings 989) and is supported by the new school of Internationalists holding international law should include not only the relations between states, but between states and citizens. Moscovitz, A.B.A. J. April 1949, p. 285; Humphrey, Director of Div. of Human Rights of U.N., Annals of Am. Acad. Pol. & Soc. Sci. Jan. 1948; Jessup, A Modern Law of Nations, pp. 137-8. The late C.J. Hughes predicted as early as 1929 the new activity under the treaty power which came after *Missouri vs. Holland,* and even then doubted the existence of any implied limitation on it. See Proceedings of Am. Soc. of Int. Law, 1929, 194-6.

[8] Hon. Orie L. Phillips, C.J. U.S. 10 CCA, Sen. Hearings 985. See also id 870, 1225.

[9] Printed in App. to A.B.A. Peace & Law Comm. Rep. Sept. 1951.

[10] Dr. Charles Malik of Lebanon, U.N. Bull. Sept. 1, 1952, p. 251.

and Roumania of 1947.[11] Those countries have been continuously and notoriously destroying the freedom of religion and speech which the treaties expressly guarantee.

The other part of the Human Rights Covenant undertakes to set up a welfare socialistic state, by requiring all nations, to the "maximum of their available resources", "individually and through international cooperation", to give everybody, everywhere, minimum wages, limited work hours, fair wages, holidays with pay, maternity aid, adequate housing, education, including higher education, and so forth.[12] Can you guess who is expected to pay for Utopia?

A second example of treaties promoted by the United Nations is that known shortly as the News Gathering Convention and related treaties. These contain the same Soviet type escape-clause as the Covenant of Human Rights, and really encourage peacetime censorship. They are strongly opposed by almost all newspapers.[13]

The third illustration is the proposed International Criminal Court. If we adopt this treaty, American citizens (1) can be taken beyond the seas for trial for acts committed here; (2) by a Court of nine, in which only one American could possibly sit; (3) in which many or most of the judges would come from countries, who have no conception of an independent judiciary, but think of judges as arms of the administration; (4) without jury trial under the express words of Art. 37; (5) without adequate protection under Art. 38 against involuntary confessions; (6) and without any right of appeal. This treaty flies in the face of our Constitution and Bill of Rights. Indeed, the denial of some of these very rights we then called "unalienable" *(sic)* was cited among the grounds for our Declaration of Independence.[14]

The advisability of adopting such a treaty to govern a specialized Nuremburg-type of military trials for "war crimes", to be defined by an International Law Commission, is not really involved. Nothing

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[11] Dulles, Sen. Hearings 863, 868.

[12] See 9 supra.

[13] This Convention was approved by the General Assembly but is not to be open for signature until action on a related treaty — see A.B.A. Peace & Law Comm. Rep. Feb. 1, 1952, Feb. 1, 1953; see Hanson, A.B.A. J. June 1951, Holman, id Aug. 1951.

[14] Declaration of Independence cites among causes lack of independent judges and "depriving us in many cases of the benefits of Trial by Jury: — For transporting us beyond seas to be tried for pretended offenses", etc.

in the draft treaty[15] limits it to the Nuremburg-type trials, so I pass by that controversial subject. There is nothing in the treaty itself which would prevent jurisdiction being given to this International Court to try "offenses against the law of nations", as defined by our own Congress under our Constitution, which otherwise would have to be tried by American Courts.[15a] If the treaty does not mean American citizens will be tried in foreign courts for crimes committed here, why isn't the treaty so restricted? Take, for example, the new treaty crime created by the Genocide Convention, now signed and pending before the Senate. This international crime includes not only lynching, but "causing serious bodily or mental harm to members of" a racial group, such as Negroes. By Article VI of that treaty such crimes are to be tried either in the courts of the territory where committed or "by such international penal tribunals" as may be given jurisdiction by the parties to the treaty. Isn't it a reasonable inference that the next step, if this treaty be adopted, would be to confer jurisdiction on this new International Criminal Court, which seems to be the very type of "international penal tribunal" referred to in Article VI? This would subject our citizens to trials for treaty crimes committed here, in a foreign court, without our own constitutional safeguards.[16] Of course, everyone is against genocide, a newly coined word intended to mean the destruction of a race, just as everyone is against sin, but if we look at it realistically, this country is not the country that has had purges and pogroms. The minorities in this country have had the greatest protection that any minorities have ever enjoyed, at any time or in any place in the history of the world. Isn't it also likely that jurisdiction will eventually be given to this same International Criminal Court for violation of the Covenant of Human Rights, in addition to the special treaty against Genocide, though the present draft only sets up a so-called "Commission" for enforcement purposes? But whether this be true or not, it is certainly true that the solution of the controversial problem of racial relations in the South is not going to be

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[15] Printed in A.B.A. Peace & Law Comm. Rep. Sept. 1, 1952. Opposing views Judge John J. Parker and George A. Finch in Aug. 1952 A.B.A. J. 641, 644. This treaty would also amend Art. III, Sec. 1 and 2 of the Constitution, which vests in the Federal Courts the judicial power over treaties.

[15a] Art. I, Sec. 8(10).

[16] The Genocide Convention, which has been pending in the Senate since 1949 and has been opposed because of its vagueness by the A.B.A. — see its Peace & Law Comm. Rep. Sept. 1949 and Sept. 1950, p. 52. See also Art. by Judge Orie L. Phillips, 35 A.B.A. J. 623. In a note in the Sept. 1950 Rep. there is a reference to a recommendation of the International Law Commission, meeting in Geneva, that an International Criminal Court be established for the trial of Genocide and other crimes.

aided by the setting up of new international authorities, whether Court or commission, dominated by foreigners, many representing bitterly hostile enemy nations, whose capacity for mischief and propaganda would be immeasurably enlarged.

A Committee of the New York State Bar, headed by former Solicitor General Mitchell and Mr. John W. Davis, opposes the Human Rights treaty, because of the disillusionment which would follow a futile Bill of Rights imposed on an unready world, and the obvious propaganda possibilities given our enemies.[17] This last point is spotlighted by the 25,279 complaints filed with the Secretary of the United Nations in a single year.[18]

To avoid any misunderstanding, let me say that nothing I have said here should be taken to mean I am arguing against the primary purposes of the United Nations, which is to attain collective security. Disappointing as its peace efforts may have been to many of us so far, we must continue to strive by trial and error to find some means of obtaining a durable peace, or perish. Nor does this debate even involve the merits of any of the various efforts to obtain a better world through the United Nations. We may agree or disagree upon the practicability of world federalism or world government, but most constitutional lawyers, who support these movements, will agree that any such revolutionary change should only be sought through constitutional amendment, and not by treaty.[18a]

In citing these new activities, which require the limitation of the treaty power, I have so far referred only to United Nations sponsored treaties. But the new doctrine of treaty legislation in domestic matters is not confined to Lake Success. Isn't the Warsaw treaty, for example, already ratified, limiting death claims of an American killed at La Guardia in an airplane accident to $8,300 if he happens to be starting on an international flight, an invasion of his rights under New York law, to have reasonable damages assessed by a jury?[19]

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[17] Report of Comm. of State Bar of N.Y. June 6, 1952, from which excerpts are quoted in A.B.A. Peace & Law Comm. Rep. Feb. 1953. See editorial Sat. Eve. Post May 9, 1953. See Dulles' concurring view quoted by Senator Bricker, Cong. Rec. May 15, 1952. The so-called non-derogation clause ignores the American concept that all men are endowed by their creator with inalienable rights, reserved to the people by the 10th Amendment, and that human rights do not exist in the U.S. "in virtue of law, convention, regulations or custom".

[18] U.N. Bull. Aug. 15, 1952, Vol. 13, No. 3, p. 200.

[18a] e.g., former Justice Owen J. Roberts, Sen. Hearings 9, 10.

[19] This treaty was held supreme over State law in *Lee vs. Pan. Am.*, 89 N.Y.S. 2d 888; 300 N.Y. 761, C.D. 339 U.S. 920.

For further example, take the treaty with Israel, signed last year, and now pending, providing in Art. 8, Sec. 2, that "Nationals of either party shall not be barred from practicing their professions within the territories of the other party, merely by reason of their alienage." Under the "most favored nation" clause common to most of our treaties, this would entitle the Nationals of many countries, Fascist and Communist alike, to practice law or to teach in this country, if otherwise professionally competent. It would repeal State laws of most States which require teachers to be citizens, and the laws of 31 States on admission to the bar. Do you really want your children taught by the Nationals, for example, of some of the communistic satellites? How many people know about this treaty or its far reaching effect? Secretary Dulles himself testified he was not familiar with it.[20]

There is much other evidence,[21] some of which I cite in a footnote. But surely it is clear that there has been for seven long years, at least, a deliberate, persistent effort to formulate multi-lateral world-wide treaties which would regulate the rights of American citizens. The same persons opposing the Bricker Amendment as unnecessary, are the very ones advocating that type of treaty. Must we indeed wait, as they suggest, until great harm is done, or should we, in the light

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[20] Israel Treaty. See Sen. Hearings 1131. Though the treaty had been pending before the Senate for a year, Secty. Dulles testified that even he was not familiar with it, thus illustrating the obscurities of treaty law. Sen. Hearings 883. Yet, the Israel Treaty would permit alien residents of Fascist and Communist countries, under the most favored nation clause, to practice law or teach, in spite of State statutes requiring citizenship, for which they would often be unable to qualify — e.g., the treaties of Hungary, Yugoslavia, Latvia, Estonia, Spain, Argentina, apparently now in force — State Dept. Treaty Ser. 748, 319, 765, 736, 422, 4. Tightening of immigration laws does not meet the problem presented by several millions of unnaturalized resident aliens.

[21] See Judge Florence Allen (U.S. CCA 6) The Treaty as an Instrument of Legislation, warning as to possible effect of 93 International Labor Organization Conventions. See also Christian Science Monitor Sept. 26, 1952, on legislation by World Health Organizations, and testimony of George A. Finch, Sen. Hearings 1104. Other examples are the Convention on Political Rights of Women, already approved by the General Assembly of the U.N., U.N. Bull. 13, No. 3, Aug. 15, 1952, p. 232, and a similar one in process on Legal Rights of Women, which would supersede all conflicting State laws and constitutions. The argument that the Amendment is not necessary because the same result can be reached through reservation to each treaty is not valid, since Congress, in spite of a reservation, has the constitutional power to implement under the necessary and proper clause, A.B.A. J. Sept. 1952, p. 735. Nor is the possibility of treaty repeal by law an answer, since this (a) does not supply the lack of power in the first instance; (b) permits the President by veto to allow the unconstitutional treaty to stand; and (c) would in any event cause international repercussion.

of this recent history, act in advance, as we did in adopting the Bill of Rights?

The Bricker Amendment (S.J. 1) as now revised by the Senate Judiciary Committee,[21a] contains but three sections, patterned almost verbatim on that proposed by the American Bar Association. The first section provides:

> "A provision of a treaty which conflicts with this Constitution shall not be of any force or effect."

This makes the Constitution, ordained by the people, supreme over treaties. Little objection has ever been made to this sentence, the opposition centering on saying it is unnecessary, in spite of the specific holdings of the Supreme Court in *Missouri vs. Holland* and later cases which no one can reasonably say do not, at the minimum, cast grave doubt on the supremacy of the Constitution over treaties.

The second section, which creates most of the opposition, reading:

> "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

removes three weaknesses in the present treaty power.

The first part removes all question as to whether any particular treaty is self executing by requiring legislation, in so far as it is to have any domestic effect. This puts us on a parity with substantially every other nation.[22] It overrules the views now held by some judges, that the United Nations Charter, without more, already may be used to invalidate state statutes, or as a basis for extension of executive power.[22a]

The latter part of the second section of the amendment, commonly referred to as the "which clause" (requiring legislation which would

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[21a] The revision was reported in the public press June 4, 1953, and is discussed in this paper as now revised. The report at the time of the writing of this paper had not actually been forwarded to the Senate.

[22] See A.B.A. Peace & Law Comm. Rep. Sept. 1, 1951, pp. 9-12; Can. Bar Rev. Nov. 1951, p. 696. The first amendment, which is a restriction on the power to legislate, could be by-passed by a treaty unless Congress is required to pass laws to give such a treaty any internal effect. Sen. Hearings 59.

[22a] Some State cases have held alien land laws invalid because of U.N. Charter (*Fujii vs. Cal.*, 217 P. 2d 481; 218 P. 2d 595; affd. 242 P. 2d 617, on grounds of moral commitments of U.N. Charter); Idaho decision, rep. in Cong. Rec. June 24, 1952, A4169; Cal.'s law against mixed marriages was invalidated because of U.N. Charter (*Perez vs. Lippold*, 198 P. 2d 17). The 3 judges dissenting in the steel seizure cases (Note 25) relied in part on U.N. Charter in seeking to uphold a power in the President to seize private property of steel companies.

be valid in the absence of treaty) outlaws the bootstrap doctrine of *Missouri vs. Holland.* Never again, if the amendment is adopted, could the President and one house of Congress, by treaty, enlarge the constitutional powers of the whole Congress.

Treaty law, insofar as it operates internally, would have to be constitutional, just like other laws. The rights of States to determine their own State policy, such as the requirements that school teachers be citizens, could not be taken away from them by treaty.

This "which clause", requiring implementation "only through legislation which would be valid in the absence of treaty", likewise removes a third defect in the present treaty power by assuring independent court review. The Supreme Court has never yet held a treaty invalid. Numerous cases,[23] like the *Oetjen* case in 1948, strongly indicate that treaties are within the political field and their constitutionality not within the competence of courts. Of course, *Marbury vs. Madison*[24] does not support any power in the courts to declare *treaties* unconstitutional. That case holds that the Constitution, which delegates only limited and restricted powers to Congress, must necessarily prevail over *laws* of Congress not within such delegated powers. But there are neither limitations on the delegation, nor restrictions on the use of the treaty power, so that the *Marbury vs. Madison* doctrine cannot apply to treaties. This "which clause", requiring legislation valid in the absence of treaty, therefore, also cures this third defect in treaty power by giving the courts exactly the same right to pass on the validity of treaty laws as they now have as to all other laws.

Summarizing the argument so far then, I submit:

(1) For seven years we have seen a persistent effort to exploit the new theory, under which there is no difference between domestic and foreign affairs, and by means of multilateral treaties to legislate as to internal affairs, which treaties then become supreme over State and Federal laws and Constitutions under *Missouri vs. Holland.*

(2) The proposed amendment would make our Constitution supreme over treaties; prevent the President and two-thirds present

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[23] *Oetjen vs. Central Leather Co.*, 246 U.S. 297, 302; *U. S. vs. Curtiss-Wright*, 299 U.S. 304, 319; *U. S. vs. Sandoval*, 167 U.S. 278, 290; *U. S. vs. Domestic Fuel Corporation*, 71 F. 2d 424, 430-1; *Banco de Espana vs. Federal Reserve Bank*, 114 F. 2d 438, 442; *Z. & F. Assets Realization Corporation vs. Hull*, 114 F. 2d 464, 468-470, affd. 311 U.S. 470; *Foster vs. Neilson*, 2 Pet. 253, 307, 309; see also *U. S. vs. Reid*, (CCA 9), 73 F. 2d 153, and cases cited. Butler, Treaty Making Power, par. 460. See also Rep. of N.Y. State Bar, cited supra in 17 on this point.

[24] 1 Cranch 137, 180.

in one house of Congress from enlarging the legislative power of the entire Congress in domestic matters; would put us on a parity with other nations by preventing treaties from having any automatic effect as internal law until implemented by Congress, and would subject treaty law to the same test of constitutionality as other laws.

I will now take up very briefly the third section of the amendment, which now reads:

> "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article."

The first sentence simply makes executive agreements subject to regulation by Congress. This is *probably* so already, since the Constitution vests in Congress power to make laws necessary and proper to carry into effect the powers granted to the President.[25] It is also supported by the reasoning of the *majority* in the Steel Seizure case, which denies the inherent power of the President to disregard available laws in seizing the steel industry. Nevertheless, Secretary Dulles has denied this power[25a] and even had he not done so it is important to put such a fundamental constitutional principle beyond the possible danger of reversal by the shift of two votes in some future Supreme Court. Moreover, it is important that the outside world, which is on notice as to constitutional limitation on treaties, should likewise have notice as to the limitation on executive agreements. There is, of course, no more reason to believe Congress will unduly restrict the Executive through its power of regulation over foreign relations than it has in domestic matters.

The second sentence, making executive agreements subject to the same limitations as treaties, is manifestly necessary, since executive agreements have historically been used interchangeably with treaties, and there is no practicable way to define the respective fields of executive agreements and treaties. It is all the more important because of the brazen statement in the well known book of an ex-State Department employee, that executive agreements should be used instead of

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[25] All legislative powers are vested in Congress by Art. I. The President, by Art. II, Sec. 3, is to "take care that the laws be faithfully executed". The power of Congress under the necessary and proper clause includes the power to pass laws for carrying into execution the powers vested in the Executive — *E. P. Quirin*, 317 U.S. 1, 25-27, 29; Steel Seizure cases, *Youngstown vs. Sawyer*, 343 U.S. 579.

[25a] Sen. Hearings 892.

treaties in all controversial matters.[26] Of course, Secretary Dulles' argument that this part was unnecessary because executive agreements are not, like treaties, supreme over domestic law, was made apparently without knowledge that the Supreme Court has held precisely to the contrary. In two cases the Supreme Court held the President's executive agreement with Litvinov when we recognized Russia was superior to New York law.[26a]

I now answer a few of the arguments of the opponents:

First, is the new view of Secretary of State Dulles, that treaty limitation would hamper his conduct of international relations, as contrasted with the opinion of Lawyer Dulles, a short year before, in a prepared address to a regional meeting of the American Bar Association when he said (and I quote the pertinent parts):

> "The treaty-making power is . . . liable to abuse. Treaties . . . make domestic law . . . treaty law can override the Constitution . . . Treaties . . . cut across the rights given the people by the constitutional Bill of Rights."[26b]

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[26] McClure on International Executive Agreements, 378; Sen. Hearings 1173. See also McDougal and Lans, 54 Yale L.J. 181, 534; cp Borchard, 53 Yale L.J. 664, 54, id 616.

[26a] *U. S. vs. Belmont*, 301 U.S. 324, 330; *U. S. vs. Pink*, 315 U.S. 203; compare *U. S. vs. Capps, Inc.*, CA 4, April 15, 1953 (not reported). The President, as Commander in Chief, has constitutional power to conduct war, which is not without limit (E.P. Milligan, 4 Wall. 2). He has to make many executive agreements covering military activities in foreign countries, but current history is convincing evidence that Congress will not interfere unduly. Indeed, the so-called Congressional Executive Agreements, being agreements by the Executive under the authority delegated by Congress, in both domestic and foreign fields, show an increasing readiness to delegate but Congress has a reserved power to regulate where necessary. For example, the reserved power of Congress may well be used to regulate the right to make agreements to surrender our soldiers for trial by foreign governments, to aid whom they have been drafted and sent overseas. The importance of securing a fair trial, such as is not provided by treaties now pending, is obvious — Sen. Hearings 1023.

[26b] Address to Regional Meeting A.B.A. at Louisville, April 11, 1952, A.B.A. J. June 1952, 487. The complete quotation from which the excerpts are taken is:

> "The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas *treaty law can override the Constitution.* Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the Federal Government or to some international body and *they can cut across the rights given the people by the constitutional Bill of Rights.*" (Italics supplied.)

His is not the first example in history, where persons after attaining office are not unnaturally impatient of restraints. He now assures us publicly that his policy will be to call a halt on the efforts to promote, through the United Nations, some multilateral treaties, and so asks us to relax. The recognition of and promise to stop this abuse of the treaty power may be a compliment to the efforts of Senator Bricker and the American Bar Association, but should hardly lull us into a false security because—

(1) He can hardly assure us against a change of administration, or that a new administration would follow his new attitude. This seems hardly likely, in view of the presence here today of former members of the last administration, who oppose the amendment.[26c]

(2) His own assurance seems but a tactical temporary retreat in view of the strong implication from the simultaneous announcement of our official representative at Geneva, indicating proposals to ratify the Covenant of Human Rights will be revived when the "climate" is more favorable.[27]

(3) Our constitutional rights must not depend upon the whim of an administration of either party. The amendment was sponsored by two-thirds of the Senate, regardless of party.

As Thomas Jefferson said:

> "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."[28]

The administration, which incidentally has no constitutional part in the amending process (though its political strength gives power to the opposition), can hardly be expected to be sympathetic to any proposal to curb executive power, even though they admit its abuse.

More complete answers to the arguments that the proposed amendment would hamstring the administration in foreign relations may be found in 1800 pages of testimony taken by the Senate Judiciary

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[26c] e.g., former Secty. of Army Royall. Another scheduled speaker opposing the amendment is former Sol. Gen'l Perlman, who in a recent address is continuing to urge the approval of the Genocide and Human Rights treaties (*Balto. Sun*, June 10, 1953), 2 of the very treaties which Secty. Dulles says we don't need to worry about because he is not going to press them.

[27] Mrs. Oswald Lord at Geneva, quoted in A.P. Dispatch Apr. 8, 1953. Mr. Dulles' specific promises are, however, confined to 3 treaties.

[28] Quoted by Mr. John W. Davis in argument in the steel seizure cases, cited supra.

Committee and in footnotes documenting this paper.[29] But it is obvious on its face that an amendment, which requires legislation only covering the effect of treaties as internal law, imposes no restriction in the traditional and normal treaty field, which deals only with external relations.

Insofar as treaties of peace, disarmament and the like may conceivably require legislation, there is already plenty of constitutional power under the almost limitless[30] war and national defense powers to pass any internal laws necessary. For example, the Atomic Energy Act, restricting its use domestically, is based on existing constitutional powers over national defense.[31] So also, the other traditional class of treaties, that of commerce, friendship and navigation, can be fully implemented by domestic law where necessary, under existing constitutional power over foreign commerce — which is as broad[32] as that over interstate commerce.

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[29] See Finch, A.B.A. J. June 1952; Deutsch, A.B.A. J. Sept. 1952, and testimony of witnesses before Senate Judiciary Committee — *passim.* Reference to all pertinent literature is contained in the reports of the A.B.A. Comm. on Peace & Law of Feb. 1952, Sept. 1952, Feb. 1953. The arguments that the peace treaty with Great Britain of 1783, guaranteeing debts due British creditors, could not have been made under the proposed amendment, ignores (1) the fact that a peace treaty, under which we became independent of Britain preceding the Constitution, in settling respective property rights, was then a necessary condition to our independence, and it is not to be assumed that our independence will be lost and we shall ever again have a similar condition; (2) the fact that historically this provision of the treaty was unjust to the debtors (Cowles, Treaties & Constitutional Law, pp. 83-4) and in fact failed, so that Congress had later to appropriate the money to pay the British creditors since it was a national obligation (Sen. Hearings 1218, 1227); (3) the fact that under modern alien property laws alien property is now used to pay war claims of our own citizens, a position we could scarcely have taken in 1783; and (4) the fact that any necessary legislation incidental to peace is a constitutional power vested in the Federal Government under its vast powers to make war and peace. This is often done by Joint Resolution (e.g., after both World Wars — see Joint Res. July 2, 1921 and Oct. 18, 1951).

[30] e.g., *U. S. vs. MacIntosh*, 283 U.S. 605, 624, and cases cited. The extreme in fantastic criticism was reached by the Bar of the Assn. of N.Y. Committee in suggesting a statute would be necessary to remove State traffic restrictions, etc., to a Canadian division assisting by invitation in our defense. An exemption would follow the President's war powers as Commander in Chief (Sen. Hearings 1221) or would involve the same type of sovereign immunity as diplomats or war vessels enjoy. See *Exchange vs. McFaddon*, 7 Cranch 116; Sen. Hearings 1145, 1221.

[31] The Atomic Energy Act, 42 U.S. Code, Secs. 1804 to 1819, in the stated exercise of the constitutional power to provide for the common defense and security (1801), contains the most drastic provisions for exclusive Government ownership and production of all fissionable materials, which is an extreme exercise already of domestic control. None would be so bold as to challenge the already existing constitutional power of Congress to do anything further in this field, since the control of atomic energy is essential to our survival.

[32] License cases. 5 How. 504, 578.

This criticism really comes down to a very, very small area. If, contrary to present policy, future treaties attempt to deal with land ownership and inheritance, without requiring State concurrence, a few States not now having general laws on the subject may have to pass additional laws. But this would hardly be inconvenient in view of the fact that some of our treaties as late as 1948 explicitly require State laws in this very field, which is so essentially a State matter.[33]

If we keep our sense of perspective any inconvenience in a few very minor and debatable areas where State concurrence might be required is (1) far outweighed by the tremendous importance of the amendment in protecting our own constitutional rights; and (2) is the very type of inconvenience regularly accepted in Canada, where the Judicial Committee of the Privy Council held action by the provinces is necessary to give domestic effect to treaties therein.[34]

Mere criticism of language does not answer the argument on principle. Suffice it to say that Senator Bricker's language has been revised by the Judiciary Committee after extended hearings last year and this year. It now conforms closely to the language worked out by the American Bar Association and adopted by its official body after prolonged study and debate between two of its committees. The part on treaties has been before the public for over two years, and the part on executive agreements almost a year. Critics, who really want to improve the language, will have further opportunity to make suggestions to the House Committee.

In conclusion, let me say we are dealing with a constitutional principle of transcendant importance.

We, the people, adopted a Constitution which provided a limited constitutional form of representative government. We provided that changes could be made only by an amendment originated by the Congress, or by a Federal convention called by the States, in either case to be ratified by three-fourths of the States through their own legislatures or conventions.

We are faced with a condition, not a theory, under which an avalanche of multilateral treaties are in the works, designed as a base

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[33] See for example, treaty with France of 1853 and treaty with China of 1948. Moreover, most States already grant aliens the right to own land without qualification or on a reciprocal basis. The State Department policy today professes to recognize the States' paramount interest in this restricted field. See Sen. Hearings 1123, 1125, 1130, 1131.

[34] *Canada vs. Ontario*, 1937 L.R. App. Cas. 326, 348, 353-4. See McNair Law of Treaties British Practice & Opinions, pp. 7-8.

for domestic legislation supreme over our Constitution. These are being (1) originated by Commissions of 60 nations, with conflicting ideologies, on which sit not a single elected representative of our people; and (2) presented for ratification to the Senate. Those who say Senate approval is a sufficient safeguard ignore the Senate's own contrary views, as evidenced by the joinder of two-thirds in sponsoring an amendment because their experience shows that treaties are often ratified with only a few actually present.[35] Some dubious treaties have already slipped through. When dealing with fundamental rights of the people the Senate needs the publicity and advice it receives on constitutional amendments. But much more importantly, treaties, when used in place of constitutional amendments, completely by-pass the final bulwark of constitutional rights. Constitutional amendments can only be made with the concurrence of the people themselves, acting through their own State Legislatures or Conventions.

"The history of liberty is a history of the limitations of governmental power, not its increase."[36]

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[35] An extreme example reported in the Washington Star, June 14, 1952, showed approval of two Consular Conventions when only two senators were present.

[36] Woodrow Wilson, quoted in A.B.A. Peace & Law Comm. Rep. Feb. 1953.

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OUR ANTITRUST POLICY

An Address

By

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ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

at

JUDICIAL CONFERENCE

OF THE

FOURTH CIRCUIT

White Sulphur Springs, West Virginia

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It is particularly pleasing to be able to attend the Judicial Conference of the Court of Appeals for the Fourth Circuit. Such meetings are always pleasant and intellectually stimulating. However, this occasion brings added pleasure because Judge Parker is our host. I share the high esteem in which he is held by you and the entire American Bar. He is recognized not only because of his judicial attainments but because of his wide leadership in judicial administration. He is especially noted for his pioneering work in creating, and in stimulating confidence in, judicial conferences.

One cannot participate in a national presidential campaign as I did this past year without having had intimate contact with people and obtaining a fairly accurate concept of the thinking going on in the minds of a great many American citizens about a great many matters. Patterns of thought and conviction gradually become evident, and ultimately comparatively clear. This has been particularly helpful in preparing to administer the affairs of the Department of Justice. It has convinced me of the imperative need of a thoughtful and comprehensive study of our Anti-trust laws.

I believe that it is not difficult to decipher a pattern of thought existing among the people of America, relating to their anti-trust laws. Many of these people would not express their thought in technical language (perhaps not even mention the "free

enterprise system"), but would refer to "competition" (or more readily "unfair competition"), to "monopolies", to "fair trade", and to the impact of antitrust law on their daily struggle for existence.

This existing interest among average American citizens is intensified among certain businessmen, among many of those holding political office, and by a great many lawyers. I have even found certain phases of it a subject not without considerable interest to gentlemen wearing robes and struggling against congested calendars.

At meetings of the bar, the first questions that our antitrust attorneys usually hear are these: What is the new Administration's attitude to be toward antitrust prosecutions? Will there be a slackening of antitrust litigation? Should not there be a reappraisal of antitrust policy? Should not the Republicans dismiss most of the pending suits? What about all those suits which were filed in the closing days of the previous Administration? Are you going to clean house?

I would remind you that the 1952 Platform Pledge of the Republican party states this:

> We will follow principles of equal enforcement of the anti-monopoly and unfair-competition statutes and simplify their administration to assist the businessman who, in good faith, seeks to remain in compliance. At the same time, we shall relentlessly protect our free enterprise system against monopolistic and unfair trade practices.

This plank emphasizes certain fundamental aspects of antitrust law enforcement policy in which this Administration, from the President on down, thoroughly believes: -- the equality of its enforcement, the simplification of its administration, assistance to the businessman acting in good faith in his attempts to follow the law, but with all, an uncompromising determination that there shall be no slackening of effort to protect free enterprise against monopoly and unfair competition; and most certainly -- no winking at violations of the law and no wholesale dismissal of pending suits.

The mere stating of such objectives is easy -- the accomplishment of them is another matter. Everyone agrees, with different degrees of vehemence, that there are inconsistencies in our statutory enactments; and there there have been inconsistencies in our administrative policies. One of our respected national magazines, in characterizing the controversies on antitrust, said:

> The public debate shows signs of being disorderly. It needs an agenda, a common language, and a common ground.[1]

Various groups and agencies have made suggestions or proposed procedures. Some speak primarily from the standpoint of the bench and the bar. I refer particularly to the report adopted by the Judicial Conference of the United States on September 26, 1951, entitled "Procedure in Antitrust and Other Protracted Cases", and to the recent "Report on Possible Work by the American Law Institute"

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1 41 Fortune Magazine 114, January 1950.

dated April 30, 1953.

Some speak from the layman's viewpoint, such as the publications of the following: (1) The American Institute of Management; (2) Report to the Secretary of Commerce by his Business Advisory Committee; (3) The Brookings Institute Preliminary Reports; (4) Current Business Studies of The Society of Business Advisory Professions, Inc.[2]

The very titles of Law Review and Economic Quarterly articles published in recent years are extremely revealing: "An Appraisal of the Antitrust Laws";[3] "Antitrust Laws; Some Recent Trends and Developments";[4] "A New Phase of the Antitrust Law";[5] "The New Sherman Act";[6] "Toward Coherent Antitrust";[7] "The Effectiveness of Antitrust Laws, A Symposium";[8] "The Orientation of Antitrust Policy";[9] "A New Look at Antitrust Enforcement Trends";[10] "Antitrust - New Frontiers and New Complexities".[11]

Bills to establish a "Commission on Revision of the Antitrust Laws of the United States" were introduced in both Houses of the 82nd Congress (1st Session), [12] as was a Senate Resolution.[13]

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2 Graduate School of Business Administration, N.Y. University, March 1953
3 Edwards, 36 Amer. Econ. Rev. 172 (1946)
4 Cahill, 1 The Record 201 (1946)
5 Harbeson, 45 Mich. L. R. 977 (1947)
6 Rostow, 14 Univ. of Chicago L. R. 567 (1947)
7 Wright, 35 Va. L. R. 665 (1949)
8 39 Amer. Econ. Rev. 689 (1949)
9 Clark, 40 Amer. Econ. Rev. 93 (1950)
10 Oppenheim, CCH Law Symposium 69 (1950)
11 Handler, 6 The Record 59 (1951)
12 H. R. 5015; S. 1944.
13 #86

And thus far, at the present 1st Session of the 83d Congress, our Antitrust Division has considered 99 proposed bills having antitrust implication and significance, and 18 additional bills proposing to modify some existing provisions of antitrust law,[14] a total of 117 bills.

Not only do the specialized magazines of business, such as Fortune[15] and Business Week,[16] consider the problem, but those with general appeal find it profitable to turn their attention to antitrust.[17]

There is, then, almost universal recognition of the fact that antitrust laws are, as has been said by a prominent lawyer:[18] "a part of the warp and woof of our economic life. Unlike the late unlamented National Prohibition Act, the Sherman Antitrust Act is no longer a noble experiment * * * With all the discontent and confusion which exists, there are few who advocate its abolition."

Or, as the President of the American Institute of Management said:[19] "It will not be denied that the business attitudes of the 1890's exist almost nowhere today. We are not entering, we have already entered a new era." And, as one well-known professor concludes:[20] "It is academic to debate repeal of the major components of the federal antitrust laws." For, it is his conclusion that "American business generally joins the public in support of a federal antitrust policy."

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14 Senate Bills 540, 766, 1357, 1377, 1396, 1523, 1912, 1913; House Bills 467, 533, 635, 2237, 3501, 3984, 4170, 4597, 4680, 5141.
15 Fortune Magazine 104 (Jan. 1950; Feb. 1953)
16 April 11, 1953
17 Collier's, May 31, 1952; Sat. Evening Post, January 24, 1953
18 McCracken: The Federal Antitrust Laws from the Viewpoint of a Business Lawyer. CCH Symposium 1953
19 Jackson Martindell, President, Amer. Institute of Management, Feb. 27, 1951; College of Business Administration, University of Florida
20 Oppenheim, 50 Mich. L. R. 1146

Once we accept the desire of the public to confirm private competitive enterprise under the theory of limitations placed on freedom of commercial action, which is what we call American Capitalism, the problem is the extent to which such enactments should control business.

I am one of those who is proud of that American Capitalism, despite the seeming conspiracy existing to avoid use of such words. But I am old-fashioned enough to believe just as thoroughly that this control should be in keeping with a middle-of-the-road political philosophy, and aimed primarily at the elimination of predatory practices.

Such control may be and has been established in one of two ways -- either by express legislative enactment, which, though general in terms, is constant and known, or by judicial, legislative, and administrative enlargement, extension or restriction, which is specific but variable in its application.

It would be difficult to overdraw the importance of proper antitrust enforcement in the business community. Business, says Professor Oppenheim, and particularly big business, of recent years, "throughout the land has made no important managerial policy or decision without conscious consideration of the prohibitions of the antitrust laws."[21] And it is the continual cry of little business that, being unable to pay large retainers to insure proper advice, it is the recipient of by far an undue proportion of criminal prosecutions, because of the average small businessman's inability to determine without such advice, whether his conduct is within or without the law. It is essential, then, that a decision be made between the two methods

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21 Oppenheim, 50 Mich. L. R. 1147

of establishing control, and that there be established adequate enactments or interpretations to give clarity, to produce uniformity, and to ensure a common-sense approach to enforcement.

To that end, I propose to set up the "Attorney General's National Committee to study the Antitrust Laws." The work of this Committee will be logically divided into two principal divisions, that having to do with substantive law and that relating to procedural law. The National Committee may be made up of lawyers and economists who will be guided by the broadest viewpoint of what is best for American economy rather than what benefits may accrue to any particular industry, any specific business, or any individual's reputation. A small working committee will be designed to receive, classify, and pass upon the recommendations made by the larger advisory committee. The working committee will attempt to clarify, possibly for congressional approval, an agreeable statement of national antitrust policy that will confirm the principles of private competitive enterprise, and in so far as possible combine certainty with flexibility. This statement can well be couched in general antitrust standards rather than in an enumeration of specific prohibitions.

The areas of research are endless, but to name a few examples which readily come to mind, the advisory committee should consider (1) the nature and extent of monopolies, their measurements, the tools by which they are tested, their economic boundaries, and the market areas they cover; (2) the rule of reason and the per se rule, with their respective possible limitations, extensions or alternatives; (3) the Robinson-Patman Act; whether it should be affirmed, eliminated or revised, and whether "hard competition" is completely incompatible with "soft competition", or whether it is a

workable corollary; (4) duplication of jurisdiction of enforcement agencies, as well as substantive conflict in the antitrust laws; (5) the broad and technical field of patents and trademarks, and their relationship to and effect upon antitrust law; (6) the exemptions existing, or which should exist, under the antitrust laws, with particular reference to labor unions, cooperative associations, trade associations, production pools and voluntary agreements under Section 708 of the Defense Production Act, and a re-examination of the Webb-Pomerene Act relating to foreign commerce; (7) the problems relating to mergers under Section 7 of the Clayton Act, the impact of recent decisions on interlocking directorates, the validity of the theory of conspiracy by implication, and of decisions resting on "conscious parallelism of action", and, finally, strengthening of the sanctions and penalty provisions of the antitrust laws, as applied to those who are guilty of deliberate wrong-doing, in order that they may not enjoy the fruits of their illegal acts.

Any one of these subjects merits careful and exhaustive study. For example, high on the priority list of problems demanding prompt solution is the entire problem of the extraterritorial application of the antitrust laws. This is a provocative subject, particularly in view of the oil case (United States v. Standard Oil Company (New Jersey), et al), which, according to the Committee on Foreign Commerce of the New York State Bar Association, "boldly presented the issue as to whether the United States antitrust laws apply to business operations abroad on the basis simply that they affect the United States". As has been well pointed out, "if the rule be that American courts have jurisdiction over every action in the world that affects us (why does not) every other nation * * * have jurisdiction over our actions which affect them."[22] And what about the I.C.I. case

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22 CCH Antitrust Law Symposium, 1953, pp 125-6

(United States v. Imperial Chemical Industries, Ltd. and du Pont de Nemours and Company) wherein the rights of a third party in England (British Nylon Spinner, Ltd.) were affected and where the English high court enjoined performance of the United States court's order, and such injunction was confirmed by the English Court of Appeal. Grave and basic questions of international comity and of foreign relations, and of national security arise.[23]

In considering antitrust law from a procedural viewpoint there are equally as many facets of thought crying to be heard, analyzed, explored and determined. One of the common criticisms heard of the Antitrust Division is the open-handed use of criminal procedures against businessmen. The Antitrust Division desperately needs aid in its present effort to find civil procedures whereby the Government can make adequate discovery preliminary to civil suit without the use of companion criminal process. Unlike the S.E.C., the F.C.C., the F.T.C., and other governmental regulatory bodies, the Department of Justice has no method prior to the institution of an action, and merely for investigatory purposes, of subpoenaing documents or of requiring testimony under oath, with the resultant possibility of prosecutions for perjury if that oath be violated. Pre-trial procedures have been suggested, but are untimely and inadequate. F.B.I. investigations are presently used, but they can be only as productive of results as is the extent of the cooperation voluntarily granted by defendants. Discovery proceedings under Rules of Federal Procedure must be limited to relevant and material matters

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23 See American Banana Company v. American Fruit Company, 213 U.S. 347, at 356-7

relating to specific allegations. Proceedings in advance of trial to perpetuate testimony are subject to similar restrictive rules. The Government cannot put the cart before the horse, and is frequently unable to spell out its legitimate demands until it has had the benefit of subpoena power, the right to punishment for contempt, and the power to charge perjury.

The Antitrust Division realized twelve years ago that -

> The grand jury is a rather blunt device. It is employed by the Division only for lack of an instrument that is better. It was never shaped for industrial research, and like every agency upon which the law imposes an alien function, it responds clumsily, expensively, uncertainly to the demands upon it. Its mechanics are not geared to antitrust work.[24]

Again, procedurally, a complete study could well be made of the possibilities of the larger use of advance rulings, similar to those now called "railroad releases", to the possibilities of provision for exemption from third-party treble damage actions, or from criminal action, by the voluntary obtaining of advance rulings from the Division. The broad phase of preventive conference procedures looking toward consent decrees has considerable possibilities and some dangers. The general subject of proper limitations on consent decrees which private industry sometimes characterizes as the product of an overreaching government, should be carefully considered.

These subjects are mentioned merely illustratively. We do not desire to shackle the committees, or limit their possibilities of constructive action. We are hopeful that all of these topics, and others, can be carefully and conscientiously analyzed by the leaders of the American Bar and of American economic thought, and it is planned that the preliminary organization of such

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24 TNEC Report Monograph 16 and 38, p. 51

committees, both working and advisory, can be announced by the time of the meeting of the Antitrust Section of the American Bar Association at Boston in August. The importance of the work of the new Committee is emphasized by the statement made by President Eisenhower, who stated this week:

> I believe that the Attorney General's National Committee to study the Anti-trust Laws will provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition. It is requested that all departments and agencies of the Federal Government give full cooperation to insure its success.

Obviously, the committees will desire to be kept closely in contact with the work of other private groups. It is intended, too, that they will include in their membership representatives of the judiciary and of the Federal Trade Commission. There should be close liaison with bi-partisan representatives from both Houses of Congress. The time is over-ripe, and we hope to move as quickly and as intelligently and as carefully as the complicated nature of the problem permits. We bespeak your cooperation in making known to me and to my staff those leaders at the Bar from your own communities who are of the stature and caliber, and of the necessary professional experience, to insure the success of the project herein outlined. It will only be by complete cooperation of this type that a result can be achieved worthy of the importance this problem bears to the welfare of our country.

Kenneth C. Royall
Speech, Judicial Conference for the Fourth Circuit
White Sulphur Springs, West Virginia
June 26, 1953

I am glad again to be before this Conference. In fact, I can think of no occasion that gives me more pleasure.

Today I am particularly honored to appear at a meeting presided over by our distinguished Judge Chesnut, who has served so long and so faithfully and with such credit to himself and the Fourth Circuit.

Now Ladies and Gentlemen, there seems to be some differences of opinion between me and the preceding speaker in support of the Bricker Amendment. Fortunately, I have found one matter on which we agree. He says "This is an important question." (Laughter) With that I am in entire accord.

At the outset -- before I begin my prepared outline -- I would like to assure you concerning three or four questions which have been brought up. There is no contention made by us opponents of this legislation that the treaty power can overrule the Constitution so far as its specific prohibitions are concerned. The only question of prevalence that has arisen, so far as I know, is whether a treaty should be superior to state legislation in matters which are normally and historically in the field of treaties.

As far as the Bricker Amendment is concerned, this question turns on whether Section 1 of that Amendment would prohibit a treaty prevailing over state legislation enacted under the Tenth Amendment -- which, as you know, gives to the state those powers not transferred to the national government. I will discuss that later.

Now something was also said about the threat of action by the United Nations. The simple fact is that the United Nations has no authority to make a treaty for the United States. They can make proposals just like anybody can but those proposals are no more binding on the United States than if made by another nation or some individual. We can say "Yes" or "No," and as to many of the things mentioned by the Bricker proponents, the answer of the United States would certainly be "No." It merely clouds the issue to leave any impression that, whether this Amendment is passed or not, it in any manner affects our obligation to follow any treaty the United Nations has proposed. And this is true whether you consider international courts, genocide, human rights, the practice of law or any other matters that have been or can be mentioned.

Another thing which I must have misunderstood is the reference to the effect of a treaty on the Bill of Rights, that is, Amendments I to IX of the Constitution. The

simple fact is that a treaty cannot now change the Bill of Rights, nor can it change any other affirmative prohibition of the Constitution. No Bricker Amendment is needed in this connection.

My last retort before beginning my planned speech is that I have not heard pointed out in our long history where any treaty of the Government has caused any material harm to our nation or to any part of our nation.

Now I come to my presentation as prepared in outline. As a background for the discussion today of the Bricker and related Constitutional Amendments, I call to mind certain indisputable world facts which face us. There is an irreconcilable contest -- ideologically and economically -- between democratic nations and Communistic totalitarianism. If the democracies lose, our form of government and our way of life will be lost.

It is clear that neither the United States nor any other single democratic nation can win this contest in war or in peace. Nor can any free nation hope alone to compose the differences with Russia and its satellites or to stop the spread of Communism. This situation has called for -- and will call for -- joint action by and between the free nations, largely through agreements and treaties.

The heart of our discussion today is the treaty provisions of Article VI of the Constitution, which reads

as follows:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;"

It is proposed by Constitutional amendment to derogate from this treaty power and to restrict executive and other agreements. A Bill to this effect was reported favorably by a majority of the Senate Judiciary Committee on June 15 last.

This reported Bill differs from the varying and numerous bills introduced and considered on this subject. But it is at least the latest draft.

We realize that there may be other changes suggested. It may be that the final bill will be so changed as to meet the objections which we now raise, but this seems improbable in light of past history. In any event I will discuss this Senate Committee draft and will not discuss the many past -- and inconsistent -- changes of the past. Nor will I attempt to forecast future changes and modifications.

Today in opposing the suggested Amendment, I will discuss the practical results of the adoption of the proposed Amendment as reported by the Senate Committee. This Amendment consists of three principal sections. Section 1 reads as follows:

"Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect."

This section is made applicable to executive and other agreements -- which agreements, under the last sentence of Section 3, would be "subject to the limitations imposed on treaties."

Section 1 either (1) has a meaning, or (2) it has no meaning, or (3) its meaning is obscure and uncertain.

Only one possible meaning has been suggested -- suggested by some proponents and concurred in by some opponents. However, I will discuss this later. Many other proponents, I understand, think that Section 1 has absolutely no meaning. From those conflicting views of proponents and opponents it would appear that the third alternative is correct -- that the meaning of Section 1 is uncertain.

Such uncertainty would have serious results for our country. Other nations would hesitate to make treaties and agreements with us, because they would not know whether such compacts would be "of any force and effect." And we ourselves would hesitate to make engagements which might be declared invalid. In important matters, world affairs and world decisions would await "round robins" of technical discussions and rulings, and confusion would result in the present critical period.

The situation would be no better -- and perhaps worse -- if there was general acquiescence in the view of most

proponents that with or without the Amendment, a treaty could not supersede the very Constitution which created the right to make the treaty and that the Section has no meaning. For this interpretation would not bind the courts. It would merely start a search for some meaning.

Constitutional changes are matters of importance and nationwide deliberation and decision. They are presumed to have a meaning. Courts would logically make every effort to supply a meaning by construction. It is likely that surprising -- and hidden -- meaning would be found. The mystery about Section 1 would deepen, and confusion about treaty powers would become confounded.

In fact, some of the Bill's proponents have already come up with a hidden meaning already referred to. They admit that, without the proposed Amendment, a treaty cannot abrogate the Bill of Rights (Amendments I to IX), or the Fourteenth Amendment as to the States, that Freedom of Religion and of the Press -- and all other similar Constitutional rights are already safe from treaty encroachment.

But they say that, under Section 1, a treaty with another nation would conflict with the Constitution, if it affects the "powers <u>not</u> delegated to the United States . . . (but) reserved to the States" under Amendment X. This would mean no treaty or agreement could deal with any matter upon which the several States had the right to act under Amendment X of the Constitution.

This would mean that our Government could not make Commerce and Friendship Treaties or agreements authorizing foreigners in any American State to own property or to engage in business here in return for Americans to own property and engage in business in other countries. There could be no treaty agreement giving international control over cultivation of narcotic poppies, or marijuana in any State. We would run into difficulties even in the matter of extradition to or from any of our States from and to any foreign country -- or for the settlement of claims of our residents against foreign governments or individuals in return for settlement of foreign claims against us. These and other agreements would be absolutely forbidden by Section 1, regardless of anything Congress could later do.

In matters of national defense, the restrictions would be even more startling. All of us must agree that an effective treaty or agreement to reduce world-wide armament, and particularly one to eliminate or control atomic weapons, would be a great step toward peace and would be in the interest of our national defense -- as well as of our national economy.

Such a plan to be effective must, of course, provide for non-residents of each country to inspect and control atomic and other armament plants in other countries throughout the world, including those in any American State. Otherwise no

country would agree itself to be restricted. But under the suggested interpretation of Section 1, no such treaty or agreement would be valid.

Let me repeat that these invalidities under Section 1 could not be cured by the President's approval or even by the unanimous vote of the House and Senate or by every State legislature or by all of these put together. For under the proposed interpretation, such treaties or agreements would touch State authority and violate the Tenth Amendment of the Constitution, and this violation could not be waived by anyone.

It would be no answer to say that Congress might regulate some of these matters under the Commerce clause or other provisions of the Constitution, or that the President could do so as Commander-in-Chief. These would be at most unilateral actions, and would not -- and under proponents' interpretation could not -- be treaties or agreements imposing mutual obligations on the part of a foreign country in favor of the United States.

So, if any meaning is given to Section 1, we have a serious limitation on the treaty powers of our nation both in normal times and in times like these where defense against war is needed to protect our nation and its form of government.

> "Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

What does "internal law" mean? What does "legislation" mean? Here are more cloudy doubts. We have also seen that many proponents contend that Section 1 had nothing to do with States rights under the Tenth Amendment. Now these same proponents say, as I understand it, that Section 2 does refer to the States rights and to State legislation, as well as to matters within the jurisdiction of the Federal Government.

Then what would Section 2 do? It would in effect invalidate all self-executing treaties and agreements which would affect anything "internal" within the United States. As to all treaties and agreements, Congress would have to approve them before the compact could become effective -- and in many cases, according to proponents, it would require an affirmation by some or all of our 48 State Legislatures. This additional Congressional step and State action would be after and in addition to previous action by the President and by two-thirds of the Senate under the present Constitution.

It has been contended that parliamentary governments like England require approval of treaties and agreements by the legislative branch. But in those countries there is no separation of executive and legislative powers. The Prime Minister is not only the agent but a member of the legislative body.

So far as I know, there are no treaty procedures anywhere, which are as cumbersome or as impractical as those here proposed for our internal treaties and agreements, and

none that require a double or possibly a fifty-fold approval of a treaty or agreement. There is no other system tending so much to confuse and discourage treaties and agreements with other nations.

Some of us who have been in the Government know how bad Government red tape and so-called "clearances" already are. We must all shudder at the practical problems that Section 2 poses, with 531 Congressmen and Senators and possibly thousands of State legislators engaged in superimposed discussions and determinations -- and maybe in actual negotiations of treaties and agreements. What chance would there be for secrecy -- or for effective bargaining with foreign nations -- or for good results for our Country.

Treaties and agreements which would have to run this gauntlet would cover all the items we discussed before and more. They would include Commerce and Friendship Treaties and atomic bomb regulations, telecommunications, civil aviation, trademarks, customs, cemeteries for war dead, the rights of Canadians in America and Americans in Canada, and many other matters.

Also Section 2 would cover matters that are and may be necessary for war or defense or prevention of war such as air base agreements and movement of troops. Without arrangements for bases, we might not have won World War II. To win any future war without such bases would be even more difficult, if not impossible.

Let us suppose another World War involving Alaska, Canada and the United States, as it almost surely would. We would need to make broad mutual arrangements for bases in the United States, Canada and Alaska -- also for use of roads, communications, etc. in some of our northern border States. What would our enemy be doing while we were debating out a double Congressional approval and a number of approvals by the various States?

Next I refer to the last clause of Section 2 which limits any effectuating legislation by Congress to that "which would be valid in absence of a treaty." The meaning is at best ambiguous. At worst, it would not merely hamper but would totally preclude legislation made necessary and exclusively designed for implementing any Constitutionally adopted treaty or agreement.

This would totally prevent effectuation, for example, of a treaty, or agreement for a joint military patrol of Canadian and Mexican borders by friendly foreign troops or joint defense of Hawaii or Puerto Rico. For as to these subjects there could have been no valid legislation in the absence of a treaty or an agreement. It follows then in many instances that the "which" clause of Section 2 would further narrow even the most narrow construction which could be given to Section 1.

There is just one more back-breaking provision to which I would refer. It is the first sentence of Section 3.

> "Congress shall have the power to regulate all executive and other agreements with any foreign power or international organization."

Note that under this language Congress would "regulate" and that this regulation would apply to "all" agreements, not merely those with internal effect. This section does not exempt the agreements made under the powers given the President under the Constitution -- does not even exempt the President's powers in peace, in defense or in war.

Congress could "regulate" foreign base agreements. It could "regulate" major and minor agreements with our Allies abroad as well as here. This change would be in derogation of the present authority of the President. It would apply to his war powers, his preparations for war, and the postwar occupation.

This provision of Section 3 would also give Constitutional notice to other nations that our agreements in war or in peace are tentative and that Congress has the power -- and perhaps the duty -- to change or abrogate them at any future time. While Congress can change or alter many agreements, yet would not such direct and threatening notice adversely affect our bargaining power? Would it not jeopardize our compacts in the interest of peace or defense?

We must remember that treaties and agreements are mutual -- not one-way streets. We cannot cross our fingers without assuming that fingers of others will be crossed against us.

If we had had this legislative encroachment on the powers of the President we could never as a practical matter have run the German and Japanese occupations, which were dependent on frequent and important agreements with our Allies. As to these occupations, I speak with first-hand knowledge. I shudder at the thought of what would have happened before dawn one morning in early 1948 if I had had to consult Congress -- in addition to the State Department -- as to how we should act with the British and the French in meeting the immediate and threatening situation presented by the Berlin blockade.

And today I would hate to see the Syngman Rhee episodes followed by a requirement that Congress also get into the Korean negotiations. Please spare us from this.

Section 3 in effect would give Congress a broad executive role, and it would be a role that Congress with its many committees could not acceptably or practically perform. It must be apparent that in the realm of emergency and other agreements, too many cooks would really spoil the broth.

What is back of all this pressure for a change of Constitutional treaty methods? Of course, many proponents are sincere though misguided. Others are just bitter against the former Administration for alleged mistakes in the Yalta and other agreements. Some seem to fear that the power of the United Nations may be improperly used as a means of legislating on internal problems -- including State problems. Some just fear any dealing with any country on any subject.

As to the United Nations, the Charter provides that no United Nations action is effective in the United States until it has been specifically approved by us. As to alleged mistakes -- and Congress can make at least as many mistakes as an Executive -- there are and always will be differences of opinions. Forecasting and hindsighting are easy but almost invariably inconclusive.

Furthermore, the fear about agreements and treaties is hard to understand. The Senate can make and often has made reservations almost at will to meet objections. But reservation or no reservation, all semblance of fear should be removed by the well-established rule that Congress itself has the undenied power to abrogate a treaty, and can do so without a blatant and threatening Constitutional provision as set out in Section 3.

In practice Congressional rescission of a treaty or agreement can come by denial of appropriations, or it can come by direct repealing legislation. An example is the Chinese exclusion case. Of course, a Congressional repeal would be subject to veto, but so would any other repealing statute on any other subject.

Under all these circumstances, what reason is there to saddle any President -- much less President Eisenhower -- with a narrowing, confusing, unnecessary and restrictive amendment that would put him to a disadvantage in dealing with his many world problems. Flexibility to meet varying conditions is necessary, and quibbling within our ranks will not build or

maintain our peace or the peace of the world.

In a democratic government there are always some with unjustified fears for the future. But in this dynamic world we cannot afford to conduct the affairs of our dynamic nation on the basis of timidity or with lack of confidence in our institutions. Such absence of faith derogates from democracy and plays into the hands of those who would destroy it.

Many like myself have an instinctive and understandable desire for America to live alone and to be entirely free and independent of the rest of the world. But after consideration we must understand that this is impossible. We cannot turn back history. We cannot shrug off Marconi, Edison or Alexander Graham Bell -- nor Fulton, Stephenson or the Wright brothers. We cannot put our heads in the sand and forget the automobile, the jet plane and the atom bomb.

Necessarily these things have narrowed our horizons. America cannot now or hereafter escape propinquity. It must make treaties and agreements. They are necessary between friends -- and desirable even between enemies. In America's past history I know of no period when the Bricker Amendment would have been necessary. Today these proposals seem to me almost grotesquely unsound and dangerous.

REPORT

IN OPPOSITION TO

REVISED SENATE JOINT RESOLUTION 1

to be presented at the annual meeting of the

Federal Bar Association

Mayflower Hotel, Washington, D. C.

September 25, 1953

COMMITTEE ON INTERNATIONAL LAW

Harvey M. Spear, Chairman

July 29, 1953

REPORT OF THE COMMITTEE ON INTERNATIONAL LAW

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WHEREAS, the Committee on International Law of the Federal Bar Association has carefully considered the views expressed in Senate Judiciary Committee Report 412 dated June 15, 1953, on revised Senate Joint Resolution 1;

WHEREAS, the Committee on International Law has thoroughly examined the material and testimony presented at the Senate Judiciary Committee subcommittee hearings, at the Forum conducted at Washington, D. C., by the Federal Bar Association, and in the articles in the Federal Bar Journal on original Senate Joint Resolution 1 and on Senate Joint Resolution 43;

BE IT RESOLVED, THEREFORE, that the Committee on International Law of the Federal Bar Association finds that revised Senate Joint Resolution 1, as reported out June 15, 1953, by the Judiciary Committee, is contrary to the best interests of the United States of America and is wholly inconsistent with the exercise of the full national sovereignty of the United States of America; and

BE IT FURTHER RESOLVED, that for the above reasons the Committee on International Law opposes the adoption of revised Senate Joint Resolution 1 as reported out June 15, 1953, by the Senate Judiciary Committee, and that the Committee on International Law recommends that the Federal Bar Association adopt this report.

INTRODUCTION

On April 22, 1953, the Federal Bar Association sponsored an impartial Forum at Washington, D. C., on original Senate Joint Resolution 1 and on Senate Joint Resolution 43. This Forum followed by several months the publication in the Federal Bar Journal of two articles on "Amending the Treaty Making Power: Pro and Con" by Senator John W. Bricker and Bernard Fensterwald, respectively.[1]

The Forum program included two speakers in support of the resolutions and two in opposition.[2] In addition, the program included a panel of experts rep-

[1] 13 Federal Bar Journal 77-98.

[2] *In support:* George A. Finch, Editor-in-Chief, American Journal of International Law, and member of Standing Committee on Peace and Law of the American Bar Association (see statement at hearings before subcommittee of Senate Judiciary Committee (hereinafter referred to as Hearings), pp. 46, 1127; see also Senate Report 412, 83d Congress, 1st Session, pp. 19-20); and Charles A. Webb, Legislative Assistant to Senator John W. Bricker.

In opposition: Theodore Pearson, Chairman, Committee on Federal Legislation, Association of the Bar of the City of New York (see Hearings, p. 213); and William Dwight Whitney, Association of the Bar of the City of New York.

resenting all the different views and consisting of two past presidents of the American Bar Association and three professors of constitutional law and of international law.[3] The Forum was recorded by the Voice of America and excerpts were subsequently rebroadcast over a local television network.

On June 15, 1953, the Senate Judiciary Committee reported the drastically modified version of *revised* Senate Joint Resolution 1 to the Senate and published therewith its report containing both majority and minority views.[4] The provisions of *revised* Senate Joint Resolution 1 as reported are almost word-for-word identical with the provisions of the proposed Amendment originally introduced as Senate Joint Resolution 43.[5]

After careful consideration of the views in Senate Judiciary Committee Report 412 and after thorough examination of the material and testimony presented at the Senate Judiciary Committee subcommittee hearings, at the impartial Forum conducted by the Federal Bar Association, in the articles in the Federal Bar Journal, and in other materials and reports examined, the Committee on International Law of the Federal Bar Association herewith finds that *revised* Senate Joint Resolution 1 is contrary to the best interests of the United States of America and is wholly inconsistent with the exercise of the full national sovereignty of the United States of America. For these reasons, the Committee on International Law opposes the adoption of *revised* Senate Joint Resolution 1 as reported out by the Senate Judiciary Committee on June 15, 1953.

STATEMENT

In opposing the adoption of *revised* Senate Joint Resolution 1, we support the administrations of President Dwight D. Eisenhower and of former President Harry S. Truman in their consistent opposition to the proposed Amendment embodied in the *revised* Senate Joint Resolution.[6]

Before passing to a more detailed discussion of the provisions of the proposed Amendment, we note that the proposed Amendment, as reported June 15, 1953, by the Senate Judiciary Committee, contains one revolutionary change from the original Senate Joint Resolution 1, as introduced January 7, 1953. This change, resulting in the addition of the "which" clause to Section 2, was, prior to the Senate Judiciary Committte report, consistently opposed even by Senator Bricker himself.[7] The "which" clause has been included in the reported version

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[3] George Maurice Morris and Carl B. Rix, past presidents of the American Bar Association (see Hearings, pp. 75, 1024); Professor Charles S. Collier, Professor of Constitutional Law, George Washington University; Professor James O. Murdock, Professor of International Law, George Washington University; and Professor Quincy Wright, Professor of International Law, University of Chicago.

[4] Senate Report 412, 83d Congress, 1st Session (hereinafter referred to as Report).

[5] Although S.J.Res. 43 was introduced at the request of a small group of officials of the American Bar Association as representing the official position of the Association, it appears that a very large part of the rank-and-file membership of the Association may not fully endorse this official position. (See testimony of Harrison Tweed, President, American Law Institute, Hearings, p. 615 at 616; testimony of Jacob Lashley, Past President of the American Bar Association, Hearings, p. 629; testimony of Judge John J. Parker, Court of Appeals for the Fourth Circuit, Hearings, p. 708 at 714-716; testimony of former Solicitor General Philip B. Perlman, Hearings, p. 399 at 402).

The Section on International and Comparative Law of the American Bar Association headed by Lyman M. Tondel, Jr., represents all the members of the Association interested in International Law. This Section has recorded its position as formally opposed to the proposed Constitutional Amendment. (See Proceedings of the Section at 1952 meeting at San Francisco, California, pp. 42, 49, 60.)

[6] Testimony of Secretary of State John Foster Dulles, Hearings, p. 823; testimony of Attorney General Herbert Brownell, Jr., *ib.*, p. 901; testimony of Assistant Secretary of Defense Frank C. Nash, *ib.*, p. 951; testimony of Director of Mutual Security Harold E. Stassen, *ib.*, p. 1054. See also testimony of former Under Secretary of State David K. Bruce, hearings on S. J. Res. 130 (82d Congress, 2d Session) before subcommittee of Senate Judiciary Committee, p. 173; testimony of former Director of Mutual Security William A. Harriman, *ib.*, p. 350; testimony of former Solicitor General Perlman, *ib.*, p. 369.

[7] Hearings on S. J. Res. 130 (82d Congress, 2d Session) before subcommittee of Senate Judiciary Committee, p. 1 at 28; Report, p. 46.

of the proposed Amendment by way of compromise between the forces fighting for the original Bricker Amendment (the original Senate Joint Resolution 1) and those supporting the more drastic Senate Joint Resolution 43.

The promoters of the proposed Amendment have paraded for their cause under the misleading claim that they are preserving the Constitution from alleged destruction. They claim that their proposed Amendment will preserve the Bill of Rights and the democratic way of life which, without the proposed Amendment, have so successfully nourished and sustained our great country for over 164 years. In one of the most misleading arguments yet made to the American public and to Members of Congress, the promoters of the proposed Amendment claim that they are preserving the Constitution while at the same time they are endeavoring to destroy the basic relationships between the federal government and the states, and between the President and the Congress, which were so carefully worked out at the Constitutional Convention at Philadelphia in 1787. Masquerading under the banner of preserving the Constitution, the promoters are in fact seeking to destroy parts of it.[8]

As we show in this report, the issues raised by the proposed Amendment were thoroughly discussed and debated in the Constitutional Convention in 1787 and were overwhelmingly rejected by our founding fathers in their foresighted wisdom.

Why all the commotion and fanfare by the promoters at this time, we ask ourselves. The answer can be seen in understanding the underlying objectives of the proposed Amendment. As we will see in this report, the first of the major changes proposed would (1) take certain powers in the treaty process away from the Senate and give them to the Congress, and (2) modify the traditional balance of federal-state powers by taking substantial legislative powers completely away from the Congress and require unanimous and concurrent action by all the 48 states before such powers could thereafter be exercised by anyone. The second of the major changes proposed would regulate all executive agreements; this appears to be strictly a matter of domestic power politics aimed at undermining the confidence placed by the people in the Office of the Presidency and in the individual chosen by the people to occupy that position.

DISCUSSION OF AMENDMENT PROVISIONS

SECTION 1.

Section 1 of the proposed Amendment provides:

> *A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.*

On its surface, this section appears innocuous, for the law is well settled that the Constitution is supreme over all treaties.[9] Section 1 of the proposed Amendment appears to be equivalent to an eleventh commandment prohibiting

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[8] "As in the case of his proposed amendment to the Constitution on the treaty-making power, Senator Bricker dressed up his reservation to the Status of Forces Agreement in the trappings of liberty and justice." *Washington Post* editorial, July 17, 1953.

[9] A careful examination of the large volume of material written on this subject leads to only one intelligent conclusion: that the Constitution is fully supreme over all treaties. Report, pp. 37-38, 40; see testimony of Attorney General Brownell, Hearings, p. 901 at 909-910; testimony of former Solicitor General Perlman, Hearings, p. 399 at 400; testimony of former Solicitor General Perlman, hearings on S.J.Res. 130 (82d Congress, 2d Session) before subcommittee of Senate Judiciary Committee, p. 396; testimony of Zechariah Chafee, Jr., Professor, Harvard University, *ib.*, p. 109; see Tucker, *Limitations on the Treaty-Making Power* (1915) pp. 420-421; 2 Butler, *The Treaty-Making Power of the United States* (1902), p. 351.

the violation of the other ten commandments. If this section is innocuous, why is it included as the opening section of the proposed Amendment and why is it so objectionable to opponents of the proposed Amendment? Opposition to this section stems from its strong implication that the Constitution is not now supreme over all treaties. Serious questions as to draftmanship may, moreover, be directed at the use in a constitutional amendment of such a vague term as "conflicts" and at the meaning of the phrase "shall not be of any force or effect." Since constitutional amendments are not ordinarily enacted to be declaratory of existing law, a federal court in the future might well search for some strange meaning in Section 1 over and above a meaning which would reiterate the supremacy of the Constitution.

The promoters of the proposed Amendment, however, obviously do not intend Section 1 to be merely declaratory of the supremacy of the Constitution in its present form, for in the later sections of the proposed Amendment, they go far beyond existing provisions of the Constitution to make reactionary changes in the substantive provisions of the Constitution. Section 1 of the proposed Amendment serves the purpose of misleading the layman into believing that the Constitution is not now supreme over treaties and thereby of justifying the drastic changes in treaty making proposed by Sections 2 and 3 of the proposed Amendment. It is significant that the changes proposed by Sections 2 and 3 go far beyond the question of the supremacy of the Constitution.

In addition to being misleading in its implication that the Constitution is not now supreme, Section 1 of the proposed Amendment might also be interpreted as incorporating references to the balance of powers between federal and state governments which Section 2 seeks to change and which are more thoroughly discussed below in references to the "which" clause of Section 2.[10] Insofar as Section 1 may be so interpreted, the "which" clause objections would of course apply so as to render Section 1 equally objectionable.

SECTION 2.

Section 2 of the proposed Amendment provides:

> *A treaty shall become effective as internal law in the United Statets only through legislation which would be valid in the absence of treaty.*

The above provisions make two drastic changes in treaty making, the first functional and the second substantive. The first change would provide that a treaty shall become effective internally only through additional legislation. The second change would provide that such legislation must be of the kind *which would otherwise be valid under the specifically delegated powers of Congress in the absence of a treaty.*

Treaty Effective Only Through Additional Legislation:

The first part of Section 2 would require that, in order for a treaty to be effective as internal law in the United States, it must be (1) approved by a two-thirds vote of the Senators present, (2) ratified formally by the President, (3) implemented by a bill approved by a majority of the House, (4) implemented by the same bill approved by a majority vote of the Senate, and (5) finally implemented by the same act of Congress approved by the President. It is too

[10] Testimony of Attorney General Brownell, Hearings, p. 901 at 911-912.

obvious to merit discussion that such a procedure is impractical, unwieldy, burdensome and costly for the large number of treaties, most of which are purely routine or administrative.

Under the existing system, a treaty may become effective as internal law as soon as it has been approved by the Senate and formally ratified by the President if that is the intention of the treaty. For most treaties this procedure is adequate and there are sufficient congressional safeguards in the Senate approval process. By their own terms, many treaties either require implementing legislation to effectuate their provisions or they require appropriations from Congress. Under existing procedure, any time a treaty is by its own terms self-executing, the Senate at the time of approving it may add the qualification that it not be self-executing internally without further implementing legislation.[11] This existing procedure has been effective in the past and works far more efficiently than would a blanket constitutional limitation prohibiting all self-executing treaties. The blanket prohibition of Section 2 of the proposed Amendment would prevent Congress from relieving itself of the large volume of paper work which will assuredly result if every single treaty requires further legislation. The existing procedure with its optional arrangement gives us the freedom of using self-executing treaties wherever practical and advisable.

The proposal made by the first part of Section 2 of the proposed Amendment was bitterly fought over at the Constitutional Convention in 1787. The fight in 1787 was part of the larger fight between the group which was fighting for a national legislature consisting of equality of representation by states and the group fighting for proportional representation based on population. The overall fight was resolved by the great compromise creating two separate houses in the national legislature, the Senate and the House. When the treaty-making process came before the Constitutional Convention, the question was whether treaties should be approved by one of the two chambers, by both of them, or by neither.[12] In agreeing that treaties should be approved by two-thirds of the Senators present, the founding fathers foresaw even in those days that it would seriously impair the expeditious handling of treaties to bring the large House of Representatives into the treaty process.[13] And the number of treaties processed or expected in those days was only a fraction of the number that now are handled each year. This number would be increased many times, moreover, if the proposal of Section 3 is adopted requiring that all executive agreements, even on routine administrative matters, be treated as treaties.

The requirement that all treaties be implemened by specific legislation in each case is an indication of mistrust in the Senate.[14] This change in the treaty-making process strongly implies that the Senate has not adequately discharged its duties as watchdog over treaties. We strongly disagree with this implication. Unless the promoters of the proposed Amendment consider the Senate untrustworthy, implementing legislation by both houses of Congress will serve no purpose that cannot be accomplished in the Senate action approving or disapproving the particular treaty. It is difficult to understand why the Senate would want to relinquish its traditional power and prestige as watchdog over treaties in exchange for a system by which it would have to share such power

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[11] Testimony of Director of Mutual Security Stassen, Hearings, p. 1054 at 1059.

[12] 2 Farrand, *Records of the Federal Convention*, 538, 540-541, 547-550; see 1 Butler, *The Treaty-Making Power of the United States* (1902), p. 319.

[13] 1 Curtis, *Constitutional History of the United States*, p. 468.

[14] In labelling the Bricker Amendment the "pathway to chaos," the *New York Times* describes the proposed Amendment as the "product of fear—fear of ourselves, of our traditional processes of government." Editorial, April 8, 1953.

and prestige with the more cumbersome House, particularly since such a plan was specifically repudiated by the Constitutional Convention and again by President George Washington during his second term in office.[15]

"Which" Clause Drastically Alters Federal-State Balance of Powers:

The most objectionable provision of *revised* Senate Joint Resolution 1 is the "which" clause of Section 2. This clause would drastically alter the traditional and fundamental balance of powers between the federal government and the states on matters of international concern. The clause would indisputably impair the exercise of the full national sovereignty of the United States both legally and politically in the international family of nations.

The "which" clause was part of Senate Joint Resolution 43, introduced by Senator Arthur V. Watkins at the request of a small group of officials of the American Bar Association.[16] It was made a part of *revised* Senate Joint Resolution 1 as reported June 15, 1953, by the Senate Judiciary Committee to the Senate by way of compromise between the forces which had been promoting the original Senate Joint Resolution 1 and those who were promoting Senate Joint Resolution 43. It is significant that prior to the compromise, Senator Bricker himself opposed the inclusion of the "which" clause in the Amendment.[17]

The question of the federal-state balance of powers as to the treaty process was thoroughly discussed and considered at the Constitutional Convention in 1787, where it was unanimously agreed that the newly-formed national government should be fully sovereign in every aspect of treaty making.[18]

The "which" clause of Section 2 would limit treaties to those subjects as to which Congress can legislate under its specifically delegated powers in Article I of the Constitution. The Supreme Court has held that traditionally Congress has powers under the treaty clause to legislate on matters which apart from a treaty are not within its specifically delegated powers for legislation. *Missouri* v. *Holland,* 252 U.S. 416. The "which" clause clearly reverses *Missouri* v. *Holland.* The facts in this case merit brief consideration as a specific example of the kind of damage to be done by the "which" clause. Congress had enacted a statute regulating the killing of migratory birds which flew over several midwestern states and up into Canada each year. The birds were rapidly being depleted because of lack of game conservation laws. Congress enacted a statute to regulate the killing of the birds within the United States. A federal court invalidated this statute on the ground that the right to regulate the killing of birds was reserved to the several states. While this first case was pending on appeal, the United States concluded a treaty with Great Britain on behalf of Canada for effective regulation of migratory birds on an international basis. Congress then enacted a new statute to implement the treaty insofar as it concerned killing the same birds within the United States. This law was upheld by the Supreme Court as a valid exercise of the powers to legislate under the treaty powers. *Missouri* v. *Holland, supra.*

In substance, the Supreme Court found that legislation to implement a treaty on a subject matter of national and international concern did not have

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[15] President Washington's Message to the House of Representatives on the Jay Treaty, dated March 30, 1796, see 3 Farrand, *Records of the Federal Convention,* 1787, p. 371.

[16] Note 5, *supra.*

[17] Note 7, *supra.*

[18] Farrand, *The Framing of the Constitution* (1913) p. 153; McLaughlin, *The Foundation of American Constitutionalism* (1932) pp. 137, 151; 1 Butler, *The Treaty-Making Power of hte United States* (1902), pp. 193, 266, 294-297; 2 Butler, *ib.,* p. 351.

to fall within the specifically delegated legislative powers of Congress. In his testimony before the Senate Judiciary Subcommittee on May 21, 1952, Senator Bricker himself upheld the result achieved in *Missouri* v. *Holland* and opposed the result which would be achieved by the "which" clause.[19]

The fight in *Missouri* v. *Holland* and the current fight over the "which" clause both involve the question of the balance of federal-state powers under treaties. The promoters of the proposed Amendment are openly seeking to reduce the powers of the national government in treaty matters and to turn the clock back to the period before the Constitutional Convention of 1787, when, during the days of the Confederation, the sovereignty of each of the separate states was regarded as superior to the sovereignty of the federal government. In so doing, the promoters ignore the very reasons which caused the Constitutional Convention to grant the federal governmnt supreme sovereignty over the states in treaty matters.

The supreme sovereignty on all treaty matters was placed in the federal government because of the fatal experience encountered by the states under the Articles of Confederation. The Constitutional Convention was itself convened in 1787 to investigate and cure the "important defects in the system of the federal government" and to "devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union." [20]

One of these "important defects" of the Confederation was that each state was placing its own treaty interests above the interests of the Union.[21] Great confusion and controversy centered around the independent activities of each of the states which, under Article IX of the Articles of Confederation, were entitled to enter into their own treaties as to customs and commerce. As a result, there was unanimous agreement at Philadelphia in 1787 that the treaty-making power should be lodged exclusively in the federal government to the complete exclusion of the states. In explaining the background to this action, Benjamin Franklin Butler summarized developments as follows:[22]

> "this reservation of customs regulations to the States was one of the chief causes for the ultimate abandonment of the Articles of Confederation and the Adoption of the Constitution in which broader powers were vested in the Central Government, as to the regulation of commerce, and no limitations were expressly placed on the treaty-making power. The Articles of Confederation, and the powers therein contained as to treaty-making were ratified by some of the States, *after full notice that Congress had determined that its rights under the treaty-making power extended to internal affairs of the different States whenever the general good of the Union depended upon the establishment of mutual and reciprocal agreements with foreign powers; * * *"* (italics supplied)

It was for the above reasons that the Constitutional Convention adopted the provisions of Section 10 of Article I of our Constitution prviding that "No state shall enter into any treaty, alliance, or confederation," and providing further that "No state shall, without the consent of Congress, * * * enter into any agreement or compact with another state, or with a foreign power." All the treaty powers were expressly assigned in our Constitution to the federal government.

In the "which" clause of Section 2, the promoters of the proposed Amend-

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[19] Note 7, *supra*.

[20] Farrand, *The Framing of the Constitution* (1913), pp. 9-10.

[21] *ib.* at 46, 151.

[22] Note 11, *supra*, at 266; Butler was Attorney General of the United States from 1833 to 1838.

ment seek to chisel away at the effectiveness of the treaty power by removing certain areas from its coverage. Since Section 10 of Article I of the Constitution precludes such powers going back to the states, the "which" clause would leave these powers suspended in air unless all the 48 states act concurrently with the federal government. Under the proposed Amendment, the subject matters which are outside the specifically delegated powers of Congress could, as a practical matter, never again be the subject of a treaty between the United States and any foreign nation, however important to the interests of the nation as a whole such a subject might be. Under the proposed Amendment, neither the federal government nor the states would have the constitutional authority to adopt treaties on such subjects.

It is impossible here to present a comprehensive list of all the possible subjects which lie outside the specifically delegated domestic powers of Congress but which might become important subjects for treaty negotiation in the future. Past experience and current world developments give us several to date: treaties relating to the preservation of such wild game as were involved in *Missouri* v. *Holland;* treaties providing exemption of consular offices and other nations from state taxation; treaties relating to the rights of aliens to own, inherit and transfer property; treaties regarding the rights of aliens to engage in trade or business having no interstate character; treaties agreeing that aliens shall pay no greater state inheritance taxes than citizens; treaties for control of domestic narcotics production such as the multipartite treaty limiting world opium production endorsed by the United Nations Opium Conference on June 18, 1953; treaties providing for reciprocal inspection of disarmament agreements; treaties providing for international control and inspection of atomic energy production; and numerous others not yet anticipated.[23]

Although the "which" clause would prevent the treaties listed above, it is not so much aimed at them as it is intended to block constitutionally the Genocide Convention and the Covenant on Human Rights. The Genocide Convention and the Covenant on Human Rights appear to need no blocking. The Genocide Convention was submitted to the Senate for approval by the State Department on June 16, 1949, and it still lingers in the files of the Foreign Relations Committee to this day. The Covenant on Human Rights is still in the drafting stage in the United Nations. According to the testimony of Secretary of State Dulles, the present administration does not intend the United States to become a party to such a covenant and does not intend to present it as a treaty for consideration by the Senate.[24] In making use of the constitutional amendment to fight these United Nations treaties, the promoters are invoking extraordinary constitutional remedies to avoid fighting the merits of the treaties.

We need not at this point discuss the pros and cons of the Genocide Convention or the Covenant on Human Rights. It is sufficient for this report that we believe that such treaties should be carefully considered on their respective merits. We believe strongly that however good or bad any one treaty may be, the fight for or against such treaty should be made on the merits of the particular treaty and not by means of a constitutional amendment which might forever bar other desirable and less controversial treaties.

In limiting treaties to those subject matters which otherwise come within the specifically delegated powers of Congress, the "which" clause of the pro-

[23] Testimony of Secretary of State Dulles, Hearings, p. 823 at 843; see Report, pp. 45-48.
[24] Hearings, p. 823 at 825.

posed Amendment places a straight-jacket on the participation of the United States in international negotiations and agreements. In these days when power politics throughout the world depends upon so many variable and unknown factors, it is necessary that we keep our diplomatic resources and bargaining potential as flexible and elastic as possible. The Constitutional Convention in 1787 fully recognized that it might be necessary to the "general good of the Union to negotiate treaties on matters which "extended to internal affairs of the different States." [25] In commenting on the broadness of the treaty-making power in the Federalist papers, Alexander Hamilton wrote that "*it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite." [26]

Should the "national exigencies" require that a treaty be negotiated on behalf of the United States and some foreign power on any of the numerous matters which otherwise lie outside the specifically delegated powers of Congress, our great country would in practice be precluded from negotiating such a treaty since Congress would not have the constitutional power to implement the treaty and the problem in securing unanimous consent from all the 48 states would be insurmountable from the administrative standpoint alone. As happened to the Confederation of the several states between 1778 and 1787, our federal government would fall into disrepute for the same reason the Confederation fell—because the several states were once again placing their internal interests paramount to the common good of the nation as a whole—paramount to the common good of the sovereign United States of America.

If our country voluntarily relinquishes its own full national sovereignty through the "which" clause, we would not be able to participate in or encourage much of the constructive work now being done at the United Nations in building the foundations for a lasting and durable world peace.[27]

The promoters of the "which" clause seek to put the clock back to the pre-1787 days when state governments were superior in sovereignty to the Confederation.

SECTION 3.

Section 3 of the proposed Amendment provides:

> *Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.*

Section 3 of the proposed Amendment involves an entirely different change in the treaty power from those involved in Section 2. This section would regulate "all executive and other agreements" between the United States and foreign powers or international organizations. This provision would completely subordinate the President to congressional regulation in the conduct of foreign

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[25] Note 7, *supra.*

[26] The Federalist, No. XXIII, Dawson ed., p. 150.

[27] "The well-founded suspicion is that he [Senator Bricker] and his supporters are aiming beyond the obvious and are really seeking to establish isolationism as the fundamental law of the United States." *Providence Journal* Editorial, December 24, 1952.

"It is impossible to avoid the conclusion that what Mr. Bricker is really doing is striking a blow for the isolationists against full American participation in the United Nations. This is not the way to progress and peace; it is the path to reaction and chaos." *New York Times* Editorial, April 8, 1953.

affairs.[28] It would take the stature, prestige and leadership from the Office of the Presidency of the United States. It would serve notice upon the world that we have no single chief executive whom we ourselves fully trust or upon whom the rest of the world can rely to represent the views and interests of the United States. This section would adopt, by way of constitutional amendment, a lasting and binding expression of mistrust and lack of confidence in the individual whom the American people has chosen as our chief executive.

This part of the proposed Amendment would strip the President of his most important function on the international political scene. It would reduce the President to a mere figurehead in foreign affairs and render him for all practical purposes powerless to negotiate on behalf of our country.

The same issues as are involved in Section 3 of the proposed Amendment were involved in the Constitutional Convention debates on the treaty power. Under the Articles of Confederation, the exclusive power to enter into treaties was in the congress. After careful consideration at Philadelphia, the Constitutional Convention unanimously placed such powers in the hands of the President "by and with the advice and consent of the Senate." Writing in the Federalist papers at that time, Hamilton wrote:[29]

> "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite." (italics supplied)

These same reasons warrant continuing the present system of flexibility and elasticity in matters related to international politics. There are numerous safeguards over "executive and other agreements" in the Constitution without tying the President's hands in all cases. The domestic effect of an undesirable executive agreement may be altered by subsequent legislation of Congress. Most executive agreements, moreover, directly or indirectly involve implementation either through specific legislation or through the appropriation of funds by Congress.

Section 3 of the proposed Amendment would effect a shift in leadership of our government in foreign affairs from the chief executive to the legislative branch of our government. This shift would create a veritable impasse since it would render our agreement-making procedure completely impractical and hopelessly inefficient. There would be grave danger of instability in our foreign relations for no foreign power could rely on the policy of the United States as expressed by the chief executive. The free world would be the loser.[30] The shift would reduce the effectiveness of the President as Commander-in-Chief of our armed forces and would prevent agreements such as the Japanese surrender, the occupation of Western Germany, the Boxer Rebellion agreements, the 1882 agreements with Mexico for troop passage across the border, and the current Korean truce agreements.[31] The extent to which Section 3 would cripple the future of all international agreements cannot even be fully foreseen at this time.

The hearings on original Senate Joint Resolutions 1 and 43 in this Congress and on Senate Joint Resolution 130 in the 82d Congress contain carefully-documented statements from members of the administrations of Presidents Eisenhower and Truman spelling out the extent of the damage which Section 3

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[28] Report, p. 49.

[29] The Federalist, No. LXIII, Dawson ed., p. 446 at 449.

[30] "The Bricker Amendement * * * would throw the coldest water upon the hopes of good Europeans. It would handcuff Americans in all future efforts at integration of the free world. In sum, it is an attempt to put a roadblock across the path of history." *Providence Journal* Editorial, December 24, 1952.

[31] Report, p. 50.

would cause to our foreign policy.[32] These words of experience and wisdom from officials of our government, who have been on the firing line of foreign affairs, when coupled with the warnings and premonitions expressed by our founding fathers in the Constitutional Convention in 1787, together confirm that the existing constitutional provisions are preferable to those of the proposed Amendment.

The authority and powers of our President in foreign affairs must continue to remain flexible and elastic, and we must continue to show the other peoples of the world and their leaders that we have implicit faith in the Office of the Presidency of the United States and in the individual chosen as our President by the majority of our people in true democratic fashion.

CONCLUSION

The law is well settled that the Constitution is supreme over all treaties. The constitutional provisions relating to the treaty-making powers have weathered the storms of history for these 164 years. The issues raised by the proposed Amendment were thoroughly debated at Philadelphia in 1787 and were overwhelmingly rejected. The treaty-making powers as enacted in the Constitution have proved their effectiveness through these years of experience. We now know what the treaty-making power represents. This is not the time to be making reactionary changes in its provisions.

The first of the major changes proposed (1) would take vital powers in the treaty process away from the Senate and give them to the Congress, and (2) would modify the traditional balance of federal-state powers by taking substantial legislative powers completely away from the Congress and would require the unanimous and concurrent action of all the 48 states whenever our foreign policy required a treaty on any subject coincidentally relating to matters of internal concern to any of the states. Under the proposed Amendment, the internal interests of the states would be placed above the common good of the nation as a whole and above the full sovereignty of the United States of America. The "which" clause of Section 2 would take us back to the pre-1787 era of the Confederation and would place our national government in the same fatal position which caused the downfall of the Confederation.

The unanimous and consistent testimony of both Republican and Democratic administrations before the Senate Judiciary Committee subcommittee on the "executive agreements" provisions now contained in Section 3 of the proposed Amendment has shown that the provisions would materially and seriously damage our foreign policy. This section would shift the responsibility and emphasis in foreign affairs from our chief executive to the legislative branch of our government. It expresses mistrust and lack of confidence in the Office of the Presidency and in the person of President Eisenhower. It would strip the President of his most important function on the international scene and would render him powerless to negotiate on behalf of our country. The Constitutional Convention wisely recognized the need for giving the President of the United States wide flexibility and elasticity in foreign affairs. Such arrangements have worked most effectively in the past subject to the existing checks and balances that already exist in the present constitutional arrangement. This hardly appears to be the time to undermine the leadership in world affairs which the United States has attained.

---

[32] Note 6, *supra*.

For these reasons, the Committee on International Law of the Federal Bar Association finds that *revised* Senate Joint Resolution 1 as reported out by the Senate Judiciary Committee on June 15, 1953, is contrary to the best interests of the United States and is wholly inconsistent with the exercise of the full national sovereignty of our great democracy. We accordingly oppose the adoption of *revised* Senate Joint Resolution 1.

Respectfully submitted,

COMMITTEE ON INTERNATIONAL LAW,
FEDERAL BAR ASSOCIATION

Harvey M. Spear, Chairman
Herzel H. E. Plaine
William A. Roberts
Roy M. Vallance
Sadye Jane Davis, Secretary

July 22, 1953

Additional copies of this report may be secured from Colonel Heber H. Rice, Executive Director, Federal Bar Association, Columbian Building, Washington 1, D. C.

ADDENDUM re KNOWLAND SUBSTITUTE

On July 22, 1953, after this report on *revised* Senate Joint Resolution 1 was adopted by the Committee on International Law of the Federal Bar Association, Senator William F. Knowland introduced in lieu of *revised* Senate Joint Resolution 1 a bill entitled "S.J.Res. 1—Amendment (in the nature of a Substitute)" providing in substance as follows:

> Section 1. A provision of a treaty or other international agreement which conflicts with the Constitution shall not be of any force or effect. The judicial power of the United States shall extend to all cases, in law or equity, in which it is claimed that the conflict described in this amendment is present.
>
> Sec. 2. When the Senate consents to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered in the Journal of the Senate.
>
> Sec. 3. When the Senate so provides in its consent to ratification, a treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

On July 22, 1953, President Eisenhower issued a statement giving his "unqualified support" to the Knowland Substitute. Senator Bricker on the same date rejected the proposal as unsatisfactory to him.

The first sentence of Sec. 1 of the proposed Substitute is virtually identical with Sec. 1 of *revised* Senate Joint Resolution 1 and the second sentence merely restates what is indisputably the well-settled law on the judicial power of the United States. The objections to Sec. 1 of *revised* Senate Joint Resolution 1 as spelled out in this report apply equally to Sec. 1 of the Knowland Substitute.

The provisions of Sec. 2 of the proposed Substitute are new at this time and they duplicate in substance the amendment to the rules of the Senate introduced by Senator Herbert H. Lehman on July 18, 1953, as Senate Resolution 145. (See also Senate Resolution 144.) Although the substantive provisions of Sec. 2 of the proposed Substitute may be desirable, it may be preferable, as suggested by Senator Alexander Wiley, to adopt them in the form of an amendment to the Senate rules rather than through a cumbersome constitutional amendment. [33]

The provisions of Sec. 3 of the proposed Substitute merely restate the existing law. It is conceded that the Senate has the authority to qualify its consent to ratification of a treaty by providing in its consent that implementing legislation be required before the treaty be effective. [34] It should be noted that where such qualification changes the terms of the treaty, it is deemed to be a counter offer to the other parties to the treaty.

—H.M.S.

July 29, 1953

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[33] Congressional Record, July 22, 1953, daily page 9757 at 9758.

[34] Memorandum of Parliamentarian of Senate, 98 Congressional Record 2602 (March 20, 1952); see Advisory Opinion of International Court of Justice, *Reservations to the Convention of Genocide*, I.C.J. Reports 1951, p. 15 (May 28, 1951).

GEORGE D. AIKEN, VT., CHAIRMAN
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HERMAN WELKER, IDAHO — EARLE C. CLEMENTS, KY.

United States Senate
COMMITTEE ON
AGRICULTURE AND FORESTRY

Chief Justice saw
Senator Anderson - 2/5/53.

February 3, 1953

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CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice
The Supreme Court

Dear Fred:

I have been talking quite a little recently with Frank Holman, Chairman of the American Bar Association Committee, who I have asked Clarence Manion to talk to me about my letters to Mr. Manion.

Mr. Holman presented to me the complete text of the Amendment which the American Bar Association Committee recommends and believes necessary. It is as follows:

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty. Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this Article."

While he was in the office Mr. Holman gave me this suggestion which is much simpler and which would be an eleventh provision to the Bill of Rights:

> "No provision of a treaty which conflicts with any provision of the Constitution of the United States shall be valid."

Would you feel that at sometime you could give me the benefit of your thoughts, not as The Chief Justice of the United States but as a lawyer friend who might be of assistance to a layman seeking guidance. We are having a meeting of the liberal bloc of the Senate on Monday, next, and will be discussing this matter at that time.

In the "Report of the Standing Committee on Peace and Law Through United Nations" dated September 1, 1952, the American Bar Association prints this comment:

> "It is of unusual significance that, in the STEEL SEIZURE CASES (Youngstown Sheet & Tube Co. v. Sawyer, decided June 2, 1952, 72 Sup. Ct. 863) Chief Justice Vinson, dissenting, with the concurrence of two other judges, stated that the United Nations Charter and the North Atlantic Treaty, as treaties designed to suppress aggression, give the President the power

to seize private property, although statutory authority is wanting, and although the majority of the Supreme Court holds that he has no such power under the Constitution, and that under the Fifth Amendment he is denied the power to take property, without due process of law and without just compensation. If two additional judges had accepted the views of the Chief Justice, the treaty known as the United Nations Charter and the North Atlantic treaty, made by the President and consented to by the Senate, would have effected a fundamental change in the American form of government, without Congress, or without the states or the people (to whom all powers not delagated are reserved under the Tenth Amendment) having anything to say about the matter. This real danger will be averted by the proposed amendment."

This is what I have been worried about. I do not question the right of the American Bar Association or any other group anywhere in the land to alert the public to any danger or to any circumstance which seems to threaten the Constitution. I do, however, object to the claim that you stated that some treaty gave the President the power to seize private property.

Sincerely,

Clinton P. Anderson

CPA:mm

GEORGE D. AIKEN, VT., CHAIRMAN
MILTON R. YOUNG, N. DAK.
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CLINTON P. ANDERSON, N. MEX.
JAMES O. EASTLAND, MISS.
EARLE C. CLEMENTS, KY.

United States Senate

COMMITTEE ON
AGRICULTURE AND FORESTRY

January 24, 1953

The Chief Justice
The Supreme Court
Washington, D. C.

Dear Fred:

I hope I haven't messed things up by my letter to Dean Manion.

I do think that a man has no right to go around the country misrepresenting what our Supreme Court has done. I know that his speech before the American Farm Bureau Federation persuaded many well-intentioned farmers that they had no protection from the Supreme Court and that the Court worked hand in glove with those who would foster Socialism if not Communism in this country. That to me is unpardonable and that is my only excuse for writing this long and possibly pointless letter.

Cordially,

Clinton P. Anderson

CPA:d

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CHAMBERS OF THE
CHIEF JUSTICE

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January 23, 1953

Honorable Clarence Manion
Doran and Manion
403 St. Joseph Bank Bldg.
South Bend, Indiana

Dear Dean Manion:

You will recall I am sure that when we talked at the 34th Annual Meeting of the American Farm Bureau Federation at Seattle I discussed with you the Bricker Resolution and the difficulties which it had encountered at the hands of the 82nd Congress.

However, of very great interest to me was the comment which you made with reference to the steel case and the action of the Chief Justice and two of his associates in the opinion in which they dissented from the majority opinion of the Court. I wrote down your words to the Seattle audience and have this quotation: "In the steel case, the Chief Justice and two other Supreme Court Justices held that treaties recently approved set aside the United States Constitution and gave permission to the President to take private property." You then said there were "twenty treaties now pending which could wipe out our liberties" and pointed particularly to the ILO treaty "which if approved could supplant our Constitution."

I had occasion to discuss this subsequently with the Chief Justice. I wanted to make sure that I had taken down your words correctly, and I asked the Farm Bureau Federation if it had a transcript of your remarks. The Farm Bureau gave me what apparently had been prepared by its publicity section and which is headed "Excerpts from speech by Clarence Manion, Former Dean of the Law School, Notre Dame University, December 10, 1952 Before the annual convention of the American Farm Bureau Federation at Seattle, Washington."

In the first paragraph of those excerpts there is this language: "Through the negotiation of international conventions

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and treaties, which unfortunately become the supreme law of the land as soon as they are ratified by the Senate, the Constitution of the United States is being repealed and the private personal concerns of the once free United States Citizen are being turned over to international authority dominated and controlled by international Socialists and Communists."

The language which I have just quoted is the language on which I need assistance and which, to me, requires clarification. Do these international conventions and treaties once ratified by the Senate become the supreme law of the land? If they contravene the provisions of the Constitution of the United States do they thereby repeal the Constitution?

My opinion was they could not and they do not and hence I asked you at Seattle to supply me with material or the brief which you told me you had which indicates how the Constitution can be repealed by the actions of the Senate alone in ratifying a treaty. My impression was that the Constitution carried within it the method for its amendment and that a repeal of any of ~~these~~ its sections would have to be in accordance with that procedure and could not happen by the action of only one of the Houses of Congress to say nothing of the subsequent actions required of the legislatures of the various states.

It seems to me that Article V of the Constitution is reasonably specific; namely, that the Congress by vote of two-thirds of both Houses shall propose Amendments and that these shall be valid only when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths of these states depending on the mode of ratification proposed by the Congress.

In the second paragraph of these excerpts you are quoted as saying something a little different than I put down as you spoke but it is very similar in content. You say "In the steel case three Justices of the Supreme Court expressed the opinion that some of these recently ratified treaties had given the President of the United States authority to seize the property of the steel companies--the Constitution of the United States to the contrary notwithstanding."

It is to that that I wish to direct your attention.

I have been reading the decision of the Supreme Court in the case of The Youngstown Sheet and Tube Company vs. Charles Sawyer in an effort to find if these three Justices including

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the Chief Justice did actually take the position that these treaties had given the President of the United States authority to seize the property of the steel companies, "the Constitution of the United States to the contrary notwithstanding." I am frank to say that I do not so read the decision. I regret that I am not a lawyer and I may miss some of the points which legal training would have made evident to me but I have read the decision over and over and have discussed it with the Chief Justice.

It seems to me that when the Chief Justice along with Mr. Justice Reed and Mr. Justice Minton found it necessary to dissent from the majority opinion of the Court, they did not depend upon any treaty as a basis for a Presidential right or power to seize the steel mills. The opinion says: "In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised." The opinion then goes on to review the fact that the world had not as yet recovered from the devastation of World War II before it had been forced to face the threat of another global conflict. It points out that in accepting its responsibility in the world community the United States had been instrumental in securing the adoption of the United Nations Charter; that under that charter the United Nations had called upon member nations "to render every assistance" to repel aggression in Korea and that this country was furnishing its vigorous support.

Reference is made then to the efforts to protect the free world from aggression in the Truman plan for assistance to Greece and Turkey and in the Marshall Plan for economic aid to Western Europe. Then there's a word or two about the North Atlantic Treaty under which Congress--not the President, but Congress--had authority to authorize military assistance to nations dedicated to the principles of Mutual Security under the United Nations Charter.

The three Justices then allude to the magnitude of the overall program and point out that Congress appropriated 130 billion dollars for our own defense and for military assistance to our allies after the June, 1950 attack in Korea, that Congress directed the President to build up our own defenses, and that Congress recognized the impact of these programs on the economy. It shows how the President asked for authority to requisition property and to allocate and fix priorities for scarce goods and that Congress in the Defense Production Act of 1950 granted the powers requested and in addition granted power to stabilize prices and wages and to provide for settlement of labor disputes arising in the defense program.

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It seems to me that steadily these three Supreme Court Justices were pointing to what the CONGRESS had done and not to any treaty. They pointed to the treaties to outline the nature of the world in which we are living but the Justices dealt with the appropriations made by CONGRESS, with the directions given by the CONGRESS to build up our defense, with the Defense Production Act of 1950 under which CONGRESS gave him powers which he requested and which added powers for the settlement of labor disputes.

Further, in the decision I find these words "the President has the duty to execute the foregoing legislative programs, "---not to carry out the provisions of treaties but to execute the legislative program. It discusses the procedure before the Wage Stabilization Board and the negotiations with the union and the steel companies.

Then follows something which to me is again significant. The opinion cites the fact that the President issued on April 8, 1952, only a few hours before the strike was scheduled to commence, an executive order under which he instructed the Secretary of Commerce to take possession of the steel plants.

Then the next day the President sent a message to the Congress and I recall hearing it read. He outlined the alternatives. He could have let the steel industry shut down or he could have granted the steel industry a large price increase which he thought would wreck the stabilization program or he could have established Government operation of the steel mills for a temporary period. His message said that he thought Government operation was the least undesirable of the courses which lay open.

Then comes this language, "It may be that the Congress will deem some other course to be wiser." The President then outlined the other courses:

1) Give in to the steel company.

2) Force the steel workers to work without a contract.

3) Let the steel industry shut down.

The President said, "I do not believe the Congress will favor <u>any</u> of these courses but that is a matter for the Congress to determine." At that time the President suggested that Congress might pass legislation for the operation of the steel mills by the

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Government--still trying to get Congress to do something.

As the opinion points out, "Twelve days passed without action by Congress." Then the President sent another letter to the Senate and said in it, "The Congress can if it wishes reject the courses of action I have followed in this matter." The opinion points out that the Congress had not acted.

In the second part of the opinion the Justices discuss the fact that the District Judge who granted the preliminary injunction did so on the basis that "the President's only course in the face of an emergency is to present the matter to Congress and await the final passage of legislation which will enable the Government to cope with threatened disaster. Under this view," said the Justices, "the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action."

They point out the constitutional provisions under which the President may act. They quote with approval what Chief Justice Marshall had said of the Constitution: that it is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." They expressed a belief that cases could arise presenting questions "which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations. But we are not called upon today to expand the Constitution to meet a new situation... It is those who assert the invalidity of the Executive Order who seek to amend the Constitution in this case."

Then in the third section of the opinion these Justices gave a review of executive actions which illustrate how other Presidents have carried out the trust to "take Care that the Laws be faithfully executed."

As I indicated to you at the beginning of this letter I find nothing in the decision which would justify the statement that the Chief Justice, Mr. Justice Reed and Mr. Justice Minton "express the opinion that some of these recently ratified treaties have given the President of the United States authority to seize the property of the steel companies, the Constitution of the United States to the contrary notwithstanding."

I have regretted that I have not heard from you since our discussion in Seattle but I renew my request that you supply

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me with your brief which shows how these treaties can supplant the Constitution.

Now I want to add another request to that and ask that you give me your theory of the steel industry decision which brings you to the conclusion I have quoted above. I say to you that I do not see it in the decision and I would appreciate your pointing out to me where you find it.

Sincerely yours,

Clinton P. Anderson

CPA:amb

JOHN J. PARKER
UNITED STATES CIRCUIT JUDGE
CHARLOTTE, N.C.

April 16, 1953.

Hon. Fred M. Vinson,
Chief Justice of the United States,
Washington, D. C.

Dear Chief:

I enclose herewith an editorial published in a recent issue of the Charlotte News. I thought you might be interested in seeing it.

With warm personal regards, I am

Respectfully yours,

John J. Parker

JJP/B
Encl.

Reprinted from The University of Pittsburgh Law Review, Winter issue 1953

THE CONSTITUTION, THE TREATY POWER, AND JURIDICAL ISOLATIONISM

*Richard A. Edwards**

With World War II and the Korean War serving as recent and current manifestations of the American decision to reject political isolationism, it is significant, indeed, to observe the efforts of large and influential groups in this country to revitalize the ghost of juridical isolationism. The principal example of existing juridical isolationism has found expression in opposition to the efforts of the United Nations Commission on Human Rights to prepare international covenants for the improvement of civil rights protection throughout the world. The commission had prepared much of a Draft Covenant on Human Rights when the General Assembly, at its sixth session (1951), directed the commission to revise the proposed Covenant and divide it into two separate covenants. In its eighth and longest session to date (1952), the commission worked from April 14 to June 13, 1952, in an effort to comply with the General Assembly's directive. But, as the commission's chairman has admitted, "all that the Commission managed to complete of its agenda was three or four out of a total of some twenty items."[1] The old Draft Covenant on Human Rights was split into a Draft Covenant on Civil and Political Rights and a Draft Covenant on Economic, Social, and Cultural Rights. Neither of these new drafts was completed, but the commission did "adopt certain basic articles for each."[2]

From the intense conflict of opinion concerning American ratification of international covenants on the subject of human rights, three principal issues of constitutional law have arisen. First, what is the relationship between national power and international obligations in the American federal system? Second, are there constitutional limitations upon the treaty power and, if so, would they be violated by the proposed Covenants on Human Rights? Third, to what extent do these Covenants create a danger of diminishing civil rights protection in the United States?

National Power and International Obligations

The first of these three issues arises principally from the problem of whether the United States may enter into a treaty which will have the effect of creating a constitutional "floor" for congressional legislation upon a subject outside the delegated powers of Congress. Is the United States, by the terms or implications of its own Constitution, disabled from assuming international obli-

* Associate Professor of Government and Law, Lafayette College. A.B., Indiana University; LL.B., Harvard Law School; Ph.D., Columbia University.

1. Malik, *Human Rights in the United Nations,* 13 U.N. Bull. 248 (1952).

2. Mrs. Franklin D. Roosevelt, *Progress Toward Completion of Human Rights Covenants,* 26 Dep't State Bull. 1024 (1952).

gations on subjects which fall outside the realm of those powers delegated to the central government?

The debates of the Constitutional Convention and *The Federalist* offer no material assistance in the solution of this problem. The framers were much concerned with the residence of the treaty power, but not with the limitations, if any, upon that power.[3] Furthermore, Supreme Court decisions give but little aid to one seeking to delineate the treaty power. In 1898, Attorney General Griggs anticipated the doctrine of the *Holland* case when he took the position that the United States had the power to enter into treaty stipulations with Great Britain for the regulation and protection of the fisheries in waters along the international boundary line between the United States and Canada, although the boundary waters were, on the American side, within the territorial jurisdiction of the several riparian states, and although Congress had no authority in the absence of a treaty to pass laws to regulate or protect fisheries within the territorial jurisdiction of the states.[4]

In 1920, Justice Holmes rendered the opinion of the Court in *Missouri v. Holland*,[5] and simultaneously raised issues of enormous constitutional significance. In 1916, the United States and Great Britain entered into a treaty which provided for the protection of migratory birds, and agreed that the two powers would "take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention."[6] Thereafter, on July 3, 1918, Congress enacted a statute which forbade the killing or capture of migratory birds described in the treaty.[7] The State of Missouri brought a bill in equity to enjoin the enforcement of this Migratory Bird Treaty Act on the grounds that the Act unconstitutionally interfered with the rights reserved to the states by the Tenth Amendment and that Missouri had a pecuniary interest as owner of wild birds within its borders. An identical Act of Congress, enacted before the treaty with Great Britain, had been declared unconstitutional by two federal courts.[8] With the treaty to support the Act of 1918, however, the district court sustained a motion to dismiss, holding the Act to be constitutional. The Supreme Court, Justices Van Devanter and Pitney dissenting, affirmed. Mr. Justice Holmes, for the majority, emphasized the position of treaties in our law as indicated by the Supremacy Clause: "[T]reaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land."[9] That is to say, acts of Congress must be "in pursuance of the Constitution," whereas treaties

3. See, *e.g.*, THE FEDERALIST, No. 64 (Madison) and No. 75 (Hamilton).
4. 22 OPS. ATT'Y GEN. 214 (1898).
5. 252 U.S. 416 (1920).
6. 39 STAT. 1702 (1916).
7. 40 STAT. 755 (1918).
8. United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 Fed. 288 (D. Kan. 1915).
9. 252 U.S. at 432.

need only be made "under the authority of the United States."[10] What does "authority of the United States" mean? Justice Holmes felt that it was "open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."[11] Recognizing that there were qualifications on the treaty-making power, the Court felt that "they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[12] Noting that the treaty did not contravene any prohibitory words in the Constitution, the Court limited its decision to a holding that the treaty was not forbidden by some "invisible radiation from the general terms of the Tenth Amendment," and that the treaty and statute were valid.

What, then, should be regarded as the effect of this decision? Where treaties are made on subjects within the reserved powers of the states, "does this not mean that the general government is, through the use of the treaty power, entering the sphere of the regional legislatures?"[13] Is the doctrine of the case so sweeping that the national government may assume the regulation of any subject merely by entering into a treaty on that subject?[14] Momentarily disregarding the dicta in the opinion, it is clear that the decision does not go that far. The subject matter of the treaty was the protection of migratory birds—an issue not likely to inflame the passions of more than our ornithologically-inclined Calhounists.[15] Not only was the subject matter of such a routine character, despite Holmes' characterization of it as a "national interest of very nearly the first magnitude,"[16] but also the basis of the attack on the constitutionality of the measure was equally uninspiring. The Tenth Amendment,

10. U.S. CONST. Art. VI, the Supremacy Clause.

11. 252 U.S. at 433.

12. *Ibid.*

13. WHEARE, FEDERAL GOVERNMENT 179-80 (1947).

14. There is reason to doubt that Justice Holmes felt that his opinion in *Missouri v. Holland* created any marked change in the distribution of power within our federal system. Indeed, in a letter written to Sir Frederick Pollock on April 25, 1920, Holmes merely said: "My latest interest was a case I gave the judgment in last Monday, affirming the constitutionality of a law in pursuance of a treaty with you for the protection of migratory birds. Missouri said it invaded her rights, reserved in the instrument." 2 HOWE, HOLMES-POLLOCK LETTERS 41 (1946).

15. During congressional consideration of the statute which was challenged in *Missouri v. Holland,* it was said that the advocates of the bill "seem to be obsessed with the idea that Congress can do by treaty an act in violation of the Constitution of the United States [thus begging the question] which it cannot do by statute—a remarkable kind of logic, which I think, can only be indulged in by a man who has become thoroughly obsessed with this bird legislation." 55 CONG. REC. 5379, 5547-8 (1918). See also 51 CONG. REC. 8349, 8354 (1914) and 56 CONG. REC. 7361, 7365 (1918) for other expressions of doubt about the power of the President and the Senate to enlarge the powers of Congress.

16. 252 U.S. at 435.

assigned the logicians' most opprobrious label, "truism," plus the tenuous proprietary interest of a state in birds *ferae naturae,* furnished the only grounds of attack. Can it be said that because such an exertion of congressional power weathered such an attack on its constitutionality, that therefore a treaty may provide Congress with the power to legislate upon *any* subject? Is the treaty power a potentially more effective and sweeping instrument of centralization than the Commerce Clause?

Refusal of the National Government to Utilize the Holland Doctrine

Contrary to the weary maxim that all departments of government seek constantly to enlarge their own powers, there was no effort on the part of the national government to take advantage of the doctrine of *Missouri v. Holland.*[17] Indeed, in the decade following Holmes' decision, the national government expressly disavowed power to negotiate with foreign nations on subjects then regarded as part of the "reserved powers" of the states.

Thus, only two years after *Missouri v. Holland,* the national government refused to subscribe to the international conventions of 1910 and 1921 for the suppression of the traffic in women and children on the ground that those documents concerned "projects which . . . pertain, under the Constitution of the United States, to the police functions of the several states of the union and which the Federal Government would not, in consequence, be capable of fulfilling."[18] The United States representative to the Sixth International Conference of American States, held at Havana, Cuba, in 1928, felt a similar want of power in the national government to adopt a conflict of laws code since such questions were "of a domestic character and pertained to the jurisdiction of the forty-eight States, which had their separate internal regulations"[19] on such matters. And in the following year, our delegation to a convention for supervision of private manufacture of arms declared that our national government was "powerless to prescribe or enforce a prohibition or a system of licenses upon private manufacture, which takes place under the jurisdiction of the States which form the United States of America."[20] The United States delegate to the International Conference on the Treatment of Foreigners, held in Paris in 1929, stated that study of the draft Convention

> "made it apparent that the rights which the Constitution of the United States of America reserved to the several States to enact laws upon various matters covered many of the important subjects dealt with by the

17. 252 U.S. 416 (1920).

18. Response of the United States, dated March 8, 1922, to the Secretary General of the League of Nations, in reply to an invitation to sign the Convention of 1921 which confirmed the Convention of 1910; quoted in Potter, *Inhibitions upon the Treaty-Making Power of the United States,* 28 AM. J. INT'L L. 456, 457 (1934).

19. *Id.* at 457-8.

20. SUPERVISION OF THE PRIVATE MANUFACTURE OF ARMS AND AMMUNITION (League of Nations Publication IX: Disarmament No. A.30) 7 (1929).

proposed Convention. For instance, the right of foreigners with respect to real estate within their territories was a question which, under the American Constitution and the system of laws flowing therefrom, fell within the exercise of their legislative powers by the several States, and in consequence the right of foreigners to own lands and to succeed thereto by inheritance was prohibited in some of the States by statute, and in others by their Constitution as well.[21] Likewise, the several States were entitled to withhold and to grant freely or conditionally the privilege of engaging in business within their borders to corporations organized under the laws of another jurisdiction."[22]

What is the explanation for this expressed refusal on the part of the national government to utilize the doctrine of *Missouri v. Holland*? Professor Swisher suggests that the reason is twofold: first, the expansion of the commerce power; second, the disintegration of international cooperation. He adds, however, that in the event of the "return of international cooperation on a large scale, the treaty-making power might yet become the basis for the further extension of the regulatory power of Congress."[23] With the advent of the United Nations, and American subscription to the principles of the Charter of that organization, have we reached that era of large scale international cooperation? Realism demands that the answer to that inquiry be tempered with a measure of the political restraints operating upon attempted extensions of congressional regulatory power, particularly over the subject of civil rights.

Limitation of the Holland Doctrine by Treaty Provision

Can the effect of the *Holland* doctrine be avoided by a provision in the treaty itself? That is to say, may the national government, by treaty provision, effectively prevent an enlargement of its own powers which, in the absence of such treaty provision, would occur by reason of the *Holland* doctrine? The belief of our State Department that such an inquiry requires an affirmative answer, plus the fear of Southern obstruction of the treaty if such an attempt were not made, has led to the insistence on the part of the United States[24] that a so-called "Federal State Article" be included in both the Draft Covenant on Civil and Political Rights[25] and the Draft Covenant on Economic, Social, and

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21. That this impression was erroneous, see pp. 214-15 *infra*.

22. TREATMENT OF FOREIGNERS (League of Nations Publication II: Econ. & Financial No. C.97.M.23) 50 (1930).

23. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 837 (1943).

24. The delegations of Australia and India have joined the United States delegation in support of the inclusion of such a federal state article in the two Covenants.

25. Article 48 of the proposed Draft Covenant on Civil and Political Rights provides, as found in 27 DEP'T STATE BULL. at 28:

"2. This Covenant shall not operate so as to bring within the jurisdiction of the federal authority of a federal State . . . any of the matters referred to in this Covenant

Cultural Rights.[26] The State Department feels that such Articles "would ensure that the constitutional balance between the powers delegated by the Federal Constitution to our Federal Government, on the one hand, and the powers reserved to the States, on the other, would not be altered by the proposed Covenants on Human Rights."[27] The obvious purpose of the articles is, however, to limit the *Holland* doctrine by treaty provision.

The use of such provisions in treaties has a long history in this country, and in each instance the criticism of such a technique has been widespread and cogent. In 1853, the United States entered into a treaty with France whereby the President of our nation became obligated to recommend to the various states the passage of laws which would permit French aliens to own American real estate. Such recommendations were made to the governors of the states in the form of a circular letter. But one authority on the treaty power asks,

> "What would be the ultimate result if this government were obliged to resort to this procedure? Few nations would enter into treaty stipulations with us granting such privilege to American citizens in exchange for a promise on our part merely to recommend to the various separate and independently constituted State legislatures the extension of a similar privilege to the subjects of those nations. No assurance that the States would comply with the recommendations could be given."[28]

In 1871, the United States ratified a treaty with Great Britain whereby the national government agreed to urge the various state governments to permit

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which independently of the Covenant, would not be within the jurisdiction of the federal authority.

"3. Subject to paragraph 2 of this Article, the obligations of such federal state shall be:

(a) In respect of any provisions of the Covenant, the implementation of which is, under the constitution of the federation, wholly or in part within federal jurisdiction, the obligations of the federal government shall, to that extent, be the same as those of Parties which have not made a declaration under this Article [*i.e.*, have not declared themselves a federal state as required by ¶ 1 of the Article if it is to apply to any state].

(b) In respect of any provisions of the Covenant, the implementation of which is, under the constitution of the federation, wholly or in part within the jurisdiction of the constituent units (whether described as states, provinces, cantons, autonomous regions, or any other name), and which are not, to this extent, under the constitutional system bound to take legislative action, the federal government shall bring such provisions with favorable recommendations to the notice of the appropriate authorities of the constituent units, and shall also request such authorities to inform the federal government as to the law of the constituent units in relation to those provisions of the Covenant. The federal government shall transmit such information received from constituent units to the Secretary General of the United Nations."

26. Article 28 of the proposed Draft Covenant on Economic, Social, and Cultural Rights contains the same text as that of the proposed Article 48 of the Draft Covenant on Civil and Political Rights.

27. Simsarian, *Two Covenants on Human Rights Being Drafted,* 27 DEP'T STATE BULL. 20, 22 (1952).

28. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 267 (2d ed. 1916).

British subjects to use the several state canals for the navigation of the lakes or rivers contiguous to the boundary line between the United States and British possessions. President Grant accordingly sent letters to the various state governors urging such action by them.[29]

Mr. H. M. Robinson and Mr. Samuel Gompers, as delegates of the United States in the 1919 drafting of the constitution of the International Labor Organization, opposed action conferring upon the Labor Organization a power to adopt measures in labor matters having *ipso facto* the force of law. The grounds of their objections included the contention that the national government could not give any assurance that the States would legislate on police power and other "reserved power" matters.[30]

These examples preceded *Missouri v. Holland,* of course, but they illustrate the difficulty which arises upon the assumption of an international obligation by a federal state upon a topic normally controlled by the several component states. The principal objection to the use of a federal state article to solve such difficulties is the failure of the article to fix responsibility so that other signatory nations may enjoy a reciprocal assurance that the specified obligations will be met. Considering the complexity of our form of government, the use of such an article could not fail to suggest to other nations that the United States was not prepared to accept the same responsibilities it wished to impose upon other parties to the covenants.[31] It is submitted that we should heed Jay's admonition "to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long . . . as we may think proper to be bound by it."[32]

Limitation of the Holland Doctrine by Constitutional Amendment

Apparently distrusting the efficacy of limiting the *Holland* doctrine by a federal state article, the American Bar Association is now sponsoring a proposed

29. U.S. FOREIGN REL.: 1871 at 531 (Dep't State 1871).

30. Potter, *supra* note 18, at 457. For a criticism of the federal state article in the ILO, see Stoke, *The Constitution and the International Labor Conventions,* 30 MICH. L. REV. 531 (1932). The ILO Constitution of 1946, approved by the Eightieth Congress, contains a highly detailed federal state article which is discussed in Sohn, *Ideas from the Constitution of the International Labor Organization as to the Implementation of a Covenant,* 35 A.B.A.J. 217 (1949).

31. "There is something . . . which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power . . . a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it." New York Indians v. United States, 170 U.S. 1, 23 (1898). Is it less shocking when material provisions—such as the proposed Federal State Articles—are known, but not understood by the other signatory nations? "It is of the highest, and, in free states, it is of the most general importance," James Wilson warned, "that the sacred obligation of the law of nations should be accurately known and deeply felt." SELECTED POLITICAL ESSAYS OF JAMES WILSON 302-3 (Adams, editor, 1930).

32. THE FEDERALIST, No. 64, Vol. 2 at 14 (Dunne ed. 1901).

constitutional amendment to achieve such purpose. That proposed amendment provides, in part, that a treaty "shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such a treaty."[33] This proposal has been opposed within the Association itself,[34] and it is regarded by some commentators as a threat of serious impairment to the conducting of American foreign affairs.[35] If the federal state articles are objectionable for the reasons suggested,[36] *a fortiori* this proposed amendment is undesirable. Where the United States and a nation having a unitary form of government ratified a treaty containing a federal state article, the unitary state would at least have the assurance that our national government had accepted an international obligation to recommend the necessary action by the states. If the proposed constitutional amendment is chosen as the method of limiting the *Holland* doctrine, then even that negligible assurance would be absent. The proposed amendment would have the effect of requiring absolute obligations on the part of unitary states while, with respect to subjects considered within the states' reserved powers, the United States' ratification would be meaningless and illusory.

CONSTITUTIONAL LIMITATIONS UPON THE TREATY POWER

The first sentence of the American Bar Association's proposed constitutional amendment provides: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect." Would this portion of the proposed amendment, if adopted, effect a change in existing constitutional law?

The grant of power to the President and the Senate to enter into treaties with foreign nations requires such treaties to be "under the authority of the United States," rather than "in pursuance of" the Constitution[37] as is the case with federal statutes.[38] Furthermore, the Constitution contains no express

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33. Finch, *The Treaty-Clause Amendment: The Case for the Association,* 38 A.B.A.J. 467 (1952).

34. See the arguments of Mr. Lyman M. Tondel, Jr., Chairman of the ABA's Section of International and Comparative Law, in *Proceedings of the House of Delegates: Mid-Year Meeting, February 25-26, 1952,* 38 A.B.A.J. 425, 435 (1952).

35. The proposed Amendment would "cripple scores of treaties which have nothing to do with the United Nations or abstract human rights, or with the relationship between our own Government and American citizens. . . . [The Amendment] would weaken the effectiveness of treaties on commerce, civil aviation, the ownership and inheritance of land abroad, carrying on business and professions abroad, freedom from discrimination in foreign taxes, protection of the pecuniary rights and personal safety of Americans in foreign courts, and many other familiar subjects of international agreements." Chafee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution,* 38 A.B.A.J. 731 (1952). See also Sutherland, *Restricting the Treaty Power,* 65 HARV. L. REV. 1305 (1952).

36. See p. 204 *supra.*

37. U.S. CONST. Art. VI.

38. In the United States, according to an early Supreme Court decision, a treaty is "to

limitation upon this power. The Supreme Court, in its interpretation of the treaty power, has never held a treaty unconstitutional, despite repeated and vigorous contentions to that effect in a variety of factual patterns. Indeed, John Marshall declared that the Constitution "confers *absolutely* on the government of the Union, the powers of making war, and of making treaties. . . ."[39] Does this indicate that there are "no limitations on the power of the people of the United States,"[40] and that therefore the treaty power is without constitutional bounds?[41] Or are there constitutional restraints upon the treaty power, and, if so, how may they be determined and defined?

At the outset, a significant but often disregarded fact should be noted, namely, that from its earliest decisions, the Court has consistently expressed its power of judicial review of treaties rather than regarding them as so political in character as to be beyond Court inquiry.[42] The peculiar nature of a treaty would have supported a contrary theory, but the Court has said that the provisions of a treaty may not be annulled or disregarded by our courts *unless* they violate the Constitution of the United States.[43] Similarly, "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."[44] Relying on a very early statement of the Court that a particular challenged treaty "as to the point in question, is of equal force with the Constitution itself,"[45] modern supporters of the "states rights" doctrine argue that "the early Supreme Court . . . supported the view that the treaty-making power under [the Supremacy Clause of Article VI] was supreme, that it was of equal force with the Constitution itself, and was not restricted by that

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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." Foster v. Neilson, 2 Pet. 253, 314 (U.S. 1829).

39. American Insurance Co. v. Canter, 1 Pet. 511, 542 (U.S. 1828) [emphasis supplied]; *cf.* opinion of Justice Gray in Downes v. Bidwell, 182 U.S. 244, 345 (1901).

40. CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 12 (1944), quoting from Ware v. Hylton, 3 Dall. 199 (U.S. 1796).

41. *Cf.* the opinion of Justice Van Devanter in United States v. Minnesota, 270 U.S. 180, 208 (1926): "The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as *usually* subject to the general limitations in the Constitution. . . ." [Emphasis supplied.]

42. The Court has indicated, however, that where the issue is one of the treaty's consistency with an act of Congress as distinguished from the problem of a treaty's consistency with the Constitution, "any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government." Thomas v. Gay, 169 U.S. 263, 271 (1898).

43. Doe v. Braden, 16 How. 635, 657 (U.S. 1853). "Although the courts have never declared a treaty unconstitutional, there seems to be no question as to the possibility of a conflict between the subject matter of a treaty and the Constitution, in which case, of course, the treaty would be invalid." MATHEWS, THE AMERICAN CONSTITUTIONAL SYSTEM 276 (1932).

44. The Cherokee Tobacco, 11 Wall. 616, 620-1 (U.S. 1870).

45. Ware v. Hylton, 3 Dall. 199 (U.S. 1796).

document."[46] The fallacy in this argument is apparent. Even the dictum chosen limits itself "to the point in question" which was the invalidity of a Virginia law confiscating British claims within Virginia contrary to the Treaty of Paris between the United States and England. Thus, the Court was simply saying that in case of conflict between a state statute and a treaty, the latter shall prevail and the state statute shall be just as void as though it violated the Constitution itself. There is clearly nothing startling about this proposition; the same may be said about state statutes which conflict with valid federal legislation.

If, then, "the determination of the constitutionality of treaties is . . . a matter for judicial determination by the Supreme Court,"[47] what are the limitations on the treaty power which create the necessity of such judicial review?

In 1816, during the debate on a bill to give effect to a treaty of commerce with Great Britain, Calhoun suggested the scope of the treaty power in terms substantially similar to those later adopted by the Court.

> "Whatever . . . concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution. If so they are void. No treaty can alter the fabric of our Government, nor can it do that which the Constitution has expressly forbad to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited."[48]

Three-quarters of a century later, the Court adopted much of Calhoun's view in what still remains the most explicit statement by that tribunal upon the reach of the treaty power. The latter, said the Court,

> "is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[49]

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46. Johnson, *The Federal Treaty Power: A Constitutional Wolf in Sheep's Clothing?*, 11 ALA. LAW. 123, 125 (1950).

47. Boyd, *The Expanding Treaty Power*, 6 N.C.L. REV. 428, 431 (1928).

48. Speech of John C. Calhoun in the House of Representatives on Jan. 9, 1816. 29 ANNALS OF CONG. 531 (1816).

49. Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

These various suggested limitations will now be separately examined in an effort to determine the meaning of each.

Subject Matter of the Treaty as a Limitation

It has often been asserted that the treaty power extends to all subjects which "might properly be matters for international negotiations,"[50] or as the Court has phrased it, "all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty. . . ."[51] Jefferson believed that "By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated."[52] While it can scarcely be contended that such a limitation operates to confine modern treaties to the subject matter of treaties at the time of the adoption of our Constitution, the difficulty of determining what is a constitutionally proper subject matter is obvious. What standard or test may be used for the application of such a limitation? To recognize the limitation but admit that "the limits of the power are coeval and coterminous with the increasing and expanding nature of the relations between nations"[53] is to deny the reality of the limitation. Perhaps that is the correct position, but the fact remains that the Court has repeatedly indicated, by dictum, of course, that there is a subject matter limitation on the treaty power.

In *Holden v. Joy*,[54] the Court declared that

> "inasmuch as the [treaty] power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."[55]

Acceptance of this dictum would mean that not only were treaties limited to subjects of treaties at the time of the adoption of the Constitution, but that, of those subjects, only those consistent "with the nature of our government"

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50. Boyd, *supra* note 47, at 441.

51. Holmes v. Jennison, 14 Pet. 540, 569 (U.S. 1840); and see Asakura v. Seattle, 265 U.S. 332 (1924); *In re* Ross, 140 U.S. 453 (1890); Geofroy v. Riggs, 133 U.S. 258, 266 (1889).

52. Section LII of Jefferson's *Manual of Parliamentary Practice,* reprinted in THE COMPLETE JEFFERSON 753 (Padover, editor, 1943).

53. Boyd, *supra* note 47, at 411. For an argument that it is "within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign country," see Comment, 29 YALE L. J. 445, 449 (1920).

54. 17 Wall. 211 (U.S. 1872).

55. *Id.* at 243.

could be the proper concern of treaties. A short time later the Court again indicated such a restrictive view of the treaty power as "ample to cover all the *usual* subjects of diplomacy."[56]

Then in the leading case of *Hauenstein v. Lynham,*[57] the Court accepted Calhoun's statement of the limitations upon the treaty power, and indicated by so doing that it no longer viewed subject matter as a separate limitation upon that power: "Within these limits all questions which may arise between us and other powers, *be the subject-matter what it may,* fall within the treaty-making power and may be adjusted by it."[58] Such a shift was partially explained by a recognition of the effect of a subject matter limitation in the light of our constitutional provisions on the treaty power. That is to say, once it is held that "the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter any treaty, alliance, or confederation.' "[59]

In *Missouri v. Holland,* it will be recalled, Justice Holmes intimated a possible subject matter limitation upon the treaty power when he referred to the protection of migratory birds as feasible "only by national action in concert with that of another power."[60] Does this indicate that the treaty power extends only to such subjects and not to those which might be regulated by another form of law?

Public law commentators have generally rejected the subject matter limitation on the treaty power or accepted it with a definition so broad as to have the same practical effect. Thus Charles Cheney Hyde believed the test to be whether there is "the requisite association with the International relations of the United States,"[61] and W. W. Willoughby required only that the treaty power "be exercised with constitutional *bona fides.*"[62] Quincy Wright combines both views by stating that "the treaty must be international in character, not a mere subterfuge for domestic regulations. . . ."[63] Still another writer believes the treaty power to be "unlimited, in terms of either subject matter or of type of treatment for that subject matter to be provided in the agreement, assuming freedom from the exercise of force or fraud upon the negotiators at the time of

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56. United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 197 (1876). [Emphasis supplied.]

57. 100 U.S. 483 (1879).

58. *Id.* at 490. [Emphasis supplied.]

59. *Ibid.*

60. 252 U.S. at 435.

61. PROC. AM. SOC'Y INT'L L. 52 (1937). The Constitution "confines the treaty power to our foreign relations." WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 433 (1936).

62. 1 WILLOUGHBY ON THE CONSTITUTION 570 (2d ed. 1929).

63. Wright, *The Constitutionality of Treaties,* 13 AM. J. INT'L L. 242, 263 (1919). "A treaty may deal with a matter which, under the general principles of the Constitution, is within the reserved powers of the states but may nevertheless be valid if it relates to an appropriate subject of international agreement. . . . But the treaty power could not infringe upon the reserve powers of a state where the interests of a foreign nation are not concerned." MATHEWS, THE AMERICAN CONSTITUTIONAL SYSTEM 277 (1932).

concluding the treaty,"[64] but he adds the protective *caveat* that his statement is true at least "in the absence of any valid restrictions of a special nature arising from either national or international sources. . . ."[65] The absence of a definition of what might be such "valid restrictions" nullifies the utility of the statement, but the reference to "force or fraud upon the negotiators" suggests that subject matter limitations on the treaty power, if they exist, are of such a character as to impose no realistic and practical restraint on the conduct of our foreign relations. It has also been suggested that the use of the treaty power must "accord with the underlying conditions inherent in the nature" of the power, "namely, that it must be exercised 'to promote the general welfare' of the American people and that the matters dealt with must directly concern the international interests or relations of the nation."[66]

Even if there is a theoretical subject matter limitation upon the treaty power, it may be clearly shown that the actual practice does not conform to the theory. Even before World War II, and in an era when the United States' participation in international relations was sharply limited, it had nevertheless incurred treaty obligations upon such diverse subjects as the standardization of herdbooks,[67] prevention of animal diseases,[68] uniformity of powers of attorney,[69] stolen automobiles,[70] bills of lading,[71] weights and measures,[72] motion-picture films,[73] statistics on causes of death,[74] limitation on the use of force for recovery of contract debts,[75] and perpetual leaseholds.[76]

Finally, there can be no doubt that the protection of human rights is such a matter as directly concerns "the international interests or relations of the nation," that such power is being exercised in good faith, and that there is the requisite association with our international relations. The Court itself has said that "it may safely be assumed, that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government."[77] Clearly the protection of civil rights has always been primarily governed by principles of public law, and the precedents for treaties upon that subject are

64. Potter, *supra* note 18, at 463.
65. *Ibid.*
66. Anderson, *The Extent and Limitations of the Treaty-Making Power under the Constitution,* 1 AM. J. INT'L L. 636, 665 (1907).
67. TREATIES IN FORCE 124 (U.S. Dep't State, No. 2103, 1941).
68. *Ibid.*
69. *Id.* at 252.
70. *Id.* at 224.
71. *Id.* at 136.
72. *Id.* at 134.
73. *Id.* at 146.
74. *Id.* at 98.
75. *Id.* at 2.
76. *Id.* at 240.
77. Holmes v. Jennison, 14 Pet. 540, 569 (U.S. 1840).

bountiful.[78] It is submitted, therefore, that the subject matter of the two Covenants on human rights should be regarded as constitutionally appropriate for inclusion in treaties.

Distribution of Powers within a Federal System as a Limitation

Closely related to, and perhaps indistinguishable from, the subject matter limitation on the treaty power is the idea that the maintenance of our federal system as a form of government imposes a limitation upon the treaty power. That is to say, the treaty power "may not be used to secure regulation or control of a matter not properly and fairly a matter of international concern,"[79] and it must be exercised in a manner "consistent with the nature of our institutions, and the distribution of powers between the general and state governments. . . ."[80] Proponents of such a limitation freely invoke that provision of the United Nations Charter which declares: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[81] Admitting that the word "state," as so used, refers to a nation rather than a political subdivision of a nation, it is nevertheless contended that the Charter provision limits United Nations activities to those subjects usually controlled by the central government in the exercise of its treaty power. One authority on international law has expressed the opinion, with reference to this provision in the Charter, that there is "little doubt that its basic idea: the existence of matters which, by their very nature, are solely within the domestic jurisdiction of a state, is erroneous. There is no matter that cannot be regulated by a rule of customary or contractual international law; and if a matter is regulated by a rule of international law it is no longer 'solely within the domestic jurisdiction' of the state concerned."[82]

Some commentators have asserted that the treaty power is unlimited except for the "implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority."[83] Stated in this manner, the limitation would prevent a change in the separation of powers between the executive, judiciary, or legislative departments as well as freezing the division of

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78. See, *e.g.*, the Treaty of 1919 on the Protection of Minorities in Poland. 1 HUDSON, INTERNATIONAL LEGISLATION 283 (1931); *Documents relating to the Protection of Minorities,* LEAGUE OF NATIONS OFFICIAL JOURNAL (Spec. Supp. No. 73, 1929). The Treaty of Berlin of 1875, Article 35, guaranteed freedom of religion and freedom from discrimination on grounds of religion. 4 HERTSLET, MAP OF EUROPE BY TREATY 2758 (1891).

79. 1 WILLOUGHBY, *op. cit. supra* note 62, at 570.

80. Holmes v. Jennison, 14 Pet. 540, 569 (1840). The treaty power "could not take a power from the states and give it to the federal government, nor a power from the federal government and give it back to the states." WILLIS, *op. cit. supra* note 61, at 433.

81. U.N. CHARTER Art. 2, ¶ 7.

82. KELSEN, THE LAW OF THE UNITED NATIONS 770-1 (1951).

83. COOLEY, CONSTITUTIONAL LAW 145 (4th ed. 1931).

powers between the state and national levels of government.[84] The former has engendered little discussion; the latter is the core of the problem. That is to say, may the President and the Senate create an international obligation on the part of the United States, the satisfaction of which will require and authorize congressional legislation upon subjects controlled by the several states in the absence of a treaty? "Doubtless a treaty would be held invalid," Benjamin Wright assures us, "if . . . it dealt with a matter which was not an appropriate subject of international agreement and which invaded the domain of powers reserved to the states."[85] Professor Corwin, on the other hand, has taken the position that in the field of foreign relations, "the doctrine of Enumerated Powers has always had a difficult row to hoe, and today [1944] may be unqualifiedly asserted to be defunct."[86]

The argument is often made that to use the treaty power to alter the present division of powers would "usurp the amending power,"[87] but it is clear that a treaty cannot amend the Constitution.[88] The Court has repeatedly said that an act of Congress will prevail, in our courts at least, over an inconsistent prior treaty,[89] whereas a formal constitutional amendment will prevail over a later inconsistent act of Congress. Thus, while a treaty may effect a change in the distribution of powers which would be an appropriate subject for a constitutional amendment, the former may be repealed, for purposes of municipal law though not for purposes of international law, by a mere act of Congress. If, then, the Covenants on human rights, or any other treaty obligation of the

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84. It has been said that "it necessarily follows from the subordination of the treaty-making power to the Constitution that it must be so exercised as not to encroach upon the powers delegated to the executive, legislative, or judicial branches of the government." Anderson, *supra* note 66, at 647. Similarly, "the power to appropriate money cannot be taken over and re-assigned by treaty to the Secretary of the Treasury." Magnusson, *Our Membership in the United Nations and the Federal Treaty Power under the Constitution,* 34 VA. L. REV. 137, 150 (1948).

The language of the Court in Geofroy v. Riggs, 133 U.S. 258, 267 (1890) "surely means that the treaty-making power is subordinate to . . . the separation of powers. The Court's reference to restraints imposed by 'the nature of the government itself' suggests that the separation of powers was in its mind." WHEARE, *op. cit. supra* note 13, at 182. But a leading authority on the treaty power, and international law generally, reaches the opposite conclusion after a careful survey and analysis of the problem: "It appears that the principle of separation of powers imposes no limitation on the treaty-making power. . . ." Wright, *Treaties and the Constitutional Separation of Powers,* 12 AM. J. INT'L L. 64, 93 (1918).

85. B. F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 136 (1942).

86. CORWIN, *op. cit. supra* note 40, at 17.

87. Magnusson, *supra* note 84, at 150. "That the President and Senate cannot by treaty change the framework of government established by the Constitution seems obvious since the Constitution itself provides how it shall be amended." BURDICK, THE LAW OF THE AMERICAN CONSTITUTION 71 (1929).

88. Hyman, *Constitutional Aspects of the Covenant,* 14 LAW & CONTEMP. PROB. 451, 457 (1949).

89. Chinese Exclusion Case, 130 U.S. 581 (1889); Head Money Cases, 112 U.S. 580 (1884).

United States, were interpreted to give Congress power to effectively protect United States inhabitants against civil rights infringements, such power would be terminable at the will of a majority of both houses of Congress.

While *Missouri v. Holland* is usually cited for the proposition that the treaty power need not be exercised in such a way as to maintain the existing division of powers, it is believed that those cases concerning the power of aliens to own and inherit real property are much more significant in demonstrating the point. The leading case on the topic, *Hauenstein v. Lynham*,[90] arose from a bill in equity brought by Swiss citizens praying that the proceeds from the sale of Virginia realty be paid to them as heirs of the intestate Swiss owner. At a prior inquisition of escheat, a judgment had been rendered in favor of the escheator for that district of Virginia, in accordance with Virginia law which provided that realty of aliens dying intestate escheated to the state. Resting on an 1850 treaty between the United States and Switzerland which gave the heirs the right to dispose of the property, the Court invalidated the Virginia statute as applied and held that the plaintiffs were entitled to the property. "We have no doubt that this Treaty is within the treaty-making power conferred by the Constitution. . . . There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject."[91] The decision was in accord with a long series of precedents.[92]

The peculiar significance of the land devolution cases is best shown by reference to the conflict of laws field. Under the Supremacy Clause, a valid federal statute nullifies inconsistent state legislation automatically and without a consideration of the importance to the state of such legislation. To determine the relative importance of state regulated interests, it is necessary to observe the hierarchy of values established in litigation involving multi-state interests. That is to say, the field of conflict of laws has indicated those areas in which the interest regulated is so fundamental to the state in question that the conflicting mandates of other states are to be disregarded. Control of succession to real property is such an interest. So fundamental is the interest of a state in defining capacity to own land within its boundaries that the law of such state controls who may inherit land, his interests, duties and liabilities, as well as the validity and effect of a will devising an interest in land, including the capacity of the testator to make the will and that of the devisee to accept the property, and the nature of the estate created.[93] In no other area does the law of a particular state have such preference in choice of law problems. Thus, conflict of laws principles on the validity of a marriage or the capacity of the parties to marry, the

90. 100 U.S. 483 (1880).

91. *Id.* at 490.

92. Carneal v. Banks, 10 Wheat. 181 (U.S. 1825); Hughes v. Edwards, 9 Wheat. 489 (U.S. 1824); Orr v. Hodgson, 4 Wheat. 453 (U.S. 1819); Chirac v. Chirac, 2 Wheat. 259 (U.S. 1817).

93. RESTATEMENT, CONFLICT OF LAWS §§ 245, 249 (1934).

validity of a divorce, contracts, torts, and other relationships, all demonstrate a "balancing of interests"—a process of compromise and yielding to determine which state law should apply. No such process is followed in determining the law to control ownership of real property. That interest is regarded so basic to the law of the situs that it must always prevail even in situations where other states have a definite interest in the matter.[94]

If, then, states have reserved powers which are absolute, so far as control of title to land within the state is concerned, but which must yield to other interests so far as the validity and effect of its citizens' marriages, divorces, contracts, and torts are concerned, it is clear that such power over land ownership enjoys a unique sanctity in the hierarchy of state powers. Yet, in spite of this sanctity, the treaty power has consistently been held capable of dictating succession to real property in terms which conflict with the law of the situs on that subject.[95] It is submitted, therefore, that such decisions more effectively refute the supposed division of powers limitation than does the usually-cited *Missouri v. Holland*.

Yet, in spite of these factors, the idea persists that the existing division of powers and separation of powers must not be disturbed by the creation of treaty obligations. Opponents of the Briand-Kellogg Treaty, for example, urged that "the power of Congress to declare war could not be restricted or destroyed, in whole or in part, by international agreement on the part of the United States."[96] And, during the Senate debate on the League of Nations, it was argued that the Treaty of Versailles was an unconstitutional invasion of congressional powers such as the war power, the commerce power, and the power to raise and equip armies.[97]

Chief Justice Hughes declared in a speech in 1929:

> "[I]f we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation on the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power."[98]

There are at least two obvious difficulties with this statement. First, it suggests little more than Professor Willoughby's requirement of "constitutional

94. *E.g.*, Fall v. Eastin, 215 U.S. 1 (1909).

95. See cases cited in note 92 *supra*.

96. SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS, App. II, 279 n. (1929).

97. 57 CONG. REC. 1605, 3741, 3911, 4030, 4312, 4523, 4691, 4699, 4859, 4864 (1919); 58 CONG. REC. 955 (1919).

98. PROC. AM. SOC'Y INT'L L. (1929).

good faith" in the exercise of the treaty power,[99] a limitation which probably attaches to all governmental power. Second, it assumes that a distinction can be made between "matters which . . . pertain to our external relations" and "matters which normally and appropriately" were within the jurisdiction of the states. Even if such a distinction may be made at any one point in our history, it is still obvious that a subject which may normally be regarded as within the jurisdiction of the states may become a matter appropriate for international action. The protection of human rights is clearly an example of this developmental process, as the lessons of World War II so abundantly demonstrate.

Express Prohibitions of Power as Limitations

It is often asserted that whatever the extent of the treaty power, it cannot constitutionally be used to violate one of the express prohibitions of the Constitution or to create power in Congress to do so.[100] Professor Willis makes the further distinction that "where the power is prohibited to the whole national government, it is also prohibited to the treaty power, because that is a part of the national government; but . . . where Congress only or some other branch of government only is prohibited from exercising a power, the treaty power is not subject to such limitation."[101] A treaty which "violated the Constitutional prohibition against the establishment of religion or the restriction of its free exercise, which abridged the right of the people peaceably to assemble and to petition for a redress of grievances, [or] which sought to re-establish chattel slavery . . ."[102] would be unconstitutional. Similarly, the provisions of the Ex Post Facto Clause and the Bill of Attainder Clause, both of which have been held to limit even the war power so far as United States citizens are concerned, would probably limit the treaty power.[103] But prohibitions such as those just enumerated are of the type which the Covenants on human rights seek to reinforce, not undermine or violate. The type of constitutional provision which is more likely to raise the issue of a third limitation upon the treaty power is the Eminent Domain Clause conflicting with a treaty providing for the nationalization of all arms factories without compensation,[104] or the Article III provision

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99. See p. 210 *supra.*

100. "[W]hile treaties in conflict with the Constitution are void, such a conflict can only occur in case one of the express prohibitions directed to all authorities of the national government is disregarded." Wright, *supra* note 63, at 262. "A treaty . . . cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do." TUCKER, THE CONSTITUTION OF THE UNITED STATES 725 (1899). "It also seems clear that the national government cannot do by means of a treaty what it is expressly forbidden in the Constitution to do at all." BURDICK, *op. cit. supra* note 87, at 71. *Cf.* Asakura v. Seattle, 265 U.S. 332, 341 (1924).

101. WILLIS, *op. cit. supra* note 61, at 434.

102. DAVIS, THE TREATY-MAKING POWER OF THE UNITED STATES (1920), an address delivered by Ambassador Davis at Oxford University, Feb. 20, 1920.

103. CORWIN, *op. cit. supra* note 40, at 24.

104. See Note, 48 COL. L. REV. 890 (1948).

for the "Trial of all Crimes . . . in the State where the said Crimes shall have been committed . . ."[105] conflicting with a treaty making United States citizens amenable to trial by an international tribunal.[106]

History is not without examples of violations of this limitation upon the treaty power. The Louisiana Purchase Treaty of 1803 contained the following provision:

> "That the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the port of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage than that paid by the citizens of the United States."[107]

By the Tonnage Act of July 20, 1790,[108] a duty of six cents per ton was laid upon ships of the United States, and a duty of thirty cents per ton was levied upon vessels built within the United States since 1789 which belonged wholly or in part to subjects of foreign powers. All other ships or vessels had to pay a duty of fifty cents per ton. In addition, there was imposed a ten per cent tax on all goods imported in ships or vessels not of the United States.[109] By terms of the treaty, the twelve year period ran from 1804 to 1816; Louisiana was admitted as a state into the Union in 1812. It has been contended,[110] therefore, that from 1812 to 1816 the ports of Louisiana enjoyed privileges in commerce with France and Spain not granted to the ports of any other state and in violation of Article I, Section 9 of the Constitution.[111]

The Sixth Amendment provides that a person accused of crime shall have "compulsory process for obtaining witnesses in his favor." The United States entered into a treaty with France in 1853 which provided that consuls of the signatory states should "never be compelled to appear as witnesses before the courts."[112] In the following year a subpoena was issued against a French consul in the United States, and the district court interpreted the Sixth Amend-

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105. U.S. CONST. Art. III.

106. *Cf.* Finch, *An International Criminal Court: The Case Against Its Adoption,* 38 A.B.A.J. 644 (1952).

107. As found in Farrand, *The Commercial Privileges of the Treaty of 1803,* 7 AM. HIST. REV. 494 (1902).

108. 1 STAT. 135 (1790).

109. *Id.* at 24, 411, 503.

110. Farrand, *supra* note 107, at 495.

111. "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."

112. Wright, *supra* note 63, at 259.

ment as guaranteeing to the accused *only* the same rights of compelling testimony as these assured the prosecution, and thus upheld the treaty.[113] It seems clear that a different result would have followed had the treaty not been involved.

One competent observer in the field of federalism feels that the language of the Court in *Geofroy v. Riggs*[114] "surely means that the treaty-making power is subordinate to . . . the Due Process Clause . . .,"[115] but there has been some indication that the treaty power may override the prohibitions of that great provision. During the Mexican Civil War of 1913, petitioners, the troops of one faction, crossed the border into the United States and were interned by United States troops "at a distance from the theatre of war" as required by the Hague Treaty of 1907. Petitioners sought writs of habeas corpus, alleging violation of the Due Process Clause of the Fifth Amendment. The federal court for the Southern District of California held that such internment was "not a punishment for crime, but simply an appropriate means agreed upon for the temporary care of alien forces who seek asylum in neutral territory. . . ."[116] The fact remains, however, that such means would have been regarded as "appropriate" only if reached by treaty.

Cession of State Territory as a Limitation

A final supposed limitation, which has no direct application to the Covenants on human rights, but which is noted to give the "flavor" of the type of limitation imposed, concerns the cession of state territory. May the national government, by treaty, cede part of a state's territory to a foreign power without the consent of such state? Many of the writers in the field of international and constitutional law have contended that such an inquiry must be answered in the negative, thus imposing an additional limitation upon the treaty power. Ours has been a history of acquisition rather than cession of territory, but in the one instance in which the United States did cede part of the territory of a state, it sought and obtained the consent of the state before ratifying the treaty. This was, of course, the settlement of the boundary between Maine and Canada. Maine was represented in the negotiations by commissioners and the Maine legislature gave its consent. While this procedure probably flowed as much from beliefs of political necessity as from constitutional compulsion, it did deprive students of the Constitution of their only opportunity to witness a test of this supposed limitation on the treaty power. If the United States should ever be successfully invaded, however, "there will be a pretty controversy as to the right of the Federal Government to ransom the rest of the Union by ceding all or any part of the invaded portion."[117] The Supreme Court itself has given support to

113. *In re* Dillon, 7 Fed. Cas. 710, No. 3,914 (N.D. Cal. 1854).
114. 133 U.S. 258 (1890).
115. WHEARE, FEDERAL GOVERNMENT 182 (1947).
116. *Ex parte* Toscano, 208 Fed. 938, 941 (S.D. Cal. 1913).
117. DAVIS, *op. cit. supra* note 102, at 17.

the idea that a treaty might constitutionally cede part of a state's territory without the latter's consent. The Court has said that "it is a sound principle of national law, and applies to the treaty-making power of this government . . . that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government, within its constitutional powers, neither the rights of a state nor those of an individual can be interposed."[118]

THE "DANGER" OF RATIFYING THE COVENANTS ON HUMAN RIGHTS

The Necessity for Legislation Implementing the Covenants

One of the principal attacks upon the Covenants on human rights has sprung from disagreement as to the self-executing character of those Covenants. Both contain provisions expressly intended to reject any suggestion that they are self-executing. The Draft Covenant on Civil and Political Rights, for example, provides that where the rights recognized in the Covenant have not already been "provided for by existing legislative or other measures, each [contracting] State undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant."[119] The Draft Covenant on Economic, Social and Cultural Rights contains a similar provision.[120]

Critics of the Covenants admit that such a provision "suggests the impression"[121] that they are not self-executing, but they rely upon a decision of an intermediate appellate court in California[122] as an interpretation of the Supremacy Clause which "points in the opposite direction."[123] In that case a California court invalidated a state statute against Japanese ownership of land as contravening the United Nations Charter. In reviewing the case, the California Supreme Court has recently held otherwise,[124] but the relevancy of the case to the problem of the Covenants on human rights may be questioned. It has been argued that due to this decision of a California court—that an unimplemented provision of the United Nations Charter may invalidate an inconsistent state

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118. Lattimer v. Proteet, 14 Pet. 4, 14 (U.S. 1840).

119. Article 2 of the Draft Covenant on Civil and Political Rights, as found in Simsarian, *supra* note 27, at 23.

120. Article 2 of the Draft Covenant on Economic, Social, and Cultural Rights provides, Simsarian, *supra* note 27, at 29: "Each State Party hereto undertakes to take steps, individually and through international co-operation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by legislative as well as by other means."

121. Fleming, *Danger to America: The Draft Covenant on Human Rights,* 37 A.B.A.J. 739, 740 (1951).

122. Sei Fujii v. California, 217 P.2d 481 (Cal. App. 1951).

123. Fleming, *supra* note 121, at 740.

124. 242 P.2d 617 (Cal. 1952).

law—"it may be assumed that another court may, in like manner, consider the Covenant in its present form, implemented or not, as the supreme law of the land. Consequently, attempts will be made to derive all sorts of 'rights' from the document independently of implementation and the courts will be asked to strike down state laws allegedly repugnant to the Human Rights Covenant."[125] The argument, therefore, is that because one court has held that the Charter is self-executing,[126] it follows that a wholly separate instrument, containing a much stronger requirement of implementing legislation, may also be found to be self-executing.[127] The two analogous provisions of the Charter and the Covenants are so dissimilar in content and purpose as to nullify the implication that interpretation of one must follow the interpretations of the other.

The proposed Covenants on Human Rights are, by hypothesis, concerned with the rights of the citizens or subjects of each of the contracting states, as distinguished from the rights of states *inter se*. It is well established in international law that where treaties "contain stipulations with regard to rights and duties of the subjects of the contracting States, their courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like."[128]

In spite of such principles and the explicit provisions of the Covenants requiring implementing legislation, opposition to the Covenants provides a further example of distrust of the democratic processes involved. Just as the Twenty-second Amendment represents a distrust of and limitation upon the popular will in the choice of a President, so also the proposed treaty amendment represents a distrust of and limitation upon those elected to the Presidency and the Senate.

The Covenants and the "Threat" of Diminished Civil Rights in the United States

The opponents of American ratification of the Covenants on human rights have made the further contention that the Covenants endanger the existing protection of civil rights in the United States. "When we adopt or acquiesce in the theory that the United Nations Assembly through its Declarations (plus, in some instances, ratification of a treaty by our Senate) can fix and define or qualify our basic individual rights," a former President of the American Bar Association warns, "then it follows that the same authority that confers these rights may later withdraw them or limit them or condition them in such man-

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125. Fleming, *supra* note 121, at 741.

126. U.N. CHARTER Art. 2, ¶ 2: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

127. Compare, with note 126 *supra*, the language of Article 2 of the Draft Covenant on Civil and Political Rights, note 120 *supra*.

128. 1 OPPENHEIM, INTERNATIONAL LAW 677 (3d ed. 1920).

ner as a majority of the representatives of the other nations of the world may from time to time deem appropriate."[129]

Such fears are groundless for several reasons. First, the proposed Covenants on Human Rights do not purport to "fix and define or qualify our basic individual rights." They are concerned only with the creation of an international obligation, on the part of signatory nations, not to permit civil rights protection to fall below the *minimum* standards prescribed by the Covenants. Each signatory party remains free either to maintain a higher standard of civil rights protection or to elevate existing protection to such a higher standard. Second, there is no authority in the United Nations or any of its agencies to "withdraw . . . or limit . . . or condition" civil rights protection within any signatory nation. Such a withdrawal or limitation or conditioning of civil rights can occur only as the result of action by municipal law-making agencies, or by their acquiescence in private infringements of civil rights, but not by international interference. Finally, the Draft Covenant on Civil and Political Rights explicitly provides that "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any Contracting State pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."[130] We are authoritatively told that the purpose of this provision[131] is "to stress the point that under no circumstances should either Covenant be utilized as a pretext for any decrease in the higher standards existing in some countries (such as the United States) with respect to fundamental human rights accorded to persons in these countries because of more advanced Constitutional safeguards or for any other reason."[132] This Article, like the articles requiring implementing legislation[133] by Congress or the state legislatures in accordance with our existing division of powers concept, is designed to prevent "any dilution or diminution of our rights and freedoms. . . ."[134] A similarly-worded article in the original Covenant on Human Rights[135] has been labelled a "trick provision" on the ground that "many of our rights arise through a restraint on 'Congress' to deny or abridge basic rights but not as a restraint

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129. Holman, *The Convention of Freedom of Information: A Threat to Freedom of Speech in America,* 37 A.B.A.J. 567, 570 (1951).

130. Article 4, ¶ 2, Draft Covenant on Civil and Political Rights.

131. Article 5, ¶ 2 of the Draft Covenant on Economic, Social, and Cultural Right contains a similar provision.

132. Simsarian, *Two Covenants on Human Rights Being Drafted,* 27 DEP'T STATE BULL. 20, 22 (1952).

133. Article 2 of each of the Draft Covenants.

134. Mrs. Franklin D. Roosevelt, *Progress Toward Completion of Human Rights Covenants,* 26 DEP'T STATE BULL. 1024, 1025 (1952).

135. Article 18, ¶ 2 of the original Covenant on Human Rights provided: "Nothing in this Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any Contracting State or any conventions to which it is a party."

on the treaty-making power."[136] It would seem apparent, however, that whatever the validity of this argument under the provision in the original Covenant, both the new Draft Covenants make it clear that irrespective of whether a civil right arises from a restraint on Congress or any other department of the government, the Covenants may operate only to enlarge, rather than diminish, the scope of human rights protection in the United States.

CONCLUSIONS

The foregoing critique of the Draft Covenants on Human Rights, in the light of the relationship between the Constitution and the treaty power, suggests nine conclusions.

First, the reserved powers of the states do not limit the power of the United States to subscribe to the Covenants on human rights, for if, under *Missouri v. Holland,* the protection of migratory birds is "a national interest of very nearly the first magnitude," *a fortiori* the protection of human rights is such an interest.

Second, the doctrine of *Missouri v. Holland* has not been exploited by the national government, not because of doubt as to the sweeping character it assigned the treaty power, but for want of need for such a doctrine due to the expansion of the commerce power and the disintegration, prior to the United Nations, of international cooperation.

Third, as a matter of power, the national government may, by treaty provisions called federal state articles, effectively prevent the enlargement of its own powers which, in the absence of such treaty provision, would occur by reason of the *Holland* doctrine. The American Bar Association's proposed constitutional amendment would also destroy the *Holland* doctrine, but in a manner which is much more objectionable than the federal state article technique.

Fourth, the subject matter of the Draft Covenants on human rights is a matter of distinct national and international importance and, therefore, should be regarded as constitutionally appropriate for inclusion in treaties.

Fifth, the treaty power cannot be used to amend the Constitution because ordinary acts of Congress invalidate, for purposes of municipal law, prior inconsistent treaties, and, *a fortiori,* at least on an intranational level, because the amending procedures of Article Five are exclusive.

Sixth, the clearest indication that division of powers does not limit the treaty power comes, not from *Missouri v. Holland,* but from the long series of cases characterized by *Hauenstein v. Lynham,* holding that treaties may create capacity in aliens to inherit and own land contrary to the law of the situs of such land.

Seventh, there are no express constitutional limitations upon the treaty

136. Holman, *supra* note 129, at 635.

power, and the Supreme Court has never invalidated a treaty, but if the treaty power has any justiciable limitations, they probably lie in the express prohibitions of the Constitution.

Eighth, neither of the Draft Covenants on human rights are self-executing by reason of the nature of their obligations as well as express provisions to that effect, and this fact is not altered by judicial decisions holding the United Nations Charter to be self-executing.

Ninth, both Draft Covenants contain explicit provisions which prevent their use to diminish the existing scope of civil rights protection in the United States. The purpose of the Draft Covenants is to create an international obligation on the part of signatory nations that they will not permit such protection to fall below the minimum standards provided by the Covenants.

AMERICAN BAR ASSOCIATION

REPLY MEMORANDUM of the
Committee on Peace and Law through United Nations
of the American Bar Association
to
The "Memorandum of the Department of Justice
on S. J. Res. 130, 82nd Congress,
Proposing an Amendment
to the Constitution of the United States
Relative to the Making of Treaties
and Executive Agreements"
Filed with the Subcommittee
of the Senate Committee on the Judiciary,
June 19, 1952

NOVEMBER 14, 1952

1140 North Dearborn Street
CHICAGO 10, ILLINOIS

NOTE: This Reply Memorandum expresses views of the Committee on Peace and Law Through United Nations of the American Bar Association, but it is not to be considered as the action of or as expressing the views of the American Bar Association.

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1952-53

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EXTRACT FROM HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

EIGHTY-SECOND CONGRESS

SECOND SESSION

ON

S. J. Res. 130

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO THE MAKING OF TREATIES AND EXECUTIVE AGREEMENTS

MEMORANDUM IN REPLY TO THE MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON SENATE JOINT RESOLUTION 130, EIGHTY-SECOND CONGRESS PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO THE MAKING OF TREATIES AND EXECUTIVE AGREEMENTS.



(Not printed at Government expense)

MEMORANDUM IN REPLY TO THE MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON SENATE JOINT RESOLUTION 130, EIGHTY-SECOND CONGRESS, PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO THE MAKING OF TREATIES AND EXECUTIVE AGREEMENTS

On June 19, 1952, the Department of Justice, through the then Solicitor General of the United States, Philip B. Perlman, filed with the subcommittee of the Senate Committee on the Judiciary a memorandum entitled as above set forth in which is outlined its objections to every part of the constitutional amendment proposed by Senate Joint Resolution 130, as well as the proposed constitutional amendment suggested by the American Bar Association. That memorandum states:

"Accordingly, the Department opposes any of the suggested amendments to the treaty power" (p. 2), and

"For the reasons stated in this memorandum, the Department of Justice opposes all of the proposed amendments to the Constitution" (p. 40).

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tion and, in furtherance of it, to legislate internally by the treaty mechanism for the regulation of rights and relationships hitherto regarded as solely domestic and mostly within the jurisdiction of our States.

Issues may be of law or may be of fact; but the issues on this question of treaty power are of law and fact. They were in 1787 and must today be considered against the factual backgrounds in connection with which they are presented. And those factual backgrounds have changed so radically since 1787 that the issues presented then bear no resemblance to the issues now presented with respect to the same constitutional provisions.[4]

The Department's memorandum goes into the history of the constitutional provisions dealing with the treaty power and with the power of treaties.[5] It demonstrates that under the Articles of Confederation a treaty or treaties had been made which the Congress was powerless to enforce under the Articles of Confederation.

The Department's memorandum lays emphasis on the Treaty of Peace with Great Britain signed at Paris September 3, 1787, which provided:

"ARTICLE IV

> "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted" (8 Stat. 82);

on article V of that treaty dealing with confiscated lands, on the State laws interfering with the collection of those debts, and on the cases dealing with the power of this treaty after the Constitution was adopted.[6]

No reference is made, however, to the treaty of May 4, 1796, with Great Britain[7] under article VI of which provision was made for the ascertainment of the amount of debts uncollected "by the operation of various lawful impediments since the peace" and which were to be paid by the United States.[8]

Certainly nothing like that situation faces the United States today.

There is today no question of an outstanding treaty made by the United States which it is powerless to comply with because of the recalcitrance of the States.

Exactly the reverse is the situation confronting us. Under this treaty power and this power of treaties the very existence of the States as sovereign bodies, their constitutions and their laws—even those relating exclusively to their internal affairs—are subject and subservient to the Federal Government.

It serves no purpose to review the debates in the Constitutional Convention or in the ratifying conventions. As set forth in the Department's memorandum, much was said about the treaty power and about the treaty situation then confronting the country, which is far different from that with which we are faced.

As stated in the quotation above from Hamilton's Seventy-fifth Federalist Paper, the reposing of the treaty power as it was placed was assailed on various grounds with no small degree of vehemence.

It is worthy of note, however, that at least three States proposed amendments dealing with the power of treaties—the supremacy clause—as follows:

Suggested amendment by Virginia:

"7th. That no commercial treaty shall be ratified without the concurrence of two-thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively." (III, Elliot's Debates, p. 660.)

Suggested amendment by Pennsylvania:

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[4] That difference is recognized in the case of *Missouri* v. *Holland* (252 U. S. 416), which case more than any other is responsible for the present proposals to amend the Constitution and which will be referred to repeatedly throughout this memorandum. Mr. Justice Holmes said, p. 433: "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

[5] D. of J. M., p. 11.

[6] D. of J. M., p. 12.

[7] 8 Stat. 116.

[8] Finch: The treaty clause amendment: The case for the association (38 Am. Bar Assn. Journal 467, at 529), reviews this entire matter and shows that under a treaty signed January 8, 1802, the United States paid Great Britain the sum of £600,000 with which to compensate the creditors for their losses. Attention might be called to the Trading With the Enemy Act and to the "freezing" of foreign credits in the late war.

"Article 6, paragraph 2, XII. That to article 6, clause 2, be added the following proviso, viz.: Provided always that no treaty, which shall hereafter be made, shall be deemed or construed to alter or affect any law of the United States, or of any particular state, until such treaty shall have been laid before and assented to by the House of Representatives in Congress." (II, Elliot's Debates, p. 546.)

Suggested amendment by North Carolina:

"23. That no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed, or made conformable to such treaty; nor shall any treaty be valid which is contradictory to the Constitution of the United States." (IV, Elliot's Debates, p. 246.)

It is further worthy of note that in the North Carolina convention Mr. Henry Abbott stated:

"It is feared, by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences." [9]

Missouri v. *Holland*, referred to earlier, poses the problem as no other case does. Congress had passed a statute regulating the shooting of migratory birds. Federal lower courts held this statute unconstitutional as not within the powers delegated to Congress. Thereupon in 1916 the United States made a treaty with Great Britain on the subject, which treaty provided for implementing legislation. In 1918 the Congress passed a statute in implementation of that treaty regulating the shooting of migratory birds. Missouri sought to enjoin the enforcement of the statute, and the case of *Missouri* v. *Holland* resulted. The Supreme Court Mr. Justice Holmes writing, held that the treaty being a valid treaty, the statute in implementation thereof was valid under the "necessary and proper" clause.

It is little wonder that this decision has been said dangerously to approach a constitutional amendment,[10] for there we have this sequence of affairs:

1. A statute.
2. That statute declared unconstitutional on the ground that the Constitution delegates no game-protecting powers to the Federal Government.
3. A treaty made on the subject.
4. A similar statute passed.
5. That statute declared constitutional as an implementation of the treaty.

Furthermore, this was a treaty made for the specific purpose of giving Congress legislative power in a field not theretofore within its competence, according to the courts which passed upon the question. That its objective was laudatory does not temper the constitutional problem involved.

That case, more than any other, has brought to the consciousness of the people the "Trojan Horse" which has been present in the Constitution since 1787, but which of late threatens to be affreighted with world legislation having the effect of domestic law by virtue of the treaty power and the power of treaties.

Are there any limitations on the treaty power—this power which "extends to all proper subjects of negotiation between our Government and the governments of other nations"?

One suggested limitation on the treaty power

The memorandum of the Department of Justice states (p. 18):

"Treaties cannot violate specific prohibitions of the Constitution, nor can they subvert its essential nature."

Dicta by the courts to that effect are cited (pp. 19, 20) but even as ardent a proponent of no change in the treaty power as Prof. Zechariah Chafee, Jr., of Harvard in commenting on this phase of the matter said: [11]

"No doubt, the question whether the treaty power is subject to constitutional limitations has never been squarely decided by the Supreme Court, because fortunately no American treaty has come near enough to violating the Constitution to make the issue worth litigating."

Professor Chafee is correct in stating that there is no case holding a treaty unconstitutional and he regards the first sentence of the proposed amendment of the American Bar Association as "unobjectionable in itself, but unnecessary." [12]

There should certainly be no objection by the Department of Justice to that sentence which reads:

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[9] IV, Elliot's Debates (2d ed., 1901), 191, 192.
[10] Lauterpacht, An International Bill of Rights of Man, p. 179.
[11] 14 The Harvard Law School Record, No. 3, p. 1.
[12] 14 The Harvard Law School Record, No. 3, p. 1.

"A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect."

Missouri v. *Holland* was followed a few years later by *United States* v. *Curtiss-Wright Corporation* (299 U. S. 304). These cases have done much to cast a deep shadow on the earlier dicta referred to.

We have seen above what *Missouri* v. *Holland* did. Let us follow the Court's reasoning.

Mr. Justice Holmes said at page 432:

"It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States."

"To answer this question it is not enough to refer to the tenth amendment, reserving the powers not delegated to the United States, because by article II, section 2, the power to make treaties is delegated expressly, and by article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under article I, section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed."

Speaking of he lower court decisions which had invalidated the prior act of Congress as unconstitutional, Mr. Justice Holmes stated:

"Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found (*Andrews* v. *Andrews*, 188 U. S. 14, 33)."

Mr. Justice Holmes further said:

"The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. * * * We must consider what this country has become in deciding what that amendment has reserved."

Probably the connotation of what is said about the tenth amendment is a full recognition by the Supreme Court that the powers reserved by that amendment in no way curtail or circumscribe the actions of the Federal Government under the expressly granted treaty power and the "necessary and proper" clause.

We do not find that this language, or any other in the opinion, "clearly states that there are constitutional limitations on the treaty power and that a treaty may not violate an express prohibition of the Constitution," as does the Department of Justice (footnote 29, p. 21, of D. of J. M.).

We think it is accurate to say that Mr. Justice Holmes did not say what qualifications, if any, to the treaty-making power existed. At most he did not exclude the possibility of such limitations, but noted that the treaty there under consideration did not "contravene prohibitory words." This may have intimated what in his opinion might be, were a case presented which called upon him to decide whether there were limitations on the treaty power.

An analysis of Mr. Justice Holmes' reasoning—giving to his not too affirmative statements about limitations on treaty power all that the Department of Justice claims for them—leads to the following conclusions:

> So far as the exercise of the treaty power is concerned, no powers are left to the States or the people under the tenth amendment because the treaty power swallows all save perhaps those things specifically forbidden in the Federal Constitution. But those are prohibitions and are not enumerations of powers granted to the Federal Government or reserved to the States or to the people.

Addition to this situation of the catalyst of the present position of the State Department: "There is no longer any real distinction between 'domestic'

and 'foreign' affairs,"[13] serves to emphasize further the position of the Federal Government that there are no powers reserved to the States or to the people when it comes to Federal legislation on any subject in implementation of a treaty. Startling as this may sound, it is probably the logical result of the delegation of treaty power as interpreted by the Supreme Court.

It would appear, therefore, that we have come to the directly opposite conclusion as to the scope of the treaty power from that entertained by Thomas Jefferson and expressed by him in his Manual of Parliamentary Practice.

"2. By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and cannot be otherwise regulated. 3. It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way."[14]

In *U. S.* v. *Curtiss-Wright* (299 U. S. 304, at p. 318), we find:

"It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the Nation in such territory must be governed by treaties, international understandings, and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. * * *

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."

While the American Bar Association committee on peace and law has pointed out that Mr. Justice Sutherland was confusing "the United States Government as viewed by foreign nations from the standpoint of international law with the position of the United States Government in international relations as a matter of domestic constitutional law"[15] and while Mr. Justice Jackson on *Youngstown Sheet & Tube Co.* v. *Sawyer* (343 U. S. 579, footnote 2, p. 635), has pointed out that much of Mr. Justice Sutherland's opinion was dictum, these two pronouncements in *Missouri* v. *Holland* and the Curtiss-Wright case do, as the committee on peace and law assert, "go in the opposite direction of an unlimited treaty power."

The Department of Justice itself calls attention to the case of *Ware* v. *Hylton* (3 Dall. 199, 237), "in which Justice Chase expressed doubts as to his power to declare a treaty void."[16]

Furthermore, in referring to the convention between Great Britain and the United States, proclaimed May 22, 1924, relating to the status of alcoholic liquors

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[13] Opening sentence of State Department Publication 3972, Foreign Affairs Policy Series 26, released September 1950, with a foreword by President Truman.

[14] 81st Cong., 2d sess., H. Doc. No. 739, p. 283:

"The proper distribution of legislative power between the Federal Government and the States was one of the most difficult before the Constitutional Convention of 1787 and in one of its phases even led to the suggestion by a few that the States themselves be abolished. Madison wrote to Jefferson on October 24, 1787, in part, as follows:

" 'The second object, the due partition of power between the general and local governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; some for indefinite power of legislation in the Congress, with a negative on the laws of the States; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. The question with regard to the negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the States appears to me necessary. 1. To prevent encroachments on the general authority. 2. To prevent instability and injustice in the legislation of the States.' III Farrand, The Records of the Federal Convention, 133."

[15] Report of Committee on Peace and Law, February 1, 1952—second printing.

[16] Footnote 29, p. 21, D. of J. M.

as sea stores or cargo destined for a foreign port and moving within our territorial waters on British vessels (43 Stat. 1161), Prof. Arthur E. Sutherland, Jr., of Harvard Law School stated in a recent article: "President Coolidge and the Senate evidently thought that a treaty could prevail over at least one amendment. [17]

One Milliken, who was alleged to be a citizen and a mariner as well as secretary of an incorporated association of masters and mates, and one Smith, who was alleged to own steamships and also stock in a steamship line, sought a declaration that this treaty was repugnant to the Constitution and an injunction against adherence to or enforcement of it by officials of the United States. Advantages were alleged to be secured by the treaty to British ships entering our ports over American ships.

The Circuit Court of Appeals for the Second Circuit, after reviewing the allegations, in affirming a decree for defendants, stated:

"We need not and do not pass upon the alleged conflict of the treaty with the Constitution, for we are satisfied that the appellants have not presented by their pleading sufficient allegations showing that they or their proprietary rights have been damaged, so as to warrant the inquiry" (*Milliken* v. *Stone*, 10 F. (2d) 981, 984. Certiorari denied, 274 U. S. 748, No. 1033).

In connection with any consideration of the treaty power and the power of treaties, it should be borne in mind that the first amendment to our Constitution reads:

"*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [Emphasis added.]

Article VI of the Constitution denominates three things as the supreme law of the land: the Constitution; laws made in pursuance thereof; and treaties made, or which shall be made, "under the authority of the United States."

A self-executing treaty is of the third class. It is not a law made by Congress, and Mr. Justice Holmes said in *Missouri* v. *Holland*, supra, "It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."

There is, therefore, grave question whether a self-executing treaty dealing with matters enumerated in the first amendment would encounter a constitutional prohibition even assuming that such a limitation on the treaty power exists.

Therefore, it cannot be categorically claimed as the Department of Justice does claim that: "Treaties cannot violate specific prohibitions of the Constitution, nor can they subvert its essential nature." [18]

Rather should it be said that the existence of such a limitation is shrouded in doubt and should be clarified once and for all.

A second suggested limitation on treaty power

A second possible limitation on the treaty power is that suggested by Mr. Justice Field's language in the Chinese Exclusion case, *Chan Ping* v. *United States* (130 U. S. 581, at p. 609):

"The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract."

This would seem to be a necessary corollary of the provisions of sections 1 of articles I, II, and III of the Constitution vesting respectively all legislative powers in the Congress of the United States, the executive power in the President, and the judicial power in the Supreme Court and such inferior courts as Congress should establish.

Mr. Burton Andrews in an article entitled "Amending the United States Constitution for Participation in World Government," [19] states that:

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[17] Restricting the Treaty Power, 65 Harvard Law Review, p. 1319.
[18] D. of J. M., p. 18.
[19] The Lawyer and Law Notes, vol. 4, No. 3, pp. 21, 23.

"For the National Government to attempt without a constitutional amendment to give by treaty, or otherwise, a world government 'authority to enact interpret or enforce world law,' or to confer those powers 'necessary to the establishment and the maintenance of world law and order' or those 'powers which, while defined and limited, shall be adequate to preserve peace,' would transfer some part of the legislative, executive, or judicial powers of the National Government to the world government and would be impliedly contrary to these constitutional provisions."

However, this suggested limitation has been put under attack and may not in fact exist.

Mr. Moses Moskowitz in the American Bar Association Journal for April 1949, at page 359, in speaking of the draft covenant on human rights, stated:

"Nor should the terming of the project as 'revolutionary' cause deep concern. The idea of 'supranational supervision' of the relationship of a State to its own citizens, which is the real crux of the matter, revolutionary as it may appear, is not without precedent: witness the activities of the defunct League of Nations in the field of general protection of minorities within the framework of the peace treaties concluded at the end of World War I; of the Upper Silesian minorities protection under the Geneva Convention of 1922, and of the supervision of the administration of mandated areas—all exercised by the League Council with by no means entirely unsatisfactory results."

In speaking of what is essentially within the domestic jurisdiction of any state, he says:

"Now, as to the argument that relations between governments and their citizens is a matter which is excluded from the intervention of the United Nations, it is of a purely legalistic character and excludes all considerations of political ethics. In the first place, the Charter does not define what matters are 'essentially within the domestic jurisdiction of any state,' It is a matter of interpretation. Perhaps, the correct position would be that once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, that subject ceases to be a matter being 'essentially within the domestic jurisdiction of the member states.' As a matter of fact, such a position represents the official view of the United Nations, as well as of the member states that have voted in favor of the Universal Declaration of Human Rights. Hence, neither the Declaration, nor the projected Covenant, nor any agreement that may be reached in the future on the machinery of implementation of human rights, can in any way be considered as violative of the letter or spirit of article 2 of the Charter" (p. 285).

And at page 286:

"In no case can it be truly said that the projected Covenant is an attempt to encroach upon the sovereign independence of member states. For it is the essence of sovereignty that it can be limited, and even completely abrogated, by international agreements freely entered into by members of the international community. This essentially is what international treaties add up to."

A third possibility of limitation on the treaty power

Hon. Charles Evans Hughes said 23 years ago:

"Now there is, however, a new line of activity which has not been very noticeable in this country, but which may be in the future, and this may give rise to new questions as to the extent of the treaty-making power. I have been careful in what I have said to refer to the external concerns of the Nation. I should not care to voice any opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such. That is, the doubt has been expressed in one of its opinions. But if there is a limitation to be implied, I should say it might be found in the nature of the treaty-making power.

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"So I come back to the suggestion I made at the start, that this is a sovereign nation; from my point of view the Nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments (pp. 195–196). But if we attempted to use the treaty-making power

to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power." [20]

But, in *United States* v. *Belmont* (301 U. S. 324), at page 331, Mr. Justice Sutherland stated:

"In respect of all international negotiations and compacts, and in respect of our foreign relations generally, State lines disappear. As to such purposes the State of New York does not exist."

Dictum or prophecy?

In summary, therefore, it may be said:

(*a*) The Constitution contains no express limitation on the scope of the treaty power.

(*b*) While courts have stated by way of dicta that a treaty may not do what the Constitution forbids, the existence of such a limitation is not free from doubt.

(*c*) It was thought two decades ago that there might be ground for implying a limitation on treaties if they were used to control matters which normally and appropriately were within the local jurisdictions of the States as distinguished from external relations.

(*d*) The Department of State has now stated that there is no longer any distinction between foreign and domestic affairs.

(*e*) "If the treaty is valid there can be no dispute about the validity of the statute * * *" implementing it.

(*f*) The expressly delegated treaty power overrides the reservation of powers by the tenth amendment, and

(*g*) The Federal Government may make a treaty for the express purpose of conferring upon itself the power to pass acts otherwise unconstitutional.

In looking at these propositions squarely we can no more turn the clock back 165 years than could Justice Holmes when he taught the full implication of them in *Missouri* v. *Holland*.

We must consider what forces are being brought to bear today for a utilization of treaties to confer Federal power and set up international arrangements increasingly resembling world government in deciding whether the Constitution should be amended.

POINT II. WHAT THE CONSTITUTIONAL AMENDMENT SUGGESTED BY THE AMERICAN BAR ASSFCIATION WOULD DO

1. The first sentence of the amendment proposed by the American Bar Association, reading "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect," would settle any doubt that a treaty to be effective must not conflict with the Constitution of the United States.

That sentence goes to the treaty power. It is a concept of which all opponents of amendment approve. They say it is already the law. Why, then, there should be any objection to this provision is not apparent. From what has been developed under the preceding point it is perfectly clear that it is essential.

The first phrase of the second sentence of the proposed amendment of the American Bar Association, reading "A treaty shall become effective as internal law in the United States only through legislation by Congress * * *," would prevent a treaty from becoming internal law in the United States by virtue of its own provisions only. No treaty would thereafter be self-executing as to matters of internal law. It would become law within the United States only by virtue of congressional action.

Three things deserve special notice in connection with this provision:

First, it would not affect the methods of negotiating, ratifying, or proclaiming a treaty as the same exist today.

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[20] Proceedings of the American Society of International Law, 1929, pp. 194, 196.

Second, it would not affect treaties as international compacts between the signatory powers insofar as they related to external affairs and did not involve our internal law.[21]

It should be noted particularly in this connection that this would place the United States on a parity in this respect with the vast majority of the other countries of the world.[22]

The report of the Committee on Peace and Law Through United Nations for September 1, 1950, a copy of which is on file with the subcommittee, contains as appendix A extracts from the constitutional provisions of many countries relating to treaty making, taken from Constitutions of Nations, by Amos J. Peaslee.

That report is before the subcommittee, and we quote, therefore, only a part of its text dealing with the point under discussion:

"There are only four nations, in addition to the United States, in which treaties may be ratified with the advice and consent of the Senate only; namely, Mexico, Liberia, Cuba, and the Philippines. The constitutions of 24 nations require all treaties to be submitted to the approval of the national legislatures, while the largest group of 28 requires parliamentary approval of all treaties which affect internal law, the rights of citizens, or which need implementation by the legislature" (p. 11).

The situation in Great Britain, which was adverted to in the Convention of 1787 and in the ratifying conventions, is a case very much in point.

"But in the United Kingdom whenever a treaty (other than treaties relating to belligerent action), or anything done in pursuance of it, is likely to come into question in a court of law, the questions will at once arise whether the provisions of the treaty accord with the existing law of the land and whether any action proposed to be taken by the Crown to execute the treaty is authorized by the existing law of the land. If the answer to either of these questions is in the negative, the Crown must induce Parliament to legislate so as to make the necessary change in the law or to equip the Crown with the necessary power to execute the treaty. If Parliament declines to do so, the Crown will not ratify the treaty; if by imprudence the Crown has already ratified the treaty, the United Kingdom is bound by it (for the Crown is internationally omnicompetent in the matter of treaties), and the Crown must do its best to extricate the country from an embarrassing situation. Even the fact that the treaty has been ratified and is internationally binding upon the United Kingdom, does not enable a British court to give effect to it municipally if it should conflict with the law of the land. Nevertheless, a duty to make reparation for any resulting breach of an international obligation would arise." [23]

In an article entitled "The Treaty-Clause Amendment: The Case for the Association," [24] Mr. George A. Finch, speaking of this subject, says:

"It is not a requirement of international law that treaties be the law of the land or be enforcible without action of the legislative power. International law is not concerned with the methods of enforcing treaties in the domestic domain" (p. 468).

He quotes from the opinion of Mr. Justice Curtis in *Taylor* v. *Morton* (2 Curtis 454), affirmed by the Supreme Court (2 Black 481), to the effect that while foreign nations have a right to expect treaty stipulations to be kept, it is exclusively the business of the United States through what means that shall be done and—

"Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one

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[21] The D. of J. M., at p. 17, quotes Madison (3 Elliot's Debates 514–515) in part as follows:

"The object of treaties is the regulation of intercourse with foreign nations, and is external. I do not think it possible to enumerate all the cases in which such *external* regulation would be necessary." [Italics added.]

And see Hamilton, 75th Federalist Paper, quoted supra.

[22] It is perfectly apparent that throughout the debates in the ratifying conventions it was realized that in England, even at that time, Parliament had to act to make a treaty effective as law in England if domestic law were affected. Madison, 3 Elliot's Debates 514 et seq.; Corbin, 3 Elliot's Debates 510; Madison, Elliot's Debates 500; Mason, Elliot's Debates 507. It was brought out in the constitutional convention itself by Mr. Mercer, 2 Ferrand 297.

Indeed Mr. Madison stated (3 Elliot's Debates 515):

"Suppose the King of Great Britain should make a treaty with France, where he had a constitutional right; if the treaty should require an internal regulation, and the Parliament should make a law to that effect, that law would be binding on the one, though not on the other nation."

[23] McNair, the Law of Treaties, pp. 7–8, as quoted in report of the Committee on Peace and Law Through United Nations of September 1, 1950, pp. 12–13.

[24] 38 American Bar Association Journal 467.

department or another, neither the treaty itself nor any implication drawn from it gives him any right to inquire."

It is not apparent, therefore, from the point of view of this particular phase of the question how it can be said, as does the Department of Justice (p. 17) that any limitation on that power [the treaty power] "would weaken the United States as a whole in its dealings with other nations." On the contrary it would seem that this provision would only put the United States on somewhat the same footing as most other nations at the council table and would so strengthen its hand in negotiating with them.

Third, it would remove any doubt as to whether a treaty was self-executing or non-self-executing, and therefore as to what the law of the land was at a particular time.

The memorandum of the Department of Justice objects particularly to this phase of the amendment suggested by the American Bar Association—that treaties could no longer be self-executing as domestic law but would require congressional action to give them that effect.

It is asserted:

"Whether a treaty is thus self-executing is not 'a matter of judicial guess' (A. B. A. committee report, p. 14); it is a matter primarily of construction of the treaty, which is no more difficult or obscure than any other question of construction of a written document." [25]

Whether or not this observation is legalistically accurate, the fact remains that probably the most far-reaching treaty ever signed by the United States—the United Nations Charter—contains two most significant articles [26] as to which controversy has continued for years as to whether or not they are self-executing. And we still do not know the answer authoritatively.

Judge Manley Hudson in 1950 maintained that they were not.[27]

Prof. Quincy Wright followed with an article maintaining that they were, at least insofar as they were involved in the Fujii case—California's alien land law case.[28]

The Supreme Court of California holds that they are not.[29]

The District Court of Appeals in California had held that they were.[30]

Presumably one day the question may be passed on by the Supreme Court of the United States which has constitutional jurisdiction of cases arising under treaties [31] and which Court alone can definitively settle the controversy. But, meantime, the question of whether these articles are or are not self-executing has been under debate for years. Seven years after the treaty was ratified we do not know.

It is submitted that the people and the courts are entitled to know, with a greater degree of certainty than that and in a far shorter period of time, whether this or that treaty provision is or is not internal law.

Certainly there can be no legitimate objection to the American Bar Association's proposal on the ground that it would furnish a categorical answer, which would be immediately understood, to that question.

3. The second sentence of the proposed amendment of the American Bar Association reads:

"A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty."

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[25] D. of J. M., p. 30.

[26] Articles 55 and 56 reading:

"Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

"a. higher standards of living, full employment, and conditions of economic and social progress and development;

"b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

"Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

[27] Charter Provisions on Human Rights in American Law, 44 American Journal of International Law 543.

[28] 45 American Journal of International Law 62.

[29] *Fujii* v. *California*, 242 P. 2d 617.

[30] *Fujii* v. *California*, 217 P. 2d 481; 218 Pac. 2d 595.

[31] Article III, sec. 2.

The second phrase of this sentence would limit the Congress, in legislating in matters pertaining to domestic law in implementation of a treaty, to its delegated legislative powers in the absence of the treaty being implemented.

This would definitely do away with the doctrine enunciated in *Missouri* v. *Holland*—that given a proper treaty any law in implementation of it is properly within the Congressional competence, that from the very making of the treaty a new legislative power may be conferred upon Congress under the necessary and proper" clause, however unrelated to any other specifically delegated power.[32]

The Department of Justice, at page 29, states that the Department of State's memorandum submitted to the subcommittee pointed out that "there does not appear to be any other jurisdiction in which two stages are required for a treaty to become effective."

Apparently the reference of the Department of Justice is not to page 11 of the statement of Hon. David K. Bruce, Acting Secretary of State, before this subcommittee, where we find:

"I am aware that it has been argued that the United States is alone in having a constitutional system under which treaties can become automatically the supreme law of the land. This statement appears to me to be quite misleading. I would like to submit for the record an analysis of the constitutional provisions of other countries dealing with this subject. *This survey shows that while in most countries participation by the legislature is required to apply a treaty which conflicts with existing laws, this action is almost universally taken as part of the same action by which the treaty is ratified.* This is generally by simple majority. The more important of these countries have parliamentary systems under which only a majority vote in the lower house is significant." [Italics added.]

The analysis by the Department of State has not been examined, but the above quotation would seem to support the position of the American Bar Association that in most countries, certainly where a treaty affects the domestic law, legislative action is a prerequisite to its effectiveness.[33] Of course, the American Bar Association amendment would not require two steps in any treaty which did not attempt to affect our domestic law.

Apparently the objection is based on time sequence. Perhaps the objection would disappear if congressional action could be obtained before the proclamation of the treaty. Or perhaps the objection would disappear (although that is to be doubted) if the Constitution should be amended to provide that no treaty should have effect as domestic law within the United States unless its provisions having domestic effect were such as could be enacted by Congress within its delegated powers in the absence of such treaty. That would obviate the two-step objection but would leave completely unsolved the problem of when a treaty was self-executing or not self-executing—a consideration which, it is submitted, well merits the two-step mechanism.

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[32] The Department of Justice's Memorandum advances the proposition regarding *Missouri* v. *Holland*, that today the regulation of migratory birds would probably be sustained under the commerce power (footnote 35, p. 27). It would come, no doubt, as a great shock to a Canadian goose which flew from Manitoba into Minnesota, or a fish which swam a crooked course in the St. Lawrence River between Ontario and New York, or a doe which wandered across the New York-New Jersey line to learn that they were in international or interstate commerce. The theory upon which the commerce clause could be invoked is not suggested. As to the courts sustaining it on "other Federal powers" as is intimated, it is not clear what these might be although it is fairly apparent that they could scarcely be inherent powers, since ours is a government of delegated powers. *Youngstown Sheet & Tube Company* v. *Sawyer*, supra.

Professor Chafee says of this contention: "This proposed amendment would have caused the case to go the other way, unless the *Supreme Court had strained itself to make flying birds interstate and foreign commerce*, or owned by the Nation like radio bands" (XII Louisiana Law Review, at p. 360). [Italics added.]

[33] Belgium provides that treaties of commerce, or which burden the state, "or bind Belgians individually, shall take effect only after having received the approval of the two houses."

Bolivia requires Congress in joint session to "approve or reject international treaties and conventions of all kinds."

Brazil gives the National Congress exclusive power to give final decision respecting treaties and conventions celebrated with foreign states by the President.

Burma gives Parliament the power to enter into and implement treaties and agreements with other countries, and specifically provides: "No international agreement as such shall be part of the municipal law of the Union, save as may be determined by the Parliament."

Chile provides that "The President shall conclude and sign treaties. Before their ratification they must be presented to the approval of Congress."

Colombia's provisions are to the same effect as Chile's.

It is needless to refer to other constitutions. Their provisions are set forth at pages 55 to 68 of the report of the Committee on Peace and Law Through United Nations of September 1, 1950, which is before the subcommittee.

That the two-step objection is really not an objection of merit is shown by the Department's defense of executive agreements, where it says (p. 37):

"It is evident from an examination of the various subjects that most of the executive agreements have been and are in fact congressional-executive agreements based upon the cooperation of the President and the Congress and the merger of their powers. A comparatively small number of the total agreements has rested upon the sole action of the President."

That the Federal Government finds a two-step system actually preferable to a one-step system where it can be utilized to expand the scope of executive agreements at the expense of treaties is strongly indicated by the thesis of Mr. Wallace McClure (formerly of the State Department) in his book entitled "International Executive Agreements" where he states at page 378:

"The result is that for controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present method is desirable as saving the time of the House of Representatives without increasing the present burdens of the Senate."

The Department of Justice, on pages 27 and 28, objects that treaties relating to the rights of aliens to own land and personalty, to inherit property, and to transfer property by will or intestate succession; to engage in trade or business having no interstate character, and treaties of extradition—where the crime was a purely domestic one—within the foreign state would probably be "invalid" under the suggested amendment.

By "invalid" the Department means, no doubt, the President and two-thirds of the Senate present could not conclude such treaties and make them effective within the various States without State legislation.

Mr. Finch in his article [34] deals at length with the history of extradition; points out that "At international law treaties are not required. Extradition is founded on reciprocity"; that the first Federal extradition statute was adopted in 1848; that in view of the history of the subject "it would be overemphasizing the importance of treaty-making in American constitutional law to hold that Congress would not have the power to enact legislation making extradition treaties internal law under the proposed constitutional amendment"; and that John Bassett Moore has written that general opinion, followed in practice, has been "that in the absence of a conventional or *legislative provision*, there is no authority vested in any department of the Government to seize a criminal fugitive and surrender him to a foreign power." [Emphasis added.]

In the same article (p. 470) Mr. Finch considers also the matter of treaties of friendship, commerce, and navigation in the light of the commerce clause, and concludes that Federal power under that clause would undoubtedly be as liberally interpreted in the matter of treaties as in connection with our internal matters, where its scope has been greatly expanded.

This, together with the delegated powers to establish an uniform rule of naturalization, to declare war, to define and punish offenses against the law of nations, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, and to make all laws necessary and proper for carrying into execution these and its other delegated powers, leaves a vast field, and certainly the external field, solely within the Federal province. That external field would not be affected by the proposed amendment.

But where a treaty sought to deal with the ownership or devolution of real property in a State, with the engaging in a purely local activity, or with any matter not within the delegated powers of Congress in the absence of a treaty, then, and only then, would the treaty power of the Federal Government be circumscribed. Then the treaty mechanism could not be used for amplifying the powers of the Federal Government to legislate for the internal affairs of the country.

As is so clearly pointed out by Mr. Finch, the amendment suggested by the American Bar Association would not prevent treaties being made on these subjects. Treaties could be drafted on a reciprocal internal state basis, which is "the regular procedure in Great Britain, which does not undertake to enforce treaties affecting the laws of the dominions, colonies, possessions, or protectorates without their consent." [35]

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[34] The Treaty Clause Amendment—the Case for the Association, supra, p. 528.
[35] Finch, p. 529.

Mr. Finch gives typical phraseology in this regard from the draft convention relating to civil procedure prepared by the committee appointed by the Lord Chancellor in 1919, which stipulated that the convention should not apply to any dominion, colony, or protectorate of the parties, but gave either contracting party the right to signify the adherence of any such dominion, colony, possession, or protectorate to the convention and gave the right to any such dominion, colony, possession, or protectorate to withdraw on 6 months' notice.[36]

It cannot be objected that requiring legislation by the States to enact domestic law beyond the delegated powers of Congress in the absence of a treaty would deprive the United States as a whole of sovereignty to make such treaties.

In Canada the question was squarely presented in the case of *Canada* v. *Ontario and Other Provinces* (1937, A. C. 326), which involved the power of the Parliament of Canada to enact labor legislation in compliance with treaties concluded. The Privy Council held such legislation was beyond the competence of the Canadian Parliament and that cooperation by the Provinces, in whom the competence lay, to enact such legislation was essential to effectuate the treaties.

Several interesting passages from the opinion of the Privy Council deserve quotation here.

"Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes."

After saying that advance approval is often sought, the opinion continues:

"* * * But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. * * *

"But in a state where the legislature does not possess absolute authority, in a federal state where legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures; and the executive have the task of obtaining the legislative assent not of the one parliament to whom they may be responsible, but possibly of several parliaments to whom they stand in no direct relation. The question is not how is the obligation formed—that is the function of the executive—but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures (p. 348).

"It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with Provincial classes of subjects, be dealt with by the totality of powers; in other words, by cooperation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters, she still retains the watertight compartments which are an essential part of her original structure. The Supreme Court was equally divided; and, therefore, the formal judgment could only state the opinions of the three judges on either side. Their Lordships are of opinion that the answer to the three questions should be that the act in each case is ultra vires of the Parliament of Canada, and they will humbly advise His Majesty accordingly" (p. 353).

There would appear, therefore, to be no objection in legal principle to any of the three objectives of the American Bar Association's proposal.

The first one makes sure a rule said to exist already, but about which there may well be grave doubt.

The second solves the problem of when a treaty becomes operative as domestic law. The two-step objection, if real, is one of time sequence and cannot outweigh the desirability of the object sought to be accomplished.

With respect to the third objective, it has been shown that the area that it would exclude from Federal competence is the area of prescribing domestic law and then only in those situations where the Federal Government would not be able to legislate in the first place, aside from the doctrine exemplified by

[36] Finch, p. 529.

Missouri v. *Holland*. It would leave external matters where they are. It would leave a very wide treaty power untouched. True it is that it would forestall the utilization of the "bootstrap" doctrine of *Missouri* v. *Holland* to enable "the government of the day" to legislate internally, by self-executing treaties or in implementation of treaties, on every subject and to make that legislation the law in every State, town, and village in the country regardless of local law or local constitutional provision. It would insure some meaning being left in the tenth amendment.

Is amendment necessary?

The memorandum of the Department of Justice, at page 17, states that "It is incumbent on the proponents of such a limitation ('any constitutional limitation of the scope of treaties') to show a definite and compelling need for it."

Perhaps it would be well to recall that the original Bill of Rights was not the result of "a definite and compelling need for it" to protect against the new Constitution, for there had been no experience under that Constitution demonstrating any such definite and compelling need. The Bill of Rights was precautionary. It was born of desire not to see precious rights and freedoms put at the hazard of being interfered with. It was the possibility not the actuality which produced one of the greatest safeguards of human rights that the world has yet known.

So, this challenge of the Department of Justice creates no issue. Its position is that it is necessary to wait until the horse is stolen before putting a lock on the stable door.

But, in today's situation, not only is there just cause for apprehension. There is real cause for alarm.

The United Nations Charter is one of the most far-reaching treaties that this or any other nation could enter into. But it was framed at San Francisco and signed in approximately 2 months time. It was subjected to but 4 days of formal hearings by the Senate, which gave its advice and consent to ratification 1 month and 2 days after it was signed.[37] There was neither time nor opportunity for the people to study, debate, and digest its 111 articles and the 70 articles of the Statute of the International Court of Justic.

The charter contained a provision (art. 2, sec. 7) which provided that nothing contained in the Charter should authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state nor require the members to submit such matters to settlement under the Charter.

It seems obvious that without such a clause the United States would never have ratified that treaty.

Very shortly it became apparent to the most casual observer, however, that this was a clause of dubious meaning—or at least was claimed to be.

Mr. John P. Humphrey, while Director of the Division of Human Rights of the United Nations, outlined the situation thus:

"What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals and, therefore, a matter which has been traditionally regarded as being within the domestic jurisdiction of the states. What is now being proposed is, in effect, the creation of some kind of supranational supervision of this relationship between the state and its citizens." [38]

It has been pointed out already (supra, point I) that Mr. Moses Moskowitz, in the April 1949 number of the American Bar Association Journal, defended the "revolutionary" idea of "supranational supervision" of the relationship of a state to its own citizens. Not only that, but he attempted to "reason away" the limitation on the United Nations with respect to domestic affairs (Charter, art. 2, sec. 7) by saying that perhaps the correct position would be that once a matter becomes the subject of regulation by the United Nations that subject ceases to be a matter "essentially within the jurisdiction of the member states." He asserted, what there is no reason to doubt, that that view represented the official view of that body.

In other words, article 2, section 7 of the Charter means nothing whatever!

Truly a long road has been traveled since Alexander Hamilton expressed his views on treaty power.

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[37] The Federal Convention of 1787 commenced May 14, 1787, and adjourned September 17, 1787 (Ferrand, vols. 1 and 2), a period of over 4 months. The Constitution did not become effective until March 4, 1789, or approximately 2 years after the convention sat.

[38] Annals of the American Academy of Political and Social Science, January 1948.

The substance, if not the language, of Mr. Moskowitz's thesis has been announced by our own Government when it stated in an official publication of the State Department with a foreword by the President of the United States that:

"There is no longer any real distinction between 'domestic' and 'foreign' affairs."

This pronouncement was made in 1950, only 5 years after the State Department participated at San Francisco in 1945 in framing article 2, section 7 of the Charter.

In footnote 33, at page 26, of the Department of Justice memorandum, it states:

"Similarly the provisions of the Convention on Human Rights relating to civil and political rights and those of the Convention on Freedom of Information would, insofar as they affect State activities, seem to come within the power of Congress to enforce by legislation, the provisions of the fourteenth amendment; * * *"

Even if it be assumed that all of the civil and political rights referred to in the Covenant on Human Rights and in the Convention on Freedom of Information are protected against invasion by the States under the fourteenth amendment, this proposition of the Department of Justice overlooks the basic fact that entering into such multilateral treaties would, under the doctrine of *Missouri* v. *Holland*, lay a broad base for direct plenary Federal legislation concerning those rights, whereas, with respect to the fourteenth amendment, the Supreme Court has said:[39]

"If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States* v. *Harris* (106 U. S. 629)), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the fourteenth amendment.

"That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject is not now the question. What we have to decide is whether such plenary power has been conferred upon Congress by the fourteenth amendment; and, in our judgment, it has not."

The Draft Covenant on Economic, Social, and Cultural Rights[40] (one of the two draft covenants into which the much talked of Covenant on Human Rights has been divided) contains as the first paragraph of article 1 the following:

"1. Each state party hereto undertakes to take steps, individually and through international cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this covenant by legislative as well as by other means."

Not a single economic, social, or cultural right recognized in the covenant, therefore, but that would be the subject of Federal legislation for everyone in the United States. These include: the right to work as defined (art. 5); the right to just and favorable conditions of work (art. 6); the right to form and join local, national, and international trade-unions (art. 7); the right of everyone to social security (art. 8); adequate food, housing, and clothing (art. 10); an adequate standard of living and the continuous improvement of living conditions (art. 11); the right to the enjoyment of the highest standards of health (health being "complete physical, mental, and social well-being, and not merely the absence of disease or infirmity") (art. 12); education (art. 13). The need for

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[39] Civil Rights cases, 109 U. S. 3.

[40] United Nations Bulletin, September 1, 1952, p. 253.

special protection to motherhood and children and the widest possible protection to the family is "recognized" by the states parties to the covenant (art. 9).[41]

Article 3, the substance of which was originally urged by the United States of America,[42] reads as follows:

"The states parties to this covenant recognize that in the enjoyment of those *rights provided by the state in conformity with this covenant*, the state may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." [Emphasis added.]

If the Federal Government were seeking complete and exclusive control over the citizen and his relations to the Government and his fellow citizens in the fields covered by this draft covenant, it would be difficult to devise a more complete charter for Federal treaty law.

Furthermore, those controls would not longer be a matter of national concern alone. They would become matters of international cognizance.

In a joint report on progress in the study of the constitutional aspects of international treaties to the house of delegates of the American Bar Association by the committee for peace and law through the United Nations and the section of international and comparative law which appears as appendix A to the September 1, 1951, report of the former committee, it was stated (p. 36):

"It appears that substantial agreement exists on the following major points:

* * * * * * *

"2. An international treaty cannot be safeguarded by a clause in the treaty or by reservation or understanding against the expansion of the limited power of the Federal Congress in the United States to such extent as necessary to fulfill the obligation under the treaty if Congress determines to exercise such power.

* * * * * * *

"No action of the parties or of the Senate and the President at the time of ratification of a treaty can take away the constitutional power of Congress to execute the treaty and to fulfill the national obligation under the treaty if Congress decides to do so."

These considerations alone would be entirely sufficient to demonstrate the need for constitutional amendment. They are cause for greater alarm, it is submitted, than the original States had when they amended the Constitution to include our Bill of Rights. Indeed they show the definite and compelling need for amendment that the Department of Justice insists must be shown.

The Fujii case was affirmed by the supreme court of California on April 17, 1952, after being under consideration for almost 2 years. While the court distinctly held that the provisions of the United Nations Charter involved (the preamble, arts. 1, 55, and 56) were not self-executing and did not supersede domestic law (pp. 620–622), the majority opinion stated (p. 622):

"The Charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs."

What weight that consideration was given by the majority of the court (the decision was by a sharply divided court) is difficult to evaluate.

One dissenting judge stated:

"The majority opinion, I think, is not motivated by an effort to find the law, and to uphold it as found. I think it stems more from the strong social views of the justices who write it and from their desire to make the law what they think it should be" (Schauer, J., p. 639).

Be that as it may, the affirmance was placed squarely on the fourteenth amendment, the court saying that decisions of the Supreme Court invited a reexamination of the constitutional issues involved. In holding that California's alien land law violated that amendment the court admittedly went contrary to the earlier holdings not only of that same court but also of the Supreme Court of the United States. (See case list, 217 P. 2d 481, 483.)

Concern over the Fujii case centers in the attitude and views reflected in the opinion of the district court of appeal, second district, division 2 (217 P. 2d 481). It felt itself precluded by the earlier cases from holding the statute un-

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[41] The text of the draft covenant should be consulted for the precise wording of the "rights" there recognized. They are couched in extremely broad, not to say vague or ambiguous terms.

[42] State Department Bulletin, June 25, 1951, p. 1004.

constitutional (p. 484). It placed its decision squarely on the United Nations Charter "an authority more potent than the constitution of this State" (p. 484). It stated that the position of the country "forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its plain language and its unmistakable purpose and intent."

The preamble and articles 1, 55, and 56 of the Charter were examined as well as the Universal Declaration of Human Rights, various articles of which were cited, and the court stated:

"This declaration implements and emphasizes the purposes and aims of the United Nations and its Charter" (p. 488).

* * * * * * *

"A perusal of the Charter renders it manifest that restrictions contained in the Alien Land Law are in direct conflict with the plain terms of the Charter above quoted and with the purposes announced therein by its framers. It is incompatible with article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property."

On rehearing granted (218 P. 2d 595) in speaking of the Declaration of Human Rights, the court said, in part:

"There is no intimation in the opinion that the declaration is a treaty, for it is not, or that it has any binding force on the United States or any State or political subdivision thereof. Reference was made to that document, as clearly shown by the opinion, as well as to the address of the President to the Senate, as especially emphasizing the purposes and guarantees of the Charter."

Prof. Quincy Wright in his article National Courts and Human Rights in 45 American Journal of International Law says:

"It is reasonable to infer from the phrase 'in cooperation with the organization' [Charter, Article 56] that the Members, in fulfilling their pledge to take 'separate action,' *SHALL be guided by the purposes stated in the Charter and by the more detailed interpretation of the meaning of those purposes and the appropriate methods of achieving them, which organs of the United Nations have recommended. Consequently, the terms of Article 56 amply support the opinion of the court in the Fujii case* [*the District Court of Appeal*] *that the Universal Declaration of Human Rights, while not a treaty, constitutes an authoritative. interpretation of the words 'Human rights and fundamental freedoms' in Articles 55 and 56 of the Charter*" (p. 72). [Brackets, capitals, and emphasis added.]

The mandatory verb "shall," which we have capitalized, is significant.

"Undoubtedly, the organs of the United Nations are also entitled to interpret the duties of the members of the United Nations, to define the meaning of human rights and fundamental freedoms, and to establish procedures for promoting universal respect for those rights and freedoms. Such action in some cases, may be obligatory upon, and, in some cases, only recommendatory to, the members. Insofar as organs of the United Nations have acted, whether by interpretative resolutions, by implementation of procedures of the Charter, or by achieving acceptance by States of concrete obligations as proposed "in the so-called Covenant of Human Rights, the members, pledged to act in cooperation with the United Nations, are bound to be guided by, or at least to consider, this action" (p. 74).

The United Nations Charter was ratified in 1945.

The Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948.

Secretary of State Stettinius stated in July 1945 to the Foreign Relations Committee of the Senate during the hearings on the United Nations Charter:

"Because the United Nations is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendation upon the member States" (hearings, p. 218).

The conclusion is obvious. Our supreme law may today be made for us by treaties, to which we adhere. But we are getting to a point in this process where it is contended that an international body in which we have only one vote out of many and which has no legislative power can subsequently advise us as to what our obligations are and consequently what our domestic law is as a result of that treaty. The danger of following such a course is apparent.

The draft covenant on civil and political rights (the other branch of the old Human Rights Covenant, United Nations Bulletin, September 1, 1952, p. 255) also requires mention. This draft covenant deals in the civil and political field with a broad and general category of matters and would constitute a wide basis for federal treaty law.

However, the Commission on Human Rights decided last spring to ask the Economic and Social Council to instruct it to complete its work at its 1953 session, so that neither draft covenant is definitive (State Department Bulletin, July 7, 1952, p. 20).

An instructive analysis by Prof. William Fleming of the older draft Covenant on Human Rights appeared in 37 American Bar Association Journal at pages 739 and 816 entitled "The Danger in the Covenant on Human Rights."

It has been stated:

"For us to serve notice that we would not today accept our own Bill of Rights if it were presented to us as an international document is a statement which should make every one of us blush." [43]

This statement representing as it may, a point of view entertained by many, fails to take into account the difference between what is essentially and solely the affair of the United States, for our own guidance and protection and subject to the interpretation of our own courts and making those same matters the affair of numerous other countries, subject to their claims of meaning and, if their ideas and ours did not coincide, perhaps subject to interpretation by the International Court of Justice or some other international body. The remark quoted above strongly illustrates the divergence between matters which are thought of as subject to the treaty power today and those considered as such in 1787.

Mention has already been made of the proposed convention for the establishment of an international criminal court [44]—not a court to try only war crimes; not a court to try international disputes between nations; [45] but one which could try an American citizen (if we should ratify such a convention and confer jurisdiction upon the Court) outside the United States for an act done here and alleged to constitute an international crime, without indictment by a grand jury and without trial by jury, in the face of the provisions of amendments V and VI to the Constitution relating to indictment by a grand jury and a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.[46]

Under article I section 8 Congress can clearly provide the definition of and the punishment for "offenses against the law of nations." But such a statute would necessarily create a crime under Federal law—not an international crime; and punishment for such a crime so created would be surrounded by all the constitutional safeguards. The difference is obvious.

The Senate of the United States knows that there is pending before it a treaty with one foreign nation, the provisions of which, if ratified, might well apply to many other nations under most-favored-nation clauses. That treaty provides:

"Nationals of either party shall not be barred from practicing the professions within the territories of the other party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other party." [47]

This would apply to attorneys and counselors at law, and is believed to be the first provision of its kind in any proposed treaty. It would, it is true, require an alien candidate for admission to the bar of any State or of any Federal court to comply with the educational and perhaps the residence qualifications of our various jurisdictions. But it would outlaw requirements as to State or National citizenship as a prerequisite to admission. Whether an oath to support the Constitution and laws of the United States and of a particular State could be required of an alien applicant who owed allegiance to a foreign state and its constitution and laws would pose an interesting question.[48] The

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[43] Mrs. Eleanor Roosevelt, New York Times, July 23, 1952, p. 14.

[44] Appendix C, Report, Committee on Peace and Law, February 1, 1952, p. 31.

[45] This is the function of the International Court of Justice in adhering to which the Connally reservation was attached providing that it "shall not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States.*" [Emphasis added.]

[46] The pros and cons of this suggested treaty are discussed in two articles in the American Bar Association Journal for August 1952, at pp. 641 and 644.

[47] Art. VIII–2 of the proposed treaty with Israel.

[48] New York: Judiciary Law, sec. 466, requires that all attorneys take the constitutional oath of office in open court and subscribe to the same in a roll book. The New York Constitution, art. XIII, sec. 1, sets forth the constitutional oath. It requires that the person swear that he will support the Constitution of the United States and the Constitution of the State of New York. Judiciary Law, sec. 467, requires before a person may practice law that he must file an affidavit stating that he is a natural-born citizen of the United States, or, if not a natural-born citizen, he must state where and when he was naturalized.

wisdom of creating aliens officers of our courts is open to serious question and to require it in the case of States which think otherwise is of the type of domestic legislation which the suggested amendment would prevent.

Were that treaty ratified the States would no longer be able to control who practiced law before their courts.

The Congress by statute, if so minded, could plainly accomplish this result for the Federal courts regardless of any treaty.

Can it possibly be that the necessity of providing Americans with the reciprocal right to practice law in the courts of foreign countries can call for any such a provision at this?

The Convention on Gathering and International Transmission of News and Right of Correction is another proposed treaty growing out of the United Nations.[49]

POINT III

The Department of Justice states (p. 28) that "the framers clearly understood that the treaty power was very broad in scope and could reach *many matters* which would otherwise be solely of State concern" [italics added] but apart from the suggested limitation that a treaty may not do what the Constitution forbids, the Department of Justice does not specify any field reserved to the States as against the exercise of treaty power. As has been shown (point I) the Federal Government may create for itself jurisdiction over all matters within the competence of the States.

Therefore the statement of the Department of Justice at page 28—

> "In respect of general legislative powers, those powers not delegated to the Federal Government are reserved to and may be exercised by the States"—

is of little significance.

The Memorandum of the Department of Justice at page 29 states that a treaty has equal status with an act of Congress so that a later inconsistent treaty will prevail over an earlier statute and a later statute will prevail over an earlier treaty. While an inconsistent later treaty will supersede an act of Congress in toto if they are totally inconsistent, a later inconsistent statute cannot totally supersede a prior treaty; and the Department of Justice recognizes this. It states (p. 31):

> "Finally, in an extreme case, there is available as a check on the President and Senate the undoubted power of Congress, by subsequent statute, to override the treaty so far as its effect on domestic law in concerned."

The same argument was advanced in the report of the Committee on Federal Legislation and the Committee on International Law of the Association of the Bar of the City of New York.[50]

Such a procedure would be not only dangerous, but would probably be open to challenge in some of its applications.

A treaty may and in many cases does have a double aspect. First, and that is its primary aspect and principal purpose, it constitutes an international agreement between sovereigns and becomes as to them binding under international law—its international law phase. But the other aspect is the domestic law phase.

True it is that a self-executing treaty may as to its domestic law phases be nullified by a subsequent inconsistent statute.[51] But that remedy is drastic indeed.[52] It involves a breach of the international obligation of the United

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California: Secs. 6060–6067, Deering's California Codes—Business and Professional Codes (1951) require an applicant for admission to the practice of law to be a citizen of the United States and to take an oath to support the Constitution of the United States and the Constitution of California.

New Jersey: New Jersey Statutes Annotated, sec. 41: 1–1, 1–2, require all applicants for admission to the bar to swear that they will support the Constitution of the United States and the Constitution of New Jersey. Such applicants must also swear that they will bear true faith and allegiance to the Constitution of the United States and to the governments established in the United States under the authority of the people. So far as can be determined, there is no statutory requirement of citizenship.

Pennsylvania: Purdon's Pennsylvania Statutes, title 17, sec. 1603, sets forth the oath of an attorney. This requires that the applicant swear that he will support the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania.

The statutes of the remaining States have not been examined.

[49] Report, Committee on Peace and Law, February 1, 1952, pp. 21 and 42.

[50] This report is on file with the subcommittee. See pp. 5, 27, and 28.

[51] Chinese Exclusion Case, *Chan Ping* v. *United States*, 130 U. S. 581.

[52] The Department of Justice recognizes this, for it says this remedy is in an extreme case.

wisdom of creating aliens officers of our courts is open to serious question and to require it in the case of States which think otherwise is of the type of domestic legislation which the suggested amendment would prevent.

Were that treaty ratified the States would no longer be able to control who practiced law before their courts.

The Congress by statute, if so minded, could plainly accomplish this result for the Federal courts regardless of any treaty.

Can it possibly be that the necessity of providing Americans with the reciprocal right to practice law in the courts of foreign countries can call for any such a provision at this?

The Convention on Gathering and International Transmission of News and Right of Correction is another proposed treaty growing out of the United Nations.[49]

POINT III

The Department of Justice states (p. 28) that "the framers clearly understood that the treaty power was very broad in scope and could reach *many matters* which would otherwise be solely of State concern" [italics added] but apart from the suggested limitation that a treaty may not do what the Constitution forbids, the Department of Justice does not specify any field reserved to the States as against the exercise of treaty power. As has been shown (point I) the Federal Government may create for itself jurisdiction over all matters within the competence of the States.

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States—that obligation which has "the force of law, but derive it from the obligations of good faith."

In an address entitled "Recent Questions and Negotiations" (18 American Journal of International Law 229, at p. 230) Hon. Charles E. Hughes, then Secretary of State of the United States, said:

"Where international rights and obligations are involved, controversies not otherwise adjusted would naturally come before an international arbitral tribunal whose decisions would be governed by international law and would not be controlled by municipal law. This principle was explicitly recognized in the recent decision by Chief Justice Taft, as arbitrator in the controversy between Great Britain and Costa Rica, where the Chief Justice illustrated the point that, while in our system an act of Congress might for municipal purposes repeal a treaty, the United States could not thus get rid of an international obligation which would continue and would be enforced by an international arbitral tribunal. The Chief Justice said:

" 'This is not an exceptional instance of an essential difference between the scope and effect of a decision by the highest tribunal of a country and of an international tribunal. The Constitution of the United States makes the Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute and a statute may repeal a treaty. The Supreme Court cannot under the Constitution recognize and enforce rights accruing to aliens under a treaty which Congress has repealed by statute. In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect.' "

Today, with the treaty power and the power of treaties being what they are, a foreign nation dealing with us is not on notice of any constitutional lack of power of the United States to make any treaty domestic law unless, perhaps, it be a treaty transgressing a prohibition of the Constitution or abdicating legislative, executive, or judicial functions, if the latter be thought longer to constitute a limitation on treaties.

Under international law, however, a foreign nation is probably on notice of constitutional limitations on the treaty power.[53]

So a subsequent statute nullifying a self-executing treaty as domestic law would be an unvarnished breach of good faith, and of our international commitments.

If full legislative debate were originally called for, any such serious situation would be much less apt to arise; and if it did could be much more easily defended.

If we are to look for our ultimate protection in an extreme case to the Congress to nullify by legislation the domestic effect of an unwise treaty, why is there objection to having the Congress put the treaty provisions in operation, domestically, in the first place? "The exception proves the rule" doesn't mean that the rule must have exceptions but that if the rule doesn't cover the exceptional case, it is no rule.

While under the "necessary and proper" clause Congress acquires by the making of a treaty the power to implement the treaty in fields otherwise beyond its powers (*Missouri* v. *Holland*), does that give Congress the right to "unimplement" a treaty in that very same field? The result would be repudiation of our international obligation once recognized and implemented by Congress. The question would not be presented where the subject matter is originally within congressional power apart from the "necessary and proper clause," such as the Chinese exclusion case, supra.

To say that these constitutional provisions have served well for 163 years is no answer to today's problems; and we are confronted with today, not 1787. We are dealing with a situation where not only is the treaty power being utilized to form a basis for domestic legislation where none heretofore existed[54] but also, as vigorously asserted by Mr. Moscowitz,[55] as a basis for creating a supranational regulation of our individual relationships, rights, and duties.

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[53] Hackworth, Digest of International Law, vol. V, p. 154, citing the Harvard Research in International Law.

[54] Articles 55 and 56 of the United Nations Charter. These articles probably furnish a constitutional basis under *Missouri* v. *Holland* for a compulsory FEPC law. And see report of President's Committee on Civil Rights, par. 10.

[55] Supra, point I.

Do we wish an increasingly centralized government which may increasingly assert (and certainly is being increasingly importuned to assert) the right, by means of the treaty power and the power of treaties to legislate for every State and citizen in the country on any subject, external or internal, that can be made the subject of a treaty with some foreign state, unless, perhaps, it be action forbidden by the Constitution? Or is the treaty power and the power of treaties to be confined to those fields which are external or which fall within the powers delegated to Congress without Congress' acquiring new powers from the very fact of the making of the treaty itself?

Are our States to be practically, if not totally, submerged by that power which was delegated in 1787 in order to allow the new Government which was being formed to implement a treaty dealing with debts owed British subjects? Or are the States to continue to be sovereign States with rights and powers of regulating and legislating with regard to their own internal affairs?

In view of the breadth of the treaty power today, it is nothing short of astounding to find in the memorandum of the Department of Justice the following:

"In such circumstances, if any constitutional amendments to the powers over foreign relations are needed, one would expect that they would be in the direction of increasing the powers of the Government in the international field, and of facilitating the conduct of foreign relations" (p. 39).

In all fairness the Department should have explained how it would be possible to increase the powers of the Government in the international field and what effect any such increase, if possible at all, would have upon the internal structure of our country and the sovereignty of the States.

Naturally, if one is in favor of increasing power, one must be opposed to any restriction on existing power.

Early in the Constitutional Convention, Mr. Read observed:

"Too much attachment is betrayed to the State Govermts. We must look beyond their continuance. A national Govt must soon of necessity swallow all of them up. They will soon be reduced to the mere office of electing the national Senate." [56]

The path for the practical abolition of the States by means of the treaty power and the power of treaties has been well marked out. The swallowing process by the treaty route is more than a mere possibility. That process must not be allowed to come to fruition.

Not only is the treaty power a threat to the States, it is a threat to the very Federal Government itself through the pressures of internationally minded groups who would favor erecting a world government by the treaty route in whose favor we would abdicate much, if not all, of our sovereignty, and who believe the treaty route to their objective more easily traveled than the amendment route.

The Department of State and the other departments should welcome the amendment which would relieve them of the pressures from these groups and put them more on a par than they are today with other nations at the conference table.

If it be the desire of the people of the United States by and through the use of treaties to permit their Government to be converted into an all-powerful state, it is within their power, and it is their right to do so. But the people should be frankly advised that this is where "treaty law" is leading us.

If the people wish much or all of the powers of the Federal Government to be abdicated in favor of a world government or an international organization through the use of the treaty power, this is their privilege. But if they want to prevent this being done through the use of the treaty power they should be told that a constitutional amendment is necessary.

If it is the desire of the people to see the States reduced to internal impotency through the use of the treaty power, that avenue is open.

If the people feel that their liberties would be safer and more adequately guarded by the representatives of other nations than by their own, this also can probably be accomplished through treaties.

In the first instance, it is not a question of the wisdom or the folly, the desirability or the repugnance, of any of these steps. The problem is of the means which may be used to accomplish these ends and the people should be fully advised by the Government that the treaty power furnishes an avenue through which these ends may be accomplished.

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[56] 1 Farrand 136.

It is submitted that the people should not make any such fundamental decisions as to their Government without full public debate and full exploration of the consequences and a full comprehension of what is being done.

As the Members of the Senate know better than anyone else, the only sure way of giving the American people an opportunity of such full debate, exploration, and comprehension is to adopt now a constitutional amendment limiting the treaty power. Then, if the American people want to change their form of government and their basic rights (both State and individual), this also would have to be accomplished by a constitutional amendment, the very mechanism of which would assure to the people in connection with each such proposed fundamental change the full public debate and full exploration and comprehension of what was being proposed.

Respectfully submitted.

COMMITTEE FOR PEACE AND LAW THROUGH UNITED NATIONS OF THE AMERICAN BAR ASSOCIATION.

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Action of House of Delegates of the American Bar Association

San Francisco, California, September 18, 1952

The resolution set forth below was adopted by the House of Delegates on September 18, 1952, at the annual convention of the American Bar Association, San Francisco, California, September 15-19, 1952.

RESOLUTION

RESOLVED, that the American Bar Association recommends to the Congress of the United States, for consideration, an amendment to the Constitution of the United States in respect of executive agreements, reading as follows:

> "Executive agreements shall not be made in lieu of treaties. Congress shall have power to enforce this provision by appropriate legislation. Nothing herein shall be construed to restrict the existing power of Congress to regulate executive agreements under the provisions of this Constitution."

(The foregoing resolution was recommended by the Standing Committee on Peace and Law in its September 1, 1952, Report, copies of which are available in leading public, university and college, and law libraries in the United States, as well as at the office of the American Bar Association.)

Additional References on Treaty Power, *see*

Deutsch, "The Need for a Treaty Amendment," 38 Am. Bar Assn. Jour. 735 (Sept., 1952)

Finch, "The Treaty Clause Amendment: The Case for the Association," 38 Am. Bar Assn. Jour. 467 (June, 1952)

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MIAMI, FLORIDA

June 1, 1953

Honorable Fred M. Vinson
Chief Justice of the United States
Washington 13, D. C.

Dear Mr. Justice Vinson:

At the risk of being thought a persistent nut, I am enclosing an article of the type I had reference to in my previous letter.

No doubt other Chief Justices have had their intellects misrepresented and villified after they were dead and could say no more about it. The attempts represented by the enclosed article imperil the United States. It is a pity you can do nothing about it, if you do not agree with the views and expressions attributed to you in this article.

I thank you for your signature and I will frame it and hang it on the wall. To me the Chief Justice of the Supreme Court is in many ways a greater office than the presidency of the United States.

Sincerely yours,

John B Olmsted

John B. Olmsted
Member of the International Law Committee
of the Florida Bar.

To all Editors, Columnists, Commentators — for IMMEDIATE RELEASE as feature article, letter-to-editor, or as background material for editorial writers.

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AGAIN THE ISSUE IS FREEDOM*

By FRANK CHODOROV

No. C-226

Before this session of Congress comes to a close, the country will hear a debate that could be entitled: Resolved, that the Constitution, including the Bill of Rights, shall be the supreme law of the land. For, coming up in the Senate is the so-called Bricker amendment, designed to prevent the subordination of the Constitution to foreign treaties in matters affecting internal affairs. Rid of its legal terminology, the resolution (and its counterpart in the House) is intended to bulwark the sovereignty of the United States against subversion by the UN.

The proposed amendment arises from a rather odd situation. A nation is threatened by invasion, not by a foreign army, but by its own legal entanglements. Not soldiers, but theoreticians and visionaries attack its independence and aim to bring its people under the rule of an agglomeration of foreign governments. This is something new in history. There have been occasions when a weak nation sought security by placing itself under the yoke of a strong one. But, here we have the richest nation in the world, and apparently the strongest, flirting with the liquidation of its independence. Nothing like that has ever happened before.

The breach in our defenses, oddly enough, is in our own Constitution. Article VI provides that ". . . All Treaties . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". This provision was made necessary by the peculiarity of dual authority which characterizes the composition of our political establishment. It would be an embarrassing situation if the State of Maine, for instance, refused to recognize a boundary treaty or a fisheries arrangement with Canada, after such a compact had been executed by the President and confirmed by the Senate.

However, it was assumed when this Article was written that a treaty was a contract to do specific things, carefully spelled out; there was no intention, as Jefferson said, to enable the President and the Senate under this Article to "do by treaty what the whole government is interdicted from doing in any way". That is, in matters concerning our internal management, and unrelated to the treaty, Article VI did not vitiate the Constitution.

But now we are a member of the United Nations, and our freedom of action is mitigated by our obligations as a signatory to its Charter. It is true that this Charter denies to the UN any authority to "intervene in matters which are essentially within the jurisdiction of any state". Nevertheless, the UN had hardly been organized when, with the full approval of our own State Department, the agencies of this body proceeded to make Conventions, Treaties and Pacts to tell the member nations how to conduct their internal affairs. If any of these Conventions, Treaties and Pacts — general in their wording and replete with such loose phrases as "racial equality", "social justice" and "world peace" — should be adopted by the General Assembly of the UN, what influence would they have on our courts, even though they were not formally executed as required by our Constitution? After all, we are a member of the UN, with authorized delegates bound by the vote of its General Assembly.

What Article VI did not envisage are these "blank check" treaties stemming from our membership in an international body. Nor could the Founding Fathers conceive of our own State Department declaring (in an official publication under date of September, 1950) that "There is no longer any real difference between 'domestic' and 'foreign' affairs" —an assertion which, if carried to its logical conclusion, would make the compulsory labor regulations of Moscow applicable to this country, or our monogamy laws applicable to Moslem countries.

The extent to which "blank check" treaties might liquidate the sovereignty of the nation and the freedom of the people was clearly defined by John Foster Dulles in a speech on April 12, 1952:

"The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and they also make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for Congressional laws are invalid if they do not conform to the Constitution, whereas *treaty law can override the Constitution.* Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers away from the state and give them to the Federal Government or to some international body and *they can cut across the rights given the people by the constitutional Bill of Rights.*" (Emphasis supplied.)

Almost a year after the delivery of this speech, Mr. Dulles, as Secretary of State, spoke before the Senate Judiciary Committee in opposition to the Bricker amendment, saying that the integrity of the present Administration could be relied upon as a protection against "Treaty Law".

The plea of Mr. Dulles amounts to asking that we place reliance on a government of men rather than of laws. Perhaps he is right, philosophically; no law is better than the men who enforce it. Yet, there is some comfort in being able to call upon the wording of a law when bad administrators seek to circumvent it. And, after all, the Bricker amendment only proposes to prevent the law of the UN from superseding the law of the U.S.

Already this has happened. The people of California have seen fit to legislate against mixed marriages. But a member of the Supreme Court of that state, invoking the Charter of the UN, declared that "In the face of these authoritative pronouncements the matter of racial equality should be a settled issue." (*Perez vs. Lippold.*) Thus, it has been implied that though the sovereignty of a state may stem from its people, it is a sovereignty subject to treaties entered into

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under our membership in the UN.

In another case (*Fujii vs. State*), the Supreme Court of California overrode the California Alien Land Law, which prohibits aliens from owning land in that state, by calling upon the UN Charter for its authority. "The Charter", concludes the Court's decision, "represents a moral commitment of foremost importance and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs." So, the Charter becomes more binding on the court than the previous decisions of the United States Supreme Court on this California law. The Normans did nothing more when they imposed their laws on the Anglo-Saxons.

Nor should it be forgotten that the Chief Justice of the United States Supreme Court argued last year that the President of the United States had authority under the UN Charter, because it was an international treaty, to seize the steel mills, something he could not do under the Constitution. The basis for this reasoning is a clause in the UN Convention which gives the Executive unlimited authority during a declared "emergency". Chief Justice Vinson succeeded in convincing two other members of the Court; six stood by the Constitution. If he had won over two of these six judges, a precedent in favor of the Charter and against the Constitution would have been established.

These cases indicate a trend. The trend is underlined in the Covenant of Human Rights, enthusiastically supported by our former delegate to the UN Assembly, Mrs. Franklin D. Roosevelt. This Covenant—which has aroused so much opposition that even UN enthusiasts are willing to drop it from treaty status to a "statement of principles"—provides that "in case of a state of emergency officially proclaimed by the authorities, a state may take measures derogating from its obligations". This means that if the President of the United States declares an emergency to exist, he can suspend the Bill of Rights forthwith. Perhaps Mr. Truman had this in mind when he said last year at a newspaper conference that he had the authority to seize the public press, even as he seized the steel mills.

The Declaration of Human Rights is in fact a blueprint for socialism, and if it were ratified by the Senate, the Bill of Rights in our Constitution would automatically be wiped out. This "great charter of human liberty" provides that "everyone has a right: 'to just and favorable conditions of work and protection against unemployment' (without defining 'just' or 'favorable'); 'to rest and leisure'; 'to periodic holidays with pay'; 'to social security' ", and a lot of other nice things that add up to totalitarianism. This Declaration, it is interesting to note, was slipped into the Japanese Peace Treaty (as an obligation on Japan), at the instigation of the State Department, and with the acquiescence of Mr. Dulles.

It is reported that the UN has some 200 Conventions in the making, and we may be sure that every one of them is an implied invasion of our sovereignty. But, who among Americans are in favor of this sort of thing?

There appear to be three groups enrolled in the "New School of Internationalists". First, there are the doctrinaire socialists, with whom must be included the whole congeries of planners, who are convinced that the millenium can be attained through Big Government. The American tradition of limited government, with delegated power, bulwarked by the Declaration of Independence and the Constitution, is the impediment that must be overcome. The chink in the armor of that tradition, they have found, is Article VI. If international law is the supreme law of the land, then the Conventions and Pacts of the UN could serve to override that tradition. The UN becomes an aid to socialists, for breaking through the barrier of the Constitution.

Then there is that agglomeration of sentimentalists who see in international sovereignty the cure for all the ills of national sovereignty. Their reasoning, if it can be called reasoning, runs like this: a number of small governments is bad; therefore, one monster world government is good. Their psychological quirk prevents them from seeing this *non sequitur*, even as it prevents them from learning anything from history.

The third group consists of those conscious Communists who would put this country under the domination of Moscow, and who find in the UN an instrument for their purpose. The U.S.S.R. joined this organization only when it became evident that its Charter was amenable to their plan for world conquest, and there is reason to believe that American stooges wrought the Charter with that end in view. At any rate, the Charter presents no threat to U.S.S.R. sovereignty, only to ours.

But, whether opposition to the Bricker amendment comes from this last group and their equally sinister fellow-traveller dupes, or from the first two, who believe they are motivated by high ideals, the fact is that all of them aim to liquidate the sovereignty of the United States. In short, there is a bit of treason in their hearts.

As your immediate and most important task in defense of America, you can perform no greater service than to give the passage of the Bricker Amendment immediate priority over all other objectives. You will be exercising such wisdom as your forebears, when they insisted upon the first ten amendments, our Bill of Rights. The American people must make it crystal-clear to all courts, to all officers of Government that no provision of a treaty shall be valid which conflicts with any provision of the Constitution.

We face powerful opposition in getting the necessary two-thirds of both Houses and three-quarters of the State legislatures to adopt the Amendment, but patriotic women and men can put this Constitutional Amendment over, if they devote their minds and hearts to the task.

Samuel Adams, of Boston, organized Committees of Correspondence in the Colonies to write letters to officials and private personages to search out supporters of American independence, and those who were against it and those noncommittal. Without their encouragement of the strong, and driving of the timid and opponents to cover, the American Revolution could not have been won.

So today in every community throughout the country such committees for action should be set up, writing to Senators and Representatives, praising and congratulating supporters, finding out why others oppose or fail to support. Get patriotic organizations and good citizens to help by actively supporting this movement.

Devote your minds and hearts to working for this new memorial to American freedom—a Constitutional Amendment to protect American rights and the American form of government against the dangers of treaty law. A strong and independent and free America is not only the best for its own citizens but the strongest influence for world peace and world order. Ask for and distribute the folder, "To American Citizens Everywhere," 20 copies free; also ask for SPOTLIGHT B-188, by Frank Holman, "Constitutional Amendment Only Effective Protection Against 'Treaty Law,' " and SPOTLIGHT C-222, by Garet Garrett, "Nullification By Treaty," 5 copies of each free upon request.

Distribute this SPOTLIGHT widely to fellow workers, shareowners, civic leaders, educators, service clubs, etc. Use it as a tuck-in in your mails. Enlist all to urge Members of Congress to support the Bricker Amendment.

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MEMORANDUM RE: SENATE JOINT RESOLUTION 3, 83rd CONG.
SENATE JOINT RESOLUTION 158, 82nd CONG.

This resolution, [illegible], would propose an amendment to the Constitution to provide that: "The executive power of the United States shall not be construed to extend at any time to any taking of private property other than in a manner prescribed by statute law."

The proposal was evidently addressed primarily to the President's seizure of the steel mills. The Supreme Court has now invalidated that seizure. To the extent that the amendment would be declaratory of the steel decision, it is unnecessary. To the extent that it would go further, it is undesirable.

Thus, the proposed amendment would apparently apply in time of war as well as in peace. The Executive is "barred" at any time. At least three members of the Supreme Court majority (Justices Frankfurter, Jackson, and Burton), however, emphasized that the Steel case did not arise in time of declared war or imminently threatened invasion. Since it would seem clear from the decision that Congress can in any event control Presidential action, if it so desires, it would seem unwise to attempt by constitutional amendment to limit the power of the Executive to deal with the sudden and unforeseeable emergencies that might arise, for example, in the event of a large-scale hostile invasion or bombing of the United States.

Moreover, the proposed amendment would apply to any taking of property, whether or not related in any way to a labor dispute. In this aspect it would appear to create serious problems in two areas having nothing to do with the Steel case.

One of these concerns the powers of military officers during war. In United States v. Russell, 13 Wall. 623, a case arising during the Civil War, it was held that military officers could, without statutory authority, seize vessels needed for military transport, and that the United States was liable for just compensation in respect of such seizures. See also Mitchell v. Harmony, 13 How. 115. In United States v. Pacific Railroad, 120 U.S. 234, a military commander was held empowered, without statutory authority, to destroy private property in the face of an advancing enemy, without creating liability for compensation on the part of the United States. The application of these principles is now before the Supreme Court in Caltex (Philippines) Inc. v. United States, 100 F. Supp. 970 (Ct. Cls.), certiorari granted, May 6, 1952, a case involving the seizure and destruction of property in the Philippines in 1941 and 1942. Adoption of the proposed amendment might cast serious doubt on the legal status of any comparable measures that might have to be taken in the future in the event of foreign invasion of the United States or its territories.

The other area is that presented by cases of so-called "implied taking." An example is United States v. Causby, 328 U.S. 256, which held that a landowner can recover compensation for loss of value of his property resulting from repeated flights over it of Army and Navy planes, although no statutory procedures for the taking of property had been pursued. A like result has been reached in a number of cases involving the flooding of lands, e.g., United States v. Lynah, 188 U.S. 445. Compare Portsmouth Co. v. United States, 260 U.S. 327, involving repeated shooting over land, and Cities Service Co. v. McGrath, 342 U.S. 330, holding that a right to just compensation could be implied if a seizure of corporate bonds authorized by the Trading with the Enemy Act resulted in the imposition on an American corporation of liability abroad to holders of the bonds. In these cases the deprivation of plaintiff's property was not specifically intended or foreseen, so that resort to statutory condemnation procedures would have been impossible or impracticable. Thus in the circumstances of these cases, executive action which in fact results in a taking of property although condemnation procedures were not followed, is treated as a "taking" under the Fifth Amendment, so as to confer a right to sue the United States for just compensation. The proposed constitutional amendment, by declaring that private property can be taken only in the manner prescribed by statute law, would, if adopted, appear to cast serious doubt on the right to recover compensation in such cases.

It would not seem that either of these lines of authority was intended to be overruled or questioned in the Steel case. The opinion of Mr. Justice Black makes no reference to these cases and would seem to be confined to the situation actually before the Court--i.e., the power to seize industrial property in connection with a labor dispute. The opinion of Mr. Justice Douglas expressly distinguished both United States v. Russell and United States v. Causby, from the case before the Court. Justices Frankfurter and Burton would appear to have confined their opinions to the proposition that in the circumstances of the Steel case, the seizure was invalid because it contravened what they regarded as an express decision by Congress in the Taft-Hartley Act that there should not be seizures in labor dispute cases. The other Justices in the majority made no reference to the cases mentioned above.

Accordingly, the proposed constitutional amendment is undesirable and dangerous. Quite apart from its effect in the area of labor disputes, it would seem of vital importance to preserve the non-statutory powers of requisitioning or destroying property which can, in case of necessity, be exercised by military authorities in a theatre of war. Obviously, in the face of an advancing enemy it is impossible to expect the military always to resort to statutory procedures for condemning property. In addition, the amendment, if adopted, might result in a denial of an effective remedy to injured persons in the area of the so-called "implied taking" cases. In those cases, also, to require resort to statutory procedures would be self-defeating because the situation is one in which the Executive does not know in advance that there will be any taking of the property in question.

CONSTITUTIONAL AMENDMENT TREATIES AND EXECUTIVE AGREEMENTS

S. J. Res. 1 (Bricker Amendment)

As Revised and Approved by the Senate Judiciary Committee on June 4, 1953



ANSWER

to

MINORITY REPORT OF SENATE JUDICIARY COMMITTEE

(See Senate Calendar No. 408—Report No. 412
83rd Congress, 1st Session)

See particularly pages 29 to 32 and page 33
Appendix A.

By FRANK E. HOLMAN
Past President of the American Bar Association

FOREWORD

On June 4, 1953, the Senate Judiciary Committee recommended to the Senate for adoption the following revised text of S. J. Res. 1 (Bricker Amendment) relating to treaties and executive agreements:

SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SECTION 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

SECTION 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

The vote was nine for and five against, with five Republicans and four Democrats voting favorably and three Democrats and two Republicans negatively. Senator Langer, although voting "negatively," did not join in either the Majority or Minority Report. Had all fifteen members of the Committee been available to vote, it is known that the final vote would have been ten for the Amendment and five against—with six Republicans and four Democrats voting for it and two Republicans and three Democrats against. Senator Everett Dirksen of Illinois was absent from the United States on an official mission but he authorizes the writer to state that he would have voted for the Amendment in the Judiciary Committee had he been present and that he earnestly favors its adoption.

The text is supported by an excellent majority report explaining the meaning of and reasons for each provision.

The minority report repeats old arguments frequently asserted in the past and rejected by the majority.

The purpose of this pamphlet is to refute each minority argument specifically.

Answer to the "Minority Views" of the Senate Judiciary Committee, As These Views Are Set Forth in Report No. 412, Calendar No. 408, Senate, 83d Congress, 1st Session.

The "Minority Views" are summarized at pages 35 and 36 of the Report.

Minority Point 1: **The final version of Senate Joint Resolution 1 is entirely different from the original version. It is almost word for word the same as Senate Joint Resolution 43, which was introduced by a single senator and which is even more harmful than the original Senate Joint Resolution 1.**

By the foregoing statement the Minority seems to complain that S. J. Res. 1, as reported and recommended by a Majority of the Senate Judiciary Committee, "is entirely different from the original version," and that it is "almost word for word the same as S. J. Res. 43."

It is difficult to understand why the Minority should be disturbed that a Majority of the Committee, after extended hearings and careful consideration, reported and recommended a Constitutional Amendment different from the original of Senate Joint Resolution 1 and also different but to some extent the same as S. J. Res. 43. This merely discloses that the Majority of the Committee after study and consideration did not slavishly adopt the language of either one of the Resolutions before it.

The Minority seems to be complaining that the Majority, having carefully considered the language of both Resolutions, produced a simple and understandable text which has the support of both Senator Bricker and his associates and the members of the

American Bar Association Committee on Peace and Law as well as numerous great patriotic and lay organizations throughout the United States like the American Legion, Veterans of Foreign Wars, the Marine Corps League, the Daughters of the American Revolution, the Sons of the American Revolution, Kiwanis International, and dozens of other important organizations. (See Appendix A, page 33.)

The final unfounded observation under Minority Point 1 that S. J. Res. 43 (which was also modified in its language by the Committee) is " even more harmful than the original Senate Joint Resolution 1," indicates a superficial analysis and understanding of the language of the text of the Amendment reported out by the Committee. Even a cursory reading of the carefully drafted Majority report demonstrates the absurdity of the quoted statement. This careless and unfounded Minority observation in Point 1 will be answered in dealing with Minority Points 3, 4, 5 and 6.

Minority Point 2: **The main argument advanced in favor of an Amendment is that one is necessary to prevent Treaties from overriding the Constitution. No such Amendment is necessary. The Supreme Court has consistently held that any Treaty which conflicts with the Constitution will be held invalid. There is no indication whatsoever that the highest court in the land will ever hold otherwise.**

Under this Point the Minority undertakes to assert that "no such amendment is necessary."

This argument was originally advanced by the Association of the Bar of the City of New York and has long since been completely discredited. It is based on the inaccurate statement that the Supreme Court "has heretofore held that any treaty which is inconsistent

with the 'Constitution' will be held invalid." This statement in turn is based upon certain judicial expressions or dicta in early Supreme Court cases such as *The Cherokee Tobacco* (1870) 11 Wall. 616, 620-1; *Holden v. Jay* (1872) 17 Wall. 243; *Geofroy v. Riggs* (1889) 133 U.S. 258, 267; *Doe v. Braden* (1853) 16 How. 635, 657. In these early cases the Supreme Court, as mere dicta, used expressions to the following effect: that a treaty cannot violate the Constitution; nor authorize what the Constitution forbids; nor change the nature of the government of the United States or the relation between the States and the United States. There is even a one-time very comforting, but now repudiated, expression in *New Orleans v. United States* (1836) 10 Pet. 662, 736, expounding the Jeffersonian view of the treaty clause, that "Congress cannot by legislation enlarge the federal jurisdiction nor can it be enlarged under the treaty-making power."

But, as has for some years been shown in the Reports of the Committee on Peace and Law of the American Bar Association, those who have intensively studied this question have long ago had to give up on those otherwise satisfying old dicta of the Supreme Court. They soon had to recognize, just as the late Chief Justice Hughes recognized in 1929, and as all those who have given the subject more than a quick look recognize, that *Missouri v. Holland* (1920) 252 U.S. 416, changed the whole course of the judicial stream, by indicating that there may be no limit on what can be done in treaties made "under the authority of the United States" (which is the only constitutional requirement), and by thus repudiating the view of Jefferson and the Founding Fathers. (Jefferson, Parliamentary Practice, p. 110, note 3; Jefferson's Works, Vol. III, p. 135, setting forth both Jefferson's and Mad-

ison's views; Hamilton's Works, Vol. IV, p. 342; as confirmed in *New Orleans v. United States,* above cited.) Under the doctrine of *Missouri v. Holland,* Congress can acquire legislative power under treaties that it does not otherwise have under the Constitution —a doctrine which, for lack of a better epithet, might be called the "bootstrap doctrine" of federal power. *Missouri v. Holland* definitely holds contrary to *New Orleans v. United States,* that the federal jurisdiction *can* be enlarged by use of the treaty power. This is why the so-called "which clause" of Section 2 of the proposed Amendment is so necessary for the protection of our basic constitutional rights and freedoms.

Before the American Society of International Law in 1929, the distinguished late Chief Justice Charles Evans Hughes said that there was in the Constitution "no explicit limitation" on the treaty power, and that he would "not care to voice an opinion as to an implied limitation on the treaty-making power; the Supreme Court has expressed a doubt whether there could be any such," his reference being to the expression of doubt in *Missouri v. Holland,* 252 U.S. at page 423.

A strong doubt is also expressed by the United States Court of Appeals for the Ninth Circuit in *United States v. Reid* (1934) 73 F. (2d) 153. This doubt has been further increased by *U. S. v. Curtiss-Wright Corporation* (1936) 299 U.S. 304, declaring that the treaty-power does not depend on a grant in the Constitution but is an *inherent* power of the federal government, and indicating that the treaty-power is unlimited.

So the dicta of the old cases which are so rapidly discovered, and so confidently proclaimed, by "quick look" lawyers can no longer be relied on at all. They can no more be relied on since *Missouri v. Holland* and

other subsequent cases, than can the old "commerce clause" cases prior to the *Jones and Laughlin* case (301 U.S. 1) upholding the Wagner Act.

Missouri v. Holland, in the minds of federal expansionists, has given rise to two remarkable doctrines (1) the doctrine that the treaty power is unlimited, capable even of overriding the Constitution and the Bill of Rights, and (2) the "bootstrap doctrine" of federal power, namely, that by its own voluntary act of making a treaty with another nation, the federal government can, apparently without limit, increase its legislative power at the expense of the states. Carried to its logical end, *Missouri v. Holland* means that, under Articles 55 and 56 of the United Nations' Charter, or under the Charter of the Organization of American States, both dealing with the entire gamut of human activity, in the civil, political, social, economic, and cultural fields, *the federal government is now one of unlimited powers.* Without the "which clause" in Section 2 of the Amendment, any administration in power, could by the device of first making a treaty—then make laws for the people of this country affecting their life, liberty and property without paying any attention to provisions of the Constitution and the Bill of Rights which were designed to protect our basic American rights and freedoms.

As indicated, the *Missouri v. Holland* doctrine is founded upon the thesis that the President and the Senate, acting as the treaty-making power, even now have broader legislative power over the people of the United States than the Congress itself, in which the people, by express grant in the first part of the Constitution, vested "all legislative power." This doctrine flies in the face of Jefferson's concept, expressed in his Manual of Parliamentary Practice, as follows:

"By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated. *It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way.*" (Italics supplied.) (Quoted from American Bar Association Journal, Sept., 1952, p. 736.)

Hence, Jefferson's view has been overruled and nullified by *Missouri v. Holland*. Richard Henry Lee and Patrick Henry of Virginia both strongly objected to Article VI concerning treaties at the time the adoption of the Constitution was under debate. (See American Bar Association Journal, Sept., 1951, p. 662).

It is also clear that the Founding Fathers, in the sharp debates over the lodgment of the treaty power, and the effect of its exercise, definitely visualized the possible need for amendment in this particular. (2 Farrand, The Records of the Federal Convention (rev. ed. 1937) p. 370.)

Until recently it was assumed that there were many things "essentially within the domestic jurisdiction of a state" or nation and it was thought that these things touching our domestic concern were to be protected by Chapter I, Article 2, paragraph 7, of the United Nations' Charter. But the Acheson State Department's position as declared in September, 1950 (and not changed by the present Secretary of State, Mr. Dulles), is that "there is no longer any real distinction between 'domestic' and 'foreign' affairs." (State Department Publication 3972, Foreign Affairs Policy Series 26, released September, 1950, with foreword by President Truman.) And it is asserted generally by

the "internationalists" today that any subject whatever that is dealt with in a treaty between two nations becomes, by virtue of that mere fact, a subject of international concern.

The late Chief Justice Charles Evans Hughes prophetically referred to our present predicament as to treaties in a statement made before the Society of International Law in 1929:

> "If we take the Constitution to mean what it says, it gives in terms to the United States the power to make treaties. It is a power that has no explicit limitation attached to it * * *."

Mr. John Foster Dulles, less than a year before he became Secretary of State, himself presented one of the most cogent arguments in support of the need for a Constitutional Amendment. His statement and public opinion delivered at Louisville, Kentucky, last year in the course of his address before the Regional Meeting of the American Bar Association (American Bar Association Journal, June, 1952) completely discredits Minority Point 2 with respect to this matter. In this address he made the following observations on the present omnipotence of treaties and "treaty law:"

> "*The treaty-making power is an extraordinary power liable to abuse.* Treaties make international law and also they make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas *treaty laws can override the Constitution.* Treaties for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the Federal Government or to some international body and

they can cut across the rights given the people by the constitutional Bill of Rights." (Italics supplied.)

Mr. Dulles' statement clearly shows the need for a Constitutional Amendment to regulate the treaty power unless the treaty-making power is now to become a legal way for bypassing our normal legislative processes and the open road to changing American rights (both state and individual), and the easy way for changing the originally intended balance of powers, and thus the easy way and legal way for changing our form of government from a Constitutional Republic to an executive oligarchy.

Why does the treaty-making power under the constitutional provisions which have not been changed since 1789, now give rise to such dangerous possibilities of change in our laws and form of government and give rise to a widespread movement for a Constitutional Amendment? There are three main reasons:

(1) In what is otherwise a government of limited and delegated powers under the Constitution, no express limitation exists on the treaty power, and the existence of any implied limitations is shrouded in doubt. (See *Missouri v. Holland* and *Curtiss-Wright, supra;* and statements by Chief Justice Hughes and Mr. Dulles, *supra.*)

(2) A basic change of viewpoint is being carried into effect with respect to the function and purpose of treaties. A veritable avalanche of new treaties is being sponsored by the United Nations and its affiliated organizations in the social, economic, cultural, civil and political fields—any number of which would seriously and adversely affect or alter American rights and even our American form of government. Any or all of these treaties can, *as admitted* by Mr. Dulles

and others, effect fundamental changes in our domestic law and in our form of government.

(3) Persistent efforts have been made during the last few years to find additional basis for expansion of the powers of the Federal Government, and the treaty power has been suggested as a conveniently available vehicle for such expansion. (Mr. Truman's Civil Rights Commission suggested that instead of continuing to try to get so-called "civil rights" legislation through the Congress the whole program could be more easily achieved through "treaty" and thus also any doubt of its constitutionality avoided. See Report of the President's Committee on Civil Rights, Par. 10.)

The foregoing considerations clearly show the need for a Constitutional Amendment to protect American rights and the American form of government against the dangers of "treaty law."

Minority Point 3: **The resolution would virtually abolish the treaty-making power given to the Government under the Constitution and would leave the United States only partially sovereign. We could not deal as a coequal with other foreign powers, since there would be many vital international subjects with which we would be constitutionally prohibited from dealing by way of Treaty.**

Here it is asserted that the proposed Constitutional Amendment would virtually abolish the treaty-making power * * * and would leave the United States only partially sovereign. This again is a discredited point originally advanced by the City Bar of New York.

The proposed Amendment is in no sense designed to and will in no way interfere with the free negotiation of treaties by the President and the State Department

and their ratification by the Senate; nor will the amendment interfere with the immediate effect of treaties as international agreements. The amendment, as proposed by the Senate Judiciary Committee, will merely:

(1) Prevent a treaty provision that conflicts with the Constitution of the United States from being effective;

(2) Place the United States on a parity with the other nations of the world so that a treaty will not become a part of our internal law until and unless implemented by legislation. (However, as above indicated and as is the case in other nations, the treaty will still take immediate effect as an international agreement on international matters);

(3) Prevent Congress from acquiring by means of a treaty legislative power that it does not otherwise possess under the Constitution; and

(4) In order to embody in the Constitution a complete statement as to all international agreements the Amendment redeclares and confirms the existing power of Congress to regulate executive agreements, and subjects them to the limitation that, like treaties, they must conform to the Constitution, and shall not become internal law within the United States until Congress acts.

The over-all purpose of the amendment is to give life and effect to Section 7, Article 2, of the United Nations' Charter which was intended to preserve and protect our American rights—which Section has been ignored and nullified by the Truman-Acheson State Department. With the adoption of such an Amendment as proposed, the power of the American people over their domestic affairs would be reasserted and re-established.

The proposed amendment is not an attack on the proper functioning of the United Nations. On the contrary, it will tend to restore confidence in the United Nations as a cooperative security organization to discuss and attempt to preserve world peace. The American people were assured by Section 7, Article 2, of the Charter, and by a public letter written at the time by Secretary of State Stettinius to the President and to the American people, that the Charter protected the American people against any interference with their domestic affairs and against any infringement of their basic individual rights as citizens of this country. Without this assurance the American people would certainly not have approved the Charter, and the Senate would probably not have ratified it. The act of ratification was hardly over when the Acheson-Truman Administration proceeded to nullify Section 7, of Article 2, by joining in the sponsoring of treaties affecting the domestic affairs and the domestic laws and the individual rights of American citizens.

The Committee proposal for a Constitutional Amendment is designed to write *clearly* into the Constitution the *simple* proposition that treaties and executive agreements shall not make domestic law for the people of this country except by Congressional legislation within the constitutional powers of the Congress. Then no State Department, past, present or future, will be able, by these international agreements, to authorize or permit the representatives of other nations to interfere with our domestic affairs and our domestic laws or change and destroy our individual rights as protected by our own Constitution and the Bill of Rights.

The second sentence of Minority Point 3 "lets the cat out of the bag" and clearly shows that the Minor-

ity does not believe in Constitutional government but rather in a government of executive power, for it is there said that with such a Constitutional Amendment "we could not deal as a co-equal with other foreign powers, since there would be many vital international subjects with which we would be Constitutionally prohibited from dealing by way of treaty." The Amendment does not prohibit dealing with any subject whatever by treaty; it in no way affects them as agreements under international law; it only limits their domestic effect to those matters that Congress otherwise has Constitutional power to deal with. The Minority obviously belong to that school of thought which desires to leave the treaty power free from any and all Constitutional restraints. Thus a world court might be established by treaty for the trial of American citizens in time of peace for alleged offenses committed in the United States—in which case an American citizen could be tried in a foreign country without trial by jury or presumption of innocence or the other important Constitutional safeguards that are afforded Americans when tried in their own courts. The official representatives of the United States on the Sixth Committee of the General Assembly of the United Nations gave a pledge to the other nations in October, 1948, that the United States delegation intended to show the need for the establishment of such a court. (See Records of the 3rd Session of the General Assembly, Part I, page 103.)

More than 200 treaties are now under consideration in the United Nations dealing with every aspect of our civil, social and economic life—the provisions of which would change and nullify many of our local laws. All these and more the Minority would risk in order to make us, so to speak, "co-equal with other foreign powers." This gets back to Mr. Attlee's state-

ment that our Constitution is away behind the times and that we should abandon our Constitution so that our representatives can deal freely and, if necessary, barter or give away our precious American rights and heritage.

Neither Mr. Attlee nor the Minority seem to appreciate the theory of the American Constitution. As stated by Mr. Justice Brandeis in *Myers v. United States* (1926) 272 U.S. 52, 293, and repeated by several of the majority judges in the recent Steel Seizure Cases, 343 U.S. 579:

> "The doctrine of the separation of powers was adopted by the Convention in 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

The sovereignty of the United States is not impaired in the slightest by the proposal. The government can make any treaty it desires, but it cannot make them domestic law (a matter with which no foreign nation has any concern, *Taylor v. Morton* (1855) 2 Curtis 135, 2 Black 484) except within the otherwise existing constitutional powers of Congress. That is what the Founding Fathers intended as Jefferson so ably stated.

The Minority point of view inevitably comes down to this: that they belong to the school of thought that has become so internationally minded that it believes world peace can be achieved by recognizing in the President unlimited power to give America away at the international conference table. That was never at any time intended by the Founding Fathers and should

be emphatically prevented. The Minority point of view opens the door to a party in power in Washington at any given time to give American rights away by treaties and executive agreements.

Minority Point 4: **This proposal would probably prevent the United States from entering into an agreement to control Atomic Energy (the Baruch Plan). It would probably invalidate existing international agreements controlling Narcotics.**

Again, the Minority is merely paraphrasing points urged last year in a Report by the Association of the Bar of the City of New York. It is stated that the proposal for a Constitutional Amendment "would *probably* prevent the United States from entering into an agreement to control atomic energy." The only difference between the Minority statement and that of the New York City Bar on this Point is that now the Minority has introduced the word "probably." However, instead of the word "probably" it should have introduced the word "not," for it was definitely shown in the Senate Judiciary hearings that the proposed Amendment would not interfere with appropriate international arrangements for the control of atomic energy.

Dr. George A. Finch of Washington, D. C., editor in chief of the *American Journal of International Law*, one of the greatest living authorities on International Law and a leading authority on Constitutional Law, testified specifically regarding this matter, as follows:

> "Now, I would like to go into another subject that has been emphasized here. That is in the field of atomic energy.
>
> "In the vitally important field of international

arrangements and legislation to protect this country from mass destruction by atomic weapons, Congress, in the absence of treaties, passed the Atomic Energy Act of August 1, 1946. The act established an Atomic Energy Commission to control the production and development of Atomic energy in the United States.

"The act declared the public policy of the people of this country to be, to provide for the common defense and security, to improve the public welfare, and to promote world peace.

"It is specifically provided that the administration of the act shall be consistent with the foregoing policies 'and with international arrangements made by the United States.'

"An international arrangement is defined by the act to mean 'any treaty approved by the Senate or international agreement approved by the Congress.'

"Congress did not wait before we had a treaty on atomic energy before it passed legislation on the subject. It had already done it, and those who argue that this amendment will affect that are simply ignoring the facts in the case.

"Consequently, it cannot be successfully maintained that the nation's safety would be endangered by the adoption of the American Bar Association constitutional amendment.

"Congress would clearly have the power to pass legislation to implement effective international inspection to guarantee that there would be no violation of disarmament terms and conditions.

"A Joint Committee of Congress was established by the Atomic Energy Act of 1946 to make recommendations to Congress for further legislation.

"If we ever have a treaty on atomic energy, such as those we have been talking about, it will be the duty of this Joint Committee of Congress, to examine that treaty.

"*Senator Bricker.* It will be the duty of the Senate members to examine that treaty.

"*Mr. Finch.* Yes, and to make recommendations to the Congress.

"But you would not need the treaty to pass legislation on atomic energy; you have already done it.

"Why would people come here and say this amendment would stop you from doing something which you have already done?"

Likewise, it is stated in Minority Point 4 that this proposal for a Constitutional Amendment "would probably invalidate existing international agreements controlling narcotics." This was also one of the fallacies of fact and law originally set forth in last year's Report by the City Bar of New York. This fallacy was also disposed of by Dr. Finch and several other witnesses. Dr. Finch testified as follows:

"Now, a previous witness, I think it was Mr. Tuttle, referred to the subject of narcotics and made a long argument that the adoption of the amendment proposed by the American Bar Association would prevent this government from participating in the control of narcotics.

"I have also answered that argument, in previous testimony before this Committee.

"Mr. Tuttle referred to the fact that as based on the treaty-making power, the acts of Congress in passing a domestic law governing the growing of poppies in this country was based upon the treaty power.

"I took the trouble to look up that law last year when that same argument was made and again we have statements made by objecting witnesses who have not looked up the law. It was just made from their own emotional feelings in the matter without any basis of law.

"An examination of the Act of 1942 for the domestic control of production and distribution of the opium poppy, discloses that the purpose of the act was stated to be not only to discharge the international obligations of the United States under the narcotic treaties, but to 'promote the public health and the general welfare, to regulate interstate and foreign commerce in opium poppies, and to safeguard the revenue derived from taxation of opium and opium products.'

"From that recitation of the act itself of the powers of Congress, it is perfectly obvious that it did not rest those powers on the treaty-making power."

It should be kept in mind, in connection with Dr. Finch's testimony that he served in the State Department under Secretaries Elihu Root and Philander C. Knox; that he was legal adviser to the American Commission to negotiate peace in Paris in 1919 and accompanied President Wilson on the "George Washington"; that he has served on numerous State Department missions in China and Japan, Canada, Mexico, Cuba and various countries in Central Europe and Great Britain; that he is president of the Inter-American Academy of Comparative and International Law of Havana, Cuba, and a member of the Curatorium of the Academy of International Law at The Hague; that he is a professor of international law of the Georgetown School of Foreign Service, Georgetown,

and has lectured at many other universities—among others, Michigan and McGill; that he is now and has for many years been editor-in-chief of the American Journal of International Law.

Dr. Finch stated to the Committee that he could not and would not support any Constitutional Amendment which he thought would impair in the slightest degree the ability of the United States Government to continue its participation in movements the success of which he regarded as vital to the maintenance of our civilization. His testimony and that of many other witnesses clearly established that the proposed Constitutional Amendment would in no sense interfere with the "normal" and "traditional" concerns of the various Departments of government.

Any analysis of the testimony in the record given by representatives of the Department of Defense, and of the Treasury, and of Commerce, and of Labor, and of the Director for Mutual Security, clearly establishes that all that testimony was merely a paraphrase of the arguments made by the City Bar of New York last year, and now discredited.

Minority Point 5: **The constitutional division of powers between the legislative and executive branches of the Government, which has worked so well for 164 years, would be fundamentally altered. The President would no longer have control over foreign relations, since the Congress could regulate his conduct of such affairs down to the last detail.**

The first part of this Point is particularly interesting in view of Secretary Dulles' statement at Louisville. The first sentence of Minority Point 5 says that the "constitutional division of powers between the

legislative and executive branches of the Government * * * would be fundamentally altered" by the proposed Constitutional Amendment. Certainly they will be fundamentally altered if this Constitutional Amendment is not passed, for Mr. Dulles said without equivocation or reservation that "our Constitutional division of powers" could be altered by treaty. He said:

> "Treaties can take powers away from the Congress and give them to the President; they can take powers from the States and give them to the Federal government or to some *international* body, and they can cut across the rights given the people under the constitutional Bill of Rights."

In the second sentence of Minority Point 5 it is stated that with the adoption of such an Amendment the "President would no longer have control over foreign relations, since the Congress could regulate his conduct of such affairs down to the last detail." This clearly establishes that the attitude of the Minority is that the President should be completely omnipotent in matters of foreign affairs. These advocates of omnipotent executive power in foreign affairs should read the Constitution as it now stands. The President is not given exclusive control over our foreign affairs. The Congress, under the "necessary and proper clause" of the Constitution (Article I—Section 8) has the right to enact appropriate legislation with respect to the President as with respect to every other official of government, when, as and if it believes such legislation is appropriate. The Minority should take time off to read *Ex parte Quirin,* 317 US 1, 25-27, 29, where the court held that Congress could pass regulatory statutes even in the Commander-in-Chief area. And they should read the *Steel Seizure Case,* 343 US 579, on the power of Congress under the "necessary and proper" clause.

Minority Point 6: **If the Amendment were now the law, the conclusion of an Armistice Agreement in Korea would be virtually impossible in the absence of special Congressional Authority.**

How ridiculous and far-afield can the arguments of the other side get? Obviously, there is nothing in the Amendment that even faintly suggests such an idea. The President as Commander-in-Chief has ample power, either by himself or his subordinate officers, to negotiate an armistice. The mere recognition in Congress of power to regulate executive agreements in no way affects the power of the President as Commander-in-Chief to make truce arrangements in the field that seem wise and appropriate to him. This has always been the law and will continue to be the law under the proposed Amendment.

This point discloses the superficiality of the whole approach of the Minority. Any but the most superficial constitutional lawyer will immediately recognize that there is an essential difference as to the powers of the President as Commander-in-Chief and the powers of the President as President. Dr. Finch testified that the proposed Constitutional Amendment would in no way curtail the President's authority as Commander-in-Chief of the Armed Forces. All those who have carefully considered the provisions of the federal Constitution and the court decisions with respect to the powers of the President as Commander-in-Chief agree with Dr. Finch's conclusion. The trouble with those who belong to the new school of internationalists is that under the pretext of an armistice or some other military arrangement they want the President to have powers like those exercised in the Yalta and Potsdam Agreements—to make dispositions of territory and to adjust and settle other matters of a permanent character between the United States and foreign countries.

Minority Point 7: **We feel that the proposed Amendment should be referred to the Senate Committee on Foreign Relations for thorough consideration of its possible effect on our relations with other countries.**

This Point indicates the desire, at this late date, to have the proposed Amendment referred to the Senate Committee on Foreign Relations. This is a last-ditch effort to stall the matter and have some other committee listen over again to the same old arguments. In the hearings this year the Departments of government followed the "line" of the City Bar of New York as that Bar presented its point of view to the Judiciary Committee last year. The Departments of government this year preserved and repeated all the errors of law and fact and illustration that the City Bar had indulged in last year. There has been apparently no new research on the matter by the opponents of the Constitutional Amendment. This proposal for a Constitutional Amendment has been fully studied now for a period of nearly four years. The research has all been done on both sides. The difference of opinion can only be resolved by recognizing that the proponents and the opponents belong to different schools of thought as to what the American government is or ought to be. The proponents of the Constitutional Amendment believe in constitutional government, which means constitutional limitations, and believe that it should be preserved.

It is true that the present treaty provision in the Constitution worked satisfactorily until recent years. It worked satisfactorily for a time even after the decision of *Missouri v. Holland,* because the administrations in power, both Democratic and Republican, observed the traditional concept and nature of treaties—that they were international compacts and agreements between nations—agreements dealing with the settle-

ment of international disputes and not directed to the control of the domestic affairs of nations or to the relationship of citizens of a country to their own government.

At the time the Constitution was adopted and until recently, treaties entered into by the United States were compacts in the primary sense of duties and obligations imposed on the contracting states, and not on individual citizens.

Alexander Hamilton stated that treaties "are contracts with foreign nations which have the force of law but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovreign."

Today, however, treaties (under the concept of the "new internationalists") are being proposed which impose civil and criminal liability for acts by citizens of the United States within the United States, or which affect the rights of, and impose duties and obligations on, citizens of the United States, in areas heretofore within the reserved powers of the states. The United Nations Charter being a ratified treaty—the Congress by implementing legislation might today and immediately pass many laws heretofore beyond the powers of Congress to pass under its delegated powers in the absence of treaty.

Many Americans seem to be laboring under the great delusion that we can save the world and have world peace by bartering away American rights and American independence through international negotiation and treaties. Mr. Dulles, in his apologia before the Senate Judiciary Committee, said nothing about abandoning the official State Department position announced in its official bulletin of September, 1950, that

"there is now no real difference between domestic and foreign affairs." In fact, Senator Wiley, who is one of the minority, within the last few weeks asserted the same thing. On the floor of the Senate June 8, 1953, Senator Wiley also joined the Acheson school of internationalists when he said: "We must carefully weigh the interrelationship between domestic economic and other interests. The line has almost become indefinable. Often, it is purely artificial. 'Domestic' and 'foreign' are one." Under this doctrine and under the declarations made by Mr. Dulles at Louisville, all our domestic rights and freedoms and laws become the subject of treaties under which our rights and freedoms can be modified or bartered away for some so-called international purpose.

This Constitutional Amendment is not aimed at any particular administration. It is wholly a non-partisan movement. It was introduced and hearings held during a Democratic administration. It is now coming up for a decision and a vote in the Senate in a Republican administration. The Majority Report is approved by ten Senators, six Republicans and four Democrats. It is not an answer for the present Secretary of State to suggest that the present administration can be trusted not to make any "bad treaties," and imply that he was for such an Amendment last year because the former administration could *not* be trusted. This is too naive to divert—let alone convince—the American people. The American people understand what this Amendment is and what it will do. They understand that it is to preserve the Constitution as the supreme law of the land and particularly to prevent treaties and executive agreements from altering and nullifying domestic law. This is all there is to the proposal.

The movement in support of the Amendment is

growing every day. Attached hereto as Appendix A is a list showing the widespread nature of this movement.

The issue with respect to this Amendment was characterized by witnesses at the hearings as the greatest issue since the controversy over the original Bill of Rights. The basic argument against it as originally set forth by the City Bar of New York and repeated by the representatives of the Departments of the government was the same as the argument made by those who opposed the original Bill of Rights, and exhibits again the fundamental difference between those who believe in a government of men and those who believe in a government of law and of Constitutional restraints.

In pressing for the immediate passage of a Constitutional Amendment on Treaties and Executive Agreements Americans today will only be exercising the same wisdom as our Forefathers when they insisted upon the first Ten Amendments as a "protective shield" to safeguard American rights. Hamilton and others at that time argued that no Bill of Rights was necessary since under the Constitution as written the federal government was one of only limited and delegated powers. But Jefferson and others insisted upon the first Ten Amendments, in order to make it crystal clear to all officers of the government and to the courts that nothing in the Constitution should be interpreted as authorizing either the officers of government or the courts to permit the federal government to encroach upon the basic rights of the citizens and of the States.

Our Forefathers did not wait until they had suffered serious infringements of their basic rights like freedom of speech and freedom of press and jury trial before taking steps to prevent such violations. They

insisted upon the adoption of the first Ten Amendments forthwith—*before* any infringement of those rights. Now, through treaties, some of our rights have already been infringed and others will certainly be infringed under the State Department doctrine that "there is no longer any real difference between domestic and foreign affairs."

The American people want a Constitutional Amendment to protect their rights, and not the word of a particular officer of government, however eminent he may be. They want and are entitled to the protection of such a Constitutional Amendment. This whole matter of treaty law has become so dangerous in the hands of international pressure groups that the American people want and are entitled to a provision in their Constitution to protect them for all time as against the past, present, and all future State Departments that may drift into a policy of compromise and appeasement as to American basic rights.

THE BASIC ISSUE

THE BASIC ISSUE BEFORE THE CONGRESS AND THE AMERICAN PEOPLE IS: SHALL WE HAVE A GOVERNMENT OF LAW OR A GOVERNMENT OF MEN?

During recent years two opposing schools of thought or ideologies with respect to government have developed in the United States. Prior to that time, except for leftist groups representing radicalism in one form or another—principally the I.W.W.'s in earlier years and in later years the Communists—practically all Americans believed in the Constitution and the form of government it established, and hence in a government of law and of appropriate constitutional

restraints instead of a government of men and unrestrained executive power.

As a result of two world wars and the enormous increase of executive bureaus and the natural ambition of men in power to act on their own judgments or even whims, a certain number of Americans now seem to believe, like Mr. Attlee, that a government of constitutional restraints is outmoded and that the President of the United States and the State Department should not be "handicapped" by any constitutional or even Congressional limitations.

This type of thinking was well-illustrated and more or less reached its peak when President Truman plunged us into the Korean War without any consultation with the Congress, and later undertook to seize the properties of the Steel Companies without any authority under the Constitution or under any law of Congress; and the Chief Justice of the United States and two other Justices approved this action.

The Chief Justice took the position that when the United Nations Charter was adopted this country thereby accepted "in full measure its responsibility in the world community" and an obligation "for the suppression of acts of aggression," and that consequently, when the United Nations called upon its members "to render every assistance" to repel aggression in Korea the President was thereupon authorized to take every action to render that assistance. The Chief Justice stated:

> "Our treaties represent not merely legal obligations but show Congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale."

In other words, acting under the Charter and other

international Commitments and implementing legislation based on "treaties" the President has powers *not* granted to him by the Constitution but even denied to him by the Constitution. For, among other things, under Section 8 of Article I of the Constitution, the *Congress* has the sole power "to declare war" and "to raise and support armies" and "to provide and maintain a navy"; and under the Fifth Amendment no person is to be "deprived of life, liberty or property without due process of law; nor is private property to be taken for public use without just compensation."

Much more might be said with respect to this ideological conflict of the omnipotence of executive power versus Constitutional government, but enough has been said to indicate that it exists, and that the arguments pro and con with respect to a Constitutional Amendment on Treaties and Executive Agreements reflect the thinking of these two differing schools of thought: Those who support the proposal for a Constitutional Amendment believe in a government of law and of appropriate Constitutional restraints. Those who oppose the Amendment believe in a government of men and a government of so-called "unhandicapped" executive power, particularly in the field of foreign relations. In considering the arguments both for and against the Amendment it should be kept constantly in mind that this is the basic line of demarcation. Only by keeping this line of demarcation in mind can the various arguments and contentions be fully resolved and understood. The issue raised today by this proposal for a Constitutional Amendment on Treaties and Executive Agreements involves the fundamental question of whether the American people want a government of law or a government of men.

Mr. Dulles says as the Constitution now stands treaties are "more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas *treaty laws can override the Constitution.* Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the Federal Government or to some international body and *they can cut across the rights given the people by the constitutional Bill of Rights.*" (Italics supplied.) Mr. Dulles' declaration of the *omnipotent* power now inherent in the treaty-making process can therefore become the easy basis, platform and "springboard" for the so-called "man-on-horseback" to legally rule this country by treaties, executive agreements and executive decrees.

By opposing a Constitutional Amendment Mr. Dulles and all the other opponents of a Constitutional Amendment therefore clearly believe in a government of men and unrestrained executive power.

Those who support a Constitutional Amendment to protect American rights and the American form of government against "treaty law" believe in a government of law and of appropriate Constitutional restraints.

They believe that Jefferson was right when he said, "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

APPENDIX A

LIST OF LEGISLATURES, BAR ASSOCIATIONS AND IMPORTANT LAY ORGANIZATIONS THAT HAVE TAKEN OFFICIAL ACTION IN SUPPORT OF A CONSTITUTIONAL AMENDMENT ON TREATIES AND EXECUTIVE AGREEMENTS

I.

State Legislatures: The following State Legislatures have passed resolutions favoring a Constitutional amendment on "treaty law": California, Colorado, Georgia, Idaho, Oregon, Montana, Texas and Wyoming. (Action by State Legislatures has been spontaneous — as yet no real effort has been made to secure such approval.)

II.

Bar Associations: American Bar Association and the following State Bar Associations: Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Louisiana, Maine, Mississippi, Montana, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia and Wisconsin.

III.

National Association of Attorneys-General — This is highly significant because this Association represents the chiefs of the legal departments of all 48 states (Democratic as well as Republican state administrations).

IV.

Important Lay Organizations:

American Legion

Various State Departments of the American Legion

Veterans of Foreign Wars of the United States

Various State Departments of the V.F.W.

Marine Corps League

Military Order of the World Wars

United Spanish War Veterans

National Sojourners, Inc.

The Catholic War Veterans

Kiwanis International

The Chamber of Commerce of the United States

Various Local Chambers of Commerce

National Grange

Pennsylvania State Grange

American Farm Bureau Federation

National Defense League of America

National Society of the Sons of the American Revolution

National Society of the Daughters of the American Revolution

Colonial Dames of America

Patriotic Women of America, Inc.

United States Flag Committee

Minute Women of U. S. A., Inc.

Women's National Patriotic Conference on National Defense, representing the following women's organizations throughout the United States:

American Gold Star Sisters, Inc.

American War Mothers

American Women's Legion of World Wars

Auxiliary to Sons of Union Veterans of the Civil War

Blue Star Mothers of America

Dames of the Loyal Legion of the United States of America

Daughters of Union Veterans of the Civil War (1861-1865), Inc.

Gold Star Wives of America

Guardians of Our American Heritage

Ladies of the Grand Army of the Republic

Marine Corps League Auxiliary

National Society for Constitutional Security

National Society, Daughters of the Revolution

National Society, Daughters of the Union 1861-1865, Inc.

National Society of New England Women

National Society, Patriotic Women of America, Inc.

National Society Service Star Legion, Inc.

National Society, Women Descendants of the Ancient and Honorable Artillery Company

National Women's Relief Corps Auxiliary to the Grand Army of the Republic

National Yeomen F

Navy Club, U.S.A. Auxiliary

Navy Mothers Club of America

New York City Colony, National Society of New England Women

Society of Sponsors of the U. S. Navy

The National Gold Star Mothers, Inc.

The Wheel of Progress
United States Army Mothers
Women of the Army and Navy Legion of Valor of the U. S. A.
Women's National Defense Committee of Philadelphia
National Association of Pro America
Wisconsin State Republican Convention
Republican Committee of One Hundred
Republican Women's Federation of San Diego County
Whitman County Central Republican Committee
American Council of Christian Churches
National Association of Evangelicals
National Society for Constitutional Security
Minnesota Federation of Business and Professional Women's Clubs, Inc.
New York City Federation of Women's Clubs
National Economic Council, Inc.
Committee for Constitutional Government
American Flag Committee
Constitutional Foundation, Inc.
Steuben Society of America
American Medical Association
American Medical Association, Women's Auxiliary
Association of American Physicians and Surgeons, Inc.
Conference of State Manufacturers Association
Southern States Industrial Council
National Cotton Compress and Warehouse Association

National Labor-Management Council on Foreign Trade Policy
Junior Order United American Mechanics
American Association of Small Business
Conference of American Small Business Organizations
Associated Industries of Delaware
Bakers Association of Michigan, Illinois, Indiana and Wisconsin
Pacific Dairy & Poultry Association
Sovereignty Preservation Council of Delaware
Texas Press Association
Society of the Friendly Sons of St. Patrick
National Association of Real Estate Boards
Freedom Clubs, Inc.
The American Progress Foundation

Many other merely local organizations throughout the United States have also endorsed the proposal for a Constitutional amendment.

The Erroneous Arguments of the Opponents of a Constitutional Amendment on Treaties and Executive Agreements



AN ANALYSIS and ANSWER

By FRANK E. HOLMAN
Past President of the American Bar Association

"Treaty law can override the Constitution * * * They (Treaties) can cut across the rights given the people by the constitutional Bill of Rights."

—JOHN FOSTER DULLES,
before Regional Meeting
American Bar Association,
Louisville, Kentucky,
April 12, 1952.

"The history of liberty is a history of the limitation of governmental power, not the increase of it."

—WOODROW WILSON

"In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

—THOMAS JEFFERSON

The Erroneous Arguments of the Opponents of a Constitutional Amendment on Treaties and Executive Agreements

AN ANALYSIS and ANSWER

PART I of this pamphlet will deal (A) with Mr. Dulles' "switch" and the "strategy" and errors of his position and those of his associates; and (B) with the fallacies of certain specific arguments advanced by the opponents of a Constitutional Amendment covering treaties and executive agreements.

PART II is a summary of the position of the sponsors of the American Bar Association's proposal for a Constitutional Amendment.

PART III is the Conclusion.

PART I

A. MR. DULLES' "SWITCH" AND "STRATEGY"

On April 6, 1953, before the Judiciary Committee of the United States Senate, the distinguished Secretary of State, Mr. John Foster Dulles, announced a "switch" in the Government's foreign policy which occasioned a "lifting of eyebrows" in many quarters. Mr. Dulles stated, *inter alia,* that the present administration does not intend "to become a party" to any Covenant on Human Rights "or present it (the Covenant) as a treaty for the consideration of the Senate." He also said: "This administration does not intend to

sign the Covenant on Political Rights of Women." Mr. Dulles also indicated that the present administration would not press for the ratification of the Genocide Convention.

Prior to his appearance before the Judiciary Committee, at 11:00 A.M. on April 6, 1953, Mr. Dulles had been an ardent supporter of the United Nations and its efforts in the field of so-called human rights. He had so far supported the Genocide Convention as to publicly upbraid the American Bar Association in September, 1949, for opposing the ratification of that treaty. He then gave a newspaper interview saying that he was "disappointed and amazed" by the American Bar Association's action opposing the ratification of the Genocide Convention. This statement was so intemperate in criticism of the American Bar Association that, as President of that Association, I wired Mr. Dulles on September 23, 1949, pointing out, *inter alia,* that before publicly criticizing the action of the American Bar Association he "should make a lawyer-like study of the Report upon which that action was based." (A copy of this telegram is attached hereto as Appendix A.) On September 24, 1949, Mr. Dulles' secretary acknowledged the wire, but Mr. Dulles has never made any reply or modified his public criticism of the American Bar Association which, after more than a year of careful study, in September, 1949, passed a resolution opposing ratification of the Genocide Convention as submitted.

Again, as late as December 29, 1952, in order not to misquote his views in a public address which I was to make on January 29, 1953, I wired and wrote Mr. Dulles to ascertain whether he had changed his position on the Genocide Convention and also, in view of his strong statement at Louisville on the dangers of "treaty law," to get an expression of his attitude on the

need for a Constitutional Amendment. (A copy of that letter, confirming that wire, is attached as Appendix B.) To date I have received no answer thereto, except for a gracious acknowledgment by one of his secretaries in the Commodore Hotel, New York City.

Therefore, it would seem clear that the distinguished Secretary of State must have made his "switch" regarding ratification of the Genocide Convention sometime shortly before his appearance before the Senate Judiciary Committee on April 6, 1953. Otherwise it would only be natural and courteous for him to have answered my letter.

Although Mr. Dulles now abandons ratification of the Genocide Convention and the drafting and ratification of a Human Rights Covenant, he says nothing whatever about abandoning the proposed Convention for the Establishment of an International Criminal Court (made up largely, if not entirely, of foreigners) for the trial of American citizens in time of peace for alleged offenses committed in the United States—in which Court an American citizen could be tried in a foreign country, without right of trial by jury, or presumption of innocence, or the other important constitutional safeguards that are afforded Americans when tried in their own courts. As early as October, 1948, the official representatives of the United States on the Sixth Committee of the General Assembly of the United Nations gave a pledge to the other nations that the United States delegation intended to show the need for the establishment of such a court (see Records of the 3rd Session of the General Assembly, Part I, page 103).

One of the so-called international crimes for which it is proposed to try an American in such a court is that of "unfairly" criticizing the personalities or pol-

icies of a foreign government, where it is charged that such criticism tends to "aggravate" our relations with a foreign state. This could, of course, easily mean that speakers and writers and editors of newspapers in this country could be imprisoned—as Mr. Oatis is now imprisoned in Czecho-Slovakia—for criticizing the status quo. The proposal is to extradite Americans from America for some such so-called international offenses alleged to be committed in this country, and to try them in a foreign country (See July, 1949, American Journal of International Law, page 499). Can anyone imagine a more brazen and flagrant treaty proposal for violating our constitutional rights of freedom of speech and of press?

Mr. Dulles says nothing about the present administration abandoning the proposed "Convention on News Gathering and International Transmission of News and Right of Correction," which would also place restrictions and conditions on freedom of speech and freedom of press, and subject American citizens to trial for so-called international crimes in the proposed International Court. It is true that the last Administration indicated that it did not favor this Convention in its present form.

Mr. Eberhard P. Deutsch of the American Bar Association Committee on Peace and Law well pointed out in his testimony before the Senate Judiciary Committee:

> "Worthy as may be the superficial objectives of such a Convention as that on the Gathering and International Transmission of News and Right of Correction and that on Freedom of Information, they contain the festering germs of destruction of a free press beyond the antiseptic properties of the First Amendment."

Mr. Dulles also says nothing about his adminis-

tration abandoning the proposed Treaty with Israel recently transmitted to the Senate of the United States. This treaty provides that the nationals of either country shall not be barred from practicing their professions in the other country by reason of being aliens. Under the "most favored nation clause" included in many existing treaties to which the United States is a party such a provision in the Israel Treaty would be automatically applicable to the nationals of a very large number of other countries. One of the fundamental salutary characteristics of the legal profession in this country is that a lawyer is *an officer of the court* and must generally take an oath to support and defend the Constitution of the United States. No alien would be in a position to take such an oath and comply with it.

Likewise Mr. Dulles says nothing about abandoning some 200 other treaties being "spawned" in the United Nations, or the numerous ILO (International Labor Organization) treaties, that would affect many basic rights of American citizens and change the relationship, as fixed by our Constitution, between the states and federal government. Under the present Constitutional situation, as announced by Mr. Dulles in his Louisville speech last year, all these various treaties—and any others that may be thought up by the "eager internationalists"—affecting our civil, social and economic rights, could become "supreme law of the land;" in fact, Mr. Dulles says, "more supreme than ordinary laws."

Generally Mr. Dulles admits, in his statement before the Judiciary Committee of the Senate, that all these various proposals in the United Nations occasioned a "legitimate concern" on the part of the citizens of this country because, as he frankly confesses, they may impose upon our citizens conceptions regarding

human rights "alien to our traditional concepts." But now the distinguished Secretary opposes *any* Constitutional Amendment for the protection of the citizens of this country and for the protection of the basic concepts of the Republic, and instead he asks that the Senate Judiciary Committee and the Senate and the Congress of the United States and the Citizens of this country accept his assurance that, at least in certain of these matters, the present administration will not make treaties. He asks that we accept this personal assurance in the face of his public and solemn declaration, as a constitutional lawyer, made before a Regional Meeting of the American Bar Association at Louisville, Kentucky on April 12, 1952, as follows:

> "The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for congressional laws are invalid if they do not conform to the Constitution, whereas *treaty law can override the Constitution.* Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the state and give them to the Federal Government or to *some international body* and they can cut across the rights *given the people by the constitutional Bill of Rights.*" (Italics supplied.)

WAS THERE EVER IN THE WHOLE HISTORY OF AMERICA SUCH A SPECIFIC INSTANCE OF ASKING THE AMERICAN PEOPLE TO RELY UPON A *GOVERNMENT OF MEN* INSTEAD OF A GOVERNMENT OF LAW AND APPROPRIATE CONSTITUTIONAL RESTRAINTS! WAS THERE EVER IN THE

WHOLE HISTORY OF THE LEGAL PROFESSION IN THIS COUNTRY SUCH A STRANGE CASE OF AN UNSOUND "PLEA IN CONFESSION AND AVOIDANCE!"

This astonishing "Plea" amounts to saying to the alert citizens and the more than 60 Senators of this country who have come into the *Court of Public Opinion* charging that these proposed treaties are dangerous to American rights, and demanding that their effect be limited by a Constitutional Amendment unequivocally and permanently restraining them from so endangering those rights: Yes, your concern is legitimate; and, what is more, I admit that not only the laws of the country but the Federal Constitution itself can be overridden by treaties; but, nevertheless, you need not and should not urge a Constitutional Amendment to prevent all these manifold dangers because the present administration is going to see that you are not hurt by this "treaty law;" in fact, as a token of our attitude in this matter, we are going to abandon any further attempt to secure a ratification of the Genocide Convention or the Covenant on Human Rights!

Mr. Dulles admits that he himself thought enough of the idea of a Constitutional Amendment so that he made an effort of his own to draft a substitute for the Bricker Resolution—adding that those efforts "convinced (him) that it is difficult, if not impossible to amend the Constitution so as to exclude possible abuses without incurring risks that are far greater than the risk that the present powers will be abused."

Therefore, perhaps it may be stated that Mr. Dulles' real position and "strategy" is to say that the "balance of risks" favors leaving the treaty power—however subject to abuses—without limitation of any kind. But

this "balance of risk" theory merely imposes upon the American people *all* the risks, whereby an uncontrolled power to make laws for the people of this country by and through treaties may change the Republic from a constitutional government to a government of men and thus leave the way open to bypass the normal legislative processes which the people have set up in the Constitution as the exclusive power for making domestic law for the citizens and, what is still more alarming, circumvent the constitutional *limitations* which safeguard the citizens.

THE BASIC ISSUE

The proposals of Senator Bricker of Ohio and of the American Bar Association to amend the Constitution of the United States respecting treaties and executive agreements raise great questions of constitutional law, and not of temporary State Department policy.

The issue has been described by that distinguished lawyer and scholar, Dr. George A. Finch, of Washington, D. C. (who prefers to be called Mr. Finch and hence will be so referred to hereafter), editor-in-chief of the American Journal of International Law, as the greatest constitutional issue since the controversy over the Bill of Rights—involving as it does the question of subversion of the Constitution and the Bill of Rights by the treaty method.

Now that the hearings before the United States Senate Judiciary Committee have been closed—after running from February 18 to April 11—a summary review of the basic issue may be in order.

Secretary of State John Foster Dulles, notwithstanding his address before the American Bar Association at Louisville on April 12, 1952—an address care-

fully prepared in writing and released to the press in advance, and expressing his considered judgment before a competent audience of distinguished lawyers and judges that the treaty power is "an extraordinary power liable to abuse;" that "treaty law can override the Constitution;" and that "treaties can cut across the rights given the people by the constitutional Bill of Rights,"—took the view, in the hearing before the Senate Judiciary Committee on April 6, 1953, that "events" had checked the trend and that now an Amendment was "unnecessary" and "dangerous."

He made in the hearing on April 6th—again in writing—such statements as the following:

"I believe the concern was then a legitimate one." (p. 2, Dulles statement)

"I have been sympathetic to the point of view reflected in S.J. Resolution 1, and I have so expressed myself." (p. 3)

"I have" indulged "in independent drafting efforts of my own." (p. 3)

But now "the fears are hypothetical" (p. 7) and "an amendment to the constitution is unnecessary." (p. 7)

To all of which, as Mr. Alfred J. Schweppe, chairman of the American Bar Association Committee on Peace and Law, has pointed out, one may counter:

(a) How can "legitimate concern" — in the space of five pages of testimony—so rapidly become "hypothetical fears" making the "amendment unnecessary?"

(b) If the "concern" was "legitimate"—a good word, meaning "grounded on a sound legal foundation"—how can a sudden change in policy by Mr. Dulles—good at most for only his administration—render the "concern" less "legitimate?"

(c) Is not the "legitimate concern" the very reason for the sudden change in treaty-making policy?

(d) Is not the statement that "the fears are hypothetical" flatly contradicted by the sudden and drastic change in policy — a change which could, under pressure, be at any time reversed overnight?

(e) In the light of his own public statements—at Louisville on April 12, 1952, when he was not in office, and at Washington, D. C., on April 6, 1953, when he was in office—how can he on the latter date consistently assert that now "the fears are hypothetical" and that "an amendment to the constitution is unnecessary?"

(f) Is the reason for opposition to a Constitutional Amendment a desire to continue this policy of using treaties "to override the Constitution," "to cut across the rights given the people by the constitutional Bill of Rights," and to make and change laws for the citizens of the United States?

(g) Has there, in fact, been a clean-cut change of policy?

The Secretary's conduct results in a series of "opposites" which may be summarized as follows:

Mr. Dulles (when he was not Secretary) started in Louisville—only a year ago—with the most forceful pronouncement made by anyone on the dangers of the treaty-making power, saying that a treaty makes law "more supreme than ordinary laws;" that treaty law "can override the Constitution;" that treaty law "can take powers away from the Congress and give them to the President;" that treaty law can "take powers from the State and give them to the Federal Government or to *some international body;*" and that "they (treaties) can cut across rights given the people by the constitutional Bill of Rights."

And then the Secretary on April 6, 1953, ends or finalizes all this extraordinary danger of "treaty law" with the conclusion that everybody's fears—even those he entertained himself—are purely hypothetical and nothing should be done about the dangers.

In spite of all the Secretary's "meanderings" in the course of the Senate hearings, the basic issue still remains one of Constitutional Law and not one of temporary State Department policy.

DIFFICULTIES OF LANGUAGE

Mr. Dulles urged in the hearings on April 6, 1953, that there are difficulties of language in phrasing a Constitutional Amendment.

All will agree that the drawing of a Constitutional Amendment on this matter or any other matter involves care and appropriateness of language. But have we become so inept and impotent in the use of language that words cannot be found to protect the American people against an admitted great and impending danger to their basic rights and form of government?

As Mr. Finch, a recognized expert in the field of Constitutional and International Law, and Judge Orie Phillips, a distinguished and experienced jurist, so ably pointed out in their testimony, the proposal for a Constitutional Amendment is merely to complete the original Bill of Rights by inserting simple language into the Constitution which will make it forever clear to government officials and to courts that treaties in conflict with the Constitution shall not be of any force and effect; that treaties shall not make domestic law unless implemented by Congress within its constitutional powers, and that the same rule shall apply to executive agreements.

The ideas that should be incorporated in this Amendment are simple, clear and substantially agreed to by everybody who has really studied the matter. Certainly it is not impossible to phrase those ideas into proper language, and certainly the eminent members and lawyers of the Senate Judiciary Committee can solve this so-called difficulty of language, if there is one.

Mr. Dulles and some of the other Government witnesses suggested that, even if appropriate language were found, some court might have difficulty in properly interpreting the language. This amounts to saying that we cannot trust our courts to be intelligent in the matter of language, and therefore we should have no Constitutional Amendment. According to such an argument, it would not be advisable to have even a Constitution!

Chief Judge Orie Phillips of the United States Court of Appeals for the Tenth Circuit, who has had one of the longest records of service on the Federal bench in this country, testified that the courts would have no difficulty in understanding and interpreting the simple language of such an Amendment as that proposed by the American Bar Association. He indicated that the proposed Amendment would be no more difficult of interpretation—and perhaps not as difficult—as the language of some of the constitutional limitations now contained in the First Ten Amendments. If so-called difficulty of language or phrasing or interpretation had heretofore been treated as a deterrent to protecting American citizens and the American form of government against acknowledged abuses or dangers of power vested in government officials, we would never have had any Constitution, any Bill of Rights, any additional Amendments to the Constitution, or any form of government of law and constitutional restraints.

It is Mr. Dulles himself who has made the greatest argument in favor of a Constitutional Amendment and the immediate necessity of phrasing one that will be adequate and appropriate. Mr. Dulles' Louisville declaration of the *omnipotent* power now inherent in the treaty-making process will become the easy basis, platform and "springboard" for the so-called "man-on-horseback" to *legally* rule this country by treaties, executive agreements and executive decrees. Mr. Dulles, more than any other man in the United States, has pointed up the necessity of a Constitutional Amendment; and the necessity for it has now become more important than any other matter engaging the attention of the officers of our Government.

Dean Clarence Manion, the distinguished former Dean of Notre Dame and Professor of Constitutional Law, said in his testimony that this is the "hottest issue" in the minds and hearts of the people of this country since the Civil War; and Mr. Finch, as already pointed out, said in his testimony that it is the greatest constitutional issue since the controversy over the adoption of the Bill of Rights—the First Ten Amendments.

The issue is more important to the preservation of this Republic than the dangers of Communist infiltration, taxation, war and peace, or any other issue.

It is almost unbelievable to have high officials of Government say that because the matter may involve difficulty of language the omnipotent power of the treaty-making process should be allowed to go unrestrained and thus some day fall into the hands of an administration which will use it for the purpose of by-passing our normal legislative processes. This is the easy and legal way to a "dictatorship."

The American Bar Association through its House

of Delegates, which is its governing and policy-making body, at its February, 1952, meeting, adopted a resolution recommending to the Congress a text for an appropriate amendment on treaties reading as follows:

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of treaty." (See proceedings of House of Delegates, 38 Am. Bar Jour. 435, May, 1952).

At its September, 1952, annual meeting the American Bar Association adopted a second resolution recommending to the Congress a Constitutional Amendment with respect to executive agreements providing, *inter alia,* that executive agreements shall not be made in lieu of treaties (See proceedings of House of Delegates, 38 Am. Bar Jour. 1069, December, 1952).

Within the principles and objectives embodied in the foregoing resolutions of the American Bar Association a shorter form of amendment was formulated and introduced by Senator Arthur Watkins of Utah as Senate Joint Resolution 43 and reads as follows (Feb. 1953 Peace and Law Report, page 10):

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty. Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."

Why should any American who believes in the Con-

stitution of the United States object to the proposition (first sentence of S.J.R. 43) which merely states that a provision of a treaty which conflicts with any provision of the Constitution shall not be of any force or effect?

Why should any American who believes that treaties should not make internal (domestic) law unless implemented by legislation, valid or constitutional apart from the treaty, object to the second proposition (second sentence of S.J.R. 43) which reads as follows:

> "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

Why should any American who believes an executive agreement ought to be based on something more than the whim or caprice of a particular President object to the third proposition above stated (third sentence of S.J.R. 43) which reads as follows:

> "Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this Article."

In the face of the foregoing three simple and understandable propositions, what becomes of the difficulty of language which Mr. Dulles talks about as an insuperable barrier to formulating a Constitutional Amendment to protect American rights and the American form of government against the dangers of treaty law? The Secretary's position means that he is opposed to *any* amendment and wants the American people to risk the abuses which he so fully depicted in his Louisville speech last year.

Senator Bricker and Senator Watkins are working in close harmony with respect to this matter of an appropriate text and those who followed the hearings closely entertain no doubt that the distinguished law-

yers of the Senate Judiciary Committee will solve the so-called "difficulty of language" and be able to report out a text for the consideration of the Senate which will be adequate in form and language to protect American rights and the American form of government without interfering with the traditional and proper functions of the executive branch of government or with the proper conduct of our foreign relations.

It is submitted that instead of opposing this salutary proposal for a Constitutional Amendment, Mr. Dulles should long since--as many members of the American Bar Association and many senators have already done —have "burned the midnight oil" in solving the problem of language, and that he should not now, at this late date, just casually brush aside the proposal for a Constitutional Amendment by merely presenting a "Plea" for no amendment. The fact is that the purpose and text for an appropriate amendment have been fully studied. Its objectives are simple and well understood. No one has yet made an effective attack upon the simple language of the *American Bar Association* proposal, most of which is supported by *dicta* of the Supreme Court of the United States, which should be made into positive Constitutional law.

ORIGIN OF THE ARGUMENTS AND THE ERRORS OF MR. DULLES AND OTHER GOVERNMENT WITNESSES

The technique and strategy employed by Mr. Dulles before the Senate Judiciary Committee on April 6, 1953, in all respects conform with evidence introduced by Government witnesses last year (see the volume entitled "Treaties and Executive Agreements" being the report of Hearings, May 21 to June 9, 1952, on Senator Bricker's S.J.Res. 130, published by the

Government Printing Office, 540 pages), and were forged from the arguments and illustrations originally advanced by the City Bar of New York. In reproducing these same old arguments and using these same illustrations, the Government witnesses this year have naturally made the same errors in law, which were exposed in the hearings last year by the proponents for a Constitutional Amendment.

As proof of this, attention is called to the following legal errors in the present State Department's "case" before the Senate Judiciary Committee on April 6th and 7th, 1953:

LEGAL ERROR NO. 1

As pointed out by Mr. Schweppe in his rebuttal testimony before the Senate Judiciary Committee, the Secretary of State, on page 6 of his April 6, 1953, mimeographed statement, erroneously says:

> "The danger to the nation, however, from agreements not submitted to the Senate as treaties, or to the Congress for legislative validation, cannot be great, because, without either Senate or Congressional action, these agreements cannot constitutionally become 'law of the land.' "

This statement completely overlooks the decisions of the Supreme Court in *U. S. v. Belmont,* 301 U.S. 324, and *U. S. v. Pink,* 315 U.S. 203, in which the Supreme Court unqualifiedly held that executive agreements entered into by the President—although without the consent of the Senate—were nevertheless the supreme law of the land and superseded the law of the State of New York. This holding is made at various points in those two opinions. One statement from the *Pink* case may be quoted, as follows:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitu-

tion. Such international compacts and agreements as the Litvinov Assignment have a similar dignity." The supposed absence of risk, therefore, which the Secretary of State imputed to executive agreements by reason of his erroneous views as to the constitutional supremacy of such agreements, is a fallacy. On the contrary, the danger from such executive agreements is present and real, because the Supreme Court has held that just like treaties executive agreements become the *supreme law* of the land, without the consent of the Senate or any other official body whatever.

LEGAL ERROR NO. 2

On page 10 of the brief of the Attorney General of the United States the case of *Ware v. Hylton* (1796) 3 Dall. 199, is cited as an instance where the Court held that the treaty of 1783 with Great Britain overrode Virginia wartime legislation discharging indebtedness to British creditors, and also held that the treaty operated to revive a debt owed by an American citizen. But this holding by the Court dealt with the treaty's effect as an *international obligation,* and it was the Congress of the United States which, by an appropriation of $3,000,000, actually discharged the Virginia debts. As a practical matter, neither the treaty nor the decision changed the effect of the Virginia statute so far as the statutory protection of the Virginia citizens was concerned. They were not required to pay the British debts in that State.

What the Attorney General overlooks is that a foreign country—as Mr. Finch and Mr. Carl Rix point out—is only interested in the *effectiveness* of a treaty as an *international obligation,* and that all treaties will continue to be valid as *international obligations* under the proposed Constitutional Amendment of the American Bar Association.

Thus the citation of *Ware v. Hylton* in this connection (as was the case when it was originally cited by the City Bar of New York last year) has no pertinency to the issue here involved. In matters of this kind it is not only necessary to read the decision of the case in question but it is important to read the history of what actually happened in connection with the carrying out of the treaty as an *international obligation.*

LEGAL ERROR NO. 3

Again, on page 11 of the Attorney General's brief, the case of *DeGeofroy v. Riggs* (1890) U. S. 258, is cited, but, just as the City Bar of New York failed to do, there was a failure to read the actual language of the treaty involved in that case. When the language of the treaty is read it becomes completely evident that what the Court said about the treaty power is pure dictum and nothing more. The treaty before the Court in that instance took full account of the fact that French citizens were only to have reciprocal rights *in those States where state laws made the treaty* reciprocal. The treaty in no sense purported to override state laws.

LEGAL ERROR NO. 4

Another error in the arguments of the Government witnesses was their assertion that American individual rights violated by a treaty could be protected by a subsequent *simple* act of Congress (emphasis being laid on the word "simple"). This was also the contention of the City Bar of New York last year. But the fact of the situation is that the same President under whose administration a particular treaty is negotiated would probably veto a so-called "simple" act of Congress looking toward its modification; so that it might often require two-thirds of each branch of the Congress to undo the domestic effect of a treaty.

LEGAL ERROR NO. 5

Another error implicit in the Secretary's position—so ably exposed by Mr. Schweppe, Mr. Finch and Mr. Rix—is the assumption that, under the Constitution *as it now stands* the courts have power to declare treaties unconstitutional.

The Government witnesses seem to have overlooked such cases as *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, where the Court says:

> "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

Then we have the statement of the late Chief Justice Hughes made to the American Society of International Law in 1929, to-wit:

> "The treaty power is a power that has no explicit limitation attached to it. I should not care to voice my opinion as to an implied limitation of the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such. That is, the doubt has been expressed in one of its opinions."

Then comes the unqualified legal fact that while the Constitution expressly says that *a statute* must be passed "in pursuance" of the Constitution, nothing is said about *treaties* except that they must be made "under the authority of the United States." Since there is no control of the treaty power under the Constitution except that it must be made "under the authority of the United States,"—that is, by the President with the advice and consent of the Senate—it would appear there is no *judicial* control over the con-

tents of treaties and that American citizens are now without remedy (without a right to have their day in court) even as to a provision of a treaty destructive of their basic rights under the Bill of Rights. Mr. Dulles himself says: "they (treaties) can cut across the rights given the people by the Constitutional Bill of Rights."

The Courts on a variety of occasions have expressed the opinion that what is done in the field of foreign relations is a purely political question and "not subject to *judicial* inquiry or decision." It cannot be said with any degree of assurance that the Courts, under the present constitutional situation, would actually hold any treaty unconstitutional. In fact, Mr. Dulles, at the time of his Louisville address (and he has not since changed his legal opinion, but only State Department policy) was sure they could not, or he would not have said: "Treaty law can override the Constitution." He was talking about what treaties could properly do under our Constitution as it now stands.

Moreover, beginning with Mr. Justice Chase who said in *Ware v. Hylton* (1796), *supra,* that he doubted the power of the Court to hold a treaty unconstitutional, we end with the Circuit Court of Appeals for the Ninth Circuit, in the case of *U. S. v. Reid* (1934) 73 F.(2d) 153, saying, "it is doubtful if Courts have power to declare the plain terms of a treaty void and unenforceable."

In fact, the distinguished "Committee on Amendments to the Federal Constitution" of the New York *State* Bar Association (not *City* Bar) consisting of the Hon. William D. Mitchell, former Attorney General of the United States, and Messrs. John W. Davis, Lewis R. Gulick, John J. Mackrell and Harrison Tweed, expressed a genuine fear that the Supreme Court of the United States might sustain the proposed

International Covenant on Human Rights. This Committee said that it would place "a heavy strain on the Supreme Court to hold these treaties invalid."

In view of this very grave doubt of the present power of the Courts to hold even a "bad" treaty unconstitutional, it is necessary to have a Constitutional Amendment in appropriate language so that the Supreme Court is in a position to say that the treaty-making power is not unlimited and to determine whether the treaty power in a given instance has been exercised within the limitations imposed by such an Amendment.

LEGAL ERROR NO. 6

Another error made in the statement of the Secretary of State is found on page 1, third paragraph thereof, under the caption, "Historical Background." There is found the statement that the records of the Constitutional Convention reveal that some of the ideas contained in the Amendment now being proposed were advanced and rejected during the Constitutional Convention. The Secretary says:

> "For instance, Gouverneur Morris made a motion that no treaty should be binding 'which is not ratified as a law.' This was voted down 8 to 1 (2 Farrand 392)."

Just how the statement quoted could be made with a straight face is not clear, although the City Bar of New York and Government witnesses made the same mistake last year. It ought to be obvious to anyone that there is an essential difference between a clause which says that no treaty of any kind shall be binding *even as an international agreement,* which has not been ratified as a law by the whole Congress, and the present proposal which leaves a treaty binding in all respects (without legislation) as an *international ob-*

ligation, but merely provides that treaties are not binding as *domestic* law until Congress acts.

B. FALLACIES OF CERTAIN SPECIFIC ARGUMENTS OF THE AMENDMENT OPPONENTS.

FALLACY NO. 1

The Amendment Opponents Say: There Is No Need for a Constitutional Amendment Because, Inter Alia, We Have Made As Yet No Really Bad or Dangerous Treaties

Of course, the first answer to this is that certain provisions of the United Nations Charter affecting domestic law are very dangerous treaty provisions under which a particular Congress might now legislate as to all manner of social, economic and property matters which, in the absence of such a treaty, Congress would have no right, under the Constitution, to deal with.

The Warsaw Convention is certainly a bad treaty in its effect on American individual rights; the proposed Genocide Convention would adversely affect American rights in several respects; the proposed Covenant on Human Rights would be a bad treaty in its effect on American individual rights.

The proposed Convention for the Establishment of an International Criminal Court is certainly a bad treaty; as is also the proposed Convention on Newsgathering and International Transmission of News and Right of Correction.

But the real danger lies in the vast array of treaties affecting American individual rights and the American Form of Government that are being prepared for submission when a sufficiently *internationally* and *socialistically* minded President and Senate will be ready to sponsor and ratify the more than 200 proposed

treaties in the United Nations and the more than 100 in the ILO (International Labor Organization).

Right here it should be said that there is nothing in the American Bar Association proposal that would interfere with the appropriate functions of the ILO as originally conceived. An appropriate Constitutional Amendment would only prevent the ILO from becoming, under ambitious leadership, a "World Parliament"—as some of its leaders have now announced it to be.

Our Forefathers did not wait until they had suffered infringements of their basic rights like freedom of speech and freedom of press before taking steps to prevent their violation. They insisted upon the adoption of the First Ten Amendments *forthwith*—before any infringement of those rights—so that it would be stated, too clearly for any of the officials of government or the courts to misunderstand, that in the matters covered by the First Ten Amendments the federal government was prohibited from acting.

Mr. Dulles well knows (and he has not repudiated it) that the State Department officially declared (State Department Publication 3972—Foreign Affairs Policy Series 26 released September, 1950—Foreword by President Truman) that there is no real difference between "domestic and foreign affairs." Hence, the State Department has taken the position that our domestic affairs are now a *proper* subject of international negotiation. By this device of expanding the area of international negotiation, the State Department can without restraint through the treaty making process "override" many of our Constitutional "guarantees" with respect to domestic rights.

Mr. Dulles well knows that in *Missouri v. Holland*, (1920) 252 U.S. 416, the Supreme Court of the United

States definitely held that whereas a law of Congress to be valid must be made *in pursuance* of the Constitution, a treaty to be valid and effective as law need only to be made by the *authority of the United States*—which merely means the President and two-thirds of the Senate present and voting; and that under this decision the powers of the National Government may be enlarged by treaty beyond what the Constitution grants and hence, our Constitution in that respect may be changed by treaty. However differently lawyers may interpret this case as to other aspects of the matter, no lawyer disputes that this much discussed case at least held that nothing presently in the Constitution forbids *enlargement* of Congressional power *by and through a treaty.*

Perhaps Mr. Dulles does not think that changing our Constitution by enlarging the powers of Government constitutes an "undermining" of our Constitution. But under this doctrine of "expansion of powers" by treaty, the Chief Justice of the United States and two other Justices in the recent Steel Seizure Case declared that though the President of the United States lacked power under the Constitution to seize private property, our ratification of the United Nations Charter and the North Atlantic Pact as treaties, and statutes implementing these treaties, gave him such power (*Youngstown Sheet and Tube Co. v. Sawyer* (1952) 343 U.S. 579).

Jefferson, who, by reason of his ambassadorship to France, was not a member of the Constitutional Convention, concerned himself greatly with the matter of ratification of the Constitution and with the first ten amendments, and in his *Manual of Parliamentary Practice,* had this to say:

"By the general power to make treaties, the Constitution must have intended to comprehend only

those objects which are usually regulated by treaties, and cannot be otherwise regulated.

"*It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way.*" (Italics supplied.)

Mr. Dulles knows that *Missouri v. Holland* overrules this Jeffersonian concept of the constitutional scope of the treaty-making power; and that as the State Department now conceives treaties under its 1950 declaration that there is no real difference between "domestic and foreign affairs" that treaties can be made on almost any subject heretofore deemed domestic only.

Mr. Dulles knows that when the United Nations Charter was ratified and approved in 1945 and presented to the American people and to the Senate, Mr. Stettinius, the then Secretary of State, in a public letter to the President under date of June 26, 1945, stated that there was no intention by and through the Economic and Social Council of the United Nations to interfere in the domestic affairs of the United States or other member nations. He said:

"The Economic and Social Council has no power or right to interfere with the domestic affairs of the states composing the United Nations."

Mr. Dulles knows also that there was included in the Charter itself a protective provision regarding any meddling by the United Nations in the domestic affairs of the member nations. The Charter would never have been ratified and approved without some such provision. Chapter 1, Article 2, paragraph 7 of the Charter reads as follows:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in mat-

ters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter * * * "

But as soon as the United Nations was organized and began to function, then *with the full approval of the State Department,* the U. N. Commission on Human Rights and other agencies of the U. N. went to work immediately to make Conventions, Treaties and Pacts to tell each and every nation how to conduct its internal affairs. As herein elsewhere stated, the U. N. and its affiliated agencies have some 200 treaties "in the works" dealing with a multitude of subjects most of them heretofore deemed domestic in character, to say nothing of the ILO.

For a year or two following the approval of the Charter the State Department was very careful not to disclose to the American people that it intended to follow such a program in violation of its own public representation in the Stettinius letter and in spite of the language in the Charter (Chapter 1, Article 2, paragraph 7). But the Director of the Division of Human Rights of the United Nations, Mr. John P. Humphrey, a Canadian, let the "cat out of the bag" in an article in the January, 1948, issue of *The Annals of the American Academy of Political and Social Sciences* where he stated:

"What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of super-national supervision of this relationship between the state and its citizens."

For a time the State Department by a policy of silence continued to try to fool the American people regarding this program of changing our domestic rights by treaties, but in September, 1950, it publicly came forth and nullified its own public representation in the Stettinius letter and the saving effect intended by Chapter 1, Article 2, paragraph 7, of the Charter by declaring that "*There is no longer any real difference between 'domestic' and 'foreign' affairs.*" Under this declaration of policy we were told that our domestic affairs were to be as much subject to United Nations' declarations, treaties and pacts as our foreign affairs. As already pointed out, Mr. Dulles has not repudiated these broad declarations of policy, except as to the Human Rights Covenant, the Covenant on Political Rights of Women and the Genocide Convention.

In addition to the foregoing declaration of policy by the State Department which in effect makes our domestic affairs no longer a matter for our own determination, we meanwhile have had the broad declaration of the "New School of Internationalists" that "once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, *that subject* ceases to be a matter being 'essentially within the domestic jurisdiction of the Member States.' As a matter of fact, such a position represents the official view of the United Nations, as well as of the member states that have voted in favor of the Universal Declaration of Human Rights." (Moses Moskowitz, 35 Am. Bar Jour. 283-285). In other words, the United Nations in carrying out what is said to be its "official view" intends to pay no attention to the provision in the Charter designed to protect

the member states from United Nations interference in their domestic affairs.

It was the State Department declaration of policy and the "New School of Internationalists" that originally produced the necessity for a Constitutional Amendment to protect American rights against the dangers of treaty law. Last year Mr. Dulles clearly disclosed the need for a Constitutional Amendment in his speech at Louisville outlining and confirming the gravest fears of American lawyers and the American people with respect to the omnipotent power of the treaty-making process, and disclosed that there is now more real threat and danger than there was when our original Bill of Rights was adopted to justify an appropriate and adequate Amendment to the Constitution to protect American rights and the American form of government.

FALLACY NO. 2

The Amendment Opponents Say: Bad or Dangerous Treaties Will Be Prevented by Senate Vigilance

The answer to this is that 58 senators last year—and more than 60 senators this year—themselves proposed for consideration a Constitutional Amendment to protect American rights and the American form of government against treaty law. Undoubtedly Senator Pat McCarran reflected the views of many other senators when he indicated in the hearings last year that the senators want a Constitutional Amendment to protect the Senate as well as the American people, in view of the fact that Senators often do not have time and opportunity to examine all the detailed provisions of a particular treaty, when the State Department is urging immediate ratification in the interest of advancing the State Department's foreign relations policy.

It may also be pointed out that under Senate procedure treaties can be ratified with only a very few senators present and voting.

On January 29, 1952, only 6 senators were present and voting when the protocol for the admission of Greece and Turkey to the North Atlantic Treaty was first agreed upon.

On June 13, 1952, when a treaty with Ireland was brought up for ratification, Senator Sparkman of Alabama was in the chair and only Senator Thye of Minnesota was in the chamber. Senator Sparkman called for the ayes and nays and declared the treaty ratified. Senator Thye stated later that he did not vote for the treaty but that he did not object.

The foregoing instances are not recalled to reflect in any manner upon the action of senators, but only for the purpose of pointing up again the need for a Constitutional Amendment as a protection both to the Senate and to the American people—particularly in matters affecting the basic rights of American citizens.

It should also be stated—once and for all—that the proposed Amendment is not an amendment of the treaty-making *power,* so far as the negotiation and ratification of treaties are concerned. When an appropriate Amendment is adopted, the President and the State Department will still be as entirely free as they are now to negotiate, and the Senate will still be as entirely free as it is now to ratify, treaties. But in the future, if, as and when it develops that some treaty adversely affects *domestic* law, then the protective shield of such an Amendment will render it possible to urge in our courts that unless a particular treaty has been implemented by a valid act of Congress it is not *domestic* law. It will still remain and be from the

instant of its ratification effective as an *international* obligation. This basic principle of international law seems to have been completely ignored by all the Government witnesses.

FALLACY NO. 3

The Amendment Opponents Say: Even where Bad Treaties Are Drafted, American Rights Can Be Protected By Understandings and Reservations

An "understanding" is sometimes appended to a treaty for the purpose of making it clear that the document has been approved under certain conditions. A "reservation" is a clause appended to a treaty which states that some portion of the treaty is not to be considered binding. Both a so-called "understanding" and "reservation" amount to nothing more than a counter offer to the other signatory nations and, of course, require acceptance—which, in connection with multi-partite treaties of the present day, is almost impossible.

Moreover, to draft appropriate understandings and reservations at the immediate time of ratification requires a detailed study of each and every provision of the treaty. This difficulty of having time for study is recognized by the senators themselves in connection with the ratification of treaties. The senators are often, and properly, so busy with committee meetings and otherwise that they do not have any more time to scrutinize *understandings* and *reservations* than to carefully read and scrutinize treaties as such. This leaves the understandings and reservations to be drawn by the same personalities in the State Department that have helped negotiate the treaty and are, naturally, anxious to have it accepted. This is no protection for the American people.

FALLACY NO. 4

The Amendment Opponents Say: If Bad Treaties Are Ratified They Can Be Nullified by Subsequent Legislation

Doubtless treaties can be nullified by subsequent congressional legislation. But even so, such subsequent legislation is not an adequate remedy to protect us against the vast array of treaty law that is being "spawned," for the following reasons, among others:

1. Congress will be unable to nullify a treaty in the face of the executive veto power, unless it can muster a two-thirds vote in both Houses. Thus a treaty which has become the supreme law of the land by an action of the President and only two-thirds of the Senate *present* cannot, even though deemed harmful to our internal rights by a large majority of Congress, be rendered inoperative unless a two-thirds vote can be secured in both Houses.

2. Such subsequent legislation by Congress may easily involve international complications. This is the exact situation which we recently faced with respect to the proposed repudiation of the Yalta, Teheran and Potsdam agreements.

3. A particular Congress might not elect to repeal a treaty even though it had some bad provisions; whereas, if a treaty were non-self-executing as to domestic matters until implemented, the same Congress might very well refuse to implement certain provisions.

FALLACY NO. 5

The Amendment Opponents Say: The Proposed Constitutional Amendment Would Interfere With Many of the Normal Matters That Various Departments of Government Are Traditionally Concerned With, Like the Control of Narcotics, Drugs, Etc.

An Amendment in the simple language of the American Bar Association Amendment would in no sense interfere with the "normal" and the "traditional" concerns of these Departments of Government. This is fully established by the testimony of numerous witnesses before the Senate Judiciary Committee and effectively and specifically established in the excerpts from the testimony of Mr. Finch (hereto attached as Appendix C) where all who are interested may clearly read in detail and thereby understand the series of fallacies argued by the Government witnesses with respect to the interference of such an Amendment with the "normal" and "traditional" concerns of various Departments of Government. In this connection, it should be borne in mind that Mr. Finch is not only a recognized authority on American Constitutional Law but one of the greatest, if not the greatest, living authority in the field of International Law.

FALLACY NO. 6

The Amendment Opponents Say: A Constitutional Amendment Would Handicap the Conduct of Our Foreign Relations

The City Bar of New York, as well as the distinguished witnesses of the Departments of Government, generally take the position that a Constitutional Amendment will interfere with the normal and proper conduct of our foreign relations, with the making of appropriate commercial treaties, with the proper build-up of our defense arrangements with

the rest of the free world, and with the international control of such important matters as atomic energy. Some of these witnesses go so far as to dramatize the matter by such statements as that "the proposed Constitutional Amendment will curtail the President's authority as Commander-in-Chief of the Armed Forces."

As an illustration, they suppose that an enemy is invading Alaska and our West Coast and that a Canadian motorized division is being rushed to the aid of our West Coast from Eastern Canada. They then make the utterly fantastic contention that such an armed force in this country *by our invitation* to help protect us would be subjected to various state laws as to carrying firearms, exceeding road speed limits, etc.

The foregoing illustration is so fantastic as to require no answer, but in passing it may be pointed out that a Constitutional Amendment in the simple form proposed by the American Bar Association would in no sense affect the President's powers as Commander-in-Chief of the Armed Forces and that any Canadian division in this country *by the invitation* of our Government would be immune from the annoyances of purely local laws and regulations. Again Mr. Finch and other witnesses who have carefully studied the matter over a period of years have clearly established the fallacy of all the foregoing contentions and many others advanced without due and proper study of the subject matter.

Those who have carefully considered the provisions of the Federal Constitution and the court decisions with respect to the broad and exclusive powers of the Federal Government in matters of *defense*, matters of *international armament* (whether atomic energy or otherwise), matters of *interstate and foreign commerce*, and all other matters of international import,

are satisfied that these arguments of the Amendment opponents—which were all made in the hearings last year and merely adopted with their legal errors and fallacies and expanded by Government witnesses again this year—are sheer bogeyism and are still bogeyism, by whatever persons made.

FALLACY NO. 7

As a Kind of Final Legal-Psychological Argument, the Amendment Opponents Suggest That a Constitutional Amendment Would Prevent the Making of Treaties by the United States Like the Kellogg-Briand Pact Outlawing War As An Instrument of National Policy, or Would Prevent the Making of a Treaty for Regional and Mutual Defense, Like the North Atlantic Treaty (NATO).

Because of his learning and competence in International as well as American Constitutional Law, Mr. Finch was recalled to testify specifically on these questions and he testified as follows:

"MR. SMITHEY (Senate Judiciary Committee Secretary): Will the American Bar Association's proposed constitutional amendment prevent the making of treaties by the United States like the Kellogg-Briand Pact outlawing war as an instrument of national policy?

"MR. FINCH: My answer is no.

"MR. SMITHEY: Then will the American Bar proposal prevent the making of a treaty for mutual or regional defense like NATO?

"MR. FINCH: I give it the same answer.

"MR. SMITHEY: Do you wish to amplify your answer, Mr. Finch, at all?

"MR. FINCH: In my main testimony yesterday I think I covered that point in general terms. Specifically, the Kellogg pact is a statement that sig-

natories renounce war as an instrument of national policy. That has generally been interpreted and was so interpreted by Secretary Kellogg, as being applicable only to aggressive war. There is no renunciation of defensive war in that pact, and unless we wish to maintain the United States is going to be an aggressor, there is no reason why there should be any influence of the Kellogg pact upon the constitutional power of Congress to declare war whenever it is necessary in the national interest.

"Now, the same comments apply even more forcibly to the so-called NATO agreement. The NATO agreement was made in direct response to a Senate Resolution known as the Vandenberg Resolution, Senate Resolution 239 of June 11, 1948, and I would like to read a few of the paragraphs of that resolution:

"It says:

" 'Resolved, That the Senate reaffirm the policy of the United States to achieve international peace and security through the United Nations so that armed force shall not be used except in the common interest, and that the President be advised of the sense of the Senate that this Government, by constitutional process, should particularly pursue the following objectives within the United Nations Charter.'

"Now, one of those objectives, paragraph 2 of that resolution reads:

" 'Progressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles, and provisions of the Charter.'

"Paragraph 3:

" 'Association of the United States, by constitu-

tional process, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.

"'(4) Contributing to the maintenance of peace by making clear its determination to exercise the right of individual or collective self-defense under Article 51 should any armed attack occur affecting its national security.'

"The NATO agreement specifically states it under Article 51.

"'(5) Maximum efforts to obtain agreements to provide the United Nations with armed forces as provided in the Charter, and to obtain agreement among member nations upon universal regulation and reduction of armaments under adequate and dependable guaranty against violation.'

"Now, Article 43 of the Charter of the United Nations says agreement for the provision of armed forces for the Security Council shall be in accordance with our constitutional processes.

"So, Mr. Chairman, there would not possibly be any conflict between this provision to amend the Constitution with reference to internal law or with reference to protecting the Constitution in agreements made by the national Government, which has full authority to provide for our national defense, and to provide for the raising of our armed forces. There could be no possible conflict between the amendment proposed by the American Bar Association and the right of this Government to enter into whatever treaties it is deemed necessary to keep the nation out of war, to achieve international peace through peaceful processes of solution, and to co-operate for collective security through such organizations as the United Nations."

Mr. Finch, as shown by his qualifications set forth in Appendix C, is not only an expert on International Law in the field of *scholarship,* but he has had a long and wide range of *practical experience* in this field. He has been a consultant to various State Departments, beginning with the administration of Elihu Root. He accompanied President Wilson to Versailles and was one of the President's consultants there. He has held many other important government assignments. He has watched International Law grow and develop over a long period of years and, as he himself says, he would favor nothing by way of a Constitutional Amendment which would incapacitate the United States from entering into appropriate agreements for outlawing war, for resisting aggression, and for attempting to secure the peace by regional or world treaties and agreements.

PART II

Summary of the Position of the Sponsors of the American Bar Association's Proposal for a Constitutional Amendment

A. THE NATURE OF THE AMERICAN BAR ASSOCIATION PROPOSAL

The proposed Amendment embodies the following ideas:

1. A provision of a treaty which conflicts with the Constitution of the United States is void.

2. The form of government of the United States as created in the Constitution, without regard to the treaty power, cannot be changed by any exercise of the treaty power.

3. A treaty shall not be effective as internal law in the United States unless made so by legislation—thus putting us on a parity with other leading nations, in which a ratified treaty, while effective as an international agreement under international law, does not become domestic law within the country binding on the individual states, unless, and to the extent, made so by legislation.

4. It will prevent Congress from acquiring legislative power under a treaty that it does not otherwise have under the Constitution.

5. As a corollary to the treaty proposal, in order to remove any possible doubt on the subject, and in order to embody a complete express statement in the Constitution respecting all international agreements a provision is made regarding executive agreements. This proposal is merely declaratory of the existing power of Congress to "make all laws necessary and proper" to regulate executive agreements; and the proposal subjects executive agreements to the limitation that, like treaties, they must conform to the Constitution, and that they shall not become internal law within the United States until Congress acts.

B. CONDUCT OF FOREIGN RELATIONS

On the one hand, an appropriate Amendment as proposed by the American Bar Association will not interfere with the negotiation and ratification of treaties, nor with the conduct of our foreign affairs, as conclusively demonstrated by Mr. Finch and other witnesses; on the other hand, *it will definitely prevent a treaty from overriding the Constitution and from cutting across the rights protected by the Constitutional Bill of Rights*—as declared by Mr. Dulles.

C. THE UNITED NATIONS

The proposed Constitutional Amendment is not intended to interfere with the proper objectives of the United Nations, but actually to protect it in the performance of its appropriate functions. The reform activities of the United Nations would not have stirred up such opposition in the United States, except from the fear that many of the treaties sponsored by it might, under the supreme law clause of Article VI of the Constitution, automatically become the internal law of the United States, setting aside state constitutions and laws and existing federal laws. Many of those Americans who are generally in sympathy with the United Nations as a world security organization will surely come to oppose it, if its various social, economic and political programs, consisting of compromises with various and conflicting ideologies the world over, should automatically—by treaty—become the supreme law of the land in the United States, under the present treaty clause of the Constitution.

D. EXECUTIVE AGREEMENTS

With respect to executive agreements, reference is again made to *U. S. v. Pink, supra,* in which the Supreme Court of the United States held that executive

agreements do have the force of law within the United States and supersede state law. In that case the court held that the so-called Litvinov Agreement made between Maxim Litvinov, Soviet Foreign Minister, and President Franklin D. Roosevelt, was a binding executive agreement that superseded the law of the State of New York. The Court said (315 U.S. at 231):

> "But state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty or of an international compact or agreement. See *Nielsen v. Johnson*, 279 U.S. 47. Then the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (Griffin v. McCoach, 313 U.S. 498) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement."

While it is true that there are many executive agreements which are made pursuant to express Congressional legislation, there is also the other group of executive agreements which the President makes without consulting Congress—of which the Litvinov Agreement is an example. This latter class of executive agreements, overriding State laws and involving long-range policy commitments, has become increasingly dangerous to the public welfare, as witness Teheran, Yalta and Potsdam. The fact is that executive agreements have been increasingly used in lieu of treaties under a strange doctrine developed in the State Department that treaties and executive agreements are interchangeable. See McDougal and Lane, *Treaties and Congressional—Executive or Presidential Agreements; Interchangeable Instruments of National Policy*, 54 Yale, L.J. 181 and 534 (1945); Borchard, *Treaties and Executive Agreements*—50 Am. Pol. Sci. Rev. 729 (1946).

In fact, Dr. Wallace McClure, for many years an officer of the State Department, Assistant Chief of the Treaty Division, now retired on a federal pension, stated this novel doctrine in his book entitled "*International Executive Agreements*" (Columbia University Press, 1941) as follows (p. 378):

> "For controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present method is desirable * * *."

You will note that this is a bold and brazen declaration that difficult and controversial problems of foreign policy should be handled by the President more or less secretly as executive agreements without consulting Congress or the Senate; whereas, for purely routine acts about which there is no argument, the President should give lip-service to the treaty clause of the Constitution and use the treaty method.

It goes almost without saying that this novel and pernicious doctrine, viz., that the President, in important matters of foreign policy, has the option to resort either to a treaty requiring Senate consent or to an executive agreement (ignoring the Senate and Congress), as he may choose, is unsound, because it renders the treaty clause of the Constitution mere surplusage.

The Founding Fathers undoubtedly intended that all international agreements of consequence should be made by treaties requiring Senate consent. The fact remains, however, that the above false and pernicious doctrine of interchangeability has been increasingly acted upon and that each extension of this doctrine

has been used as a precedent for further extension of executive agreements. This practice must be curbed and the original constitutional intent restored by an appropriate Amendment.

E. APPROPRIATE TEXT OF AMENDMENT

So far as an appropriate text of a Constitutional Amendment is concerned, and as already indicated, certainly the distinguished members of the Senate Judiciary Committee, after the voluminous testimony taken, will be able to select appropriate language to keep both treaties and executive agreements within their proper sphere without at the same time impairing the Federal Government's ability to negotiate appropriately in the international field.

PART III

CONCLUSION

As stated in the beginning, not only the lawyers but the lay people of this country are aroused. They want something done about the dangers (most vividly pictured by Mr. Dulles) of treaty law and executive agreements. It is no answer to them to say that we now have an Administration which will not make dangerous treaties or agreements.

The matter has been studied by many lawyers, and the *City* Bar of New York is the only Bar Association that has taken official action opposing a Constitutional Amendment. The City Bar's inadequate research on this matter, however, has become the *erroneous handbook* of the opponents to a Constitutional Amendment, both in and out of Government.

The House of Delegates of the American Bar Association is made up of lawyers from all over the United

States. It did not hurriedly come to a conclusion. It acted only after several years of study and then by an overwhelming vote approved a Constitutional Amendment.

The suggestion has been made in some quarters that this proposal for a Constitutional Amendment has "split" the American Bar Association and that there is a great difference of opinion in the Association regarding it. This is wholly untrue, as the record shows, and as all the officials of that organization from the President down have stated, both officially and in their public utterances.

The opposition to the amendment has been "spearheaded" by the *City* Bar of New York. The official policy body of the American Bar Association—the House of Delegates—after hearing full argument of the matter and all of the objections of the small coterie of opponents, adopted by an overwhelming majority in February, 1952, a resolution recommending a Constitutional Amendment; and similar action was taken by the House of Delegates of the American Bar Association at its annual meeting in San Francisco in September, 1952, with respect to executive agreements.

The extended studies made in this matter have been supervised and conducted by a distinguished American Bar Association committee—The Standing Committee on Peace and Law Through United Nations. This Committee is composed of leading constitutional lawyers throughout the United States:

EBERHARD P. DEUTSCH, Esq.
New Orleans, Louisiana.

DR. GEORGE A. FINCH
Washington, D. C.

VERMONT HATCH, Esq.
New York City

JUDGE ORIE L. PHILLIPS
Denver, Colorado

FRANK B. OBER, Esq.
Baltimore, Maryland

CARL B. RIX, Esq.
Milwaukee, Wisconsin

ALFRED J. SCHWEPPE, Esq.
Seattle, Washington

This Committee has rendered documented reports to the American Bar Association annually and semi-annually over a period of several years. These reports have not only been studied and considered by the officers and Board of Governors and members of the House of Delegates of the American Bar Association, but they have been considered by the officers of State and Local Bar Associations throughout the United States. The matter of the need for a Constitutional Amendment has also been studied and considered by Regional Meetings of the American Bar Association.

The unanimity of opinion by the lawyers of this country regarding this matter IS WITHOUT PRECEDENT IN THE ANNALS OF THE LEGAL PROFESSION OF THE UNITED STATES.

Many City and State Bar Associations have also approved the proposal for a Constitutional Amendment. Others are acting as their studies are completed.

The National Association of Attorneys General,

after two years of study, approved a Constitutional Amendment.

Many state legislatures have already approved the general objective of a Constitutional Amendment on treaties and executive agreements.

Resolutions approving an Amendment passed by the American Legion, the Veterans of Foreign Wars, the Marine Corps League of America, and other great national organizations, were not hurriedly passed. They were all screened and studied by the distinguished legislative commitees of those organizations over a period of a year or more.

There are numerous other organizations that could be similarly mentioned.

It is in the heart and mind of the great majority of the American people that they want something done about this problem of "treaty law"; they want the gap in the Constitution closed; they want written into the Constitution a simple Amendment which will prevent not only the present administration but any administration from using the treaty-making power to establish a dictatorship in this country; an Amendment that will forever prevent the officers of government from giving away our powers of government to some "international body," which Mr. Dulles says can be done under the present unlimited treaty-making power.

The issue involved in this matter of a Constitutional Amendment covering treaties and executive agreements is, in the last analysis, an issue of ideology in government: Shall we have a government of men—a totalitarian government (of which Communism is only one form)—or a government by the consent of the governed, through their duty-elected represen-

tatives in the State Legislatures and in the Congress of the United States?

Long before anything was heard of Communism—in fact, in every age and among every people—there have ever been two schools of thought with respect to government: one, a government of *unlimited* powers; the other, a government of *limited* powers.

We in America have thought and supposed that we had a government of *limited* powers and Americans are completely dedicated to that principle. Men out of power recognize this principle, but when men get into power they come to dislike constitutional restraints. It is so much easier for them to operate according to their own personal ideas of what is *good* for the country, if they do not need to have regard for constitutional restraints.

From the writings of Thomas Jefferson and others it is quite clear that this treaty-making power was not intended by our Forefathers to be unlimited and unrestrained—but by a series of circumstances and judicial decisions it has become just that.

Mr. Dulles himself has stated that the treaty power is *unlimited* in the sense (a) that it can "override the Constitution"; (b) that it "can take powers away from the Congress and give them to the President"; (c) that it "can take powers from the state and give them to the Federal Government or to *some international body;* and (d) that it "can cut across the rights given the people by the constitutional Bill of Rights."

Hence, basically, the choice of senators and members of Congress, in voting on the proposed Amendment, is the simple choice between having a constitutional provision which will place adequate and appropriate restraints on the treaty-making power—or

leaving that power so free to function that under it and by that route a President and his executive staff may, through treaties and executive agreements, impose rules and regulations as law upon the people of this country which neither the Congress nor the State legislatures have ever enacted as law, and rules and regulations which not only override state laws and constitutions but which, as Mr. Dulles says, may override the Federal Constitution and even put the United States into an "international" organization or into a world government, without the people or the Congress having the opportunity to voice any objection or even hearing about it until it is a *fait accompli!*

Wake up, America, before it is too late!

APPENDIX A

TELEGRAM

Seattle, Washington
September 23, 1949

HON. JOHN FOSTER DULLES
UNITED STATES SENATOR
SENATE OFFICE BUILDING
WASHINGTON, D.C.

ST. LOUIS POST DISPATCH QUOTES YOU EDITORIALLY AS "DISAPPOINTED AND AMAZED" BY THE AMERICAN BAR ASSOCIATION'S ACTION OPPOSING RATIFICATION OF THE GENOCIDE CONVENTION. I AM SENDING YOU, UNDER SEPARATE COVER, COPY OF THE REPORT OF THE ABA COMMITTEE ON PEACE AND LAW UPON WHICH THE ACTION AT ST. LOUIS WAS BASED. CERTAINLY AS A MEMBER OF THE ABA AND BEFORE YOU EXPRESS FURTHER CRITICAL PUBLIC COMMENT OF ITS ACTION YOU SHOULD MAKE A LAWYERLIKE STUDY OF THE REPORT UPON WHICH THAT ACTION WAS BASED.

FRANK E. HOLMAN

APPENDIX B

December 29, 1952

Honorable John Foster Dulles
72 East 91st Street
New York, New York

Dear Mr. Secretary Designate:

This will confirm my night letter to you of even date as follows:

"In addressing the Women's Patriotic Conference on National Defense, January 30, 1953, in Washington, D.C., I expect to comment on several United Nations treaty proposals approved by the Truman-Acheson regime which will soon require your official attention as our new Secretary of State. In order not to misstate or misjudge your present attitude toward these treaty proposals I respectfully submit the following questions:

"Question No. 1: In September, 1949, you publicly, in a press interview, upbraided the American Bar Association for opposing the Genocide Convention. Have you ever retracted your statement or your position in that regard? If so, where, when and to what extent? If not, do you still favor ratification of the Genocide Convention by the United States Senate?

"Question No. 2: As you know, the American Bar Association favors a Constitutional Amendment to set at rest any question as to whether the provisions of a treaty may modify, enlarge or supersede in any particular the United States Constitution and Bill of Rights. Do you favor such a Constitutional Amendment? If not, what is your position with respect to effectuating the declaration in the 1952 Republican Platform that 'We (the Republican Party) shall see to it that no treaty or agreement with other countries deprives our citizens of the rights guaranteed them by the Federal Constitution'?

"Your timely answer to the foregoing questions will be greatly appreciated."

If you will refer to my telegram to you dated September 23, 1949, regarding the Genocide Convention and the action of the American Bar Association with respect thereto, I am sure you will understand the basis and purport of Question No. 1 above.

As to Question No. 2 I am forwarding you under separate cover a copy of the February, 1952, Report of the American Bar Association's Standing Committee on Peace and Law Through United Nations—also a copy of the latest Memorandum prepared by the Peace and Law Committee in reply to the Memorandum of the Department of Justice on S. J. Res. 130, 82nd Congress, both of which appear in the recently published HEARINGS re Treaties and Executive Agreements before a Sub-Committee of the Committee on the Judiciary of the United States Senate. For your convenience I am also forwarding you an official copy of the report of said HEARINGS.

Your respectfully,

/s/ Frank E. Holman
Past President
American Bar Association.

APPENDIX C

Excerpts from STATEMENT OF GEORGE A. FINCH, Sr. Member, Committee on Peace and Law, American Bar Association, before the Sub-Committee of the Judiciary Committee of the Senate of the United States

April 10 and 11, 1953

Senator Smith. Mr. Finch, now I will ask you not to be too modest, but identify yourself. Of course I know who you are, what you have done and what you have been doing, but the record will not carry it unless you tell us now about your qualifications and your activities and do not be modest.

Mr. Finch. Mr. Chairman, and members of the subcommittee, I am appearing in this hearing in my capacity as a member of the Committee on Peace and Law of the American Bar Association. I might say I was born in the city of Washington and I hold a law degree from Georgetown University.

I served in the Department of State under Secretaries Elihu Root and P. C. Knox. During that period I was secretary to the American Commission to Liberia, visited that country and also the French territories on the north and the British territory on the south.

I was assistant legal adviser to the American commission to negotiate peace in Paris in 1919 and accompanied President Wilson on the George Washington.

I visited Japan, Korea, Manchuria and China in 1929. I met Generalissimo Chiang Kai-shek several times, also Dr. Sun-Fo, the son of Dr. Sun Yat-sen, the founder of the Chinese Republic. I also met Mr. Yoshida, who is now the Prime Minister of Japan and practically all of the leading

officials of the Japanese, Manchurian, Chinese and Korean Governments at that time.

Senator Watkins. Did you help write the Treaty of Versailles?

Mr. Finch. I was an assistant legal adviser.

* * *

I have been a delegate to several inter-American conferences. I have been around to South America several times, been to Canada, Mexico and Cuba, visited Europe several times, the countries of central Europe and Great Britain.

I have some other titles besides being a lawyer. I am a professor of international law of the Georgetown School of Foreign Service. I am president of the Inter-American Academy of Comparative and International Law of Havana, Cuba. I am a member of the Curatorium of the Academy of International Law at The Hague. I have lectured at The Hague. I have lectured at the University of Michigan, Washington, at Seattle, and McGill University in Canada.

I am also the editor-in-chief of the American Journal of International Law.

* * *

I am a member of several organizations. I am a member of the Xavier Committee of the American Institute of International Law. I will refer to Who's Who in America for anything that I have forgotten to tell you.

* * *

Senator Smith. Let the record show, lest someone might think that Mr. Finch was bragging, that this information was insisted upon and extracted from him by the committee.

Mr. Finch. Mr. Chairman, in view of the fact that I have had some opportunity to make some observations outside of this country as well as within it, I want to make my position perfectly clear at the outset.

Senator Smith. Before you begin that, there is one thing the chairman would like to ask you to do and I imagine the other members of the committee would like to hear: this morning did you hear Governor Stassen's testimony?

Mr. Finch. I heard Governor Stassen's testimony.

Senator Smith. Now, his ideas of some of the legal principles involved seem to be somewhat at variance with some of the ideas of some members of the committee. Now, I would like for you to discuss frankly and freely any consideration you may have given to Governor Stassen's opinion and bearing in mind all we are trying to do is to reach a proper conclusion about these particular matters because you are the man who has had so much experience that you should be able to give us an answer to the questions that he raised.

Mr. Finch. Mr. Chairman, as I remember his testimony, and I have a copy of his paper here, but I will not take the time to look it up, I think that Governor Stassen when he came to talk about treaties of friendship and commerce and navigation was a little weak on his understanding of what the Congress of the United States could do under the interstate and foreign commerce laws. I am going to discuss that in a little detail in my paper, so I will not elaborate at this time.

I may say something more about what he said. I think also that his fears about the effects of the amendment of the American Bar Association, which I am speaking principally to, are not well taken. I think most of the argument he made omitted the fact that his agency is operating under the laws of Congress and these amendments do not affect those laws at all. The whole argument, I think, was beside the point, and I think a good deal of the arguments of the other government witnesses who have been here have been beside the point. I will try to point that out as I go along.

I started to say in my paper that I sincerely hope as a person with the experience that I have had, going around the world and being what you might call an internationalist—I think I might qualify to be a professional internationalist, I have devoted practically my whole life to the subject of internationalism—I sincerely hope that the Unit-

ed Nations will succeed as an organization for the maintenance of international peace and security by collective action. I deeply regret that up until now that primary objective has not been achieved in any appreciable measure and that this vital task of the United Nations, which ought to be fulfilled by all the members, has been thrown almost wholly upon the United States.

Moreover, I am a believer in international cooperation on a really reciprocal basis for the mutual benefit of the contracting states.

Collective security against aggression and international cooperation in other fields can and should be accomplished without sacrificing our form of government or the fundamental principles upon which it is founded. That was the expressed intention of the Charter of the United Nations, which stipulates that nothing contained in it "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." (Art. 2, par. 7) Without that provision it is doubtful that the Senate would have given its advice and consent to the ratification of the Charter. This reservation, which applies to every chapter, article, and paragraph of the Charter, was, however, later virtually abrogated by Executive fiat, so far as the United States is concerned. I refer to the statement published in 1950 by the State Department, with the approval of President Truman, that "there is no longer any real distinction between domestic and foreign affairs." (Publication No. 3972)

* * *

Now, in pursuance of that official statement, treaties are now before the Senate or in course of negotiation by representatives of the United States in organs or specialized agencies of the United Nations which would entangle the United States in international commitments to control the treatment of our citizens at home in matters which up to the present time have been generally recognized as essentially within the domestic jurisdiction of states.

* * *

The adoption of the proposed constitutional amendment now before this committee relating to the treaty-making power would stop the prevailing trend to regard the United Nations as but the first step in the ultimate establishment of a world government in which the United States would occupy the position of a province. The establishment of such a government, I believe, Mr. Chairman, would be the greatest catastrophe that could happen to this world.

* * *

Evidence which is indisputable has been placed before this subcommittee which demonstrates that the philosophy underlying the United Nations conventions in the field of human rights approximates more nearly the principles of the Constitution of Soviet Russia than those of the Constitution of the United States.

* * *

The chief witness that may be called to prove the progressive socialistic and communistic trend of United Nations Conferences is the Chairman of the United Nations Human Rights Commission, Mr. Charles Malik, of the Lebanon. His statement during the last session of the Commission in 1952 is appended to the Report of the Committee on Peace and Law of the American Bar Association, dated September 1, 1952, already filed with this subcommittee. I shall here quote only a few sentences from Mr. Malik's statement:

"I think a study of our proceedings will reveal that the amendments we adopted to the old texts under examination responded for the most part more to Soviet than to Western promptings. * * *

He goes on:

"The concept of property and its ownership is at the heart of the great ideological conflict of the present day. It was not only the Communist representatives who riddled this concept with questions and doubts: a goodly portion of the non-Communist world had itself succumbed to these doubts. A study of this particular debate will reveal the

extent to which the non-Communist world has been communistically softened or frightened. It seems incredible that in these economic matters, which reflect indeed much more than mere economic divergencies, the Western world is so divided on itself as to be incapable of presenting a common front against communism.

"Again and again it became apparent that our difficulties stemmed for the most part from radical differences in intent in regard to fundamental concepts."

That is the end of the quotation from Mr. Malik. Mr. Malik I again say is from the Lebanon. I would suggest that those who are interested more in Mr. Malik's views along these lines read an article which he published in Life Magazine for October 31, 1952, entitled "A Message from the Friend of the West." It is his warning to the West against these very things that are happening to us in these International Conferences.

Opponents of the constitutional amendment relating to the treaty-making power reply that the Senate may be relied upon to protect this country from ill-advised treaties. I leave the answer to that to the Senators themselves.

It is then urged that even if the Senators should consent to the ratification of a bad treaty, that Congress has the power at any time to abrogate it by legislation. Legally, that is true, but I submit that the United States should not participate in the negotiation of treaties, the effect of which would be to build around us a wall of socialistic and communistic containment in anticipation of the withering away of our principles of human freedom and of the decay of the free institutions we have established to secure them. Are we so certain of our internal strength that we can resist indefinitely the communistic softening to which we are being subjected? By adopting the proposed amendment relating to the treaty-making power, our representatives in future international conferences, as well as the representatives of other nations, will be placed on notice that the American way of life and the Constitution adopted to se-

cure it can not be replaced by a gradual process of creeping paralysis through successive treaties becoming the supreme law of the land without the approval of the American people acting through the Congress.

Senator Dirksen. Mr. Finch, can you think of a better safeguard than to impose upon our representatives abroad the necessity of saying when a thing like this comes along, "We are sorry, but in the Constitution of the United States there is a provision that we simply can not do it." That ends it.

Mr. Finch. Why, certainly that ought to be done. I should say right here—I would like to interpolate again—that up to comparatively recent times the representatives of the United States at International Conferences, when they were asked to deal with subjects which they knew under our Constitution were matters within the states—and in those times we have had delegates who knew that—they refused to take part in those discussions or they put reservations: "We can not sign this Convention" or "We can not ratify that because in our countries these matters are subject to the laws of the states." That has been discontinued.

Senator Watkins. You have heard these gentlemen say here that they would be terribly handicapped, that they could not go on with these negotiations.

Mr. Finch. Senator, I would like to make a statement here. I would like to envisage the meeting which is going on now in Geneva of the Economic and Social Council with the representatives of all those different countries there. I would be willing to state that practically none of those countries except the United States has a Constitution under which what they agree upon there, if ratified, will become the law of the land. We are acting in that respect under a great handicap. Those people can go there and agree to anything they want to. They are like our political conventions. They can get up and make speeches about ideals for consumption back home and nothing will ever be done about it unless their national legislatures later on make it the law of the land, which they very seldom do. If we

were not handicapped by Article VI of the Constitution, we could do the same, and Mr. Dulles would not have to go to the embarrassment of telling our people, "All right, we can talk about these things, but we can not do anything about it." They are in the same position already by their Constitution but they do not have to publish it to the world.

Some objections to the proposed amendment conjure up a series of pretended calamities that would befall the nation if any change were made in the Constitution as adopted by the founding fathers. I dislike to take the time to go into the historical part of it, but so many people have, including the representatives of the Government, that I think I should say something about it.

The views of the founding fathers have had, as I shall show, but little influence upon the Supreme Court in the interpretation of the treaty-making power.

The purpose of inserting the treaty supremacy clause in Article VI of the Constitution was to compel the States to respect the nation's promise in the Treaty of Peace with Great Britain concerning the recovery of British private debts contracted before the War for Independence. Notwithstanding the decision in Ware v. Hylton (1796) 3 Dallas 199, holding this article to be supreme over the confiscatory laws of the states, the clause failed of its purpose and the United States was obliged to pay Great Britain $3,000,000 in satisfaction of the confiscated debts.

* * *

So this clause which had such a tremendous influence upon the treaty-making power of the United States practically failed of its original purpose at the time it was inserted in the Constitution.

The treaty supremacy clause was vigorously opposed in some of the State Conventions when the Constitution was submitted for their ratification. Criticism of the Constitution on this ground was one of the main reasons for the addition of the Bill of Rights. Unless this phase of our constitutional history is studied, there is little point in trying

to dogmatize on what the founding fathers meant by the treaty supremacy clause. Patrick Henry declared in the Virginia State Ratifying Convention: "Sure I am, if treaties are made infringing our liberties it will be too late to say that our constitutional rights are violated. * * * Suppose you be arraigned as offenders and violators of a treaty made by this government. Will you have a fair trial which offenders are entitled to in your own government? Will you plead a right to the trial by jury?" (Cowles, Op. cit., p. 33)

Those who object to amending the treaty-making power because of the fancied dangers involved, fail to see the actual dangers to our constitutional rights as foreseen by Patrick Henry which are inherent in proposals now under consideration by the United Nations. I refer to the Draft Statute for an International Criminal Court formulated by a United Nations Committee at Geneva in the summer of 1951 under an American chairman appointed by the State Department. The most significant feature of this proposal from an American point of view is its express prohibition of trial by jury. Should the United States persist in participating in the formulation of this statute and eventually ratify it, we could not carry it out in good faith, with reference to crimes committed in the United States, without violating our constitutional requirements securing the right of trial by jury and in the State where the crime is committed, not to mention other important rights of fair trial, and so forth. Moreover, the Draft Statute could not in such cases be applied by the United States without infringing upon the judicial power as laid down in the Constitution, namely, that there shall be but one supreme court, and that the trial of all cases arising under treaties shall take place in the federal courts (Article III, Secs. 1 and 2).

We just can not create an international court to be supreme to our one supreme court or try them in international courts, because the Constitution provides that crimes arising under treaty shall be subject to the jurisdiction of our federal courts.

The adoption of the proposed amendment would remove

the doubt expressed by Mr. Justice Holmes in Missouri v. Holland that treaties need not be made in pursuance of the Constitution, because Article VI now reads that treaties need only be made under the authority of the United States, which may mean no more than "the formal acts prescribed to make the convention." Namely, that if we conclude any treaty on any subject, and the Senate agrees to it by a two-thirds vote, then that is a treaty under the authority of the United States without reference to any other provisions of the Constitution. That is what Mr. Justice Holmes means, and it can not mean anything else.

The proposed amendment will prevent further development of the dicta of Mr. Justice Sutherland in the Curtiss-Wright Case (1936) 299 U. S. 304, that the treaty power does not rest in grant in the Constitution—we take it another step—but is inherent in the sovereignty of the nation, a view which found support in the minority opinions of the Supreme Court in the recent Steel Seizure Case. Youngstown Co. v. Sawyer (1952) 343 U. S. 579.

We see this progression of ideas about this extent, this unlimited extent of the treaty-making power and we are now having it brought forward that it does not rest in grant at all, it is inherent in the Government.

Another series of objections are grounded on the argument that the proposed amendment would seriously curtail the treaty-making power of and prevent the Government from entering into necessary treaties. I shall undertake to show that these arguments are not tenable.

The amendment approved by the American Bar Association would not interfere in any way with the conclusion of treaties under Article VI of the Constitution as it now stands. The first sentence of the amendment that "A provision of a treaty which conflicts with this Constitution shall not be of any force or effect" would have no bearing on the negotiation and ratification of treaties, except to admonish the American negotiators that they are subject to the Constitution and derive no extra-constitutional authority or power

because they happen to be at the time conducting negotiations with a foreign government.

I would like to call attention to a sentence in the opening part of Secretary Dulles' statement which I think he did not give sufficient consideration to when he said, "Each of the resolutions now before this committee would deprive the nation of treaty-making power in large areas. They would deny to all treaties the force of law, making their enforcement depend on subsequent action of Congress."

Senator Smith. That is ridiculous, is it not, that statement?

Mr. Finch. The amendments themselves have no bearing on the negotiation and conclusion of treaties, giving them all the international force and all the validity in our courts which they have as political instruments of the Government.

Senator Watkins. As between us and other nations.

Mr. Finch. And other nations. It is only when the treaty becomes legislative in character as bearing on the people of the United States as distinguished from its government that these amendments have any effect or would have any effect within the United States.

The second sentence of the American Bar Association reads: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." The adoption of the first clause of this provision would have no more effect upon the treaty-making power of the United States than similar provisions of law have upon the treaty-making powers of substantially all other nations of the world. An analysis of modern constitutional provisions concerning the treaty-making power was printed in the Report of the Committee on Peace and Law for September 1, 1950.

* * *

Article VI of the United States Constitution was the first instance of any government declaring that treaties are to

be the supreme law of the land. With a few minor exceptions other governments have not followed the example. It is not a requirement of international law that treaties be enforceable as municipal law in the courts of the contracting parties. In 1858 Mr. Justice Curtis held "If the people of the United States were to repeal so much of their Constitution as makes treaties their municipal law, no foreign government with whom a treaty exists could justly complain, for it is not a matter with which he has any concern." I have the reference to the paper. (Taylor v. Morton, 2 Curtis 454, affirmed by the Supreme Court in 2 Black 481)

The great majority of present-day constitutions distinguish between treaty stipulations of a national contractual nature and provisions affecting private rights and duties. Most of the nations follow the usage and custom of Great Britain, which has been clearly explained by a distinguished British legal authority, Dr. Arnold D. McNair, now President of the International Court of Justice at The Hague, as follows:

"Many treaties have nothing to do with the law of the land and never come in question in any court of law. * * * Whenever a treaty, or anything done in pursuance of it, is likely to come into question in a court of law, the Crown must induce Parliament to legislate so as to make the necessary change in the law or to equip the Crown with the necessary power to execute the treaty."

I have quoted that from Dr. McNair's volume entitled "The Law of Treaties, British Practice and Opinion," 1939, pp. 7-8.

Whenever treaties of the nature of national contracts between governments are relied upon in litigation in domestic courts, the courts are bound to apply them as political acts of the Government over which the judiciary have no jurisdiction to interfere. Such was the interpretation that Alexander Hamilton placed upon the treaty supremacy clause in the Constitution:

"The power of making treaties * * * relates neither to

the execution of the subsisting laws, nor to the enaction of new ones * * * Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." (The Federalist, No. 75)

Now, Mr. Alexander Hamilton wrote to try to answer some of the criticisms of the Constitution and in order to try to defeat a Bill of Rights. This was Hamilton's reply to states' rights critics of the original Constitution.

The Bill of Rights was adopted to allay their fears. It was thought that amendments added subsequent to Article VI would control its interpretation. However, that has turned out not to be the fact and what these amendments which are now in consideration will in effect do will be to provide a Bill of Rights against the treaty-making powers. That is what we need.

The decision of the Supreme Court in Ware v. Hylton, rendered after the Bill of Rights was adopted, was focused on the contractual nature of the Treaty of Peace by which the United States had achieved its independence. It emphasized the vital importance of compliance with the terms of the treaty by the United States lest Great Britain be given justification to repudiate them in whole or in part. It was unthinkable at that period of our history that the treaty supremacy clause could be invoked to transfer rights of the States to the Federal Government, as was done by the language used by Mr. Justice Holmes in Missouri v. Holland.

Opponents of the proposal that a treaty shall become effective as internal law only through legislation by Congress, base their objection upon the assumption that treaties constitute an independent source of legislation in the United States. It is an assumption that should be deleted from our jurisprudence. Aside from what has already been said concerning the effect of the adoption of the Bill of Rights upon the interpretation of Article VI of the Constitution, the

express language of the first section of the first Article of the Constitution would seem to leave no residuum of legislative power anywhere after providing that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." If Congress is vested with all legislative powers, how can any fraction of legislative power remain in the treaty-making power?

The purpose of the American Bar Association amendment to make all treaties non-self-executing as internal law and thus require legislation to make them internally effective has already been explained by other members of the Committee on Peace and Law.

* * *

The greatest opposition to the amendment is centered upon the second clause of the second sentence which would require that legislation to make treaties effective as internal law in the United States must be valid in the absence of treaty. It has been asserted, for instance, that "If the implementing statute were required to fit within the delegated powers, in order to eliminate Missouri v. Holland, no treaty could thereafter be enacted to provide for reciprocal rights to inherit land, or for similar local matters, unless it depended on subsequent legislation in the forty-eight States." (Professor Arthur E. Sutherland, Jr., in "Restricting the Treaty Power," Harvard Law Review, Vol. 65, No. 8, June, 1952, p. 1335). The learned author obviously wrote that statement without examining the State laws on the subject. Twenty-seven States—this would apply also to the same criticism that was made by Governor Stassen this morning when he was discussing the subject—grant the same rights of land ownership and inheritance as are possessed by citizens. Nine States grant similar rights provided the alien is eligible to citizenship. All restrictions on naturalization because of race were removed by the Immigration and Naturalization Act of June 27, 1952, Sec. 311. Some had been previously removed by an act of 1946. (Restrictions against Chinese, Filipinos, and races indigenous to India

and North and South America had been removed by the Act of July 2, 1946.) Four States grant aliens real property rights according to reciprocal rights granted American citizens. Eight States have limited restrictions according to the length of tenure, or the quantity or location of the real property. (This foregoing information concerning State laws was obtained from the Digest of Laws in Martindale-Hubbell Law Directory, 1953, Vol. III.)

It has not been the policy of the Government in negotiating commercial treaties to override the laws of the States, as seemed to be assumed by everybody that appeared here. "A Fact Sheet" published by the Department of State in March, 1952, contains the following interesting statements in regard to the "Commercial Treaty Program of the United States:"

"Consistently from the early days of our national independence, the provisions of American commercial treaties have reflected the primary aims of American policy * * * Actually these treaties reinforce in terms of international obligation the position of the Federal Government as guardian of the rights of foreigners in this country. They thus reflect a domestic policy that has developed through the years in conformity with the Constitution and Federal Law. They confer upon qualified aliens the privilege of indefinite sojourn for purposes of foreign trade. They safeguard aliens, on a basis of reciprocity, against a number of legal restrictions to which aliens from non-treaty countries are or may become subject. Moreover, the States themselves on occasion voluntarily extend by law more favorable treatment to treaty aliens than is granted other foreigners, particularly in the matter of land ownership."

An example of the form of reciprocal treaty referred to is the Consular Convention with France of 1853, the interpretation of which was involved in the case of Geofroy v. Riggs, 133 U. S. 258. Article VII reads in part:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall

remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States * * *

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right," so we have in this treaty no such conflict between the State laws and commercial treaties as most of the witnesses for the Government seem to think exist.

* * *

Senator Watkins. Pardon me for bringing this up now, but I have to leave. Somewhere in this paper do you discuss the extradition treaties?

Mr. Finch. I will do it.

Senator Watkins. I was wondering whether you were going to discuss that.

Mr. Finch. I can tell you now I put in the hearings of last year a historical statement regarding the development of extradition treaties. There is nothing in our law of extradition to support the critics that this amendment will have any effect whatever upon our ability to negotiate and fulfill extradition treaties.

First of all, in the United States it depends upon either treaty or convention in the alternative.

Senator Watkins. You mean between States?

Mr. Finch. I mean international extradition. I might say here that in the beginning of our Government the States themselves undertook to extradite. New York State had a law on the subject authorizing its Governor to extradite to surrounding States. When Mr. Seward became Governor of New York he refused to carry out that law. He said he thought extradition ought to be handled by the Federal Government, and a few years later when the Governor of Vermont attempted to extradite a fugitive to Canada, the

fugitive took the case to the Supreme Court, and the Supreme Court then held in Holmes against Jennerson that the matter of extradition was a subject for the Federal Government.

Senator Watkins. That is the international extradition?

Mr. Finch. Yes. We have had on our statute books for over a century a law governing the matter of international extradition and that law was made not only in contemplation of two extraditions that they then had negotiated, but of all future extradition treaties. I gave a reference to that history in the testimony I gave last year. I will give it again here.

Senator Watkins. I think it would be very well if you would.

Mr. Finch. I intend to bring that up later on. Governor Stassen, members of the Department of Justice, and other legal advisers simply have not looked up the law of extradition of the United States.

Last year the President submitted to the Senate a series of revised treaties of friendship, commerce, and navigation. Their provisions were explained to a subcommittee of the Senate Committee on Foreign Relations by a representative of the State Department who said:

"In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law * * *.

"Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty provisions have been worked out with the same careful regard for the States' prerogatives and policies that has traditionally characterized agreements of this type." (Department of State Bulletin, Vol. XXVI, No. 675, June 2, 1952, pp. 881-883.)

In the face of this official assurance, what becomes of the

great hullabaloo that if the constitutional amendment proposed by the American Bar Association is adopted, it would deprive Congress of the power to pass legislation putting the commercial treaties into effect in the absence of treaty?

A modern treaty of friendship, commerce and navigation, formulated on the basis of internal State reciprocal terms is that signed with China on November 4, 1946, which went into effect on November 30, 1948. Article VIII reads in part as follows:

"The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, hold and dispose of real and other immovable property throughout the territories of the other Contracting Party subject to the conditions and requirements as prescribed by the laws and regulations of such other High Contracting Party. * * * In the case of any state, territory or possession of the United States of America which does not now or does not hereafter permit the nationals, corporations and associations of the Republic of China to acquire, hold or dispose of real and other immovable property upon the same terms as nationals, corporations and associations of the United States of America, the provisions of the preceding sentence shall not apply. In that case, the Republic of China shall not be obligated to accord to nationals of the United States domiciled in, and to corporations and associations of the United States of America created or organized under the laws of, such state, territory or possession treatment more favorable than the treatment which is or may hereafter be accorded within such state, territory or possession to nationals, corporations and associations of the Republic of China."

Here is an example of what I refer to as a commercial treaty on a reciprocal internal state basis. In other words, Senator, if your State of Utah does not want to grant to foreigners certain rights in Utah, to Chinese out there, for example, then the citizens of Utah will not have the same rights in China, but the citizens of California, or New York, or any other State willing to agree to that reciprocal treaty have a right to do so.

Senator Watkins. It has not been difficult to administer?

Mr. Finch. It has not been difficult at all.

Any restrictions on alien land ownership or tenure remaining in the few States of the American Union, could be taken care of by treaties providing for internal State reciprocity on the model of the treaty with China just quoted.

* * *

Mr. Finch. Mr. Chairman, I got part way through my statement when we adjourned to give everybody a breathing spell. Before I begin with the narration which I have in this statement, I would like to supplement a part of my testimony which I gave very hurriedly yesterday afternoon.

I referred to the provisions of the constitutions of all the nations of the world regarding the treaties becoming the law of the land, those by ratification and those that require parliamentary approval. I referred to an analysis of these provisions of all the constitutions of the world which was appended to the report of the Committee on Peace and Law for the United Nations for September 1, 1950. I have that report with me now and if it is desirable to incorporate that appendix in the record, it is here for that purpose.

The Chairman. Let it be incorporated.

Mr. Finch. It may be found on pages 55 through 68 of that report.

Mr. Finch. In that connection I would like to read my analysis of those provisions which is very short and which is embodied in that report. I am now reading from page 11 of that report:

"The ratification of treaties without the approval of the National Legislature is the exception rather than the rule in modern constitutional law. There are only four nations in addition to the United States in which treaties may be ratified with the advice and consent of the Senate only, namely: Mexico, Liberia, Cuba, and the Philippines.

"The constitution of 24 nations requires all treaties to be

submitted to the approval of the National Legislatures while the largest group of 28 requires parliamentary approval of all treaties which affect internal law, * * *."

—and that is the effect of the amendment which we are now proposing, to put us in that greatest category of modern constitutions of the world—

"requires parliamentary approval of all treaties which affect internal law, the rights of citizens, or which need implementation by the Legislature.

"In the last-mentioned group, treaties are divided into two general classes according to subject matter. First, those within the prerogative of the executive power alone, and, second, those requiring approval by the national representative body so as to safeguard the right of the people to be governed only by laws enacted with their consent."

So the American Bar Association is proposing to put the United States on a parity with most of the other nations of the world.

Senator Smith. Mr. Finch, that means, does it not, that one of the main objectives of these proposals is to protect the individual citizen and give him the full benefits of the Bill of Rights under the American Constitution so they cannot be whittled away by this roundabout, circuitous evading of these rights by this system of treaty law such as you described yesterday?

Mr. Finch. It does that, Senator, and it does more. It protects the whole body of our citizens from being subjected to law in which foreign nations participate. We can make a treaty with the smallest nation in the world and under the concept which we are now adopting under our present Constitution, the smallest nation in the world can get a treaty with the United States, and the Senate can ratify it, and that is binding as law upon everybody in the United States although there may be only a few hundred thousand people within that foreign nation that can govern the conduct of 150 million people over here.

Senator Smith. And although its effect would not be allowed by legislative enactment by itself, by the House and Senate, and approval of the President?

Mr. Finch. That is right.

Senator Smith. It is in violation of the Bill of Rights.

Mr. Finch. Such a treaty, Senator, overrides all previous federal law and all state laws and state constitutions, and, as we have shown by judicial construction it probably overrides the Constitution as Secretary Dulles admitted out in Louisville a year ago.

Senator Smith. There is not anything in your testimony that can call attention more vividly to the fact that what we are trying to do is to preserve, among other things, to the individual citizens, the rights guaranteed by the Bill of Rights.

Of course, my state at the time of the adoption of the Constitution held out to the very last, was next to the last state to ratify, and would not ratify the Constitution until the Bill of Rights was approved.

Mr. Finch. That is exactly what we are trying to do. As I said yesterday, we are now trying to write a bill of rights against the treaty-making power.

Senator Dirksen. Referring to Governor Stassen's testimony of yesterday, Mr. Finch, it occurs to me it is such settled doctrine beyond all cavil or question, that if Congress enacts any law that contravenes these rights it falls when the Supreme Court gets its teeth in it. I think that is settled doctrine with which nobody would quarrel.

Now, the second step would be how strange that what Congress cannot do by the solemn use of the law-making power could be done by treaty so that you contravene the Constitution. As I recall, he (Mr. Stassen) said, "Well, under certain circumstances." Well, can you imagine any circumstances under which a treaty ought to contravene the rights vouchsafed in the Constitution?

Mr. Finch. I can not. On the other hand, I cannot envision the Supreme Court declaring a treaty unconstitutional. It has not done it and under the more recent advanced position of the Supreme Court, I cannot see how the Supreme Court could declare a treaty unconstitutional. It is possible that some administration could be so foolish as to say that the United States should have a King. I cannot imagine the Supreme Court would say that would be unconstitutional, but if you depend on the prohibitory words of the Constitution, they are very few because the Constitution is not, so far as the Federal Government is concerned, a series of prohibitions; it is a series of provisions of affirmative delegation of power.

Senator Smith. That is it exactly.

Mr. Finch. When the Supreme Court says you cannot do by treaty what the Constitution forbids, you have to take a fine tooth comb to find what the Constitution forbids.

In this connection, several of the witnesses have tried to minimize the importance of what I am testifying to here about the need of Congressional parliamentary approval for treaty law of an internal character by stating that other governments have parliamentary systems and we do not have that sort of system, and therefore there is a difference. I have been trying to figure out in my own mind what they mean by that, and for the life of me I cannot do it.

I think they are ignoring one of the well-established principles of international law that a change in government does not affect the international rights or obligations of that nation. It does not make any difference whether Mr. Churchill is in power in England or somebody else is in power, its treaty is going on and on, and that succeeding government has the same international obligation that the previous government had that made the treaty. Yet the rule of that constitution remains, no matter what parliament is in power, before that treaty obligation can become a matter of internal law that parliament has to enact it.

Senator Dirksen. It would seem to me, Mr. Finch, that

argument that was made by Secretary Dulles actually helps state the case for the Bricker resolution for this reason: Because when the treaty is negotiated and the government leaders are a part of it and they are also members of the House of Commons, they come there with the information in the first instance. Here, however, the Senate is never a part of the negotiations; it is absolutely uninformed until the treaty has been negotiated, and it has to start from scratch. In a parliamentary country they do not start from scratch because every occupant of the government bench in the House of Commons has already been warned in advance of the details that go into the making of the treaty because he has been part of it. Notwithstanding that fact, they still require it be implemented by legislation.

Mr. Finch. Yes, sir. I would like to make another suggestion, Senator, on the question of the Senate constitutional power over treaties and the question of legislation.

Now, most of the witnesses opposing this amendment have gone back and tried to tell us what the founding Fathers meant. I answered that, I think, yesterday, but I would like to add another element to that argument.

The reason why the Senate, as distinguished from the House of Representatives or the whole Congress, was made a partner in the ratification of treaties was the argument of the need of secrecy. That runs through all the debates in the Constitutional conventions. Now, who can argue, though, that legislation binding upon the people should be enacted in star chamber proceedings? The whole argument redounds against those who make it. The very element of legislation binding on the people is that it should be public. Imagine the Congress of the United States closing its doors to the public when legislation is under consideration.

The reason why they had the Senate—if you will examine those debates—was the need of secrecy. You could not let the public in on what is being done in treaties. Of course, they have plenty of secrecy in treaties and executive agreements, too, but they also apply it to law-making treaty; the

people would not know what is being acted on in the form of treaty-making power in the form of legislation binding on them unless some time in some lawsuit involving criminal action, involving the rights of a citizen, the treaty is sprung on you and you are told this is binding on whatever you have in your state laws or constitution.

Now, may I proceed with the main argument, Senator?

Senator Dirksen. Certainly.

Mr. Finch. I concluded yesterday afternoon with an answer to the criticisms that the amendment of the American Bar Association would require the consent of the 48 States of the Union to treaties of commerce and navigation. I dealt specifically with the question of the rights of aliens to own and dispose of land. Now I will take up this morning, the subject of other provisions of such treaties.

It might be argued that there are provisions of commercial treaties outside of those relating to land tenure and ownership, such as those relating to details of business, as to which it might not be feasible or desirable to stipulate on an international State reciprocal basis and that, as to these, Congress would lack legislative power to legislate in the absence of treaty. That argument may have been valid some years ago, but it would be of very doubtful validity today.

I should like, at this point, to quote from the little book by former Justice Owen Roberts of the Supreme Court, entitled "The Court and the Constitution," which contains lectures he delivered at Harvard University, and were published by the Harvard University press in 1951. Mr. Justice Roberts says:

"By virtue of the exercise of the commerce power to remove prospective burdens on interstate commerce arising out of purely local practices and conditions, the Congress has superseded the police power of the States and taken unto itself police power in a vast field of business and other activity. * * * It seems hard to draw a line in respect of this type of prophylactic legislation. Its operation must be permitted

to extend to the smallest units and to activities that once were thought so remote from interstate commerce as to have no appreciable effect on it."

That is the end of Mr. Justice Roberts' statement about the extent of the interstate commerce clause.

Now, we must remember that commerce clause vests in Congress all legislative power to regulate commerce not only with the states, but with foreign nations. A good deal of the testimony that was submitted here I think by Governor Stassen, overlooked that fact, ignored entirely that the interstate commerce clause also confers the same legislative power on the Congress in matters of foreign commerce.

In a case before the Supreme Court, it was held that these two powers, the powers over interstate commerce and the powers over foreign commerce, are co-extensive. I give the reference to that in the document. (License Cases, 5 Harv. 504, 578.)

Can it be logically maintained that Congress has the legislative power to remove prospective burdens on interstate commerce arising out of purely local practices and conditions, but does not possess under the same constitutional provision, legislative power to remove burdens affecting aliens in this country which Congress may deem it necessary to regulate in order to promote reciprocally the rights of American citizens abroad in the interest of foreign commerce? You would have to ignore one part of that constitutional clause in order to try to make that point against the amendment proposed by the American Bar Association.

Senator Smith. Didn't Governor Stassen take a different view yesterday?

Mr. Finch. I do not recall that he did.

Senator Smith. I mean, did he not take the view that the commerce clause did not give the power that you state it did give, and which I also thought it gave?

Mr. Finch. I say he made the wrong argument.

Senator Smith. That is what I was trying to bring out.

Mr. Finch. He made only half an argument.

The Chairman. At any rate, his argument is contrary to yours.

Mr. Finch. It is contrary to mine. I had not heard his argument when I wrote this statement.

In asserting that Congress has legislative power to pass all necessary and proper laws to implement its power to regulate commerce with foreign nations, I am not advocating the extension of Federal power under that clause. I am using that argument solely to show that the adoption of the constitutional amendment approved by the American Bar Association would not seriously interfere with the negotiation of future commercial treaties.

* * *

I shall not prolong this statement by discussing all the enumerated legislative powers vested in Congress by Section 8 of Article I of the Constitution in the absence of treaty. This feature of our amendment has been dealt with at length in an article by me in the American Bar Association Journal, 1952, entitled "The Treaty-Clause Amendment," which the editor of that Journal did me the honor of stating was: "The Case for the Association." I beg leave to submit that article for the record.

Mr. Finch. Now, at this point I should like again to break my chronological statement and to read a section of the memorandum that Mr. Dulles read here on the sixth of April, at the top of page 7, entitled "S.J. Res. 43."

Now, S.J. Res. 43 embodies the proposal of the American Bar Association. This paragraph reads:

"S.J. Res. 43 which follows the language proposed by a Committee of the American Bar Association, contains a further provision. This would require that no treaty shall be effective in any field in which Congress in the absence of a treaty cannot legislate. This would create a no-man's land in

foreign affairs. It would require the concurrence of all 48 States to make effective such common treaties of friendship, commerce and navigation, extradition, reciprocal inheritance taxation, migratory birds, collection of foreign debts, and status of foreign troops. In this field, the foreign affairs of our country would not speak with one voice, but with 49.

"The primary objective of the framers of our Constitution in this respect would be defeated."

Mr. Chairman and Senators, I should like to submit if that is the only argument that can be made against S.J. Res. 43, I think we might as well not bother about the objections to that resolution any longer.

Now, let us take the reason they give for alleging that this amendment would require the participation of all 48 States and the Federal Government also in treaty-making powers. I have already disposed of the subject of treaties of commerce and navigation as shown, that the gentlemen who have made that argument have not examined the State laws on the subject or they have not given full effect to the powers of the Federal Government under the interstate and foreign commerce clause of the Constitution.

Now, let us take the next subject, extradition. I referred to that yesterday afternoon but I would like to refer to it again. I have shown in this article in the American Bar Journal that the subject of extradition was one of doubtful jurisdiction during the early days of the Republic, and that some of the States claimed the right to have jurisdiction over international extradition, but that finally the Supreme Court of the United States, in a case which reached it from one of the cases coming up in the States, held that the subject of extradition was exclusively within the jurisdiction of the Federal Government.

At that time we had no treaty on the subject at all. A few years later after that decision, in 1848, in other words, over a hundred years ago, the Federal Government enacted a law on the subject of international extradition. That law is still on the statute books; it has been amended from time to time

and there is nothing, by any stretch of the imagination in the proposal of the American Bar Association, by which anybody can argue that our amendment will repeal that law.

That law was made applicable to two extradition treaties we had made following the decision of the Supreme Court. Two treaties, one with France and one with Great Britain, and it was made applicable to all future extradition treaties.

Senator Smith. Is there any doubt about the validity or effectiveness of that?

Mr. Finch. None in the world.

* * *

Now, I would like to go further on this subject of extradition. This happens to be a subject which I handled myself in the State Department some years ago.

Treaties are necessary in international law to bring about international extradition. John Bassett Moore, probably the greatest authority on this subject, says so, and in his work on extradition he says that in the United States extradition is dependent on treaty or legislation. He puts it in the alternative. And anybody that tries to argue with John Bassett Moore on this subject has a pretty hard task on his hand.

Senator Bricker. We have a student of John Bassett Moore here, so he should be impressed by that.

Mr. Finch. Furthermore, we have actually extradited without a treaty. In 1864, President Lincoln in the absence of any treaty with Spain delivered up a fugitive named Arguelles, and when the legality of his action was questioned because we did not have a treaty with Spain, it was vigorously defended by none other than William H. Seward, Secretary of State, in a letter to the Chairman of the House Committee on the Judiciary, I think. I have given the references in my article.

Mr. Seward happened to have been a Governor of New York before he became Secretary of State. The State of New York as early as 1822 had passed a statute authorizing the

Governor of New York to render fugitives to foreign governments under the state law, and when Mr. Seward became Secretary of State he refused to execute the law.

Senator Bricker. When he became Governor?

Mr. Finch. When he became Governor he refused to execute the law. He said the State had nothing to do with the matter of extradition. He said it was a matter purely for the Federal Government. He refused to execute that law and later, the Supreme Court in Holmes v. Jennison, confirmed the views and said the matter of international extradition is solely within the jurisdiction of the Federal Government.

Anybody who puts in, as the State Department has done, that our amendment would prevent the United States from making extradition treaties simply does not know the history of that subject in the United States. I do not think they ought to come before this committee and try to tell this committee what we can or what we cannot do in the matter of international extradition when they haven't read the record on the subject.

* * *

Senator Watkins. What page are you on?

Mr. Finch. I am reading from page 7 of Dulles' statement.

Let us take the next one, collection of foreign debts. I have also covered that in the article of the American Bar Journal and also talked about it in my testimony before this committee last year. That argument is that if the amendment of the American Bar Association is adopted we could not make any arrangement with reference to the collection of foreign debts without the consent of all 48 States of the Union. That is what they argue.

Now, what is the record on that? Following the World War on February 9, 1922, without any treaty involved at all in the matter, Congress created and authorized the World War Foreign Debt Commission to conclude agreements with foreign countries subject to the approval of the present Congress, but not subject to the ratification of the Senate. Here

was the assertion of the legislative power of the Congress over the subject of foreign debts without any reference at all to treaty.

Yet we have the State Department coming here and telling you Senators that if you pass this amendment, you cannot enter into arrangements on foreign debts except with the consent of the 48 States of the Union. No State of the Union was consulted in February, 1922. It was a matter that Congress felt it had under its delegated powers and I think it had under those powers, and nobody ever challenged it.

Then, the status of foreign troops. I will skip that for the present, but I am coming back to it. I wish to make the point here that in taking these positions, the government officials who are intent upon keeping the treaty-making power as it now stands, under which they can expand their own power and control, seem to regard the Congress itself as something less than a silent partner when we come to the conduct of the foreign relations of the government. They just keep silent but when you need money you have to appropriate it, but in other respects the whole conduct of our international relations is in the hands of the President and the Senate acting as a treaty-making power.

* * *

Now I would like to read a statement from the Supreme Court in the Chinese Exclusion case. In that case the Court was not discussing the treaty-making power. It was discussing the power of Congress to abrogate a treaty. The Court said this: "The National Government is invested with power over the foreign relations of our country." It says the National Government. "War, peace and negotiations and intercourse with foreign nations, all of which are forbidden to the State government. It has jurisdiction of all those general subjects of legislation and sovereignty which affect the interest of the whole people equally and alike and which require uniformity of regulations and law."

That is the extent to which the National Government, including the Congress, has jurisdiction of matters affecting our

international relations. It is true that the Congress cannot make a treaty, but a treaty in its real essence is nothing more than a written document by which we try to bind down some foreign nation to some contract or to some policy which has the approval of the National government. It is simply an agency, an agency putting the document in writing so there can be no misunderstanding of what the agreement is between the two governments, and when you talk about the government you include the whole government, not a part.

Now, a previous witness, I think it was Mr. Tuttle, referred to the subject of narcotics and made a long argument that the adoption of the amendment proposed by the American Bar Association would prevent this government from participating in the control of narcotics.

I have also answered that argument, in previous testimony before this committee.

Mr. Tuttle referred to the fact that as based on the treaty-making power, the acts of Congress in passing a domestic law governing the growing of poppies in this country was based upon the treaty power.

I took the trouble to look up that law last year when that same argument was made and again we have statements made by objecting witnesses who have not looked up the law. It was just made from their own emotional feelings in the matter without any basis of law.

An examination of the Act of 1942 for the domestic control of production and distribution of the opium poppy, discloses that the purpose of the act was stated to be not only to discharge the international obligations of the United States under the narcotic treaties, but to "promote the public health and the general welfare, to regulate interstate and foreign commerce in opium poppies, and to safeguard the revenue derived from taxation of opium and opium products."

From that recitation of the act itself of the powers of Con-

gress, it is perfectly obvious that it did not rest those powers on the treaty-making power.

* * *

A curious criticism was made by representatives of the Association of the Bar of the City of New York in their testimony before this subcommittee on February 19. They envisioned an enemy invading the United States by way of Alaska and a Canadian motorized division being rushed to our aid through United States territory under an agreement with the President.

It was argued that unless and until Congress, under our proposed amendment, if it were adopted, passed a law making the agreement effective in this country, the Canadian Army would be subject to all the state laws forbidding the carrying of firearms, traffic regulations, and so forth.

I must say, Senators, I sat in amazement to listen to such a statement by people claiming to be qualified to testify on the subject.

No situation like that could arise under the rules of international law.

* * *

And you must remember in all these subjects of international relations you are not only in the field of constitutional law, but you are in the field of international law to which we as a member of the family of nations are obliged to give respect.

Under international law a friendly foreign army passing through this country by official permission would not be subject to either federal or state jurisdiction unless there were conditions in the treaty or executive agreement to that effect, a highly improbable situation.

The exemption from domestic jurisdiction of a foreign army passing through our territory is in the same category of sovereign immunities as the sovereign himself and his diplomatic representatives while in this country, and of his public ships of war in our waters.

The reasons for these immunities from territorial jurisdiction were stated by Chief Justice Marshall as follows:

"One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or his sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunity depending on his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him."

Mr. Chief Justice Marshall made that statement in the very celebrated Exchange versus McFadden case.

You will find that case as one of the cases I teach my students in the School of International Law at the Georgetown School of Foreign Commerce.

For further information on this subject and to bring you up to date, those who are interested in the matter should read an article in the American Journal of International Law, published in 1942, volume 36, pages 539 to 567, entitled "Jurisdiction Over Friendly Foreign Armed Forces," by Colonel Archibald King, a very distinguished member of the Judge Advocate General's Department of the United States Army.

* * *

In this case these gentlemen put up a hypothetical situation that we were being invaded from Alaska and that the President in order to help us get up a quick defense before it could get down here, asked Canada to send us a motorized division in order to help us defend, and this division to get here quicker came down through the United States.

Then this gentleman said if you adopt that amendment you defeat the attempt of the President to defend the United States.

The Chairman. Your argument is that they are here by official permission?

Mr. Finch. Yes.

Now Mr. Nash talked about the stationing of troops in the United States under certain of our agreements, under the defense agreements, and foreign troops being sent here for training and what would be the law governing those troops.

Now, I have not had a chance to write a brief on that, but I should say offhand the law would be this: As long as foreign troops are over here as organized bodies under the command of their own officers, this rule cited by Chief Justice Marshall would apply.

If troops are permanently stationed and garrisoned here, and still under the control of their own commanders, the rule would probably also apply.

If they come here as student officers, not under the command of their own people, but going to some of our military colleges, or something, they would certainly be under the same rules as our own soldiers and officers at those colleges would be governed by.

If Congress passes a law authorizing some foreign cadet to go to West Point, you would not say he carried immunity from our laws there, but he would be governed by the rules governing West Point Cadets.

Now it was argued that this amendment of the American Bar Association would prevent the making of agreements changing this rule of international law where it might be desirable to place some of these men under local jurisdiction for certain purposes.

You could not do that under our amendment, because it requires the consent of the states. That is an argument in reverse, because the states, to begin with, do not have this power.

The laws that apply, under Chief Justice Marshall's ruling, are the laws of the United States.

Now if we wish to make agreements, as we probably have made agreements, it is necessary to make agreements for troops to be stationed a long time in order that these friendly

troops may not themselves become a cause of friction because of their relation to the local population. The proposition is not to take away from the states any jurisdiction, because they do not have it.

The proposition is to confer on the states jurisdiction which they do not have.

So, the gentlemen who made that argument are arguing the question in reverse.

Now, you might say, and this would apply either to a treaty or executive agreement, the President or the Congress and the treaty-making power wishes to enter into an agreement that troops stationed here shall be subject to certain suits in our civil courts or certain of our criminal courts. That is conferring a power on the state.

It is not taking anything away, because they do not have it to take away.

Can you imagine a state then saying, "We don't want this jurisdiction?"

The only reason why the executive or the Congress would make such an agreement would be because the state wanted it.

I cannot imagine any state where foreign troops were stationed objecting to any agreement made by the federal government which would say these troops when they are down here in your territory in certain matters affecting your population shall be subject to your courts, and if the federal government agrees to that, that is all you have to do in order to make it legal according to international law.

I just could not understand those arguments, arguments in reverse against our amendment.

They are not only trying to argue that our amendment would take away certain rights of states according to their laws, but they also say you cannot confer any rights on them.

Now it can be stated, once and for all, that there is noth-

ing in the Constitutional amendment approved by the American Bar Association that would subject to state control the constitutional powers of the President as Commander-in-Chief of the Armed Forces, or that would impair the powers of Congress to provide for the common defense or to repel invasion or that are within any other powers vested in Congress in the absence of treaty.

This denial applies to all executive agreements of the Department of Defense and other departments and agencies of the government made under authority of law or subsequently approved by law.

Now, I have answered either last year or this year, every specific case they brought up. It would take probably a year to write a book examining all the thousands of agreements they referred to and try to apply this rule specifically to them, but I am quite confident in that general statement I have answered any argument that they can bring forth.

Now, I would like to go into another subject that has been emphasized here. That is in the field of atomic energy.

In the vitally important field of international arrangements and legislation to protect this country from mass destruction by atomic weapons, Congress, in the absence of treaties, passed the Atomic Energy Act of August 1, 1946. The act established an Atomic Energy Commission to control the production and development of Atomic energy in the United States.

The act declared the public policy of the people of this country to be, to provide for the common defense and security, to improve the public welfare, and to promote world peace.

It is specifically provided that the administration of the act shall be consistent with the foregoing policies "and with international arrangements made by the United States."

An international arrangement is defined by the act to mean "any treaty approved by the Senate or international agreement approved by the Congress."

* * *

Congress did not wait before we had a treaty on atomic energy before it passed legislation on the subject. It had already done it, and those who argue that this amendment will affect that are simply ignoring the facts in the case.

Consequently, it cannot be succesfully maintained that the nation's safety would be endangered by the adoption of the American Bar Association constitutional amendment.

Congress would clearly have the power to pass legislation to implement effective international inspection to guarantee that there would be no violation of disarmament terms and conditions.

* * *

A Joint Committee of Congress was established by the Atomic Energy Act of 1946 to make recommendations to Congress for further legislation.

If we ever have a treaty on atomic energy, such as those we have been talking about, it will be the duty of this Joint Committee of Congress to examine that treaty.

Senator Bricker. It will be the duty of the Senate members to examine that treaty.

Mr. Finch. Yes, and to make recommendations to the Congress.

But you would not need the treaty to pass legislation on atomic energy; you have already done it.

Why would people come here and say this amendment would stop you from doing something which you have already done?

Mr. Smithey. You speak of international inspection. What about ownership of the mines and the licensing of the use of atomic energy for peaceful pursuits by an international commission?

Mr. Finch. I am glad to say that has been abandoned. I should think that would be another subject, and I think the objections to it were so strong that the federal government abandoned it.

That was in the first proposal known as the Acheson-Lilienthal proposal. They wanted to set up an atomic development authority of, I think they said, fifteen members, which would be super national in function and jurisdiction.

Senator Smith. In other words, that would be part of the world government?

Mr. Finch. Yes. That is what the Acheson-Lilienthal proposal would have done. They would have deprived even the Congress of the United States of any authority in the matter, and it would have passed the ownership of the lands in the United States, which contained uranium, into the hands of an international body.

I discussed that matter with a very good friend of mine from the State of Colorado. He said, "Why, if that law were enacted, we would take away from private ownership three-fourths of the land in Colorado and vest it in an international commission."

That was so absurd I think the administration had to abandon it.

But that is the line of thinking of these men who are obsessed with the idea of international government and it bears, that one, the signatures of Dean Acheson and Mr. Lilienthal.

Senator Bricker. That is the same principle of the Baruch plan.

Mr. Finch. That was in the original plan, but I think they abandoned that.

I think all they are arguing for now is that we must have some sort of international inspection so that a treaty on atomic energy would not be a mere scrap of paper. I see no objection to that, if we agree to some form of international control of atomic energy under some law of Congress authorizing a commission of that body to come around and see that we observe the law providing safeguards are placed so that they cannot get access to secret information.

Mr. Smithey. Before you conclude they have abandoned that proposal, I would like to draw your attention to page 5 of the supplementary statement presented to the committee by Secretary Dulles.

Now in all fairness to Secretary Dulles, he said he had not read this, that it had been prepared by Mr. Phleger of his legal staff, but in there this statement appears on page 5:

"The Baruch proposal for atomic disarmament was based on control at the source and inspection by an international agency which would possess powers over the process and ownership of atomic facilities. The United States proposed this solution for the problem created by the progress of atomic science. It met with widespread approval by the free nations, but was blocked by Soviet opposition. Section 2 of the proposed amendment referring to S.J. Resolution 1, if adopted, would not only prevent our advocating such a proposal; it would prevent our agreeing to such a proposal if advanced by others."

I am wondering, in view of that statement, if they have abandoned it.

Mr. Finch. I have not followed those negotiations in detail, and if they make any such proposal as that, I am in favor of S.J. Res. 1 and S.J. Res. 43 stopping it. I think that would be one reason why we should adopt the amendment.

Senator Watkins. I was going to ask you that question. Would not the adoption of either one of those proposed amendments effectively block it.

Mr. Finch. Yes, it would effectively block turning over to a super national atomic commission. I think we ought to have the amendment.

Senator Bricker. It would not affect in any way the international relationship.

Mr. Finch. No.

I would like to see an international agreement now say we

will abandon atomic energy if it means mass destruction in war. I should think we ought to be willing to have some system of international inspection to see that not only we carry it out, but that Russia carries it out.

Russia has been the one objecting to that.

Senator Watkins. Could it be possible, looking from the other nations' point of view, that is one of the reasons why Russia objected to such a proposal?

Mr. Finch. I think so.

Senator Watkins. Whatever provision we might have had with respect to the complete control of atomic energy sources in this country would have been the same thing in Russia?

Mr. Finch. That is right.

We want inspection primarily because we want to go over to Russia to see that they are living up to that treaty.

As I understand the subject, the benefits of atomic energy go up to a certain point where it is useful for peaceful purposes. We do not want to stop that, but if you go beyond that point, you get into the area of using it for explosive purposes, and that is what they want to stop.

That can be controlled by inspection to see that your plants are not built for the purpose of going beyond that point for peaceful purposes.

Mr. Smithey. Before we leave this question of whether the administration has abandoned the portions of the atomic energy proposals relating to land ownership, mine ownership, and the licensing of atomic energy for peaceful pursuits, let me draw your attention to page 25 of the statement before this committee by the Attorney General last Tuesday:

"One cannot help but speculate upon what such a constitutional amendment will do"—

And there he refers to S.J. Res. 1 again—

"to any effort of the United States to achieve genuine international control in important fields relating to peace and safety of the world. For example, the United States proposal of 1946 rejected by the Soviet Union of an international agency for the control and development of atomic energy included broad powers in the international agency for the management and ownership of all atomic activity potentially dangerous to world security as well as power to control, inspect and license all other atomic activities."

Mr. Finch. I would simply answer in the same vein I have already stated, if that is the present contention of this administration, I think that is an additional reason why we should adopt the amendment.

Now, Mr. Chairman, I have dealt on page 16 with the question of an international criminal court. I covered that yesterday. Instead of going over that again, I would like to submit for the record another article which I wrote covering that subject very comprehensively in the American Bar Association Journal for August, 1952.

In that journal Judge Parker, who is for the international criminal court, gives his reasons why we should have it, followed by an article by me why we should not have it.

The Chairman. We will see that it is printed in full.

Senator Smith. Both articles are going in?

The Chairman. Yes, right at this point in his remarks.

Mr. Finch. Now the next subject I take up in the statement is the testimony of the representative of the Board of Directors of the Christian Science Church when he appeared before this subcommittee a few days ago to enter a protest against certain sanitary and quarantine regulations of the Health Assembly of the World Health Organization as violative of the First Amendment of the Bill of Rights. That amendment prohibits the Congress from making any law respecting an establishment of religion, and so forth.

The regulations protested against were not approved by Congress, but became effective in this country by virtue of

article 22 of the Constitution of the World Health Organization, which provides that such regulations "shall come into force for all members after due notice has been given of their adoption by the Health Assembly except for such members as may notify the Director General of rejection or reservations within the period stated in the notice."

I am quoting from the constitution of the World Health Organization.

Now the Secretary of State on behalf of this government notified the World Health Organization that the United States would make no reservations.

Now, the constitution of the World Health Organization is not a treaty, but the President was authorized to accept membership in the Organization by Joint Resolution of Congress on June 14, 1948.

It is accordingly an executive agreement made with the express authority of Congress.

It is contended that this is an instance where a prohibition in the constitution against Congressional action has been bypassed through the delegation of legislative power to an international organization.

For the purposes of this hearing it is not necessary to consider whether the action complained of is valid.

It is pertinent to point out, however, the Constitutional amendment proposed by the American Bar Association would prevent treaties and executive agreements from becoming law in the United States except by legislation of Congress which would be valid in the absence of treaty or executive agreement.

I think our amendment would prevent any organization from enacting legislation in the United States which was not also submitted to and enacted by the Congress of the United States.

Senator Bricker. And then would be subject to the prohibitions of the Bill of Rights.

Mr. Finch. That is right because every law of Congress is subject to the prohibition.

Senator Bricker: That is right.

Mr. Finch. In other words, I am glad you mentioned that, Senator, because the effect of our amendment would be this:

In future cases involving the rights of citizens of the United States, under the reserved powers of the Constitution the Supreme Court cannot rely upon the unlimited clause of the treaty-making power, but it would have to subject the legislation of Congress to the test of constitutionality under the Constitution.

That is what we ought to have. We just cannot have the Supreme Court going on saying that there may be or maybe not limitations in the treaty-making power, but it does not apply to this case.

Mr. Smithey. Does it not extend even further than that? Does it not also say effectively that the Supreme Court will have the power to rule on it?

Mr. Finch. They will have the power to rule on it.

Mr. Smithey. And is there not some question at the present time as to whether the Supreme Court would have the authority to declare a treaty void and unenforcible?

Mr. Finch. I have already stated that.

I think there is grave doubt whether they can declare any treaty void and unenforcible. When you get from the realm of law-making treaties into the field of political action, treaties for purely political character, the courts have absolutely nothing to do with it because it is a rule of constitutional law that in these matters the courts are bound by the political action of the government.

Of course, it cannot say that that is not a valid treaty. They are excluded from even consideration of such a treaty under our rule that political acts are not within the jurisdiction of the courts.

Mr. Chairman, from page 18 to page 25, I discuss in detail these human rights conventions. I wrote this before Secretary Dulles said we were not going to sign those conventions.

I would like to include this whole statement in the record, but I do not believe it is necessary to take our time now in discussing those provisions because Secretary Dulles said we would not sign those conventions.

He evidently saw our argument in advance.

* * *

The final provision of the American Bar Association amendment reads:

"Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."

Mr. Smithey. Were you present at the time I asked a question of the Secretary of State with respect to that provision?

Mr. Finch. I think I was. I heard the testimony.

Mr. Smithey. At that time I told the Secretary of State that I interpreted this to mean that "regulation" meant by act of Congress.

Is that the interpretation which was intended by the members of the American Bar Committee?

Mr. Finch. I think that is. That is mine and there are two others here.

Mr. Holman. There is no doubt about it.

Senator Watkins. In other words there is no attempt to take the meaning of "regulation" into the administrative field; entirely legislative?

Mr. Finch. That is right.

Senator Smith. In other words, it would be interpreted "legislation"? Would that be it?

Might there be any objection to the use of that word?

Mr. Finch. Legislation by Congress.

Well, we have had a good many discussions among ourselves about all the words in here and I would not want to argue with what the Attorney General said.

Mr. Holman. If I may say so, we came to this wording after great deliberation and it comes from the Constitution where Congress is empowered to regulate interstate and foreign commerce.

Through the Constitution you have the word "regulate" used when you are conferring such a power on Congress. We first had "legislation" in there and Judge Phillips said we ought to take it out and put "regulation" in, because we would then be using a constitutional term which has been heretofore interpreted.

Senator Smith. However, it means the same thing.

Mr. Holman. It has been so construed, yes.

Mr. Finch. Briefly, the purposes of these short amendments are these:

1. To counteract the practice that treaties and executive agreements are alternative methods of making international commitments, and that it rests in the sole discretion of the President to determine which method shall be employed in any given instance.

2. To prevent the circumvention of the proposed amendment on the treaty-making power by the making of executive agreements in lieu of treaties. The next one is probably the most important of all.

3. To give public notice that the President of the United States does not have uncontrolled power permanently to bind the nation in matters of vital national importance.

The leading modern American author in international law, Dr. Charles Cheney Hyde, who served as Solicitor for the Department of State under Secretary of State Charles Evans Hughes, wrote in 1922:

"It may be fairly doubted whether the present practice whereby the President agrees without the approval of the Senate, to understandings or declarations of vast import, serving both to further the political aspirations of other states or to weaken proportionally the subsequent influence of the United States as a deterrent, is to be regarded as advantageous to the nation." International Law Chiefly as Applied by the United States, Volume II, page 33, note.

For purposes of the constitutional law of the United States, executive agreements are not treaties, but for purposes of international law, they are not to be distinguished from treaties. "Law of Treaties," Research in International Law, American Journal of International Law, Supplement, Volume 20, 1935, page 667.

From a summary of the doctrine, practice, and jurisprudence, the exhaustive research just cited concludes:

"that the preponderance of authority is in favor of the view:

1. That the competence of the treaty-making organs of a state is determined by the law of that state; and

2. That treaties made on its behalf by organs which are not competent under that law to conclude them are not binding, internationally, upon such state."

In other words, every nation with which we deal internationally is on notice that our Constitution requires that treaties shall be made by and with the advice and consent of the Senate. They are on notice of that and they cannot maintain the position that the President himself undertakes to make a treaty without the advice and consent of the Senate.

They are on notice that, if he does, that is not binding on the United States.

The Constitution now controls the power of the President to make treaties by requiring the advice and consent of the Senate. I have covered that.

But "executive agreements" are not mentioned in the Constitution and other nations are consequently not presumed to know that there are any limitations on his executive power.

If this amendment is adopted, it would put other nations on notice as to the President's power over executive agreements as they have now notice as to the limitations on his power in the treaty-making field.

The proposed amendment has been framed so as not to require action by Congress and to the extent it decides to exercise its power, which it already possesses under its delegated power:

"To make all laws which shall be necessary and proper for carrying into execution * * * all powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Article 1, Section 8, last clause.

It is advisable to work out Congressional control gradually as the result of actual experience. For example, it would be undesirable, and harmful to the effective administration of the Department of State, that routine functions in the daily conduct of foreign relations, involving in many instances informal agreements with other nations, be rigidly controlled by law. These types of executive agreements have been described by Dr. John Bassett Moore, author of Moore's Digest of International Law, who, after serving for many years as an Assistant Secretary of State, and Counsellor for the State Department, became a judge of the Permanent Court of International Justice at The Hague. See quotation from him in the report of the Committee on Peace and Law in its report of September 1, 1952, pages 17 and 18.

The proposed amendment would obviously not apply to so-called executive agreements made pursuant to authority of law or with the subsequent approval of Congress.

And most of the objections that have been made to this provision about executive agreements are made on the supposition that this is not true. Most of the executive agreements that have been presented before this committee are made under some authority of law, either previously given or by subsequent approval.

This amendment would not affect at all the ability of the executive to negotiate such agreement with the approval of Congress.

Congress, at the request of the President, has been considering what action to take upon the so-called secret agreements made by the former President during World War II. It is doubtful if Congress would wish, if it could, to interfere with functions of the President as Commander-in-Chief during the actual operations of war.

The principal act of the former President now under discussion is the so-called Yalta agreement. President Roosevelt at first thought that the Yalta arrangements must be approved by the Senate. He said so in the prepared text of his report to the joint session of Congress on March 1, 1945, as released by the White House prior to delivery. Department of State Bulletin, Volume XII, No. 297, page 234. But that sentence was omitted from the speech as delivered—Congressional Record, March 1, 1945, Volume 91, Part 2, page 1620.

When releasing the text of the secret Yalta agreement a year after it was signed, Secretary of State Byrnes stated on January 29, 1946, that:

"There was not any question about what was intended at Yalta because at Yalta he heard Mr. Roosevelt on at least one or two occasions take the position that as to cession of territory, it was a matter that had to be settled in the peace treaty. He said that that was always Mr. Roosevelt's view, and that at Potsdam Mr. Truman took the same position as to the Silesian area." Department of State Bulletin, Volume XIV, No. 345, February 10, 1946, pages 189-90.

It appears, therefore, that the Yalta agreement is subject to the criticism of Dr. Hyde, previously quoted, of Presidential agreements made without the approval of the Senate on matters of vast import which further the political aspirations of other nations and weaken the subsequent influence of the United States.

It also appears that the Yalta agreement is a perfect example of the practice of the President using his discretion "for controversial international acts" to have recourse to an executive agreement instead of a treaty.

In that respect he followed the advice of Dr. Wallace McClure, formerly of the State Department, who wrote a book called "International Executive Agreements" in which he said:

"For controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present method is desirable."

Senator Watkins. He means "secretly abandoned" instead of "quietly abandoned."

Mr. Finch. No, quietly; in other words, not to let the Congress know anything about it at all.

Senator Smith. He meant if it was not called to the attention to those of Dr. Hyde, Solicitor for the State Depart- that was submitted there and not know about it.

Mr. Finch. It may be subject also to "secret," too. You do something quietly. That is secret, too.

Senator Watkins. It meant that to me and that is what was done. He quietly kept a lot of it from us.

In the second sentence he, in effect, said it would be all right to bring the building of privies and all that sort of thing to the Senate, but as to things like Yalta, "Don't let them know anything about that."

Mr. Finch. The views of Dr. McClure were in contradiction to those of Dr. Hyde, Solicitor for the State Department under Secretary Hughes.

Speaking before the American Society of International Law on April 30, 1937, Dr. Hyde said:

"From examination of the various permitted modes of agreement making to which the United States has had recourse, it will be found that in practice the test of whether it is obligatory for the President to work with the Senate, or, to put it differently, whether there has been imposed through the Constitution a duty to make use of a treaty as the instrumentality of agreement, has in the particular case usually been deemed to rest upon the character of objectives sought to be accomplished. It has not been supposed, for example, that the executive, with or without the aid of Congress, was free to dispense with treaty making whenever he might desire to avoid difficulties to be encountered in obtaining the senatorial approval of a desired compact. Deference to the constitutional privilege of the Senate has been constantly manifested in the making of certain well defined classes of international arrangements; and that deference has revealed a seeming acknowledgment that the constitutional provisions in relation to treaty making were far more than indicia of a procedure to be followed in case the executive chose to employ a treaty as a pleasing setting for an agreement, and that the provisions in that instrument were rather to be regarded as declaratory of a constitutional duty on the part of the executive invariably to submit agreements within a broad and fairly defined field to the Senate for its approval. The practice of the United States throughout its life reveals respect for this idea." Proceedings of American Society of International Law, 1937, page 45.

In reading Dr. Hyde's statement, it should be borne in mind that the constitutional amendment under consideration does not affect the negotiation and ratification of treaties under Article VI of the Constitution, but would be of force only to require Congressional action before treaties may become internal law in the United States.

In conclusion, I should like to refer to treaties for the peaceful settlement of international disputes, which have been mentioned in the course of these hearings.

Beginning with the Jay Treaty of 1794, the United States

has occupied a position of leadership in promoting the substitution of law for force in the conduct of international relations. Among a number of Congressional declarations of policy, I shall mention only one, the Concurrent Resolution of 1890 which requested the President:

"to invite * * * negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means." Congressional Record, 51st Congress, first session, volume 21, part 3, page 2986.

It was John Hay, an American Secretary of State, who proposed a plan for a permanent international tribunal to the First Peace Conference at The Hague in 1899. In his instructions to the American Delegation he used the following inspiring language:

"Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent states, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation."

For this and other references on the subject, see letter dated February 17, 1923, from Secretary of State Charles Evans Hughes, to President Warren G. Harding, recommending the participation of the United States in the Permanent Court of International Justice at The Hague. Congressional Record, Sixty-Seventh Congress, Fourth Session, Volume 64, No. 74, page 4508.

I could not and would not support any constitutional amendment which I thought would impair in the slightest degree the ability of the United States Government to continue its participation in that movement, the success of which I regard as vital to the maintenance of our civilization.

There is nothing in the amendment approved by the American Bar Association that can have any effect upon the ratification by the United States of treaties for the establishment of mixed claims commission, arbitral tribunals, joint boundary commissions, or international courts for the adjudication of disputes with foreign nations arising under international law or treaties. Such international differences are not within the domestic jurisdiction and cannot be subject to internal law.

The states of the union are expressly forbidden by the Constitution to enter into any agreement or compact with a foreign power without the consent of Congress. Article 1, section 8, cl. 10.

"The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement or arbitration, or otherwise." Chief Justice Charles Evans Hughes in Monaco versus Mississippi, 1934, 292 U.S. 313.

I am putting these in because I wish to make it perfectly clear that there is nothing in this amendment which would require the consent of the states to any of these arrangements for preserving the peace of the United States.

The function of the federal government to enter into treaties, through constitutional processes, for the submission of international controversies of all kinds to peaceful solution in lieu of resort to armed force, must not be confused with the conclusion of treaties which would impose criminal and civil liability upon persons within the United States without action by the legislature, or that would be destructive of the existing division of authority between the states and the federal government.

Mr. Chairman, I have taken a long time and I appreciate your patience and I appreciate the chance you have given to me to give you my best thought upon what these proposals

mean, and also to express what is in my mind and heart about what position this government should take in the world we are trying to straighten out today.

The Chairman. Believe me, the committee is very, very grateful to you.

Senator Smith. I quite approve of what the Chairman said. I think we should be very grateful to you, Dr. Finch. I feel as though I have been a member of one of his classes and I just wish that the opponents of these amendments could likewise hear him.

The Chairman. I suppose this represents months and months and months of work; is that not true?

Mr. Finch. Mr. Chairman, this paper represents a lifetime of work devoted to this subject. It has taken me several weeks to put it down in this which to me is a condensed form.

Senator Bricker. Mr. Chairman, let me say that I deeply appreciate the contribution that Mr. Finch has made. He has had a lifetime of service in this field and his responsibility and experience is unique. It may be as extensive as any man that has ever practiced in this field in the history of our country, and I think it is a great exposition of the principles that are involved in this consideration.

Senator Smith. I wish that every member of the Senate could have heard what he had to say.

Senator Watkins. May I join with my associates and with the other members of the committee in their praise of Mr. Finch and expression of gratitude for his fine services to us and to the country.

Mr. Finch. I thank you all for these very fine expressions. I deeply appreciate it.

Calendar No. 408

83D CONGRESS, 1st Session } SENATE { REPORT No. 412

CONSTITUTIONAL AMENDMENT RELATIVE TO TREATIES AND EXECUTIVE AGREEMENTS

JUNE 15 (legislative day, JUNE 8), 1953.—Ordered to be printed

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Mr. BUTLER of Maryland, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. J. Res. 1]

The Committee on the Judiciary, to which was referred the resolution (S. J. Res. 1), proposing an amendment to the Constitution of the United States relative to the making of treaties and executive agreements, having considered the same, reports favorably thereon, with amendments, and recommends that the resolution be adopted.

AMENDMENTS

1. Amend the title so as to read:

A bill proposing an amendment to the Constitution of the United States relating to the legal effect of certain treaties and executive agreements.

2. On page 2, line 5, beginning with "SECTION 1", strike all down to and including the word "submission" on line 3, page 3, and insert in lieu thereof the following:

SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SEC. 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

SEC. 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

SEC. 4. The Congress shall have power to enforce this article by appropriate legislation.

SEC. 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

In order to appreciate the significance of both of these occurrences, and their relation to one another, some historical review and elaboration is necessary.

In 1920 the Supreme Court of the United States was presented with a case involving the authority of a treaty and its relation to the 10th amendment to the Constitution. The United States had entered into a treaty with Great Britain for the purpose of protection of migratory birds and this treaty had been implemented by an act of Congress. The Congress had attempted to regulate the subject prior to the conclusion of the treaty but its legislation had been declared unconstitutional by two lower Federal courts. The right of the Congress to enact legislation pursuant to treaty, which it was unable to enact in the absence of treaty, was challenged by the State of Missouri in the case of *Missouri* v. *Holland*, (252 U. S. 416). The Supreme Court decided in that case, that the treatymaking power was not limited by the 10th amendment which reserves all rights not expressly delegated to the United States by the Constitution to the States respectively or to the people.

The decision by Mr. Justice Holmes noted that laws of the United States are required to be made in pursuance of the Constitution, while treaties need only be made under the authority of the United States, which, according to Mr. Justice Holmes, may mean nothing more than observance of the requirement that treaties be negotiated by the President and ratified by the Senate. This case served to accent the fear of many who, like Henry St. George Tucker, viewed the treatymaking power as a Trojan horse for in what was otherwise a government of limited and delegated powers, no express limitation existed on the treatymaking power.

Then in 1929, in an address before the American Society of International Law, former Chief Justice Charles Evans Hughes observed:

> If we take the Constitution to mean what it says, it gives in terms to the United States the power to make treaties. It is a power that has no explicit limitation attached to it, and so far there has been no disposition to find in anything relating to the external concerns of the Nation the limitation to be implied.
>
> Now there is, however, a new line of activity which has not been very noticeable in this country, but which may be in the future, and this may give rise to new questions as to the extent of the treatymaking power. I have been careful in what I have said to refer to the external concerns of the Nation. I should not care to voice any opinion as to an implied limitation on the treatymaking power. The Supreme Court has expressed a doubt whether there could be any such. That is, the doubt has been expressed in one of its opinions. But, if there is a limitation to be implied, I should say it might be found in the nature of the treatymaking power.

Chief Justice Hughes' statement is notable because of his reluctance to express an opinion that the treatymaking power is limited and because of the character of the limitation which he suggested might be implied. Although uncertain that any limitation on the treatymaking power could be implied, Chief Justice Hughes indicated that it might be applied to treaties intended to make laws for the people of the United States in their internal concerns and not substantially related to the Nation's foreign affairs.

This implied limitation, however, seemed doubtful after the sweeping dictum in the opinion of the Supreme Court in the case of *U. S.* v. *Curtiss-Wright Corporation*, in which the Court seemed to regard the treatymaking power not as a delegated power, but as an inherent power vested in the Federal Government as an attribute of sovereignty

(299 U. S. 304, 316–319 (1936)). The implied limitation seemed even less formidable when the United States Department of State issued a bulletin in 1950 in which it declared:

> There is no longer any real difference between "domestic" and "foreign" affairs. (State Department Publication 3972, Foreign Affairs Policy, Series 26, released September 1950; foreword by President Truman.)

These statements were followed by the dissent in the *Steel Seizure* cases (*Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 579, 667 (1952)), in which three justices seemed to find authority for the seizure of a whole industry in the obligation of the President to carry into effect certain treaties and acts of Congress implementing them although, admittedly, the seizure was not authorized by any specific act of Congress nor by any express provision of the Constitution.

The growing apprehension in regard to the scope of the treaty power was reflected by the present Secretary of State in a speech before a regional meeting of the American Bar Association at Louisville, Ky., on April 12, 1952, when he stated:

> The treatymaking power is an extraordinary power, liable to abuse. Treaties make international law and also they make domestic law. Under our Constitution, treaties become the supreme law of the land. They are, indeed, more supreme than ordinary laws for congressional laws are invalid if they do not conform to the Constitution, whereas treaty law can override the Constitution. Treaties, for example, can take powers away from the Congress and give them to the President; they can take powers from the States and give them to the Federal Government or to some international body, and they can cut across the rights given to the people by their constitutional Bill of Rights. (For the full text of the address, see p. 862, Hearings on S. J. Res. 1 and 43.)

A large group of the American legal profession apparently believe Mr. Dulles was right in 1952. One of these lawyers, a former dean of the Law School of Notre Dame University, told the committee that he believes that a—

> properly ratified treaty may completely change and/or supersede the Constitution itself. * * * I am sure that the legal opinion stated by Mr. Dulles at that time is shared now by the great majority of lawyers who have studied this question closely. (Hearings on S. J. Res. 1 and 43, p. 810, 811.)

When these expressions are viewed in the light of present day conditions, that view only serves to heighten fears that there is a loophole in the Constitution as far as protection against abuse of the treatymaking power is concerned.

The tendency, first noted by Chief Justice Hughes, in the statement quoted earlier, of a new line of activity in the field of treatymaking, is no longer a tendency but a reality. The United Nations, and its affiliated agencies, have drafted, and are now in the process of drafting, covenants and conventions to be submitted for ratification as treaties which seek to regulate internationally almost every conceivable facet of American life. That this was not the original purpose of the treatymaking power is best shown in Hamilton's interpretation of that power, which appears in the Federalist, No. 75, as follows:

> The power of making treaties * * * relates neither to the execution of the subsisting laws, nor to the enaction of new ones * * *. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

The committee is informed that over 200 treaties are in various stages of preparation in the United Nations or its affiliated agencies.

Many of these covenants and conventions deal with humanitarian subjects and elicit humanitarian sympathies, but they are not appropriate subjects for the conclusion of treaties. They go far beyond the traditional function of the treatymaking power. One witness who appeared before the subcommittee phrased it well when he observed that, worthy as the superficial objectives of some of these proposed treaties may be—

> they contain the festering germs of destruction * * * beyond the antiseptic properties of the first amendment. (Hearings on S. J. Res. 1 and 43, p. 116.)

Such conventions, if ratified as treaties, would govern the economic and political relationship between the citizen and his own government and, as a result, other contracting nations would be given the right to interfere in matters which are essentially local in character. (See, for example, the statement of Mr. John Foster Dulles on the designs of the Soviet Union in the drafting of the Japanese Peace Treaty, hearings on S. J. Res. 1 and 43, p. 863.)

The revolutionary quality of one of these proposed conventions, that relating to human rights, was shown in 1948 by Mr. John P. Humphrey, who was at that time Director of the Division of Human Rights of the United Nations. Mr. Humphrey wrote in the January 1948 issue of the Annals of the American Academy of Political and Social Sciences:

> What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of supernational supervision of this relationship between the state and its citizens.

This veritable barrage of new treaties under a novel exercise of the treaty power might ordinarily, of itself, prompt a reexamination of our constitutional protections. When, however, that examination discloses a sharp difference of opinion among capable, intelligent men concerning the present adequacy of such protections, where no such differences ought to exist, the need for additional constitutional protection is apparent.

2. Pros and cons

Section 1 removes any possible doubt whether a treaty must be consistent with the Constitution. It gives unequivocal constitutional effect to early judicial dicta not yet incorporated in binding decisions that no provision of a treaty which violates the Constitution or which is inconsistent with the nature of the Government of the United States or of the relation between the States and the United States shall be valid (*New Orleans* v. *United States*, 10 Pet. 662, 736; *The Cherokee Tobacco*, 11 Wall. 616, 620–1; *Holden* v. *Joy*, 17 Wall. 211, 243; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; and see *Asakura* v. *Seattle*, 265 U. S. 332, 341). The inferences drawn by some persons from *Missouri* v. *Holland*, cited supra, and *U. S.* v. *Curtiss-Wright Corporation*, also cited supra, that the treaty power is unlimited in any field of alleged international concern, regardless of the Constitution, will be unqualifiedly negatived, and any doubt on this score forever put to rest.

While some argument has been made that such dicta as contained in the Cherokee Tobacco case, cited above, and the case of *Geofroy* v. *Riggs*, also cited above, that the treaty power does not authorize what

the Constitution forbids should abate all fears on the subject, the fact remains that *Missouri* v. *Holland, supra,* and *U. S.* v. *Curtiss-Wright Corporation, supra,* go in the opposite direction of an unlimited treaty power. The dicta in the earlier cases cited above are also suspect because of judicial statements recognizing that what is done by our Government in the field of foreign relations constitutes political matters over which the President, with the advice and consent of the Senate so far as treaties are concerned, has complete authority, unfettered by judicial review. In any event, since the last dozen years have seen hundreds of earlier decisions overruled and disregarded by the Supreme Court, it would be inappropriate to rest content on the dicta of earlier cases. Undoubtedly, it is best to establish once and for all, by unequivocal language, that the treaty power cannot be used for purposes in conflict with the Constitution.

Most of the witnesses who testified in opposition to this section of the amendment objected to it on the grounds that it was unnecessary or that it might be misconstrued. The necessity for this section of the amendment has already been examined, and it should be entirely clear to the Supreme Court or to any other agency which interprets this section that it is intended only to state what most of the American people have always felt should be the law. In plain words, this section is designed to make it inescapably clear that a treaty may not override the Constitution or be in conflict with it. The argument that the Supreme Court might construe this proposal in a manner not intended and that such construction might lead to possible undersirable limitations on the treaty power is strikingly similar to the argument which Alexander Hamilton made against the Bill of Rights when its inclusion in the Constitution was under consideration. Here is what Mr. Hamilton stated:

> I go further and affirm that Bills of Rights, in the sense and to the extent in which they are contended for, are not only unncecessary in the proposed Constitution but would even be dangerous.
>
> They would contain various exceptions to powers not granted and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done for which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of authority which was not given, and that the provisions against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the National Government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for Bills of Rights.

Some of the witnesses who opposed the resolution opposed this particular section because they felt that neither the President, the Senate, nor the Supreme Court would approve a treaty which conflicted with the Constitution. However, it was pointed out by Senator Bricker in his testimony before the subcommittee that:

> In one case, the President and Senate deliberately achieved by treaty a result which the Constitution expressly forbids. The Supreme Court in 1923 held that the 18th amendment prohibited the importation of intoxicating liquor under seal into the territorial waters of the United States (*Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100). To overcome that effect of the 18th amendment, President

Coolidge negotiated in secret and the Senate in 1924 approved in secret, a treaty authorizing such importation on British ships. The validity of the treaty was challenged in one case which was dismissed on procedural grounds, and it was never further interpreted (hearings on S. J. Res. 1 and 43, p. 6).

Having this case and the case of *Missouri* v. *Holland* in mind, one witness before the subcommittee logically asserted that "The 1st and 14th amendments are no more immune from transgression by international government than were the 10th and 18th" (hearings on S. J. Res. 1 and 43, p. 116).

But even if the President, the Senate and the members of the Supreme Court might be trusted not to make a treaty which conflicted with the Constitution, such trust rests on confidence in men rather than in laws. Where basic constitutional rights are concerned, the protection and good will of men have always been considered inadequate. As Thomas Jefferson so aptly put it:

> In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

B. Section 2 (a treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty)

Section 2 embodies two ideas. The first idea is contained in the main clause, that a treaty shall become effective as internal law in the United States only through legislation—in other words, all treaties to that extent will be non-self-executing. The second idea is contained in the "which" clause and requires that in order for treaties to become effective as internal law in the United States, they must be implemented by legislation which could have been adopted in the absence of the treaty. These two ideas will be discussed separately.

1. Non-self-executing clause

a. *Necessity for Clause.*—At the present time treaties may, by their terms, be self-executing or non-self-executing. A self-executing treaty in American constitutional law refers to a treaty provision which imposes, in and of itself, an obligation upon the United States of such a character as to require application by the courts of the United States. When treaties are of such a character that execution belongs not to the courts but to the Congress, the President, or the treatymaking authority, such treaties are usually referred to as "non-self-executing treaties" *Wright, Quincy, National Courts and Human Rights—The Fujii Case,* 45 American Journal of International Law, 63, 64 (January 1951)). It is often difficult to tell from the terms of a treaty whether it is or is not self-executing. Indeed, the Supreme Court has, in at least one instance, decided that a treaty was not self-executing (*Foster* v. *Nielson,* 2 Pet. 253, 314 (1829)), only to reverse itself 4 years later in another case involving the same treaty (*U. S.* v. *Percheman,* 7 Pet. 51 (1833)).

The issue has now become one of current interest because of articles 55 and 56 of the United Nations Charter, relating to the promotion of human rights by members of the United Nations.

In January 1948, the American Association for the United Nations submitted a brief to the Supreme Court of the United States in the case of *Shelley* v. *Kraemer* (334 U. S. 1 (1948)) in which that organization urged the Supreme Court of the United States to adopt the opinion that articles 55 and 56 of the United Nations Charter were self-execut-

ing and, as such, required the invalidation of racial restrictive covenants. The opinion of the Supreme Court in that case was not based upon the approach urged by the American Association for the United Nations.

The failure of the Supreme Court in this case to utilize the United Nations Charter caused one commentator to observe:

> Here, in effect, we broke a solemn treaty of this Government. This was not only betrayal, morally; it was stupid and needless betrayal. Commonsense as well as honor requires us to rectify it in the next case, and in every case that comes before any court in this country involving the clear terms of the charter itself (Sayre, Paul, *Shelley* v. *Kraemer and United Nations Law*, 34 Iowa Law Review, p. 11, November 1948).

That same year, four Justices of the Supreme Court indicated that they viewed article 56 of the United Nations Charter as having self-executing effect (*Oyama* v. *California*, 332 U. S. 633 (1948)).

In concurring opinion in the Oyama case, Justice Black, who was joined by Justice Douglas, wrote:

> There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this Nation be faithful to this international pledge if State laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

Mr. Justice Murphy, who was joined by Mr. Justice Rutledge, said in that same case:

> Moreover, this Nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The alien land law stands as a barrier to the fullfillment of that national pledge. Its inconsistency with the charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

More recently, a California court decided that articles 55 and 56 of the United Nations Charter were self-executing and for that reason (and because the charter was a treaty and treaties constitute the supreme law of the land) invalidated certain State laws pertaining to land ownership by aliens (*Fujii* v. *California* (Cal. App.) 217 P. 2d 481, 218 P. 2d 595 (1950)).

The Supreme Court of California, in its decision of April 17, 1952, in the same case on appeal, did not give the United Nations Charter controlling legal effect. However, it is quite obvious that, as in the *Lippold Case* (*Perez* v. *Lippold*, 198 P. 2d 17), the majority opinion was largely influenced by what the court called the "moral commitment" of the charter.

As stated by one of the witnesses who appeared before the subcommittee considering this resolution:

> Thus, though in a technical legal sense, the California Supreme Court holds the charter is not a self-executing treaty, the charter is allowed to produce the same effect by projecting itself into the thinking of the court in a new construction of the equal protection clause of the 14th amendment to the Constitution of the United States, to the extent that earlier statutes and decisions (even of the Supreme Court of the United States) upon the identical issue that had stood the test of time and experience were swept aside (hearings on S. J. Res. 1 and 43, p. 138).

That this State court decision did not dispose of the issue is apparent from a ruling made subsequently by a judge in the State of Idaho.

The judge sustained an objection to a question concerning the citizenship of a party in a case involving an alien land law of the State of Idaho on the ground that the law had been invalidated by the United Nations Charter (Power County Press, American Falls, Idaho, June 19, 1952; reprinted in Congressional Record, June 24, 1952, p. A4169).

Thus, with respect to many treaties, it is a matter of judicial guess whether their provisions are self-executing or not. When, as under our Constitution, self-executing treaties become the supreme law of the land, the applicable law controlling a host of Government powers and private rights may depend on nothing more definite than the intent of the parties to a treaty. When treaties are used to make domestic legislation, as they are being used today, the law on many important domestic questions must remain uncertain or unknown until such time as the self-executing or non-self-executing character of the treaty is determined by legislation or by authoritative judicial decision.

While the Supreme Court of the United States has not yet decided whether articles 55 and 56 of the United Nations Charter are self-executing legal obligations, some lawyers maintain that articles 55 and 56 must be judicially enforced as the supreme law of the land. For example, a professor of law at the University of Iowa wrote:

> We are now in a period of transition in which provisions of the United Nations Charter as well as treaty provisions, both of which are undoubtedly binding on our courts, can be held to apply to nations, but can also be applied to other entities including individual citizens. In point here are the equality provisions of the preamble and article 55 (Sayre, Paul, *Shelley* v. *Kraemer and United Nations Law*, 34 Iowa Law Review 1, 4 (November 1948)).

If this interpretation is correct, it will require decades of litigation before such general phrases as, "universal respect for, and observance of, human rights and fundamental freedoms (civil, political, economic, social, and cultural) for all without distinction as to race, sex, language, or religion," can acquire any definite meaning. It seems reasonably certain that if articles 55 and 56 represent self-executing legal obligations, thousands of Federal and State laws have been superseded. No such possibility would exist if the proposed amendment had been in effect at the time the Senate gave its consent to ratification of the United Nations Charter.

There is an additional reason why a constitutional amendment is needed which would require implementation of treaties by act of Congress, so far as their domestic effect is concerned. The United States is one of the few nations of the world where a treaty becomes domestic law of the land immediately upon ratification (hearings on S. J. Res. 1 and 43, p. 1113).

In the British Commonwealth of nations, for example, a treaty does not become domestic law unless there is separate legislation by the legislative body. Until that legislation is adopted the treaty is merely an international agreement which is not binding on the courts of the British Commonwealth in the determination of domestic rights.

As stated in the Canadian Bar Review of November 1951, page 969:

> It is a well-established rule of Anglo-Canadian law that the provisions of a treaty, though binding upon the state under international law, do not become part of the law of the land unless they are implemented by legislation. A treaty that has not been implemented by legislation cannot be a source of legal obligations affecting private rights.

This amendment would place the United States on a par with these other nations of the world by requiring legislative action before a treaty becomes effective internally.

b. *Pros and cons.*—The first clause of section 2 will prevent a treaty from becoming internal law in the United States by force of any of its self-executing terms. It will make all treaties non-self-executing, so far as domestic law is concerned, until Congress acts, but the treaty will continue to be effective as an international obligation. The first clause of section 2 removes the question of the self-executing nature of a treaty from the realm of judicial speculation and makes the internal effectiveness of the treaty within the United States depend exclusively on statutes passed by both Houses of Congress, or the State legislatures, whichever may be the appropriate forum. Everyone, including those who negotiate with us, will know that a treaty negotiated by the President and ratified by the Senate will have no internal effect or be binding in that respect on the States and the people until either the whole Congress or the State legislatures enact legislation in furtherance of the treaty. This will afford officials of the several States, and the people generally, an opportunity to present their views to both Houses of Congress if the treaty proves to be objectionable as internal law. It would also insure that legislation by treaty will cease and only the elected representatives of the people will adopt domestic legislation for the United States.

Section 2, contrary to the understanding of some opponents of the amendment, does not make all treaties non-self-executing. It would not affect a great many treaties concerned exclusively with some phase of external relations and which would not operate as domestic law. Nor will section 2 prevent any treaty from becoming immediately effective as an international obligation. The effectiveness of any treaty within the United States will be limited to the extent that appropriate legislation has not been enacted. In this connection, the committee wishes to emphasize that where the United States made a treaty intended to operate as internal law, the Congress would be under a moral obligation to enact, within the limits of its constitutional authority, the necessary implementing legislation. By making such legislation necessary, however, Congress would be able to translate in the light of hearings, committee discussion, and floor debate, the generally vague provisions of a treaty into a statute stating the rights of individuals with some degree of precision. In addition, there would be much more likelihood that the interpretation by which a treaty was approved by the Senate would be reflected in the law of the land.

While this section of the amendment renders all treaties having domestic effect non-self-executing, it does not limit the Department of State, or the President, in negotiating treaties. The Department of State, or the President, can negotiate a treaty with any country in the world and the Senate can promptly ratify it, but the treaty, when ratified, does not supersede any law in this country unless or until legally implemented. Thus, it will be known exactly at what point of time there is an impact of that treaty on Federal and State domestic law.

There is no reason why the United States should not be in the same position as other countries in this regard. There is no reason, for example, when a treaty is concluded with Canada, for that treaty to be a binding international agreement without domestic effect in Canada, unless implemented by legislation and, at the same time, be

a binding international agreement and effective as domestic law in the United States without implementation by legislation.

As a matter of fact, Judge Manley O. Hudson, of the Harvard Law School, pointed out some years ago the anomalous situation in which we find ourselves because of our supreme-law clause, which other nations do not have (American Journal of International Law, vol. 28, p. 276). If we make a treaty that is self-executing in character, it is binding on our courts. The courts in our country will enforce those treaties with respect to private rights, whereas courts in other countries have no duty or right to enforce them, unless the legislature of that nation has implemented them by legislation giving them domestic effect.

If this amendment is adopted, a treaty concluded with the United States will be an international agreement binding under international law, but like Britain, Canada, and most other countries, it will not be domestic law until the appropriate legislative body incorporates it into the domestic law of the country, to the extent it deems it necessary and proper to do so.

The first clause of this section of the amendment will also remove a substantial problem of constitutional construction. Since this proposal requires that treaties having internal effect be implemented by legislation, the Supreme Court could, under the doctrine of *Marbury* v. *Madison* (cited supra), declare any such act unconstitutional insofar as that act conflicts with the Constitution. Thus, though the conclusion of treaties may be a "political" decision, the internal effect of such treaties under this provision becomes sufficiently separable from the international obligation that the courts may examine its constitutional effect exactly as they do any other legislation. This clause of section 2, coupled with the "which" clause of the same section, makes it clear that legislation enacted pursuant to a treaty must "stand the test of constitutionality" (hearings on S. J. Res. 1 and 43, p. 169).

Some people apparently feel that such a proposal will make it more difficult for this Nation to conclude treaties with other nations. Such a proposition is difficult to understand. In the first place, if the United States elects to make all treaties non-self-executing, no other government has any right to complain. It is not a requirement of international law that treaties shall be the internal law of the land without action by the legislative authority.

This proposition was recognized as long as a hundred years ago by Mr. Justice Curtis in the case of *Taylor* v. *Morton* (2 Curtis 454), which was affirmed by the Supreme Court (2 Black 481):

> * * * If the people of the United States were to repeal as much of their Constitution as makes treaties their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern.
>
> The foreign sovereign between whom and the United States a treaty has been made has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done is exclusively for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the Government, whether the power to enforce and apply it shall reside in one department or another, neither the treaty itself nor any implication drawn from it gives him any right to inquire * * *

Futhermore, in view of the many undertakings of the United States by treaties within the last several years with nations which have had

similar requirements, it can hardly be said that such requirements have proved to be an impediment to the conclusion of binding and effective international agreements.

Some of the witnesses appearing before the subcommittee sought to discount any comparison between the United States and other countries about the need for congressional or parliamentary approval of treaty law of an internal character by stating that other governments have parliamentary systems and we do not.

This is another argument that is difficult to comprehend. The fact that under a parliamentary system a government would fall if the treaty were not implemented by the parliament, does not at all affect the international obligation of that nation under the treaty, and even a succeeding government would be required to secure legislation implementing the treaty before a treaty could have effect as internal law (hearings on S. J. Res. 1 and 43, p. 1129).

Also, as a member of the subcommittee pointed out at the hearings, such an argument is even more difficult to understand because under the parliamentary system of government the treaty is negotiated by government leaders who are a part of the parliamentary body, whereas in the United States, the Senate seldom has any part in the negotiation of a treaty. As Senator Dirksen put it:

> In a parliamentary country they do not start from scratch because every occupant of the Government bench in the House of Commons has already been warned in advance of the details that go into the making of the treaty because he has been part of it. Notwithstanding that fact, they still require it be implemented by legislation (hearings on S. J. Res. 1 and 43, p. 1129).

Some witnesses also sought to discount the worth of this clause by making reference to the committee action of the Founding Fathers in rejecting Gouverneur Morris' proposal that no treaty should be binding on the United States "which is not ratified by law."

Reference to the attitude of the Founding Fathers in this respect is of doubtful aid, however, for the Senate was chosen rather than the House of Representatives as the partner in the ratification of treaties because it was originally felt that such instruments which were to be contracts, not legislation, required secrecy and the Senate, as the smaller body, was more adaptable to that need. But it is difficult to suppose that the Founding Fathers would have advocated the conclusion and ratification of treaties in secret when those treaties were legislative in character and legislative in effect. As one of the witnesses at the hearings on this measure pointed out:

> The very element of legislation binding on the people is that it should be public. Imagine the Congress of the United States closing its doors to the public when legislation is under consideration (hearings on S. J. Res. 1 and 43, p. 1130).

2. "Which" clause

a. *Necessity for clause.*—The Constitution of the United States vested all the legislative powers granted in that instrument in a Congress of the United States consisting of a Senate and a House of Representatives. It also conferred upon the Congress the power to make all laws which shall be necessary and proper for the carrying into execution of all of the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. These have always been significant grants, but they became even more significant after the decision of the Supreme Court of the United

States in *Missouri* v. *Holland* (cited supra). As indicated earlier, the case of *Missouri* v. *Holland* established that the treatymaking power was a delegated power which was, therefore, not restricted by the reservation of the States and the people in the 10th amendment. *Missouri* v. *Holland* has provided the mechanism whereby the treaty-making authority can adopt treaties on subjects not normally within the legislative powers, and by virtue of that ability and the necessary and proper clause, the Congress may pass legislation pursuant to a treaty which it could not otherwise constitutionally enact.

Under this unusual authority the Federal Government has within its power the means to destroy the present Federal-State relationship. At the time the Constitution was adopted, and until recently, treaties were restricted to their traditional field as instruments of contract between sovereign nations, imposing duties and obligation on the contracting states and not on individual citizens. As long as treaties were so restricted the need for constitutional limitation on treaty-making power perhaps was not so strikingly urgent. As mentioned earlier, however, treaties are today being proposed which impose criminal and civil liabilities directly on individual citizens, which affect their rights, and impose duties on individual citizens, all of which were heretofore reserved for State legislation.

It was clearly intended by the Founding Fathers that all powers not expressly delegated in the Constitution, nor reasonably implied from those expressly granted should be reserved to the States or to the people. That is the language of the 10th amendment. Jefferson, in his Manual of Parliamentary Practice, specifically stated:

> By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties and cannot be otherwise regulated.
>
> It must have meant to except out all those rights reserved to the States; for surely the President and the Senate cannot do by treaty what the whole Government is interdicted from doing in any way.

It should be clear that the purpose of the 10th amendment was to maintain a balance between State and Federal power and it was never intended that the established constitutional balance should be substantially upset by the exercise of the treaty power.

Yet today, by operation of a treaty already adopted by the United States Senate, the Federal-State relationship established in the United States is in danger of being substantially altered. There are those who maintain that by virtue of articles 55 and 56 of the United Nations Charter the Congress now has the authority to legislate with respect to social, economic, cultural, civil, and political rights. If there is any field of human endeavor not encompassed within those words, it is difficult to imagine what that field might be.

The possibility of the accretion of additional power to the Federal Government by virtue of the adoption of treaties has not gone unnoticed. President Truman's Commission on Civil Rights, after discussing the power of Congress under its existing constitutional authority to pass civil rights legislation, added:

> The Human Rights Commission of the United Nations at present is working on a detailed national bill of rights, designed to give more specific meaning to the general principles announced in article 55 of the charter: If this document is accepted by the United States as a member state, an even stronger base for congressional action under the treaty power may be established.

Also, when H. R. 4453, 81st Congress, was introduced, one of the purposes cited was—

> to promote * * * observance of human rights * * * in accordance with the undertaking of the United States under the United Nations Charter * * *.

When this bill was reported by the Committee on Education and Labor of the House of Representatives, the report of the committee discussed the constitutionality of the legislation (establishing a Federal Fair Employment Practice Commission), and after citing the purpose quoted above, article VI of the Constitution, and portions of articles 55 and 56 of the United Nations Charter, the report stated:

> So viewed, it is immaterial whether or not the bill could be constitutionally enacted in the absence of an enabling treaty. The Supreme Court has established that there are some matters "that an act of Congress could not deal with but that a treaty followed by such an act could" (*Missouri* v. *Holland*, 252 U. S. 416, 433). In that case, the Court upheld a statute regulating the killing of migratory birds, a matter normally within the exclusive jurisdiction of the States. The existence of a treaty with Great Britain providing for such regulation supplied the basis for the Court's holding that "the great body of private relations usually fall within the control of the State, but a treaty may override its power" (252 U. S. 434).
>
> If, as four justices of the Supreme Court recently noted, the United Nations Charter compels the invalidation, without more, of State legislation which does violence to its "high ideals," it certainly warrants affirmative action by Congress to eliminate "those forces of evil whose destruction recently necessitated a devastating war" (*Oyama* v. *California*, 332 U. S. 633, 673; 68 S. Ct. 269, 288).

The obligation of the United States under the Charter of the United Nations was also cited in justification for a bill which would have made unlawful the transportation or importation of false and defamatory statements designed to arouse intergroup conflict (H. R. 7717, 82d Cong., 2d sess.).

There is another important point to consider as this section is reviewed. To date, there is not a single instance in which a treaty has been declared unconstitutional (*U. S.* v. *Thompson*, 258 Fed. 257, 260). Indeed there is some doubt whether the "courts have power to declare the plain terms of a treaty void and unenforceable" (*U. S.* v. *Reid*, 73 F. (2d) 153, 155). In *Ware* v. *Hylton* (3 Dall. 199, 237 (1796)), Mr. Justice Chase expressed doubts as to his power to declare a treaty void.

The Supreme Court stated on one occasion that—

> the conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—"the political"—departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision (*Oetjen* v. *Central Leather Company*, 246 U. S. 297, 302 (1918)).

In *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.* (333 U. S. 103), the Court said:

> * * * the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the Government, executive and legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and whi,h has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry (p. 111).

Also, the Supreme Court, in the case of *U. S.* v. *Curtiss-Wright Corporation* (cited supra), cited with approval a statement that the

President is "the sole organ of Government in the field of foreign relations" and that—

> he manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospects of success. For his conduct he is responsible to the Constitution.

If it is correct that the President has the exclusive and absolute discretion "to determine when, how, and upon what subjects negotiation may be urged," conditioned only by the power of the Senate on completion of the President's negotiations to ratify or not, then the subject matter of treaties is solely a political matter; and the judiciary has no jurisdiction except to determine whether the treaty was (1) made "under the authority of the United States" and (2) what it means. The only express constitutional limitation on the treaty power is that a treaty must be made "under the authority" of the United States; it need not be made "in pursuance" of the Constitution as is the case with statutes, if article VI of the Constitution is to be interpreted literally.

The celebrated case of *Marbury* v. *Madison* (1 Cranch 137, 180 (1803)), which established the power of the Supreme Court to declare a statute null and void if it conflicted with the Constitution, does not negate this possibility for that decision ends with an argument resting on the "in pursuance" clause of article VI.

While the Attorney General of the United States, in his testimony before the subcommittee, stated that he believed the Supreme Court had the power to declare a treaty which conflicted with the Constitution null and void, other witnesses who appeared before the subcommittee urged the adoption of the "which" clause of section 2 as a means of establishing the power of the courts to declare the internal effect of a treaty unconstitutional if the act passed in implementation of the treaty is not in harmony with the Constitution.

b. *Pros and cons.*—The last part of the sentence which forms section 2 is commonly referred to as the "which" clause.

The purpose of the "which" clause is to make it clear that Congress shall not acquire legislative power under treaties which it does not otherwise possess under the Constitution. This would negate the doctrine announced in *Missouri* v. *Holland* (cited supra), that Congress had authority to legislate in otherwise prohibited areas by virtue of its power to carry treaties into effect under the Constitution. The proposed amendment is also intended to correct the broad language in *U. S.* v. *Curtiss-Wright Corporation* (cited supra), in which the court seemed to espouse the theory of inherent Federal powers in the field of international relations. The proposed text negatives any inherent power theory in the Federal Government in the field of international relations, by confining Congress to its otherwise delegated powers. Under the proposed "which" clause, the treatymaking power may not be utilized to create legislative power not otherwise existing in Congress to enact internal law binding on the several States, such as Federal legislation under treaties which would have the effect of abridging the reserved rights and powers of the States, imposing criminal and civil liabilities on citizens of the United States, or affecting the rights or imposing duties on citizens of the United States.

Our National Government is, and should be, exclusively one of delegated and limited powers. We do not have such a Government if

the Congress is permitted to acquire legislative power through the adoption of treaties by the President and Senate. As Mr. Justice Brewer stated in the case of *Kansas* v. *Colorado* (260 U. S. 46, 89)—

> But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a Government of enumerated powers.

As a people, this Nation has from the beginning opposed unlimited power in government and has committed itself to the principle of constitutional limitations. To secure the ratification of the Constitution, the Bill of Rights was added to insure, among other things, that the new Federal Government should not interfere with any rights retained by the people, and that all powers not delegated to the United States by the Constitution nor prohibited by it to the States, should reside, not in the Federal Government, but be reserved to the States respectively, or to the people (articles of amendment 9 and 10 to the Constitution).

While the 10th amendment contributes nothing affirmatively to the power of the States and the people, it does, by way of emphasis, make it clear that what was not delegated was emphatically reserved (*U. S.* v. *Darby*, 312 U. S. 100, 123–4; *Fernandez* v. *Wiener*, 326 U. S. 340; *Case* v. *Bowles*, 327 U. S. 92, 102). The purpose was clearly to maintain a balance between State and Federal power as originally established in the Constitution. It certainly is plain from the whole history of the Convention that it was never intended, or even remotely contemplated, that the established constitutional balance between State and Federal power, could be substantially upset by the exercise of the treaty power. The ingenious schemes which are now being put forward by ardent and impatient innovators seek to make new domestic law for the United States and to upset the balance between State and Federal power by treaties and acts of Congress passed pursuant thereto.

It was asserted before the subcommittee that this proposed amendment would limit the Congress in implementing treaties to its delegated powers in the absence of such treaties, and that this would unreasonably limit the Federal Government in the international field. This amendment would limit the Congress to its power in the absence of treaties, but such power includes the authority to declare war, to regulate commerce with foreign nations, to define and punish piracies and offenses on the high seas and offenses against the law of nations. With these and the other powers which the Congress possesses, the Government would be far from impotent if this resolution is adopted.

Under its power to make war, Congress can conclude peace, and it customarily does so by joint resolution (joint resolution after World War I approved by President Harding on July 2, 1921; joint resolution of 1951 terminating war with Germany, approved by President Truman on October 19, 1951).

Under its power to regulate commerce with foreign nations (art. 1, sec. 8 of the Constitution), it can implement treaties of friendship, commerce, and navigation, which is by far the most numerous class of treaties negotiated by this Nation. This includes consular conventions when made separately from general commercial treaties, consuls being trade representatives, and in no way necessarily involved when diplomatic relations are severed.

The legislative power to regulate foreign commerce is by no means a power with narrow application. Former Justice Owen Roberts, of the Supreme Court, in his book entitled "The Court and the Constitution," published by the Harvard University Press in 1951, stated:

> By virtue of the exercise of the commerce power to remove prospective burdens on the interstate commerce arising out of purely local practices and conditions, the Congress has superseded the police power of the States and taken unto itself police power in a vast field of business and other activity. * * * It seems hard to draw a line in respect of this type of prophylactic legislation. Its operation must be permitted to extend to the smallest units and to activities that once were thought so remote from interstate commerce as to have no appreciable effect on it.

The same clause which vests in Congress legislative power to regulate interstate commerce also grants the Congress the power to regulate commerce with foreign nations. This power over interstate commerce and the power over foreign commerce have been construed by the Supreme Court to be coextensive (*License Cases*, 5 How. 504, 577).

It would be difficult to maintain, with any degree of logic, the proposition that the Congress had legislative power to remove prospective burdens on interstate commerce arising out of purely local practices and conditions, and did not possess, under the same constitutional provision, a similar power to remove burdens affecting commerce with foreign nations.

Some of the witnesses before the subcommittee maintained that the "which" clause of this resolution would prevent this Nation from concluding treaties and international agreements for the control of narcotics. This argument usually has its basis in a decision by a lower Federal court in the case of *Stutz et al.* v. *Bureau of Narcotics et al.* (56 F. Supp. 810), that the Federal Government had authority to regulate the growing of poppies within the several States by virtue of the fact that a treaty had been concluded on that subject prior to the adoption of the Opium Poppy Control Act of 1942, which forbids the growing of opium poppy except under Federal license, and limits such licenses to the quantities needed for medical and scientific requirements.

While the three-judge court which rendered this opinion found legislative authority in the Congress as a result of the conclusion of the treaty, the court did not hold that the Congress lacked the power to regulate the growing of poppies under its authority to regulate interstate commerce. As a matter of fact, the purpose of the act was stated to be not only to discharge the international obligation of the United States under the narcotic treaties, but to promote the public health and the general welfare, to regulate interstate and foreign commerce in opium poppies, and to safeguard the revenue derived from taxation of opium and opium products.

Thus, it is hardly correct to say, on the basis of this case alone, that the Congress of the United States would not have the authority to pass legislation regulating the growing of opium poppies if this amendment were to be adopted.

Several other objections to this clause of the resolution were raised on the basis that it would deny needed authority to the Federal Government. One of these related to the conclusion of treaties of commerce and friendship after the adoption of this amendment, which

would contain provisions relating to the rights of aliens to own and dispose of land in this country in exchange for reciprocal rights for United States citizens in the foreign jurisdiction. In such a case, it is contended that provisions in such a treaty would be subject to the veto of any of the individual States. Presuming, solely for the sake of argument, that this conclusion be true, what would the effect of this amendment be on the rights of aliens to own land within the United States?

One of the witnesses who appeared before the subcommittee (hearings on S. J. Res. 1 and 43, p. 1123), examined the State laws on the subject and discovered that 27 States grant the same rights of land ownership and inheritance to aliens as are possessed by citizens. Nine others grant similar rights if the alien is eligible to citizenship and all restrictions on naturalization because of race have been removed by the Immigration and Naturalization Act of June 27, 1952, section 311. In addition, four States grant aliens real property rights according to reciprocal rights granted American citizens. Eight other States have limited restrictions according to the length of tenure, or the location or quantity of the property.

Thus, even if this clause permitted the States to have a voice in the rights of aliens to hold land within the United States, such persons would be accorded equal rights with American citizens in at least 40 of the 48 States if such a treaty were adopted. And also, as a matter of fact, such a proposition is neither novel nor startling for the treaty, the interpretation of which was involved in the case of *Geofroy* v. *Riggs* (cited earlier), provided in part:

> In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. * * *
>
> As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engaged to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right. * * *"

Similar provisions appear in some modern treaties. For example, the treaty of friendship, commerce, and navigation, signed with China on November 4, 1946, reads in part as follows:

> The nationals, corporations, and associations of either high contracting party shall be permitted to acquire, hold, and dispose of real and other immovable property throughout the territories of the other contracting party subject to the conditions and requirements as prescribed by the laws and regulations of such other high contracting party * * *. In the case of any State, Territory, or possession of the United States of America which does not now or does not hereafter permit the nationals, corporations, and associations of the Republic of China to acquire, hold, or dispose of real and other immovable property upon the same terms as nationals, corporations, and associations of the United States of America, the provisions of the preceding sentence shall not apply. In that case, the Republic of China shall not be obligated to accord to nationals of the United States domiciled in, and to corporations and associations of the United States of America created or organized under the laws of, such State, Territory, or possession treatment more favorable than the treatment which is or may hereafter be accorded within such State, Territory, or possession to nationals, corporations, and associations of the Republic of China.

Another argument against this clause of the resolution has been that it might prevent the conclusion of extradition treaties. This contention was thoroughly explored and found baseless in an article written by Mr. George A. Finch entitled "The Treaty-Clause Amend-

ment: The Case for the Association," which appeared in the American Bar Association Journal, 1952. Mr. Finch stated in that article:

> Fears that the adoption of the proposed constitutional amendment would deprive the United States of the power to conclude treaties for the mutual surrender of fugitives from justice are grounded in an inadequate understanding of the history of extradition in this country. At international law treaties are not required. Extradition is founded on reciprocity.
>
> The Constitution provides for the delivery of fugitives between the several States (art. IV, sec. 2) but the question whether the power of international extradition was vested in the States or the Federal Government was long in doubt. The Jay Treaty of 1794, stipulating for extradition for murder or forgery, expired in 1807. For the next 35 years the United States had no treaty relations on extradition. During that period the Federal Government declined to act upon requests of the States to apply to foreign governments for the surrender of fugitives, and it referred to the States for their action the requests of foreign governments for the delivery of fugitives found therein. The President and the Secretary of State held that they lacked power to act for the nation in matters of international extradition in the absence of treaty or act of Congress. New York State adopted an act in 1822 conferring power upon its Governor to act internationally. It remained in operation until 1839 when Gov. William H. Seward, later Secretary of State in President Lincoln's Cabinet, declined to act under the State law, on the ground that international extradition was "intimately connected with the foreign relations of the United States, and should be exclusively under the control of the General Government" (Moore, Digest of International Law, vol. IV, 242). In the same year the Governor of Vermont issued a warrant for the surrender of a fugitive to Canada. On a writ of habeas corpus the case reached the Supreme Court of the United States, which declared that the power of extradition belonged "exclusively to the Federal Government," and that the action of the Governor of Vermont was "repugnant to the Constitution of the United States" (*Holmes* v. *Jennison*, 14 Pet. 540 (1840)). See the full discussion of this case by John Bassett Moore in Treatise on Extradition (1891) (vol. 1, pp. 55–59). The following year the United States concluded an extradition treaty with Great Britain and another with France in 1843.
>
> The first Federal extradition statute was adopted in 1848. Its purpose was to regulate extradition procedure in the United States and put the surrender of fugitives to foreign governments on a completely reciprocal basis. It was made applicable to extradition treaties already concluded and to future treaties.
>
> In view of this history, it would be overemphasizing the importance of treaty-making in American constitutional law to hold that Congress would not have the power to enact legislation making extradition treaties internal law under the proposed constitutional amendment.

It was also urged that if this amendment were adopted with the "which" clause included, that it would be impossible for the United States Government to conclude agreements with foreign countries on the collection of foreign debts without the consent of all the 48 States of the Union. The fallacy in this argument is readily revealed by examining the action of the Congress following the First World War. On February 9, 1922, without any treaty being involved, the Congress created and authorized the World War Foreign Debt Commission to conclude agreements with foreign countries subject to the approval of the President but not subject to the ratification of the Senate. This clearly constituted the assertion of the legislative power of the Congress over the subject of foreign debts without any reliance on any authority which might be obtained as a result of the conclusion of a prior treaty. As one of the witnesses before the subcommittee pointed out, no one ever challenged the authority of the Congress to pass such legislation (hearings on S. J. Res. 1 and 43, pp. 1142 and 1143).

It is sometimes asserted that a treaty such as the Treaty of Peace of 1783 with Great Britain concerning payments of debts to British creditors could not be concluded under the proposed amendment.

That argument is of doubtful validity. That treaty was held supreme over State law in *Ware* v. *Hylton* (cited supra), but the treaty was of little benefit to creditors for several reasons and the Congress itself ultimately appropriated the money to pay British creditors.

Some of the witnesses who appeared before the subcommittee proposed that instead of adopting a constitutional amendment, the Congress, and particularly the Senate, could utilize other remedies.

One of the remedies proposed was that the United States representatives who negotiate treaties in behalf of the United States include protective clauses in such treaties. However, there is often difficulty in securing the insertion of such clauses, especially in multilateral treaties. The United States representatives, for example, have tried for 4 years to insert in the Draft Covenant on Human Rights a so-called Federal-State clause intended to protect our own Federal-State relationship and that of others similarly situated. So far, they have been unable to do so. But even if the representatives of the United States had been successful, there is serious question whether the clause as now drafted would constitute adequate protection. The Committee on Amendments to the Federal Constitution of the New York State Bar examined the Federal-State clause proposed by the United States representatives and came to the following conclusion:

> If such a treaty as the covenant on human rights is within the treatymaking power, then under our Constitution and the decisions of our Supreme Court the effect of our becoming a party to the covenant would be to give the Congress of the United States full power to enact legislation effective within the States to put the covenant into effect. That obviously would be accomplished "in accordance with the constitutional processes" of the United States. It would be a result consistent with our Constitution, as already determined in *Missouri* v. *Holland*. Consequently Congress would in accordance with our constitutional processes, have full power, and subdivision (b) dealing with favorable recommendations to the States would be inoperative. If we want to put a clause in the covenant on this subject, it would have to go further and provide that the Federal Government assumes no obligation to enact legislation which it could not constitutionally enact, in the absence of the treaty. This would relieve the Federal Government from an obligation to enact Federal legiislation, but even then it might be held that under the rule in *Missouri* v. *Holland* Congress would gain power to fully implement the covenant although under no international obligation to do so (hearings, S. J. Res. 1 and 43, p. 621).

The Committee on Peace and Law Through the United Nations of the American Bar Association likewise feels that the proposed Federal-State clause is inadequate (Report of the Committee on Peace and Law, American Bar Association, September 1, 1951).

In addition to these expressions, a scholarly dissertation on the inadequacy of such clauses is contained in the supplementary testimony of a former president of the American Bar Association, beginning at page 1024 of the hearings on S. J. Res. 1 and 43.

Moreover, such clauses, whether they be of the Federal-State variety or of the non-self-executing variety, are likely to be in such form that judicial interpretation will be necessary in order to ascertain whether they constitute adequate protection.

Some opponents of the proposed amendment argue that the Senate of the United States could achieve the aim that is sought to be accomplished by the amendment by attaching reservations or understandings to treaties.

An "understanding" is a clause sometimes appended to a treaty for the purpose of making it clear that the document has been approved

on the condition that it or some portion of it is to be interpreted or construed in a given manner." For example, the State Department attached "an understanding" in its letter of transmittal of the Genocide Convention in 1950. An understanding generally amounts to a counteroffer and requires acceptance by the other contracting party or parties, either expressly or by legally binding acquiescence in some form.

A reservation, on the other hand, is a clause sometimes appended to a treaty which states that some portion of the treaty is not acceptable or to be considered binding and that the treaty is accepted only subject to the reservation. For example, the United States Senate attached the so-called "Connally reservation" to the statute of the World Court, which provided that the United States reserved the right in each case to determine whether a controversy involving it should be submitted to that court.

It is true that the Senate may attach reservations or understandings to treaties. The Senate undoubtedly has that power. However, in practice, the exercise of that power may be extremely difficult, for a number of reasons. First a reservation to a treaty, no matter how innocuous, amounts to a counter offer. The United States must, in effect, renegotiate the treaty with the other parties to the treaty. Secretary of State Dulles testified to this effect when he appeared before the subcommittee considering the proposed amendment. He said:

> * * * This whole area of reservations is one which you know is subject to a good deal of doubt and question, but I think that the treaty of the type of the North Atlantic Treaty, which creates reciprocal contractual rights and obligations of the Japanese peace treaty, a reservation which changes appreciably the substance of our own rights and obligations would not be effective unless it was accepted by the other parties whose rights and obligations would be correspondingly increased and diminished by our action.
>
> * * * * * * *
>
> It is my view that in the case of most treaties at least the insertion of a reservation which is not accepted by the other party in effect negates the treaty. There is no valid treaty any more * * *.

In the case of multilateral treaties, renegotiation because of reservation creates a great deal of difficulty. Because of this the Senate is oftentimes subjected to a strong pressure to approve the treaty as written. Where a bilateral treaty is under consideration, reservations may occasion less difficulty or embarrassment. But where the reservation must be submitted to scores of nations joined in a multilateral treaty, the Senate's freedom of action is correspondingly limited.

Secondly, the Senate cannot always see at the time it considers a treaty that a reservation might be necessary or desirable. The United Nations Charter is a case in point.

Finally, it is becoming increasingly difficult for parties to multilateral treaties to make effective reservations. For example, the International Court of Justice has ruled that substantial reservations to the Genocide Convention will nullify the effect of ratification (Advisory Opinion to the U. N. General Assembly, May 28, 1951). In line with this recent development in international law, article 20 of the proposed Universal Copyright Convention flatly declares that reservations thereto "shall not be permitted" (hearings on S. J. Res. 1 and 43, p. 580).

In addition to all of this, the Congress may, under a treaty and by virtue of article I, section 8 of the Constitution, pass all laws necessary and proper to give effect to and implement treaties even though, in the absence of such treaty, the Congress would not have the power to pass such legislation. Neither by reservation nor understanding can this power of Congress be controlled if the Congress chooses to exercise it (American Bar Association Journal, September 1952, p. 735).

This statement represents the agreed views of the American Bar Association's Committee on Peace and Law Through the United Nations and the section of the international law of that same organization (see report of Committee on Peace and Law, September 1, 1951, p. 36).

Thus, while reservations or understandings may be attached to a treaty by the Senate or the State Department, they in no way inhibit the power of Congress to ignore the reservations and understandings and to enact legislation under the treaty binding on the States and the people which it could not enact in the absence of treaty. In other words, neither a reservation nor understanding affects the power of Congress to set aside State constitutions and laws and existing Federal laws within the purview of the treaty.

It was also urged before the Subcommittee that adequate protection from abuse of the treaty-making power now exists in the authority of Congress to abrogate or modify treaties by subsequent legislation, at least insofar as their internal effect is concerned.

Doubtless treaties can be repudiated or modified by subsequent congressional legislation, a principle recognized in *Ware* v. *Hylton* 3 Dall., 199, 261 (1796) and since reexamined. *Head Money Cases* (112 U. S. 590, 597–599 (1884)); *Hijo* v. *U. S.* (195 U. S. 315, 324 (1904)); *Sanchez* v. *U. S.* (216 U. S. 167 (1911)).

As stated by Mr. Justice Blackford in the case of *Horner* v. *U. S.*, 143 U. S. 570:

> The statute is a law equally with the treaty and if subsequent and conflicting with the treaty, supersedes the latter.

It is thus clear that Congress can, by subsequent legislation, denounce the treaty entirely or, in a more limited way, render it inoperative as domestic or internal law in the United States. While this power resides in the Congress, the question still remains whether such power is adequate to prevent serious abuse of the treatymaking power. The committee does not believe that it is. In the first place, subsequent legislation to repeal the internal effect of a treaty would require the signature of the President. It is doubtful that the same President who transmitted a treaty to the Senate for its ratification would readily accede to its repudiation. It is likely, therefore, that such legislation would be met with a veto by the Chief Executive and it would thus be necessary, in order to repeal the domestic effect of a treaty, to secure a two-thirds vote of those present and voting in both the Senate and House to overcome the veto. With the prestige of the President involved, such a vote would be extremely difficult to obtain.

Also, it is likely that the Congress itself would hesitate to repudiate the internal effect of a treaty because of the international conflicts which might result from such repudiation, and more especially is this true where the treaty is one which involves many other nations

that is, a multilateral treaty, as distinguished from a bilateral treaty. It is unthinkable that the United States, whose international honor is involved in all of these obligations, would undertake extensive or wholesale repudiation of unwise treaties. The United States has always followed the policy of upholding its commitment, once given, and it is quite likely that that consideration alone might cause the Congress to refrain from repudiating an unwise treaty.

This leads to the very salutary effect which this proposed amendment would have, if adopted, on our international relationships. Those who bargain with us as a nation would know at the bargaining table that the domestic application of the treaty would be a matter for the ultimate determination of the elected representatives of the people of the United States. To the committee it seems a much wiser course to adopt a constitutional limitation setting up such a standard in advance, thus preventing the difficulties encountered in the repudiation of treaties, especially multilateral treaties.

C. Section 3 (Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article)

1. Necessity for section

The phrase "executive and other agreements," as used in the proposed amendment, includes every agreement and understanding, formal and informal, made by any official of the executive branch with any foreign power or international organization and not submitted to the Senate as a treaty. In this respect, the committee proposal follows, with minor changes, the language of Senate Joint Resolution 1 as introduced.

Senate Joint Resolution 43 covered only "executive agreements." The term "executive agreement," by itself, is ordinarily "intended to denote a transaction of a more formal and important nature, such as a protocol, a modus vivendi, a postal convention, etc." (Fraser, Treaties and Executive Agreements, S. Doc. No. 244, 78th Cong., 2d sess., p. 1.) Inasmuch as "executive agreement" has no settled meaning, and because the regulation envisaged in section 3 might be frustrated by classifying particular agreements as something other than "executive," the committee deemed it necessary to bring all international agreements, other than treaties, within the purview of section 3.

Executive agreements is a term widely used to apply to all international agreements and treaties. Such agreements are sometimes made in accordance with prior authorization of the Congress or are made subject to the approval of both Houses of Congress. These are often referred to as congressional-executive agreements. One witness who appeared before the subcommittee estimated that 85 percent of the executive agreements concluded in 1951 were of this variety (hearings conducted on S. J. Res. 130, 82d Cong., p. 82). Other agreements concluded by the Chief Executive, however, may never be submitted to the Congress for approval or implementation, nor are they concluded as a result of prior congressional authorization. These are sometimes referred to as "Presidential agreements" (McDougal and Lans, Treaties and Executive Agreements, vol. 54, pp. 181, 205). The Congress, however, may have an opportunity to review some of these

Presidential agreements when appropriations are required to implement them. In addition, some of this last group may concern relatively routine matters which the Congress may never desire to examine or review.

There is no express constitutional sanction for the conclusion of executive agreements by the President. However, the power of the President to make such agreements has been recognized by the Supreme Court (*U. S.* v. *Curtiss-Wright Corporation* (cited supra); *U. S.* v. *Belmont*, 301 U. S. 324; *U. S.* v. *Pink*, 315 U. S. 203 (1942)).

Obviously, treaties and executive agreements, as instruments for the conduct of foreign policy, are closely related. Both are international agreements which obligate the United States to some course of action. Some have gone so far as to assert that treaties and executive agreements are wholly interchangeable instruments of national policy (infra). In view of this attitude, it would be absurd to adopt a constitutional amendment limiting the more difficult treaty method of concluding international agreements without nailing down the power of Congress to control the less difficult method.

On the other hand, there are many who believe that the Congress now possesses the power to regulate executive and other agreements. A resolution now pending before the Senate Foreign Relations Committee, sponsored by Senator McCarran and Senator Bricker, proposes the regulation of executive agreements by the Congress under its present authority. It is believed that this authority is derived by virtue of the power of Congress to enact legislation necessary and proper to carry into effect any of the powers conferred by the Constitution of the United States.

The most positive assertion of this power of Congress during the hearing was made by the chairman of the Committee on Peace and Law through the United Nations of the American Bar Association (p. 1244, et seq.). In addition, the Attorney General of the United States, Herbert Brownell, acknowledged that the Congress has in the past exercised its powers to regulate the making of executive agreements (hearings on S. J. Res. 1 and 43, p. 932).

However, other witnesses before the committee disputed the present power of Congress to regulate the making of executive agreements. Secretary of State Dulles was one of those who disputed such authority (hearings on S. J. Res. 1 and 43, p. 892). The General Counsel of the Department of Defense seemed to support this view of Secretary Dulles (hearings on S. J. Res. 1 and 43, p. 983).

Inasmuch as there appears to be some doubt concerning the power of Congress to regulate the making of executive agreements, it is appropriate for Congress and the several States to dispel this doubt by the adoption of an appropriate amendment to the Constitution.

All of the witnesses who appeared before the subcommittee recognized that the Congress has some regulatory power with regard to executive agreements. No witness, for example, challenged the power of Congress to regulate executive agreements by the use of its power to appropriate money. The Department of State recognized this power in its memorandum to the subcommittee (hearings on S. J. Res. 1 and 43, p. 838). However, the power of the purse is not an adequate safeguard against the making of improper or unwise executive agreements. Congress has not even learned of some executive agreements until long after they were made. The Roosevelt-Katsura agreement

of 1905 was not known until 1924; the Lansing-Ishii agreement contained a secret clause unknown until 1922; provisions of the Yalta agreement also remained undisclosed for years after the conclusion of the agreement (Borchard, Edwin, *Treaties and Executive Agreements—A Reply*, 54 Yale Law Journal 616, 659 (June 1945)).

Other witnesses who appeared at the hearings on Senate Joint Resolutions 1 and 43 recognized the power of Congress to repeal an executive agreement. However, unilateral repudiation of unwise executive agreements by the Congress is, likewise, not an adequate remedy. In many cases, other parties to the agreement have acted in reliance on its performance by the United States and repudiation of the agreement would provoke international repercussions.

The power of Congress to legislate against executive agreements already concluded was recognized by the opponents of Senate Joint Resolutions 1 and 43 and inasmuch as these persons oppose any form of prior regulation to the making of executive agreements by the Congress, their opposition seems tantamount to an admission that legislation after the fact is not an effective form of control.

This is borne out by certain recent executive agreements which were concluded without prior authorization of Congress, and although their validity is subject to doubt, the agreements present the Congress with a fait accompli, which the Congress may alter only by resort to its power to declare war. The agreements at Yalta and Potsdam are illustrative of this type of agreement. The decision to cede portions of the Sakhalin Islands to Russia, the decision to partition land along the Curzon line, and the decision concerning the provisional government of Poland were political decisions not military decision (see testimony of Secretary of State Dulles, appearing at p. 874 of the hearings on S. J. Res. 1 and 43). Yet, these decisions were made by the Chief Executive acting independently of the Congress. When the Congress became aware of them, it was unable to alter their provisions short of war. The unusual aspect concerning the Yalta agreement is that apparently the President who concluded it felt that the agreement required ratification by the Senate (hearings on S. J. Res. 1 and 43, pp. 1172–73).

One of the witnesses before the subcommittee (p. 1173 of the hearings on S. J. Res. 1 and 43), himself a former employee of the Department of State, thought that such agreements were subject to the criticism expressed by Dr. Charles Cheney Hyde, who served as Solicitor for the Department of State under Secretary of State Charles Evans Hughes in 1922, that—

> It may be fairly doubted whether the present practice whereby the President agrees without the approval of the Senate, to understandings or declarations of vast import, serving both to further the political aspirations of other States or to weaken proportionally the subsequent influence of the United States as a deterrent, is to be regarded as advantageous to the Nation (International Law Chiefly as Applied to the United States, vol. II, p. 33 note).

In recent years, some Americans have invented the doctrine that treaties and executive agreements are wholly interchangeable. One of the leading articles in support of this doctrine frankly described the treatymaking power as a "sort of constitutional vermiform appendix." (McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements*, 54 Yale Law Journal 181, 535 (1945)). This article reflected somewhat the attitude expressed in a book written in

1941 by Dr. Wallace McClure, onetime Chief of the Treaty Division of the Department of State. Dr. McClure stated:

> For controversal international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present method is desirable * * *. (International Executive Agreements, by Wallace McClure, New York, Columbia University Press, 1941, p. 378).

The Committee on the Judiciary cannot agree that the President acting alone, or the Congress and the President acting together, should bypass the treaty procedure whenever the approval of two-thirds of the Senators present and voting appears doubtful. The treaty clause is an integral part of the Constitution, which both Senators and Representatives have taken an oath to protect and defend. The committee does realize, however, that the exact line of demarcation between treaties and executive agreements has always been undefined, but existence of such a line does not seem to have been seriously questioned prior to 1940.

For example, in 1939, Assistant Secretary of State Francis B. Sayre drew the following distinction between treaties and executive agreements based on subject matter:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements (see Sayre, The Constitutionality of the Trade Agreements Act, 39 Col. L. Rev. 751, 755).

The Secretary of State, in his testimony before the subcommittee recognized that there is an undefined borderline "between executive agreements which may be made by the President alone and those that require validation by the Senate as treaties, or the Congress as laws" (hearings on S. J. Res. 1 and 43, p. 828). The Secretary of State alluded to the controversy between the executive and legislative branches of Government inspired by this undefined area, but he concluded that "the danger to the Nation cannot be great because, without either State or congressional action, these agreements cannot constitutionally become the law of the land" (hearings on S. J. Res. 1 and 43, p. 828).

The Secretary of State, when he made that statement, must not have been aware of the decision of the Supreme Court of the United States in the case of *U. S.* v. *Pink* (315 U. S. 203 (1942)). The Supreme Court of the United States in that case stated:

> A treaty is a "law of the land" under the supremacy clause (art. VI, clause 2) of the Constitution. Such international compacts and agreements as the Litvinov assignment have a similar dignity * * * (315 U. S. 203, 230).

And later on in the same case the Court stated:

> But State law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen* v. *Johnson* (279 U. S. 47). Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin* v. *McCoach*, 313 U. S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.

Executive agreements then, to the extent that they may override contrary State laws and policies, become the law of the land and this is true whether the agreements are congressional-executive or Presidential.

Messrs. McDougal and Lans article, which has been cited earlier, stated that the Supreme Court has put the executive agreement entirely upon a par with the treaty (54 Yale Law Journal 181, 261).

Secretary of State Dulles recognized, however, that the controversy over the use of executive agreements instead of treaties has been a source of friction. He proposed at the hearings conducted on Senate Joint Resolutions 1 and 43 that the matter be—

> dealt with by friendly cooperation between the three departments of Government which are involved, rather than by attempts at constitutional definition, * * *.

It should be noted that the proposed amendment does not seek to define the area in which executive agreements may properly be made, but instead leaves the matter to be worked out by the more flexible method of statutory definition.

It should be readily recognized that the "friendly cooperation" which has been urged upon the committee is hardly possible if the President alone has the unlimited discretion to decide whether a particular international agreement requires the approval of one, both, or neither of the two Houses of Congress. The amendment which is here proposed includes the power to regulate executive and other agreements, which power carries with it the power to determine what types of agreements may be concluded by the President alone, by the President and the Congress, and by the treaty method. However, it is significant that this power of regulation can be exercised only through legislation in which all of these parties participate.

The solution of the Secretary of State to the problems developed by this undefined borderline was a promise on the part of the administration to—

> consult with appropriate congressional leaders and committees in determining the most suitable way of handling international agreements as they arise (hearings on S. J. Res. 1 and 43, pp. 828 and 829).

The committee appreciates this obviously sincere and honest desire on the part of the President and his Secretary of State to avoid friction in an area of divided and uncertain responsibilities. The pledge of consultation in this field should lead to a more harmonious relationship between the President and the Congress. Such cooperation will not only be permitted after the adoption of this amendment, but should be encouraged. The committee, however, cannot accept this well-intentioned offer of consultation as eliminating the need for a permanent solution to this long-standing problem.

As Hamilton explained in The Federalist (No. 75):

> This history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

Section 3 of this resolution would not alter the President's role as the sole organ of the United States in the conduct of international negotiations. Even if this amendment were to be adopted the President would continue to have the exclusive power of initiating agree-

ments with foreign governments, and if the amendment is adopted, it will not permit Congress to compel a particular international agreement to be made. The Congress could only recommend such action, as it has done for example in the Vandenberg resolution, which led to the negotiation of the North Atlantic Treaty. But while the amendment permits the President to continue as the sole negotiator of international agreements, it permits the Congress to fix conditions which particular types of agreements must satisfy in order to be valid and binding upon the United States. The Congress under this amendment could, likewise, prohibit the making of certain types of executive agreements, for the power to regulate carries with it the power to prohibit (hearings on S. J. Res. 1 and 43, pp. 74, 1243). For example, the Supreme Court of the United States, in the case of *U. S.* v. *Darby* (312 U. S. 100), in construing what the word "regulate" meant as it was used in the interstate and foreign commerce clause of the Constitution stated:

> The power to regulate commerce is the power to prescribe the rule by which commerce is governed. It extends not only to those regulations which aid, foster, and protect commerce, but embraces those which prohibit it (312 U. S. 113).

Under this judicial construction of the word "regulate" Congress, after adoption of this amendment, would have the authority to determine what agreements might be made by the President alone and what agreements, either before or after their negotiation by the President, might require congressional approval. The Congress might also prescribe under what conditions, limitations, or prohibitions these agreements might be made. The proposed amendment would enable Congress to prescribe standards for all international agreements, as it does now with respect to those relating to reciprocal trade, the Mutual Security Act and many other types of agreements (hearings on S. J. Res. 1 and 43, pp. 967, 983). This amendment would also permit the Congress to determine what types of agreements should be approved by the Senate as treaties, what types should be approved by act or joint resolution of the Congress, and what types the President could conclude without the approval of either House of Congress. But, the amendment in no way interferes with the President's authority to conduct the negotiations leading to these agreements.

At the present time constitutional lawyers in the United States do not agree on the nature of the limitations on the power of executive agreements and, in such a state of affairs, it would be ludicrous to presume that other nations are aware of any such limitations. This, as one witness before the subcommittee pointed out, is perhaps one of the best reasons for adopting this section relating to executive agreements (hearings on S. J. Res. 1 and 43, pp. 1171 and 1172).

Important executive agreements have been made since the birth of the Republic, usually with, but on occasion without, the approval of Congress. Unless, therefore, other parties to an agreement know that an agreement should be a treaty within the meaning of the Constitution, they are entirely justified in assuming that an executive who negotiates an agreement has the authority to do so, that Senate approval is not necessary and, more important, that the agreement as concluded will be carried out. In such a situation international misunderstanding and ill-will might be expected, for although other parties to an executive agreement are entitled to treat such an agreement as an international obligation equally as binding as a treaty, the

American Congress, the succeeding President, and the people are entitled to treat that agreement as an entirely different instrument.

This section of the resolution will have a salutory effect on our international relationships because it will place all other countries with whom we deal on notice that treaties and executive agreements are not wholly interchangeable instruments to be invoked at the whim of the President of the United States.

Since the amendment leaves the definition of the proper area of Presidential agreements to be worked out on a case by case basis by statutory law, the full measure of benefits to be derived from this type of Congressional control over international agreements other than treaties will depend in large part on the type of legislation enacted pursuant to this provision of the amendment.

Section 3 of Senate Joint Resolution 1 also requires that all executive or other agreements shall be subject to the limitations imposed on treaties by the amendment. It would be absurd, of course, to limit the treatymaking power without attaching comparable limitations to the executive-agreement-making power. Otherwise,the demise of the treaty method of concluding international agreements would be assured. This much was conceded by a witness who, appearing in opposition to Senate Joint Resolution 1, said:

> I would say this, that if a decision is reached by you gentlemen and the Congress and by the people to put certain limits on treaties, how it is going to be done I do not know. But suppose that is so. Certainly the same restriction should be put on executive agreements.
>
> You would not want to be restricted in making treaties and have less restriction on the executive agreements. One seeks to deal with executive agreements, and another seeks to deal with treaties. So far as scope is concerned, the President should not be able to do more than the Senate (hearings on S. J. Res. 1 and 43, p. 228).

At several points in the course of the hearings it was suggested that this sentence, coupled with the non-self-executing feature of section 2 of the proposed amendment, could result in a useless doublestep by the Congress, so far as the conclusion of executive agreements is concerned. For example, in the Trade Agreements Acts, as amended, Congress passed laws giving the President power to enter into agreements for the reciprocal lowering of tariffs. Such agreements become "internal law" in the United States without further legislation by the Congress. Therefore, it was argued, Congress would be required under this sentence of section 3 and the provisions of section 2 to reenact the agreement to make it effective in the United States.

The committee is convinced that no such wasted motion would ever prove necessary. In authorizing, for example, reciprocal-trade agreements, Congress could certainly provide in the same act that any agreement made by the President under its authority would become "internal law" in the United States.

On the other hand, in dealing with other types of agreements, Congress might very well want to retain its authority under this section to take a second look at the executive agreement which had been concluded, in order to determine the manner in which domestic rights and duties would be or should be aflected by the executive agreement. In such a situation, additional legislation would be required in order to make the agreement effective as internal law where the Congress had not specifically so provided in its authorizing legislation.

In addition, there is perhaps even greater reason to safeguard the reserved powers of the States against infringement by executive agreements than against infringement by treaties. Such protection is afforded in this amendment by the combined effects of sections 2 and 3.

The case of *United States* v. *Pink*, cited earlier, expanded the executive-agreement-making power in the same way that *Missouri* v. *Holland* (cited supra) expanded the treatymaking power. In the *Pink case*, the Supreme Court held that the Roosevelt-Litvinov assignment superseded the law of the State of New York. Except for the agreement between President Roosevelt and Ambassador Litvinov (which was not approved by either House of Congress), the State of New York's proposed distribution of assets of the New York branch of a nationalized Russian insurance company would have been valid against any possible action by the United States. But the executive agreement enabled the United States to take possession of the property to satisfy the claims of another class of creditors contrary to the State law.

As pointed out by the opponents of Senate Joint Resolution 1 so often, the States of the Union are protected, in some measure, against abuse of the treaty making power by the respect for the rights of those States among the members of the Senate and the House of Representatives. However, the *Pink* case is a precedent by which any President, merely by making an executive agreement with the head of any other government, could invade vital State functions and prerogatives. It is extremely doubtful if anything would have shocked the Founding Fathers more than the suggestion that the Federal-State relationship was alterable at the will of a single individual.

2. Pros and cons

Opponents of this resolution have argued that the adoption of this sort of an amendment would not have prevented the highly questionable and controversial agreement concluded at Yalta. Reasonable and honest men may differ concerning the extent to which the Yalta agreement, standing alone, is responsible for the world's postwar crisis, but the committee categorically rejects any suggestion that the United States Senate would have advised and consented to any agreement so repugnant to the ideals of this Nation and to the principles enunciated in the Atlantic Charter.

Also frequently expressed throughout the hearings was the objection that congressional regulation of executive and other agreements would so hamstring the President as to endanger the national security.

This argument is unsound for a number of reasons. In the first place, as earlier pointed out, most of the agreements now concluded by the Chief Executive in the name of the United States have either been authorized by the Congress or later approved by act or joint resolution. There is no reason to assume that Congress will be any more unreasonable or arbitrary in this respect than it has been in prior years, and it is quite unlikely that congressional regulation of the remaining 15 percent of executive agreements would place the President in any straitjacket. Many of this 15 percent are agreements of a minor nature, which the Congress would have neither the time nor the inclination to regulate. Certainly this applies to routine

and relatively unimportant agreements relating to the day-to-day conduct of diplomatic business. And as regards the remainder of that 15 percent, it must also be pointed out that the regulation envisaged in this amendment will be pursuant to act of Congress, which requires the signature of the President, and if the President should choose to veto the legislation, it would require the approval of two-thirds of the House and Senate of the United States.

Despite this knowledge, it was contended before the subcommittee that with respect to the small group of executive agreements now being concluded by the President solely, that the President must continue to be free to act without congressional restraint. One of the examples used in support of this argument bears particular analysis, in view of its history following the conclusion of the hearings by the subcommittee. A witness used this example (hearings on S. J. Res. 1 and 43, p. 198):

> To prevent a flood of Canadian potatoes into this country after Congress passed a price-support law, the President arranged with Canada to restrict the import of Canadian potatoes to the United States for food. But for this agreement, we would have been supporting the price of Canadian potatoes also (*U. S.* v. *Guy W. Capps, Inc.*, 100 Fed. Supp. 30 (1951)).

It is interesting to note that the Capps case, cited by this witness, was recently reversed on appeal by the Fourth Circuit Court of Appeals of the United States. The court decided that Congress had provided a plan for regulating potato imports which the President did not follow, but which he was obliged to follow under the decision of the United States Supreme Court in the Steel Seizure case. This, however, is only a circuit court of appeals decision, and so far as the committee has been able to determine, the Supreme Court has never declared an executive agreement unconstitutional.

This amendment is designed to eliminate any abuse of power inherent in this situation and in order to do that, the power of Congress to regulate the making of executive agreements must be firmly established. Any possibility of congressional abuse of power which might result from this, as has been noted, is minimized first, by the President's veto power, and secondly, by the well-established power of the Supreme Court of the United States to strike down any laws enacted by the Congress not made in pursuance of the Constitution.

Recently, both at home and abroad, the Constitution of the United States has been attacked because it was deliberately designed to restrict the President's freedom of action in foreign affairs. To circumvent those restrictions, the authority of the Chief Executive to make executive agreements has been exploited to the point where the treaty procedure may ultimately become an historical relic. Notwithstanding the disastrous consequences which have often flowed from foreign policy decisions by a single individual, many well-meaning people believe that it would be suicidal in a time of world crisis to subject the President to the observance of traditional constitutional restraints.

To this argument there are two answers. First, the framers of the Constitution lived in a time of equal, if not greater peril, than does this Nation in the present hour. The infant Nation was well-nigh powerless to resist several possible combinations of aggressors. Yet,

it is significant that the men who gathered at Convention Hall did not place their trust in one-man rule of either foreign or domestic policy.

Secondly, complete and exclusive executive direction of American foreign policy may well lead eventually to complete executive control of domestic policy. Certainly, that statement is true if the attitude exhibited in the State Department bulletin (i. e., there is no longer any difference between foreign and domestic policy) is accepted.

Now, there are some who maintain that exclusive executive control of foreign policy and domestic policy, insofar as it may be affected by foreign policy, may be the price of survival in an atomic age. But the constitutional amendment recommended to the Senate rests on the assumption that world leadership and national security are objectives not incompatible with the preservation of liberty at home.

III. Summary and Conclusion

A. SUMMARY

In summary, this amendment will (1) render void any treaty, or provision of a treaty, which conflicts with the Constitution of the United States; (2) require that a treaty shall not become effective as internal law in the United States unless made so by the adoption of legislation implementing the treaty; (3) prevent the Congress of the United States from acquiring legislative power under a treaty which it does not otherwise possess under the Constitution; and (4) subject executive and other agreements to regulation by the Congress and to the limitations imposed on the making of treaties.

On the other hand, this amendment will not affect the present method of negotiating and ratifying treaties. Treaties will continue to be negotiated by the President and ratified with the advice and consent of two-thirds of the Senators present and voting. This amendment will not interfere with legitimate activities of the United Nations. The amendment will not prevent the President and the Senate from concluding a treaty otherwise valid under the Constitution on any subject whatsoever, nor will it affect in any manner treaties which do not make internal law in the United States, but it will make impossible the participation of any foreign nation by the treaty method in the proscription of laws for the regulation of the conduct of the citizens of the several States of the United States. It will prevent the reduction of State power and the enhancement of congressional power at the expense of the States through the ratification of a treaty, and the balance between State and Federal power will be subject to change only by the regular processes of constitutional amendment or judicial interpretation. The proposed amendment will not render acts of Congress unconstitutional which have been adopted under a treaty concluded prior to the ratification of this amendment. However, legislation enacted after the adoption of this amendment in implementation of a treaty will be subject to the provisions of the amendment irrespective of whether the treaty antedates the amendment or not. These are some of the things which the amendment will and will not do.

B. CONCLUSION

The committee has been urged by responsible officials to delay action on this measure and to seek an examination of the whole program of the making of treaties and executive agreements by a specially constituted commission. Such a course of action could only result in additional delay of a measure which has already received thorough examination. The committee also has been urged to delay action until a treaty violating the Constitution had been adopted. The committee would neither be wise nor judicious if it adopted such a course.

Also, strange as it may seem, some witnesses even seemed to urge that the committee delay action until such a treaty had been upheld by the Supreme Court or until the court had refused to pass upon it. It is extremely doubtful if Members of the Senate, who take an oath to support the Constitution, could consistently adopt such an attitude.

The committee has been presented with evidence which certainly establishes that there exists no express limitation on the treatymaking power, and the existence of an implied limitation is shrouded in doubt. It has also been presented with substantial evidence to establish that the existing Federal-State limitation is in jeopardy of destruction by abuse of the treatymaking power and liberal application of the decision in the case of *Missouri* v. *Holland*. In addition, the committee could almost take legislative notice of abuses by the executive branch in the conclusion of executive agreements and the need for supervisory authority of the Congress over such agreements.

With this wealth of material before it and with the benefit of the thorough examination which this measure has received, the committee feels that delay is unwarranted.

As Mr. Justice Sutherland stated in the dissent in *Associated Press* v. *NLRB*, 301 U. S. 103, 141 (1937):

> For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

The committee reports favorably on this resolution and urges that it be favorably considered by the Senate of the United States.

MINORITY VIEWS

[To accompany S. J. Res. 1]

Summary of Points Developed by Minority

1. The final version of Senate Joint Resolution 1 is entirely different from the original version. It is almost word for word the same as Senate Joint Resolution 43, which was introduced by a single Senator and which is even more harmful than the original Senate Joint Resolution 1.

2. The main argument advanced in favor of an amendment is that one is necessary to prevent treaties from overriding the Constitution. No such amendment is necessary. The Supreme Court has consistently held that any treaty which conflicts with the Constitution will be held invalid. There is no indication whatsoever that the highest Court in the land will ever hold otherwise.

3. The resolution would virtually abolish the treatymaking power given to the Government under the Constitution and would leave the United States only partially sovereign. We could not deal as a coequal with other foreign powers, since there would be many vital international subjects with which we would be constitutionally prohibited from dealing by way of treaty.

4. This proposal would probably prevent the United States from entering into an agreement to control atomic energy (the Baruch plan). It would probably invalidate existing international agreements controlling narcotics.

5. The constitutional division of powers between the legislative and executive branches of the Government, which has worked so well for 164 years, would be fundamentally altered. The President would no longer have control over foreign relations, since the Congress could regulate his conduct of such affairs down to the last detail.

6. If the amendment were now the law, the conclusion of an armistice agreement in Korea would be virtually impossible in the absence of special congressional authority.

7. We feel that the proposed amendment should be referred to the Senate Committee on Foreign Relations for thorough consideration of its possible effect on our relations with other countries.

We respectfully disagree with the majority report of the Committee of the Judiciary, and urge that the Senate should not accept Senate Joint Resolution 1, which would amend the Constitution in a manner which would result in prohibiting many useful and legitimate types of international agreements entirely and which would require additional procedures for the making of practically all of them. In these perilous times when on every hand our country has need for friends and allies, we cannot afford to shrink the power of the United States

to use the tried and proven means for dealing with other nations. In our own self-interest, we do not want to incapacitate ourselves from performing our own part in the worldwide problems of achieving and maintaining peace.

General

The final version should be numbered Senate Joint Resolution 43 and not Senate Joint Resolution 1. The first thing that should be noted is that Senate Joint Resolution 1 as approved by the majority of the Committee really is not Senate Joint Resolution 1 at all, as introduced by Senator Bricker on January 7, 1953, with a number of cosponsors. It is in fact almost the same as Senate Joint Resolution 43 which was introduced by Senator Watkins alone on February 16, 1953. This fact can be most easily seen by a comparison of the wording of the several texts:

SECTION 1

Final version:

A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Senate Joint Resolution 43:

A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect.

Senate Joint Resolution 1:

A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

SECTION 2

Final version:

A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty.* [Italic supplied.]

Senate Joint Resolution 43:

A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty.* [Italic supplied.]

Senate Joint Resolution 1:

A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

SECTION 3

Final version:

Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Senate Joint Resolution 43:

Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article.

Senate Joint Resolution 1:

All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article.

This comparison readily shows that the final version of section 1 is virtually identical with the language in Senate Joint Resolution 43 and very different in phraseology and substantive content from the similar provision in the original Senate Joint Resolution 1. As to section 2, the final version is exactly the same as Senate Joint Resolution 43, whereas the original Senate Joint Resolution 1 not only is entirely different in wording but consciously and purposely omits the very harmful clause which requires that the legislation be "valid in the absence of treaty." Section 3 of the final version of the resolution is different in wording from either other draft, but it is much nearer Senate Joint Resolution 43 than Senate Joint Resolution 1 in content.

The point to be made by this detailed comparison is that we the undersigned feel that many of the Senators who cosponsored Senate Joint Resolution 1 in its original form may not wish to cosponsor the final version. In fact this resolution is not Senate Joint Resolution 1, but rather Senate Joint Resolution 43. In any event, it is in such a radically different form that the original sponsors may no longer wish to have their names on the resolution as sponsors. The resolution has been made more extreme and more crippling by the adoption of the clause which requires that implementing legislation would have to be valid in the absence of treaty; this clause has been consistently opposed even by Senator Bricker himself. It should be remembered that the administration officials who appeared before the subcommittee consistently maintained that Senate Joint Resolution 43 was even more objectionable than Senate Joint Resolution 1, and it is Senate Joint Resolution 43 which in substance has been adopted by the majority of the committee.

In addition, many of the original cosponsors signed the original resolution for the avowed purpose of stimulating study on this important subject. We feel sure that the thorough study given the problem by the subcommittee has convinced many of the cosponsors, as it has convinced us, that the proposed amendment is either unnecessary or unacceptable in its present form and requires more work and study.

THE MAIN ARGUMENT FOR THE RESOLUTION DOES NOT SUPPORT IT

The one claim most frequently and vehemently made in support of the resolution is that there is a danger that treaties may override constitutional rights of citizens. This legal question was exhaustively analyzed by the principal law officer of the United States in his testimony at the subcommittee hearings on the resolution (excerpts from which are included in the appendix hereto), and laid to rest. The Honorable Herbert Brownell, Jr., Attorney General of the United States, concluded:

> * * * no amendment of the Constitution appears to be needed to prevent abridgement by treaty or executive agreement of the essential liberties guaranteed by the Bill of Rights or by the Constitution as a whole.[1]

But although the main argument for the resolution is expressed as a concern for the protection of constitutional rights, the terms and

[1] Statement by the Hon. Herbert Brownell, Jr., Attorney General of the United States, hearings on S. J. Res. 1 and S. J. Res. 43 (83d Cong. 1st sess.) before subcommittee of Senate Judiciary Committee (hereinafter called *hearings*), p. 901 at 909–910.

substance of the resolution go far beyond any declaratory statement for such a purpose. Thoughtful men can well conclude that its real effect is to make unconstitutional the path to peace. The adoption of the resolution would be taken by other peoples of the world as our announcement that the less we deal and agree with them the better. For example, section 2 of the resolution as recommended by the majority of the committee would probably make unconstitutional such things as our own Baruch proposal for joint international supervision and control of facilities for making atomic bombs within the jurisdiction of each country. Under which "delegated power" could Congress authorize inspection of our atomic facilities by an international agency? Proponents of the amendment argue that there is power in the Federal Government, under the war power and the commerce clause, to do much in this line. However, even one of their chief proponents of this amendment stated that he wanted to adopt the language now appearing in this amendment to stop our own Baruch plan for atomic disarmament.[2]

WE NEED "PEACE" AS WELL AS "WAR" POWERS

We must, to remain a sovereign nation, have in the United States not only a "war" power but a "peace" power—the treatymaking power as it stands today. The scientist in his laboratory may not be engaged in any form of commerce and his peaceful occupation may be quite outside the war power, yet he may be concocting an earth-shattering formula which should be the subject of international regulation within the United States if we are to protect ourselves from like activity abroad by sharing in regulation of similar foreign activities. Truly the peace power to enforce treaties domestically must remain in the Federal Government if we are to have any hope of safety for ourselves, our wives, and our children.

In the words of the Honorable John J. Parker, judge of the Circuit Court of Appeals for the Fourth Circuit, and section delegate of the house of delegates of the American Bar Association for its section in international and comparative law:

> Under the present provisions of our Constitution we have grown to greatness. There is no reason to think that, now that we are great, we can no longer trust in them.[3]

Of the many Senators who permitted their names to be added as cosponsors of the resolution, it may be noted that a large number signed in order that there should be a study of the treaty power and the executive agreement power. This salutary purpose has already been accomplished in part, since extensive hearings have been held on the resolution currently, and last year on the previous version of the same measure (S. J. Res. 130 of the 82d Cong.). At both sets of

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[2] Testimony of George A. Finch, Sr., Member Committee on Peace and Law, American Bar Association, hearings, p. 1127 at p. 1150.

[3] Hearings, p. 708 at 714.

hearings, the Executive (under a Democratic administration in 1952 and a Republican administration in 1953) opposed the amendment. The process to date has been healthy, by informing the electorate of both the scope and the importance of these national powers. The Judiciary Committee has explored the subject from the domestic point of view. If this exploration has not convinced the Senate of the unwisdom of the proposed amendment, at the very least, before the Senate acts, the resolution should be referred to the Foreign Relations Committee to report on its impact upon our relations with other nations. The fact that a related resolution (S. J. Res. 2 introduced by Senator Pat McCarran) is already pending before that committee emphasizes the necessity for further review of this subject.

PUBLIC OPINION HAS BEEN ALERTED

In a very real sense, insofar as the resolution has raised questions of policy, Senator Bricker and the cosponsors are entitled to feel that they have stimulated the forces of public opinion, and that an informed public opinion will be a more perceptive guide to the Nation's destinies than words in a constitutional amendment. The Secretary of State has pointed out some of the new policies toward various treaties in his testimony before the committee.[4] It is the opinion of the minority that these policy considerations can be adequately dealt with now—without changing the Constitution.

We will analyze the provisions of the "revised" resolution, and our objections thereto, on a section-by-section basis. In addition there is attached an appendix which contains some of the major points in the form of questions and answers. However, before proceeding to this task, we would like to state very briefly three general reasons why we feel that Senate Joint Resolution 43, or Senate Joint Resolution 1 as it is now called, should not be accepted by the Senate:

1. Our constitutional system of dealing and agreeing with other peoples—by treaty, executive agreement, and other international agreements—has worked well for 164 years. It gives us the essential capacity to make and stand by our agreements, coequally with other nations. As there can never be power without risk of its abuse, our system also provides adequate checks and balances under our basic plan for the separation of governmental powers.

2. The prohibitions and encumbrances which the resolution would impose are in themselves unwise and dangerous. Insofar as they are urged as attempted declarations of the existing protections of the constitutional rights of citizens, they run the risk of producing some quite different and unexpected result. Insofar as they shrink the Nation's power and efficiency to make essential agreements, they are unwise and—in the field of war and the prevention of war—stark folly.

3. The resolution will certainly do more harm than it possibly can good. We would be well advised to leave well enough alone. Whatever the ills that may be besetting us, the fault, cause, and cure do not lie in the Constitution.

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[4] Testimony of Hon. John Foster Dulles, Secretary of State, hearings, p. 823

Analysis of Section 1

The wording of section 1 has been changed from—

A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

to—

A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

The basic objection to this section remains: If it is intended to assert the supremacy of the Constitution over treaties it is unnecessary, because the section would merely state what the law is and always has been; if, on the other hand, it is construed to have some other meaning, then the section will invite endless controversial searches into its meaning as disputes over particular treaty provisions arise.

The views of President Eisenhower on this subject appear to be both pertinent and incisive. In reply to a question at his press conference on March 19, 1953, the President said that he believed all that the proponents meant by section 1 was to put into the Constitution a provision which would make it impossible to break the Constitution. He went on to say that to him there seemed to be an anomaly in that kind of reasoning, and that there was no reason to amend the Constitution in order to show that it was going to remain the same.[5]

The purported reasons for the resolution, at least those generally talked about, are the fears that a treaty might bargain away our Bill of Rights. Endless reference has been made to a speech delivered in Louisville, Ky, in 1952 by Secretary of State Dulles, then a private citizen, at which time he urged further study of the treatymaking power, and introduced his speech with a prefatory remark indicating that treaties might have this effect. This prefatory remark—but not his plea for further study—has been widely quoted in support of the resolution, although the further study which has taken place has convinced him that the treatymaking power is not an unlimited power and that "while the Constitution provides that treaties made under the authority of the United States shall be the supreme law of the land, they only rank on an equality with congressional enactments.[6]

Treaties on Parity With Federal Law

As pointed out by the Association of the Bar of the City of New York, from the fact that Federal law may override a treaty, and Federal laws are subject to the Constitution, it may be concluded that treaties, being on a parity with Federal law, are also not above the Constitution.[7] The Supreme Court of the United States has consistently been of this view.[8]

The revised draft still has certain ambiguities. The meaning of the word "conflicts" is far from clear. Even more ambiguous is the term "shall not be of any force or effect." Does this mean internally or externally? If it means internally, the matter would seem to be adequately covered by the provisions of section 2 of the final draft

[5] New York Herald Tribune, Mar. 20, 1953, p. 8.
[6] Statement by John Foster Dulles, Secretary of State, hearings, p. 823 at 824.
[7] Report approved by the association of the bar of the city of New York opposing S. J. Res. 130 (82d Cong., 2d sess.), p. 16, note 1. (reprinted in hearings, p. 235 at 241, note 24). Also the Record of said association (report opposing S. J. Res. 1), April 1953, p. 173.
[8] *The Cherokee Tobacco*, 11 wall. 616, 620-621 (1870); *Geofroy* v. *Riggs*, 133 U. S. 258, 267 (1890); and *United States* v. *Minnesota*, 270 U. S. 181, 207-208 (1936).

which require implementing legislation; the implementing legislation must be constitutionally valid before it can be given force and effect internally. If it means externally, it is doubtful if the section would be of any validity under the usually accepted rules of international law. Under these rules, sovereign states are bound by their solemn contracts, which have been concluded and ratified according to the normal rules of procedure, whether or not the treaties conflict with some internal law. If we insist that the validity of all the treaties to be made by the United States must await some final determination as to their constitutionality, most nations will be most reluctant to make even essential treaties with the United States, and the treaty-making power will be dealt a death blow.

Analysis of Section 2

The wording of section 2 (which was originally sec. 3 of the Bricker proposal) has been changed from—

> A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

to—

> A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty.* [Italic added.]

Except for the addition of the final "which" clause, this section remains essentially unrevised. Before outlining the very serious nature of the objections applicable to the "which" clause, it is necessary to recall the strong objections which were made to the original section by witness after witness, by eminent lawyers both without and within the Democratic and Republican administrations alike. These objections go to the procedural aspects of the treatymaking process which is envisaged by the resolution.

The first clause of section 2 of the resolution would give us the most cumbersome treatymaking procedure in the world. Under its terms, wherever any internal effect was involved, a treaty would have to receive five separate approvals: (1) a two-thirds vote of the Senators present, (2) ratification by the President, (3) a majority vote in the House, (4) a majority vote in the Senate, and (5) the President's signature on the resulting act of Congress. "This is unprecedented, anywhere." [9]

In discussing the purposes of this proposal, its sponsor has argued that our Constitution is unique in permitting self-executing treaties and that this first part of section 2 provides for "equality of international obligations"; also, that at the time a treaty is approved it is often impossible for the Senate to know whether it will be self-executing.[10] The change proposed is to make all treaties non-self-executing.

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[9] Statement by Hon. Herbert Brownell, Jr., hearings, p. 901 at 920.

[10] Senator Bricker (99 Congressional Record, 2026, Mar. 13, 1953).

The evidence is that our arrangement is not unique. See the discussion of France in statement by Department of State, hearings, p. 830 at 835, and of other countries in annex C thereto and in the State Department memorandum on the same subject dated May 23, 1952 (referred to in the Attorney General's statement, hearings, p. 901 at 920).

NO SUCH RIGIDITY IS NECESSARY

No such rigidity, however, is necessary to meet whatever defects may be thought to exist. As was pointed out by Mr. Harold E. Stassen, Director for Mutual Security, any treaty can be limited by a clause in the treaty or by a reservation of the Senate, so that it could not be self-executing.[11] If the words of the first part of section 2 are adequate to effect a change in the requirements for conclusion of treaties under the Constitution, then these same words would be just as effective when inserted in a treaty or in a reservation thereto. There is thus already available a simple and traditional mechanism which would take care of both of Senator Bricker's anxieties. By using it in any case where self-execution was thought undesirable and where any possible doubt existed under the terms of the treaty, we could assure ourselves both of "equality of international obligations" and also complete certainty that the particular treaty was non-self-executing. We would also retain our present freedom to have self-executing treaties when desirable. Even for a multilateral treaty, no difficulty or embarrassment would arise from a reservation which did not change the substance but merely stated when or how the treaty was to take effect as internal law.

WOULD THROW DOUBT ON FOREIGN RELATIONS

In addition to producing rigidity and awkwardness in our procedures at home, section 2 could raise doubts in the minds of foreign nations with whom we are dealing. As the statement by the Department of State says:

> A treaty is not a one-way street. It represents an international bargain, which history has shown is only effective if and as long as it represents an advantageous arrangement for both parties. We cannot secure advantages or privileges in another country unless we are prepared to grant comparable ones within our own. Our ability to assure those with whom we negotiate that when we seal the bargain, there is reasonable ground to believe that it will be made effective with the advice and consent of the Senate, is an essential ingredient in our ability to negotiate successfully. When approval by the Senate, with whom there can be and is close cooperation with the Executive, is the sole requirement we are in a position to give reasonable, although not absolute, assurances during negotiation. That approval must be given before the treaty is ratified and brought into force with the other nation or nations. But if action by Congress is to be required in addition, it is conceivable, and in fact the amendment would be meaningless if it were not anticipated in some instances, that a treaty would receive the consent of the Senate and yet fail of implementation by Congress. In that event the United States would either lose all benefits of the treaty, if ratification were postponed until after enactment of legislation, or, if ratification took place before the Congress acted, the United States would be in default on its treaty obligations.[12]

The statement submitted to the committee from an organization outside the Government summed up the matter:

> Such a requirement would impose a substantial burden on the time and energies of the Congress of the United States without offering protection to individual rights and to our existing democratic system not already available through present procedures.[13]

[11] Hearings, p. 1054 at 1059.
[12] Statement by Department of State, hearings, p. 830 at 836.
[13] Statement of American Jewish Congress, hearings, p. 305 at 311.

If a purpose of section 2 is to provide participation in the treaty-making process by the House of Representatives, such a proposal can and should be considered on its own merits. In 1945, the House proposed an amendment to require only "the advice of both Houses of Congress," urging that the Senate two-thirds rule tended to increase the use of executive agreements.[14] Similar proposals in the present Congress are House Joint Resolutions 12 and 65. To whatever extent these considerations may have motivated section 2, however, they should obviously be given effect as a direct and frank change in the treatymaking process, and not by superimposing House and additional Senate action on the existing requirements.

THE DESTRUCTIVE "WHICH CLAUSE" OF SECTION 2

The cumbersome procedural obstacles which would be placed in the way of treatymaking are serious enough as objections to section 2. But the "which" clause of that section contains a provision of substance, relating to the treaty power, that is even more seriously objectionable.

Section 2 contains a clause specifying that the implementing legislation required to give effect to a treaty in this country must be "valid in the absence of a treaty." The effect of this clause would be to delete from the Constitution the treatymaking power of the United States as it was conferred on the Federal Government 164 years ago.

When the Constitution was framed, a careful delegation of powers was provided for. Certain Federal powers were conferred upon the legislative branch of the United States Government by article I of the Constitution. Other Federal powers were conferred on the executive and judicial branches of the Government by articles II and III. Under article II, the President—

> shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

Thus, the Constitution conferred upon the Federal Government certain legislative powers to be exercised by the Congress, and, in addition, a treaty power to be exercised by the President by and with the advice and consent of the Senate. As pointed out so clearly by Solicitor General Perlman in 1952 and by Attorney General Brownell in 1953, the framers of the Constitution designed the grant of treaty-making power in the Constitution so that the United States would be able to enter into whatever treaties the proper conduct of foreign relations would require. The Founding Fathers provided our Union with a peace power equal to the war power. For the sake of our children, we must keep it that way.

WOULD ELIMINATE TREATY POWER

The effect of section 2 in the revised Senate Joint Resolution 1 would be to eliminate from the Constitution that treaty power so deliberately granted to the Federal Government in the Constitution, leaving the powers of the United States in the field of foreign relations limited to the powers delegated to the Congress by article I of the Constitution. If the amendments proposed in Senate Joint Resolu-

[14] H. Rept. 139, 79th Cong., 1st sess.

tion 1 were adopted, the United States could, if it close, make international agreements within the scope of the delegated powers of Congress under article I of the Constitution, but it would no longer have the additional treaty-making power specifically provided in article II, section 2 of the Constitution.

It has been argued that such a drastic change in our constitutional structure is necessary, or at least salutary, to prevent violations of the Constitution by treaty. This argument is baseless. The Supreme Court in an unbroken line of opinions has made it clear that the United States cannot do by treaty what the Constitution forbids.[15]

It has been argued also that constitutional amendment is necessary to preserve the 10th amendment, but the 10th amendment was never applicable to restrict the treaty power. The language of the 10th amendment is very clear. It says that—

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The treaty power was delegated to the Federal Government in article II and was specifically prohibited to the States. Its exercise was clearly contemplated by the 10th amendment and could not result in violation of that amendment.

WOULD ACTUALLY HASTEN FEDERAL ENCROACHMENT

Taking the treaty power away from the Federal Government, as contemplated in Senate Joint Resolution 43 (and now included in Senate Joint Resolution 1), would not give it to the States. Although in respect to general legislative powers those not delegated are retained by the States, the same is not true of the treaty-making power. Article I, Section 10 of the Constitution directly provides:

> No State shall enter into any Treaty, Alliance, or Confederation; * * *

Although it is the object of the framers of Senate Joint Resolution 43 to cut down on Federal prerogatives by depriving the Government of its treaty power, the adoption of the proposal would probably have a contrary result, because, out of sheer necessity, the courts would be forced to construe much more broadly the "delegated powers" in order to find authority for essential treaties. Chopping off the treaty power would inevitably result in an unwarranted expansion of the other powers of Congress. It seems obvious that the present constitutional situation, with a normal treaty power, is highly desirable.

THE SECTION THAT WAS DROPPED

Section 2 of the original Senate Joint Resolution 1 has been dropped from the final version. It read as follows:

> No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.

At first glance one might be inclined to rejoice at this deletion. It might even indicate that the study and discussion had gone a long way in convincing the sponsors that there is no real need for an amendment and that the inherent dangers are in fact much greater than any risks we may run under our Constitution as it now stands.

[15] See notes 7 and 8, *supra*.

However, another glance at sections 2 and 3 of the final version will quickly dispel such an optimistic conclusion. In fact, much of the improvement made by the elimination of the limiting provisions regarding supervision, control, and adjudication has been undone by the addition of the American Bar Association proposal to section 2 in its final form.

For example, in President Eisenhower's recent speech, which was approved throughout the Nation, he welcomed solemn agreements for reduction of the burden of armaments, including the international control of atomic energy and "the enforcement of all these agreed limitations and prohibitions by adequate safeguards, including a practical system of inspection under the United Nations." [16] The Baruch plan, sponsored by the United States for control of atomic energy, recognized this principle by providing for supervision at the source in each country.

Although under the revised resolution there is no specific prohibition against a treaty which would implement a plan for the international inspection of atomic facilities, the peace power of the United States is snipped to shreds by the impossible necessity of finding a "delegated power" to cover all phases of our Government's participation in such a plan, as required by revised section 2. The peace power to make and enforce treaties must remain in the United States on a parity with the war power.

If we are to have through an international body a voice in controls in foreign countries, we must be able to give a similar power to the international body in this country. In the words of one journal, "We cannot have guaranteed disarmament and the Bricker amendment." [17]

The elimination of the objectionable features of section 2 of the original Senate Joint Resolution 1 and their reappearance in section 2 of the final version might be described as robbing Peter to pay Paul.

A NATION LACKING FULL SOVEREIGNTY

As illustrated by the problem of the control of atomic facilities, the result of the adoption of section 2 of the final version of Senate Joint Resolution 1 would be to leave the United States as a nation stripped of a part of the normal attributes and necessary powers of sovereign nations. This country would be disabled in international relations from dealing with other countries on a footing of equality. The following are a few additional examples of matters which could not effectively be dealt with by the United States as a nation if section 2 of Senate Joint Resolution 1 were to be adopted: treaties relating to the rights of aliens to own, inherit, and transfer property (*Chirac* v. *Chirac*, 2 Wheat. 259); *Hauenstein* v. *Lynham* (100 U. S. 483); *Santovincenzo* v. *Egan* (284 U. S. 30); treaties regarding the rights of aliens to engage in trade or business having no interstate character (*Asakura* v. *Seattle* (265 U. S. 332)); treaties agreeing that aliens shall pay no more state inheritance taxes than citizens (*Nielson* v. *Johnson*, (279 U. S. 47).)

Treaties for control of domestic narcotics production would in various aspects be unenforceable, since implementing legislation not valid in the absence of a treaty would be required.[18] Even the treaty

[16] Address to the American Society of Newspaper Editors, at Washington, April 16, 1953.
[17] America—National Catholic Weekly Review, April 4, 1953, p. 8.
[18] Statement by Elbert P. Tuttle, General Counsel of the Treasury, Hearings, p. 1012 at 1017.

ending the Revolutionary War could not be enforced by the Federal Government, since it protected prewar debts, and the persons, liberty, and property of British sympathizers who became United States citizens (with reciprocal protection afforded in Britain.) It was to make possible enforcement of this and other treaties that the supremacy clause was written into our Constitution. Now the proposed amendment would thrust us back into the stagecoach difficulties of the unworkable Articles of Confederation.[19]

DON'T MAKE PEACE "UNCONSTITUTIONAL"

Proponents of the "which clause" say that "By virtue of its power to regulate foreign commerce, to define and punish offenses against the law of nations, to declare war, etc., the Congress now has delegated power to legislate with respect to all of the important subjects in the legitimate treaty field"—at least under a "liberal interpretation." [20] But these powers would not let Congress legislate on the particular subjects of which we have given examples, and as we have already seen, the proposed amendment would block our own Baruch plan for controlling atomic energy. If we are to have peace, we must not make the means for peace unconstitutional.

In defending the curtailment of national power that the "which clause" intentionally effects, its proponents say that insofar as Congress would thereby not have power to legislate, the consent of the several States must be appropriately obtained, citing Canada. Whether or not the Canadian requirement is there regarded as workable (as to which there is sharp difference of opinion), it would obviously be fatal here. A treaty which required the separate consents of our 48 States would be no treaty at all, and foreign nations would not even take the time to negotiate it.

The inclusion of the treaty clause and the supremacy clause in the Constitution was not only wise, but essential to our existence as a nation. As James Madison said:

> the necessity of some adequate mode of preventing the States in their individual characters, from defeating the Constitutional authority of the States in their united character * * * had been decided by a past experience.[21]

SENATOR BRICKER'S COMMENTS

This limiting "which" clause was purposely omitted from the proposed amendment submitted by Senator Bricker to the 82d Congress (S. J. Res. 130) and to the 83d Congress (S. J. Res. 1). In his testimony before the Judiciary Subcommittee on May 21, 1952, Senator Bricker himself said that under his resolution:

> * * * Congress, in implementing the provisions of a treaty, could enact legislation which, in the absence of a treaty, would be invalid as infringing upon the powers reserved to the States by the Tenth Amendment. Section 3 of my proposed amendment confirms the doctrine of *Missouri* v. *Holland* (252 U. S. 416). In that case, the taking of migratory game was assumed to be a State rather than a Federal problem in the absence of a treaty.

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[19] 1952 Report of The Association of the Bar of the City of New York, Hearings, pp. 236, 241, 244 and footnote 38 thereon.

[20] Report of Standing Committee on Peace and Law of American Bar Association and article by one of its members, Mr. George A. Finch, there cited; Hearings, pp. 46–7 and 1136–7.

[21] Farrand, The Records of the Federal Convention, 1911 ed., vol. 3, p. 523.

At the same time, the protection of migratory birds spending part of the year in Canada and part in the United States was certainly an appropriate subject for a treaty calling for implementation by national legislation.[22]

We believe that Senator Bricker correctly anticipated and shared the serious objections to the proposal to limit the treatymaking power in the manner of the last clause in the revision of section 2. This clause definitely reverses, not confirms, the holding in *Missouri* v. *Holland*. That case arose out of the question of the regulation of the killing of migratory birds which flew not only over the several States of the United States but over Canada as well. The birds were rapidly being depleted because of the lack of conservation laws. Congress enacted a statute to regulate the killing of the birds within the United States. A lower Federal court invalidated this statute on the ground that the right to regulate the killing of birds was reserved to the several States. Then the United States concluded an agreement with Great Britain (on behalf of Canada) for effective regulation on an international basis. Congress then enacted a new statute to implement the treaty insofar as concerned the killing of birds in the United States. It was this law which was upheld by the Supreme Court in *Missouri* v. *Holland*. Without passing on the validity of a regulatory law in the absence of a treaty, the Court held in substance that the individual States were prohibited from making a treaty with Great Britain, that in this instance a national interest could be protected only by national action in concert with another power, and that legislation to implement it internally did not have to fall within the enumerated powers delegated to Congress. It is extremely difficult to argue with the decision on its merits and we believe that Senator Bricker was correct last year in confirming the doctrine of the case. As he then said in discussing whether the elimination of this doctrine would not unduly restrict the treaty power—

I feel there are certain fields in which the treaty power must be protected in the interest of the integrity of our country, and the very sovereignty of our country.[23]

Analysis of Section 3

The wording of this section (originally section 4 of the Bricker proposal) has been changed from—

All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article."

To—

Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Concentrating for the moment on the first sentence of the revised section 3, we note at once that the power to relieve the Executive of his authority in foreign affairs remains in the bill. The spirit of this approach is that Congress can carry on foreign affairs better than the Executive, a proposition which we regard as contrary to the necessities of the situation.

But what is gained (or lost) by this first sentence as compared with the Constitution as it stands?

[22] Hearings on S. J. Res. 130 (82d Cong., 2d sess.) before subcommittee of Senate Judiciary Committee, p. 28.
[23] Ibid.

Article I, section 8, of the Constitution provides:

> The Congress shall have power * * * to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The proponents of the change testified there was no difference.[24] Then, we say, leave the Constitution alone.

Under existing United States legislation, the Secretary of State is required to publish all treaties and "all international agreements other than treaties," which is a measure of regulation.[25]

There is a contrast in the spirit of the "necessary and proper" clause, which emphasizes cooperation in "carrying into execution" the foregoing powers, and the policeman's approach of "regulation." Furthermore, what these "regulation" proponents have in mind is illustrated by a piece of proposed legislation in the present session of Congress, Senate Joint Resolution 2, which properly met strong opposition from the Administration of President Eisenhower.[26] This includes a provision limiting the duration of executive agreements to a single presidential term, unless extended by proclamation of the succeeding President. But this of necessity would reopen the bargaining process for the other side, too. In 1949, with our armies demobilized, we could never have won the right to continue our then preeminent position in Japan, based on the instrument of surrender (an executive agreement) gained at the height of our power. Proponents of such "regulation" should consider its deleterious effect upon our country.

MIGHT TIE PRESIDENT'S HANDS

The spirit of the first sentence of section 3 is to strip the President of one of his most important functions. If hampering legislation inspired by this spirit were passed, it would reduce the President to a mere figurehead in foreign affairs, unable to deal effectively or with dispatch in matters which may be of the utmost urgency. Under such legislation, a Congress at odds with the President might tie his hands completely and bring the conduct of foreign affairs to a stalemate, perhaps at a time of great international emergency.

We agree with Attorney General Brownell "that the President should have the full power to exercise the powers given him in the Constitution." This is no time to encourage the legislation of rigid requirements withdrawing from the President his power to conduct foreign affairs.[27] No necessity has been shown for the proposed change under the "regulation" clause of section 3. In the words of a witness against Senate Joint Resolution 1, we "do not face the future with the fear and distrust of our elected leaders such as to require a constitutional amendment which would cripple the freedom and flexibility which has worked so well in the past." [28]

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[24] Hearings, p. 1245 and following.

[25] Memorandum Relating to the Making of International Agreements Other than Treaties (see note 30 below), pp. 1–3; Hearings, pp. 853, 854. The Charter of the United Nations requires that "every treaty and every international agreement" entered into by any member after the Charter comes into force shall as soon as possible be registered by the Secretariat and published by it.

[26] Testimony of Harold Stassen, Director of Mutual Security, hearings, p. 1054 at 1057—see also pp. 248, 249; testimony of Attorney General Brownell, hearings, p. 901 at 933.

[27] Testimony of Attorney General Brownell, hearings, p. 901 at 931-933. Secretary of State Dulles also raised the question of whether the first sentence of section 3 required legislation or only congressional action not requiring presidential signature as a law. It may be that the passage of a law is intended, but the word "legislation" is not used in section 3 though it appears in section 2; hearings, p. 892, cf. language article I, section 8 (18) and article I, section 7 (2) of the Constitution.

[28] Testimony of Rev. Charles F. Boss, Jr., executive secretary of the Board of World Peace of the Methodist Church; hearings, p. 378 at 383.

THE RESOLUTION DEMOTES OUR COMMANDER IN CHIEF

Section 3 of the resolution would weaken our national defense in a way as startling as it is unwarranted. The Constitution makes the President the Commander in Chief without any qualifications whatsoever. This is a tremendous power for any constitution to vest in any one man, but the need for it had already been established by General Washington's experience in the Revolutionary War.

Yet if section 3 were adopted, the defense of United States territory would be strangled in red tape. Let us suppose an enemy force invaded Alaska and a joint American-Canadian army was sent through the continental United States to meet it. Any agreements between the two commanders could not become effective as internal law in the United States save through legislation. Thus, the Congress would have to go through the time-consuming process of enacting laws so that the Canadian force could carry pistols (without State license). could rush supplies to the front (without violating State speed laws) and could deploy on a battlefield (without being trespassers). In addition, some "delegated power" would have to be found upon which to base such legislation. The enemy (not being hampered by the proposed constitutional amendment) would not meet these impediments.[29] Certainly the proposal is a poor way to protect our country.

At the time that this report is being printed an armistice agreement at Panmunjom will either have been concluded or, we hope, be on the verge of being concluded. If the proposed amendment had been in effect during the negotiations for the armistice, one of two alternatives would have been necessary. Congress might have delegated extremely broad powers to the negotiators, in which case the amendment would be more or less inoperative and the negotiations would have proceeded as they have in actuality. Or, all negotiations might have been made ad referendum, subject to governmental approval or ratification on both sides.

This latter course, however, is impossible from a practical point of view and would make the negotiations futile. During the time Congress acted (and there is no use in their acting at all unless they consider the matter carefully), the fighting would continue. By the time that Congress approved the armistice terms (if it did), more negotiations would be necessary to fit the terms of the armistice to the changed circumstances due to the continued fighting. For example, the battleline can shift, as it has done in Korea since the "truce line" was agreed upon in November of 1951. It requires a shift in the terms of the armistice agreement. If the negotiators had to go back to Congress to get approval of such shift as might occur while Congress was studying and approving the terms of an armistice, the process would be endless and no armistice would be concluded.

[29] Hearings, p. 199. It is no answer to say the Canadian forces would have sovereign immunity, since the amendment does not recognize this exception, cf. Hearings, p. 1145.

THE RESOLUTION INVITES HAMSTRINGING THE NATION'S FOREIGN BUSINESS

Section 3 strikes not only the power of the Commander in Chief, but the President's diplomatic power in representing our country in dealing with other nations. As distinguished from his constitutional function in the making of treaties, the question of whether it is wise to do anything to regulate executive agreements is a different problem and requires a different approach.

As the Attorney General has pointed out, most executive agreements have been and are in fact congressional-executive agreements, based upon the cooperation of the Congress and the President and the merger of their powers. A comparatively small number of the total agreements has rested upon the sole action of the President. These have related to his express and exclusive constitutional powers as Commander in Chief of the Army and Navy, and his diplomatic powers as the sole organ of the United States in the field of international relations, including the power to receive ambassadors and other public ministers.[30]

As examples of the exercise of the executive power to make agreements in the foreign field, the statement of the Department of State cites the Japanese surrender and the creation of the Far Eastern Commission, the German surrender, the agreements with our allies for the occupation of Western Germany, the arrangement for the conduct of our operations in connection with the Boxer Rebellion and its settlement, and the arrangements made with Mexico in 1882 covering the passage of troops of either country over the border in connection with Indian depredations. The Department of State says:

> * * * Some agreements of this general character would be impossible if an attempt were made to formulate them as treaties, others must be made immediately operative to be effective, and others continue only so long as they appear mutually advantageous. The restrictions proposed would appear to make it difficult or impracticable to conduct our foreign affairs successfully.[31]

The important fact is, as the Attorney General pointed out, that under the broad grants of power in the Constitution to the Congress and to the President, other procedures than formal treatymaking have developed and have been utilized throughout our history for entering into international agreements on important subject matters with more or less the same legal and practical consequences.

> * * * Care must therefore be exercised, in any consideration of altering the full foreign affairs power, not to cut off, inadvertently or otherwise, functions, practices, and methods of operation that have developed usefully and to our advantage, and without which our facility in dealing with other nations would be hampered and restricted.[32]

ARRANGEMENTS FOR "BIG THREE" CONFERENCE

Apart from the numerous agreements which, from time to time, are made through comparatively formal processes, including the exchange of diplomatic notes or the signing of documents setting forth details of agreement, there are necessarily countless agreements, mutual com-

[30] Statement by Hon. Herbert Brownell, Jr., hearings, p. 901 at 929. See also "Memorandum Relating to the Making of International Agreements Other Than Treaties," Annex D to Statement by Department of State, hearings, p. 853.

[31] Statement by Department of State, Hearings, p. 830 at 839.

[32] Statement by Hon. Herbert Brownell, Jr., Hearings, p. 901 at 931.

mitments, and arrangements entered into on the Executive level between this and other governments and in a more or less routine way dealing with a countless variety of matters. A recent example of such an arrangement, which received much more than the usual amount of publicity, was the agreement among President Eisenhower, Prime Minister Churchill and Premier Mayer to have a Big Three Conference in Bermuda. The arrangement was made upon the initiative of President Eisenhower and it was necessary for him to act with great speed in order to keep the Soviet Union from depriving us of our initiative. The arrangement is the type of thing that probably would not have been thought of and agreed to by Congress in advance. Delay in seeking congressional approval after the arrangement had been negotiated would have been fatal. This is only one example out of myriads which could be cited.

Section 3 makes all executive agreements subject to the same limitations as are imposed upon treaties. It thus makes all executive agreements, including those for the recognition of other governments, subject for their internal effect to implementation by Congress. This could in effect nullify agreements made by the President solely within his constitutional authority, notwithstanding statements by the proponents that the amendment is not intended to affect such agreements.

It seems clear that this amendment providing for limiting the making of executive agreements would not have been proposed at the present time but for the Yalta and possibly the Potsdam agreements. The wisdom of making these agreements has been the subject of endless debate. Those people who feel that they should not have been made are left with a feeling of uneasiness for the future. On the other hand, the destroyers-for-bases deal, a good example of fast action in an emergency, has many times received the sanction of congressional appropriations, and when announced was approved by the Republican candidate for President.

THE PROBLEM

But the problem is not whether any particular executive agreement should or should not have been made, or indeed whether the Senate would have ratified it if submitted as a treaty at the time. The question is whether it is wise to write into the Constitution a new provision subjecting all executive and other international agreements to congressional regulation, and thereby correspondingly to reduce the power of the President to act. As Secretary Dulles said in speaking of the resolution generally—

> * * * it is difficult, if not impossible, to amend the Constitution so as to exclude possible abuses, without incurring risks that are far greater than the risk that the present powers will be abused.[33]

And so far as concerns the possibility of defining the subject matter appropriate for an executive agreement, Senator Bricker has wisely recognized that—

> it is probably impossible to draw a satisfactory line of demarcation even in a statute. It would be unwise to make the attempt in a constitutional amendment.[34]

A secondary but startling result of section 3 is produced by its second sentence, under which any executive or other international

[33] Statement by Department of State, hearings, p. 823 at 826.
[34] 98 Congressional Record 927 (Feb. 7, 1952).

agreement is also subject to the limitations of section 2, requiring further congressional action for all internal effects of the agreement. Even though the agreement had been specifically authorized by both Houses of Congress in advance, it would after signature have to be resubmitted and passed by both Houses again before it could become effective as internal law.[35] (In such a process, incidentally, the President would have to sign the same provisions twice.) Commenting on this requirement of double congressional authorization, the statement by the Department of State said:

> * * * Thus it would appear that in various fields the action of the Executive pursuant to prior legislation would be severely hampered in its effectiveness by the requirement for subsequent legislation to implement his action. Such would seem to be the case in action under the Reciprocal Trade Agreements Act (19 U. S. C. 1351) and in such matters as civil aviation and communication.[36]

The proposal of any such legislative redundancy is difficult to understand—unless it springs from sheer antipathy to all international agreements and a determination to make them just as difficult as possible. Such a motive would be unworthy of our position in the world, and could not have been controlling.

The difficulties and dangers of adopting constitutional provisions for executive agreements have been well stated by Senator Bricker:

> * * * Should the executive branch be unduly restricted, one of two things would happen. Observance of an unduly rigid constitutional provision might seriously interfere with the conduct of the Nation's foreign affairs. This fact would tend to place a high premium on evasion of the fundamental law.[37]

PRESENT ARRANGEMENT MUCH SUPERIOR

In the face of the procedural encumbrances which section 3 could and probably would produce (entirely apart from the wisdom or unwisdom of shifting the final responsiblity for the conduct of foreign affairs from the President to the Congress), it seems apparent that our present arrangement is much to be preferred. Indeed, there are obvious advantages of having some overlapping in the field of international agreement, so that the President can act on his own authority (subject to checks and balances) as well as under congressional sanction or with treaty ratification by the Senate. The ideal would be some formula which would retain this adaptability and at the same time provide a complete protection against abuse, but our study of section 3 and other proposals leads us to doubt that such perfection can be achieved in words.

There are practical curbs, however, against the improper exercise of executive authority. The internal effect of an executive agreement can be overcome by an act of Congress. Moreover Congress possesses the power of the purse and of investigation and the Senate must confirm Presidential appointments.[38] These do not operate like the restraints of constitutional invalidity but they have their own potent effects in the daily relations between all members of the executive and legislative branches.

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[35] That this double authorization is the intended effect of these two sections was confirmed by statements made by Senators Dirksen and Willis Smith, hearings, pp. 232-233.
[36] Statement by Department of State, hearings, p. 830 at 838.
[37] Hearings on S. J. Res. 130 (82d Cong., 2d sess.), (see note 22 above), p. 29.
[38] Statement by Department of State, hearings, pl 830 at 838.

Equally important, we may be permitted to acknowledge the force of practicable ideals in the art of government. As Secretary Dulles said "This is an area to be dealt with by friendly cooperation between the President the Senate and the House, rather than by attempts at constitutional definitions, which are futile or by the absorption by one branch of government, of responsibilities which are presently and properly shared." The nub of the matter is well stated in the words which he, with the authority of President Eisenhower, transmitted as follows:

> It has long been recognized that difficulties exist in the determination as to which international agreements should be submitted to the Senate as treaties, which ones should be submitted to both Houses of the Congress, and which ones do not require any congressional approval.
>
> Differences of opinion resulting from these difficulties have given rise in the past to disputes between the executive branch and the Congress concerning the handling of international agreements. It must be recognized that it would be extremely difficult if not impossible to fit all agreements into set categories. At times there may be disagreement as to the manner in which agreements are to be dealt with. While recognizing this, the Executive cannot surrender the freedom of action which is necessary for its operation in the foreign-affairs field. In the interest of orderly procedures, however, I feel that the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed. To that end, when there is any serious question of this nature and the circumstances permit, the executive branch will consult with appropriate congressional leaders and committees in determining the most suitable way of handling international agreements as they arise.[39]

Clearly, section 3 would make a shift in constitutional power, from the Executive to the Congress. Clearly, it would hamper the Nation's foreign business. On balance these changes seem more dangerous than the risk of abuse of executive power in the foreign field. The arrangement under which we have operated for 164 years may not be perfect, but it still seems better than attempting a constitutional amendment.

Conclusion

The foregoing analysis of Senate Joint Resolution 1 is, we think, a fair interpretation of the effects which would follow from its wording. At other times and under the exigencies of other events, as we of course recognize, courts might avail of other constructions. But that is no argument for placing in the Constitution roadblocks to the effective conduct of our foreign relations. Moreover, at least some parts of the resolution might have retroactive effect, and the possibility of its undoing what the Nation has already achieved has scarcely been mentioned.

There is no need to change the Constitution just because bad treaties may have been or may be submitted. The obvious course is to vote the treaties down and leave the Constitution alone. Senator Bricker said last year that there is not the remotest chance that even one-third of the present Senate would vote for the United Nations draft Covenant on Human Rights or any other treaty of similar import.[40] The Senate is congenitally cautious in considering treaties, as the record shows. Of the nearly 1,200 treaties submitted from 1789 on (excluding those still pending on March 24, 1953), 28.8 percent either failed of Senate approval by reasons of rejection, failure

[39] Statement by John Foster Dulles, Secretary of State, hearings, p. 823 at 828.
[40] Hearings on Senate Joint Resolution 130 (82d Cong., 2d sess.) (see note 2) above, p. 433.

to take action, or withdrawal, or were approved subject to reservations and understandings.[41]

If the treaties now in question are as debatable as they are said to be, how can anyone fear that they will ever be ratified? How can anyone—after a candid look at the facts—believe that there is need for any constitutional amendment to stop them? In any event, the Constitution now gives us adequate protection.

In peace, in war, and in localized wars such as the present, the resolution would so hamper the activities of the United States as to threaten the very survival of the cities in which we work. Atomic destruction does not wait on fine points of constitutional theory. But by retaining our existing sovereign powers to make treaties and agreements, and using these powers wisely, we shall be able to do our part in building and maintaining peace. Those who follow us would not thank us for tying their hands with this proposed constitutional amendment.

Recommendation

Despite great efforts, no one has suggested a text of an amendment which is not acutely dangerous to the security of this Nation. We, the minority, feel that the intense study and discussion in 1952 on Senate Joint Resolution 130 and in 1953 on Senate Joint Resolution 1 and Senate Joint Resolution 43 have convincingly demonstrated the complete lack of need for any constitutional amendment regarding the treaty power and have shown the serious pitfalls in all of the texts which have been suggested. In any event, we feel that no text of a proposed constitutional amendment on the treaty power should be adopted by the Senate without full hearings and recommendations by both the Judiciary and Foreign Relations Committees.

Estes Kefauver.
H. M. Kilgore.
Alexander Wiley.
(Per J. N. C.)
Thos. C. Hennings, Jr.

[41] Statement by Department of State, hearings, p. 830 at 836.

INDIVIDUAL VIEWS OF SENATOR LANGER

I have not joined in either the majority or the minority reports on this legislation, even though, when the matter of reporting the legislation to the Senate was before the committee, I voted against reporting the measure. It was and is my thought that the reporting of the resolution at this time was premature, since I have been informed that efforts are being made by the majority leader and some members of the administration to work out a compromise text on this matter which would be acceptable both to the administration and to the proponents of this resolution. To my knowledge, such a compromise had not been effected by the date on which this resolution was ordered reported favorably by the committee.

This is a measure of far-reaching importance. Action upon it should be neither hasty nor ill-advised. It has been charged that if this measure is adopted as it is now worded it would hamstring the President of the United States in his conduct of the foreign relations of the country and it would also seriously affect the separation of powers which now exist between the legislative and the executive branches of the Government. While I recognize the dangers which have alarmed the proponents of this legislation, I have no desire to see a remedy effected which might prove worse than the ill sought to be cured. It was my hope, therefore, that a measure might be worked out on which we could have assurances from the Chief Executive, or the members of his Cabinet directly affected by such an amendment, that the proposed amendment would not adversely affect the conduct of the foreign relations of the United States, nor adversely affect the present separation of powers between the legislative and the executive branches.

I recognize that under the existing provisions of the Constitution the Chief Executive plays no part in the procedure established for amendment to that instrument. However, this amendment so vitally affects the operation of the office of the President and the whole executive branch that it seems to me desirable to make every attempt to reach an accord which will prove satisfactory to the Chief Executive and to the proponents of the resolution.

It is for these reasons that I have respectfully refrained from joining in the opinions of either the majority or the minority on this matter.

APPENDIX TO MINORITY VIEWS

QUESTIONS AND ANSWERS ON SENATE JOINT RESOLUTION 1

The following questions and answers relate to Senate Joint Resolution 1 (the Bricker resolution), as reported with amendments on June 15, 1953, which proposes to amend the Constitution relative to the legal effect of certain treaties and executive agreements.

Purpose of Proposed Amendment

The stated purpose of the amendment is to insure that treaties shall not be regarded as superior to the Constitution and shall not have force as domestic law without legislation which would be valid in the absence of treaty. It would subject executive agreements to regulation by Congress and to the limitations imposed upon treaties by the amendment.

The resolution raises important constitutional and practical problems which are briefly treated in the following questions and answers.

A. The President's Views

Question

What is the position of President Eisenhower on the question of an amendment on the treaty power?

Answer

The President's remarks with respect to the Bricker resolution are not available for direct quotation, having been made in news conferences reported by the press in substance only.

In his press conference of March 19, 1953, the President was asked if he favored Senator Bricker's proposed constitutional amendment on treaties, which he had discussed with Senator Bricker the previous day.

The President replied, as reported by the press, that it was a highly argumentative point and that he thought people who were arguing for a constitutional amendment were not trying really to amend the Constitution. What they were trying to show, the President was reported as saying, was that we were going to make it impossible in the Constitution to break it. He is reported to have added there seemed to him to be a little bit of an anomaly in that kind of reasoning, that the Constitution be amended to show that it was going to remain the same. He is said to have pointed out, however, that the President did not have to take a decision since a constitutional amendment is enacted by two-thirds of each House and three-fourths of the States, a procedure that ignores the President.

At the press conference the following week, March 26, the President was asked if he felt the Bricker amendment would restrict his conduct of foreign affairs.

According to press reports, the President answered that the Bricker amendment, as analyzed for him by the Secretary of State, would, as he understood it, restrict in certain ways the authority that the President must have if he is to conduct the foreign affairs of this Nation effectively.

The President reportedly said there were certain features of the amendment that would work to the country's disadvantage, particularly by making it impossible for the President to work with the flexibility he needs in this highly complicated and difficult situation.

No information is available as to whether the President ever authorized anyone to elaborate on his personal views on this matter.

The following appeared in person or by representatives or by letter and opposed the resolutions:

Secretary of State
Attorney General
Secretary of Defense
Secretary of the Treasury
Secretary of Commerce
Director for Mutual Security
Secretary of Labor
Chairman of Federal Communications Commission

No representative of the administration appeared in support of the resolutions.

B. Revised Version of Senate Joint Resolution 1

REVISED TEXT OF SENATE JOINT RESOLUTION 1

The substantive sections of Senate Joint Resolution 1, as reported by the Senate Judiciary Committee, are as follows:

SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SEC. 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

SEC. 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Question

Is Senate Joint Resolution 1 as reported by the Senate Judiciary Committee the same resolution that was introduced by Senator Bricker on January 7, 1953, and sponsored by a number of other Senators?

Answer

No. Senate Joint Resolution 1 as reported by the committee is very different from Senate Joint Resolution 1 as originally sponsored.

In some ways it is more far-reaching. Section 2 would permit a treaty to become effective as internal law in the United States only through legislation "which would be valid in the absence of treaty." No such restriction was contained in the Senate Joint Resolution 1 sponsored by 64 Senators. It is a provision taken from Senate Joint Resolution 43, a proposal officially sponsored by only 1 Senator. That proposal was roundly condemned by Secretary of State Dulles and by Attorney General Brownell in testimony before the Senate Judiciary Committee. The Secretary of State said:

This would create a "no-man's land" in foreign affairs. It would require the concurrence of all 48 States to make effective such common treaties as treaties of friendship, commerce and navigation, extradition, reciprocal inheritance taxation, migratory birds, collection of foreign debts, and status of foreign troops. In this field of foreign affairs our country would not speak with 1 voice but with 49. The primary objective of the framers of our Constitution in this respect would be defeated.

Question

Senate Joint Resolution 1 was opposed by every administration official who testified before the committee. Does the revised version of Senate Joint Resolution 1 remedy the defects and dangers pointed out by those officials?

Answer

No. It retains objectionable features of both Senate Joint Resolution 1 and Senate Joint Resolution 43.

While purporting to safeguard the Constitution, it deliberately sets out to alter that document in certain fundamental ways.

Section 3, as revised, would destroy the balance of power under the Constitution. It would take from the President a large slice of the authority granted him by the Constitution and place it in the hands of the Congress. It would strip the President of control over the exercise of powers that are essential to his position as Commander in Chief of the Armed Forces. It would demote the President from a responsible agent of this Government in foreign affairs to a mere figurehead.

Question

The proposed amendment would permit a treaty to become effective as internal law only through legislation which would be valid in the absence of treaty. What would be the effect of this proposal?

Answer

It would cut down the treaty power to the limits of powers already vested in Congress in the absence of a treaty.

It would cut down the power of Congress to make effective many important treaty provisions. For example it probably would prevent the enactment of Federal legislation adequate to carry into effect treaties for the international regulation and control of narcotics.

It would prohibit the United States as a nation from putting into effect many traditional types of treaties which gain rights and privileges for our own citizens abroad. This Government could no longer assure other governments that it would enforce treaties relating to rights of aliens to engage in local trade or business, or to own, inherit, and dispose of property in return for those rights being given Americans in other countries. The United States could not enter into a treaty of extradition and give assurance that it would be recognized by the States. This country could become a haven for criminals from other lands.

The adoption of such a provision would be a voluntary surrender of the right of this Government to deal as a coequal with other sovereign states. It would be a return to the chaotic condition that existed under the Articles of Confederation. It would give individual States the power to defy the terms of many important types of treaties; yet they would remain expressly forbidden by the Constitution to enter into treaties themselves. The ability to deal effectively with other nations on many important matters would nowhere exist.

C. Treaty Law Relative to the Constitution and Individual Rights

Question

Is there any basis for fearing that, because the first amendment to the Constitution is directed specifically at the Congress, it would be possible for the President and the Senate, by means of a treaty, to deprive American citizens of freedom of speech, press, or religion?

Answer

No. The courts have consistently taken the view that the Federal Government, through any one of its branches, is bound to safeguard the fundamental rights guaranteed by the first amendment. For example, the Supreme Court has assumed that action by the President, orders of administrative agencies, and judicial proceedings are all subject to the first amendment.

The treaty power is, of course, one of the powers of the Federal Government necessarily subject to the limitations of the first amendment.

As stated in the Supreme Court decision in *Geofroy* v. *Riggs* (133 U. S. 258 (1890)):

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids. * * *

Question

Can the Constitution, and the individual rights which it protects, be violated or undermined by a treaty under present circumstances?

Answer

No. A treaty cannot conflict with the Constitution. A treaty cannot override the Constitution. The exercise of the treaty power is the exercise of a constitutional power itself. Thus the Bill of Rights, protecting the rights of the individual citizen, cannot be violated or undermined by a treaty.

Furthermore, treaties and executive agreements, like any other acts of the Federal Government, may be challenged in the courts on the ground that they infringe the specific constitutional guaranties of individual liberties.

The Supreme Court has repeatedly emphasized the subordinacy of treaties to the Constitution. In its decision in *The Cherokee Tobacco* (11 Wall. 616 (1870)), the Court said:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.

Question

If a treaty cannot override the Constitution, what are the objections to having a constitutional amendment specifically saying so?

Answer

It is unnecessary and open to unintended interpretations. Constitutional amendments are not ordinarily adopted to declare existing law but to change existing law, and the Supreme Court at some future time would no doubt search for a reason for the change. Secondly, no matter how artfully words are chosen, their ultimate legal effect or their interpretation cannot be anticipated with cer-

tainty. An amendment that merely declares what is already constitutional law in this country could have unforeseen results that might endanger the peace and security of the Nation.

Here are a few of the questions which might arise were the amendment adopted: Does it apply to existing treaties or only to future treaties? Would it be asserted that existing treaties on narcotics control and extradition of criminals are invalid because they affect matters reserved to the States by the 10th amendment? Would the United States be unable, because of the retroactive effect of the amendment, to fulfill its existing treaty obligations?

The reasons advanced for the amendment seem insufficient to justify the grave risks involved in this change in our fundamental law.

Question

Is it true that, while the Supreme Court has held some laws unconstitutional, it has never held any provision of a treaty unconstitutional?

Answer

It is true that the Supreme Court has never held any provision of a treaty unconstitutional. This attests to the scrupulousness with which treaties have been prepared and entered into by the Government, not to any inability on the part of the courts to proclaim a treaty provision unconstitutional.

Question

Do all treaties under our Constitution become supreme law, thus automatically wiping out inconsistent Federal and State laws?

Answer

No. Many treaties by their provisions are non-self-executing; that is, they do not automatically become domestic law in this country without legislative action by Congress.

Whenever it is desired that a treaty should not automatically become internal law, a clause to that effect can be inserted, or the Senate may make a reservation to that effect.

No treaty need be self-executing unless the Senate desires that it should.

Question

In sum, then, what safeguards now exist against abuse of the treaty power?

Answer

The safeguards existing under present law are:

1. The requirement that treaties be approved by a two-thirds majority vote of the Senate; the ability of one-third plus one of the Senators to defeat a treaty; and the right of the Senate to make reservations relating to any provision of a treaty.
2. The power of Congress to erase by statute the internal operation of any treaty which it considers undesirable.
3. The power of the Supreme Court to declare unconstitutional any treaty which it believes would infringe basic rights.

Of these safeguards, Attorney General Brownell has said:

* * * they constitute as strong a legal guaranty against unbridled exercise of the treaty power as the ingenuity of man has devised in any effectively working political system.

D. Treaty Law Relative to the United Nations and Other International Organizations

Question

Is there any danger that a treaty drafted in the United Nations, one of its specialized agencies, or other international organizations could regulate purely domestic rights of American citizens?

Answer

No. Article 2 (7) of the Charter of the United Nations provides that—

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state * * *.

No treaty or covenant drafted in the United Nations, its agencies, or any other international organization can bind this Government to anything it does not wish to be bound to, whether in respect to the domestic rights of its citizens or in any other matters. (This holds true, of course, for treaties drafted in such specialized U. N. agencies as the International Labor Organization or such U. N. bodies as the Commission on Human Rights.)

No treaty sponsored by the United Nations or any of its organs or specialized agencies can become binding on the United States until it has consent and approval by a two-thirds vote of the Senate, as well as ratification by the President. The Senate and the President will doubtless continue to scrutinize treaties with the same care and attention to the protection of our fundamental rights that they have always exercised in the past.

Question

What effect would the amendment have on international disarmament agreements or atomic energy control agreements?

Answer

The proposals probably would prevent the adoption of international measures for the control and regulation of atomic energy. There seems to be common agreement that no measures for international disarmament can be effective without inspection within each country concerned by an international body to see that the limitations are observed.

It could be charged that a treaty provision agreeing to such inspection "conflicts" with the Constitution and is without force or effect under the terms of this amendment.

We cannot expect to have rights with respect to such countries as Soviet Russia unless we are willing to give them ourselves. Treaty-making is a two-way street. We cannot obtain rights with respect to the citizens of other nations without agreeing to give similar rights with respect to our own.

E. Executive Agreements

Question

What would be the effects of giving Congress authority to regulate executive agreements, as proposed in the resolution?

Answer

It could have the effect of placing the conduct of foreign relations in a straight jacket, depriving the President of his long-established rights to act on behalf of this country in both routine and urgent matters of foreign affairs. It could result in his being forced to await the result of congressional debate in both Houses of Congress before taking action in any case involving an international commitment.

It would bring about an alteration of the fundamental division of powers between the executive and legislative branches of Government. It would be in direct derogation of the constitutional powers given the President in the conduct of foreign affairs.

It should be noted, too, that the overwhelming majority of international agreements concluded without being submitted to the Senate are entered into or made effective under and pursuant to legislative authority. They do not change or attempt to add to the laws passed by Congress but merely carry out the legislative policy expressed through enactments.

At a critical period such as this, when speed of action may be decisive, it is of major importance that the President have the power and freedom of action, consistent with his responsibilities, to make agreements necessary to meet emergencies.

Question

What safeguards now exist against abuse of the power of the President in making executive agreements?

Answer

Existing safeguards include the following:

1. The power of an act of Congress to overcome the internal effect of an executive agreement.
2. Congressional power of the purse and of investigation and senatorial requirement for confirming Presidential appointments.
3. The necessity that most executive agreements be in accord with existing law, or have congressional implementation, to be effective.
4. The power of the courts to declare void any executive agreement which is not in accordance with existing legislation or the President's constitutional authority.

F. General

Question

Is the United States on a par with other countries in its treaty-making process?

Answer

The treatymaking process in the United States is at least on a par with that of other nations, and in many respects it is more rigidly controlled. The requirement that a treaty have Senate approval by a two-thirds vote before it can be ratified imposes a control more rigid under our form of government than the usual majority vote of parliamentary bodies in other countries.

Furthermore, under a parliamentary system such as exists in France or England, the executive and legislative bodies are essentially the same entity. The executive wields the predominant power in treaty-making because the continuance in power of the government depends upon parliamentary concurrence in the executive's proposals. Submission of a treaty to the legislature is often a mere formality, it being understood that the legislature is in agremeent with the executive or the party could not remain in power. There is no true basis for comparison with our system.

Here the President cannot ratify a treaty without the two-thirds vote of a wholly independent Senate, fully aware of its prerogatives and responsibilities in this phase of our foreign relations.

G. Conclusion

Question

What are the positive harms that could result from the adoption of the amendment?

Answer

1. It could critically weaken the United States in its conduct of foreign affairs.
2. It could immobilize the President in carrying out many of his major responsibilities in the field of foreign affairs.
3. It could frustrate any international moves toward the effective control of atomic weapons or disarmament.
4. It could upset the constitutional balance of power between the executive and legislative branches of government which has worked so well for over a century and a half.
5. It could prevent the President from making an armistice agreement in Korea.

○

WHAT CHIEF JUSTICE VINSON REALLY SAID

SOME proponents of the Bricker resolution, which would dangerously restrict the President's powers to conduct international affairs, now argue that the amendment should be passed because some Supreme Court Justices cited the U. N. Charter in justification of former President Truman's steel seizure. Chief Justice Vinson, who wrote the three-man minority opinion in the steel case, has been represented as saying that U. S. obligations under the Charter, coupled with the President's proclamation of an emergency, justified the seizure of the steel industry, though no statutory authority for the seizure existed.

Chief Justice Vinson did not so contend. He did refer to the U. N. Charter and treaties, noting that "the U. S. was instrumental in securing adoption of the U. N. Charter, approved by the Senate by a vote of 89-2 . . ." and that "our treaties represent not merely legal obligations, but show Congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale."

But Mr. Vinson in no wise intimated that the U. N. Charter or any other treaty justified the President's steel seizure. The Chief Justice argued that the seizure was justified by the power of the President to see that the laws are faithfully executed, and he referred to the dangerous conditions incident to the world crises and the necessity of carrying out programs initiated by Congress as furnishing occasion for the exercise of this Presidential power.

Treaties were referred to only as showing the obligations assumed by the United States in its effort to protect the free world from aggression and to defend itself, which led up to the Congressional programs. There is not a hint or a suggestion in his opinion that a treaty could of itself enlarge Presidential power.

Incidentally, John W. Davis, who represented the steel companies before the Supreme Court and who presumably understands the steel decision and implications to be drawn from it, has joined Secretary of State Dulles, Attorney General Brownell, Mutual Security Administrator Stassen, Charlotte's Judge John J. Parker and other knowledgeable authorities in opposition to the Bricker amendment.

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United States Senate

COMMITTEE ON
AGRICULTURE AND FORESTRY

February 11, 1953

Mr. Chief: Just to keep your files complete. Clint

Judge Orie L. Phillips
U. S. Court of Appeals
Box 2210
Denver 1, Colorado

Dear Orie:

Thanks very much for your letter of February 2, which was prompted by a conversation I had with Frank Holman. When Mr. Holman was here, he was so emphatic about this suggested amendment to the Constitution now covered by the Bricker amendment, that I tried to find out who in the American Bar Association agreed ~~as~~ with his point of view. When he told me that you had been enthusiastically supporting this amendment, I told him that I would appreciate very much having your views on it.

Let me say that my original interest in this arose out of a speech which I heard Clarence Manion deliver at Seattle. He was speaking to the American Farm Bureau Federation and in the course of his remarks he said, according to the notes which I made at that time:

> "In the steel case, the Chief Justice and two of the Supreme Court Justices held the treaties recently approved set aside the United States Constitution and gave permission to the President to take private property."

He further said there were:

> "Twenty treaties now pending which could wipe out our liberties."

Knowing the Chief Justice as well as I do and admiring him as I do, I was stunned by what Dean Manion had said. I could not believe that the Chief Justice would hold that the treaties recently approved by this country had set aside the United States Constitution, and had given permission to the President to take private property. I got a copy of the steel case decision and I read it through carefully, not once but three times. I then wrote Dean Manion pointing out certain specific things. I think I had better send you a copy of that long letter, because it will help you understand my point of view. You will see that I pointed out to the Dean that Congress, because of the world in which we were living and because of certain treaties which may have been made, had done certain things; and these things done by Congress had laid upon the President of the United States certain obligations, which he in turn had attempted to discharge by seizing the steel mills. So far as I can tell, there

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is nothing in the decision in the steel case, which infers that because of treaties the President is given some power. The treaties, to be sure, impel the Congress to do certain things, but it is the carrying out of the mandate of Congress which caused the difficulties and led to an action by the Supreme Court of the United States.

I went farther in my search and I came upon a pamphlet, which Mr. Holman had sent me. It is the "Report of the Standing Committee on Peace and Law Through United Nations" dated September 1, 1952. In that report at page 8, I find this language:

> "It is of unusual significance that, in the STEEL SEIZURE CASES (Youngstown Sheet & Tube Co. v. Sawyer, decided June 2, 1952, 72 Sup. Ct. 863) Chief Justice Vinson, dissenting, with the concurrence of two other judges, stated that the United Nations Charter and the North Atlantic Treaty, as treaties designed to suppress aggression, give the President the power to seize private property, although statutory authority is wanting, and although the majority of the Supreme Court holds that he has no such power under the Constitution, and that under the Fifth Amendment he is denied the power to take property, without due process of law and without just compensation."

This worried me greatly again because here we find the American Bar Association saying that Chief Justice Vinson stated that the United Nations Charter, the North Atlantic Treaty, give the President the power to seize property. He said no such thing, and if the text as printed in the report of the Bar Association had been uttered about a private individual and he didn't like it, he could probably sue someone for the misrepresentation of his views and the slander implied in them. I assume a Supreme Court Justice, and least of all the Chief Justice, would not sue the American Bar Association, but it does seem to me that the American Bar Association could be in better business than misrepresenting the attitude of the Chief Justice of the United States and two other Justices generally regarded as being among the most conservative members of that Court, namely Justice Reed and Justice Minton.

This matter is surely going to come before this session of Congress. In the first place, there are many Senators who feel that there is more to this resolution than meets the eye. The Senators of the United States are not going to throw away the liberties of the people of this country, and a majority of the Senators I believe will feel that we do not need to have any group of lawyers tell us that we should not throw away the liberties of the people. The Bricker Resolution assumes that two-thirds of the Senate will be venal when the time comes, and that the President of the United States himself will lack sufficient integrity to protect the rights of the people of this country.

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When an ordinary law is before the Congress and the President, after its passage, vetoes it, it takes a two-thirds vote to override that veto; because we believe that two-thirds of the Senate and the House will never do an improper thing, and even if the President has made a mistake that two-thirds can override him if absolutely essential. We have that same protection as to treaty making. It takes two-thirds of the Senate, but it not only takes the two-thirds that could override the President on an ordinary veto, it takes two-thirds plus the President to make the treaty effective. Now I say that Senator Bricker and his friends are going a long way when they assume that two-thirds of the members of the United States Senate and the President are so stupid that they would sign away the rights of the American people by the approval of the treaty.

That is the only part of your excellent speech with which I would find myself pretty sharply in disagreement. You point to the fact that 150 treaties or so are in the works, and you begin to wonder if the adoption of those treaties will not whittle away our liberties. What is there to persuade you that the mere fact that a treaty is in the works someplace around the world, is a guarantee that the treaty will be adopted by the Senate of the United States by a two-thirds vote, and will then be signed by President Eisenhower if it actually does whittle away at the liberties of the American people? I refuse to have that belief. I have seen too many members of the Senate at close range and I have seen General Eisenhower too many times at close range to believe that a two-thirds majority of the Senate and the President of the United States could both be guilty of lack of diligence to protect the American people at the same time. There are some places where executive agreements may be needed. We are working now with the very delicate problem of the international control of atomic energy. I do not look for the Russians to yield any ground. We have wanted, that is the United States and most of the forward looking nations, to provide for the inspection of atomic facilities, so that we might at all times know whether one nation was using its great plants for the peaceful purposes that could lift from the backs of humanity great burdens or whether they were using them solely for the production of deadly weapons. I am a member of the Joint Committee on Atomic Energy and I have some very interesting information as to the possibilities of peacetime uses of atomic energy, but I know that these peacetime uses are impossible without the international control on devices which could bring death and destruction to great portions of the earth in a very few seconds. All a person has to know is what took place in the recent tests and what type bombs were tested to appreciate how deadly new bombs can be, or can become in another ten years. I cannot visualize what would be left of civilization if there were to be an all out war between two countries both well possessed of the latest and most effective types of bombs. I know that New York would be a shambles in a few seconds, and that this beloved city of Washington which we all prize as the citadel of our democracy could be taken off the map with ease by one shot, and probably one shot only. That being true, I want to see international control of atomic energy. The treaty making that might be required in a treaty

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to safeguard the development of future atomic weapons, probably would affect the domestic economy of this country. I still think such a treaty ought to be enacted and I will trust the Congress of the United States and the President to safeguard our liberties to any degree that is necessary when that time comes.

This is to say thanks for material that you sent me. I hope you will continue to give me the benefit of your thinking on this important resolution.

Sincerely yours,

Clinton P. Anderson

CPA:mm

P. S. As I re-read this letter before sending it, I wondered if you might think I am no longer president of the Orie Phillips Fan Club. Dispel that thought. I am. I never admired you more or prayed more devoutly that my dream of seeing you adorn the Supreme Court might now speedily come true. Not a word of my feeling toward the Bricker amendment applies to you. I wanted your guidance and appreciate what you sent me. But I do have lots of faith in two-thirds of the Senate.

Come and see me when you're here.

C. P. A.

[1953]

THE ATTORNEY GENERAL
WASHINGTON

April 8th

My dear Mr Chief Justice —

In view of our conversation, you might be interested in the attached.

Sincerely,

Herbert Brownell Jr.

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STATEMENT

by

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

before the

SENATE COMMITTEE ON THE JUDICIARY

on

S. J. Res. 1 (83d Cong.) a proposed Amendment to the Constitution of the United States relative to the making of treaties and executive agreements, and

S. J. Res. 43 (83d Cong.) a proposed Amendment to the Constitution of the United States relating to the legal effect of certain treaties.

Tuesday
April 7, 1953

Mr. Chairman and Members of the Committee:

On one premise, I am sure we all agree - both the proponents and opponents of the resolutions which are before you for consideration - namely, that our nation, or any nation, cannot maintain itself successfully in the family of nations unless it enjoys fully and coequally the capacity to make and stand by its treaties. The foremost deficiency of our government under the Articles of Confederation was a weakness in our treaty-making power. It led to the formation of our present Union under a Constitution which committed to the national government the whole of the treaty power and forbade its exercise by the states.

The Articles of Confederation, it is true, purported to confer upon the federal government the exclusive power to make treaties. But there was a qualification that no such treaty should restrain the legislative power of the respective states to impose certain imposts and duties or to prohibit certain exportations or importations. Furthermore, any treaty required the assent of nine states. Article VI provided that no state without the consent of the United States in Congress assembled, could "enter into any conference, agreement, alliance or treaty." The Articles, however, contained no provision for federal legislation to implement a treaty, no supremacy clause, and did not provide for a federal judiciary with power to construe and enforce treaties.

All of the principal plans for a new Constitution presented at the Constitutional Convention of 1787 -- the Virginia plan,[1/] the New Jersey

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1/ The Virginia plan, proposed that the national legislature and the national executive should enjoy, respectively, the legislative and exclusive rights vested in Congress by the Articles of Confederation, which, as we have seen, included the exclusive power to make treaties, and that in addition the national legislature should be empowered "to legislate in all cases in which the several States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation," and to negative any State Law contravening the Articles of Union. The federal judiciary was to be empowered to decide any "questions which may involve the national peace and harmony." 1 Farrand, Records of the Federal Convention, 21-22.

plan,[2] Hamilton's plan,[3] and Pinckney's plan [4] -- contained broad and effective treaty provisions, including the power in the Congress to legislate in support of treaties and a supremacy clause. The intention was, and there resulted from the clauses finally evolved, an investiture in the federal government of the full and exclusive treaty power. In respect of foreign affairs the federal government acquired the full powers of sovereignty, and our people have never since retreated or detracted from that grant.

The basic grant of the treaty-making power in the Constitution should be stated at this point. It is contained in Article II, Section 2, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Treaties so made may, if necessary or appropriate, be implemented by act of Congress adopted under the authority conferred by Article I, Section 8, empowering Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As a corollary, Article I, Section 10, provides: "No State

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2/ The New Jersey plan would have given the federal government all the authority then vested in the Congress under the Articles of Confederation as well as authority over trade and commerce; it would have given the federal judiciary jurisdiction over the "construction of any treaty or treaties," and would have provided that all acts of Congress "and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens." 1 Farrand, Records of the Federal Convention, 243-245.

3/ The plan submitted by Alexander Hamilton would have given the Executive power, with the advice and approbation of the Senate, to make treaties, and would have contained a supremacy clause. 1 Farrand, Records of the Federal Convention, 292-293.

4/ The Pinckney plan would apparently have added to the treaty provisions of the Articles of Confederation a provision giving a federal Supreme Court power to review state court decisions involving treaties. 3 Farrand, Records of the Federal Convention, 608.

shall enter into any Treaty, Alliance, or Confederation," and further prohibits any state from entering without the consent of Congress "into any Agreement or Compact * * * with a foreign Power."

Article VI provides that "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article III, Section 2, provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *."

Throughout the years since the adoption of the Constitution there has been general agreement with the statement of Mr. Justice Story that, "had the framers of the Constitution done nothing more than to securely vest the treaty-making power in the Central Government they would have been entitled to immortality and to unending gratitude of the American people." 5/

Every generation or so, this treaty-making power of the federal government comes up for critical analysis and review, especially whenever the President or the Senate or the Supreme Court applies it to a new set of facts in a changing world. Such analysis and review are healthy, for if our basic Constitutional principles do not meet modern needs, consideration should always be given to changing them.

The proposals for amendment now before you emanate from two groups. One group desires to severely limit the treaty-making power of the federal government by confining it to matters which are not "domestic" or "internal." It would revoke the doctrine of the case of Missouri v. Holland, which I propose

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5/ 2 Butler, "Treaty-Making Power of the United States," 403.

to discuss later. Senator Bricker, as I understand it, does not agree with the views of this first group on this point.

With the agruments of the first group, I wholly and totally disagree. Rather, I present with approval the statement of the late Chief Justice Charles Evans Hughes:

> "I take the view which I understand to be that of the Supreme Court that this is a sovereign nation; that the States, in relation to foreign affairs, are not sovereign States; that if this nation exercises its sovereign power in regulating by agreement its relations to other nations, it must be done through the exercise of the treaty-making power and in that relation there are no states, there is but one country. * * *
>
> "Now I quite agree with the suggestion * * * that, as it has been found in connection with interstate and intrastate commerce, there may be such an intermingling of activities that it would be necessary in order to support the supremacy of the national power to subordinate the local power with respect to a matter of intermingled local and national concern to the exercise of the national power.
>
> "In the case of interstate and intrastate commerce where the supremacy of the Federal Government was sustained, it was because, if the intrastate rates that discriminated against interstate rates as established by the Interstate Commerce Commission were allowed to be maintained, then the States would be dominant in the federal field and the national supremacy would be subordinated within its own field, the national field, to the power of the State. There was no escape from the alternative. Either the national power must be sacrificed to the States or it must be exerted within its field. If it were allowed to be exerted within its field, then it must be supreme, and anything that contravened it must fail.

"I imagine that the same doctrine would be sustained in regard to the treaty-making power where concerns, which perhaps under former conditions had been entirely local, had become so related to international matters that an international regulation could not appropriately succeed without embracing the local affairs as well."[6/]

The second group of proponents, headed by Senator John W. Bricker, raise a problem that deserves most serious study. Senator Bricker himself has performed a great service by calling attention forcibly to the trend, in the executive branch of our government during the last twenty years, to negotiate treaties which it has been claimed deal primarily with domestic matters. Fortunately, none of these treaties has been ratified. Our federal system did not contemplate having treaties deal with matters exclusively domestic in their nature. Largely as a result of Senator Bricker's vigorous activity, this trend in the Executive Branch has been halted. This Committee is now faced with the problem of whether a constitutional amendment can be drafted which will prevent possible misuse of the treaty-making power without, at the same time, unduly restricting its legitimate exercise.

As to the arguments of the second group of proponents, my position is that by and large, our constitutional system of treaty-making, adopted in 1789 and developed to this day, has worked well; and it therefore devolves upon the proponents of change to show a definite and compelling need for the change. That showing is not made by pointing to drafts of treaties, not yet ratified or even submitted for ratification, which rightly or wrongly are said to be objectionable. There are several proposed conventions, in various stages of draft by organs of the United Nations, to which objections have been made by some of the proponents

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6/ Proceedings, 1929 American Society of International Law, 194-195.

of these amendments. If these proposed treaties are as bad for America as they are said to be, they will not be approved by two-thirds of the Senate, or for that matter even be submitted by the President to the Senate. Certainly there is no basis in our history for assuming that the President and the members of the Senate, all of whom are bound by oath to support the Constitution, will seek to undermine the Constitution.

Furthermore, I propose to demonstrate later in this discussion that if a President and a Senate do adopt a treaty which seeks to override a right expressly confirmed to our citizens by the Constitution, such as is contained in the Bill of Rights, the judicial holdings of our federal courts to date indicate clearly that the treaty provision would be stricken down. But if this be true, the proponents of the change argue, why not amend the Constitution to say so. My answer is that no one has yet succeeded in devising language to amend the Constitution to guard against such a hypothetical treaty provision which does not also jeopardize the federal government's necessary and proper treaty-making powers.

I would now like to consider with you the four substantive sections of S. J. Res. 1 and the corresponding provisions of S. J. Res. 43.

"SECTION 1. A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect."

/The corresponding provision in S. J. Res. 43 reads:

"A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect."/

This amendment is said to be necessary in order to establish that a treaty is not superior to the Constitution, particularly the provisions of the Bill of Rights. The possibility of the contrary, advanced by the sponsors of the constitutional amendment, is derived from a crucial difference, as they see it, in the phraseology of Article 6, clause 2, the supremacy clause, where it is provided that the Constitution and the laws of the United States made in pursuance of the Constitution and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land. It is said that laws in pursuance of the Constitution, as distinguished from treaties under the authority of the United States, places laws and treaties on a different plane in regard to the superiority of the Constitution. In support, reference is made to what Mr. Justice Holmes said for the Supreme Court in Missouri v. Holland,[7] in the course of reaching the conclusion that the Tenth Amendment was not a limitation upon the treaty power, which is vested expressly by the Constitution in the federal government.[8] The Holmes statement in

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7/ 252 U.S. 416 (1920).

8/ The Supreme Court reached a similar conclusion 21 years later in holding that the Tenth Amendment was not a limitation on the federal commerce power, United States v. Darby, 312 U.S. 100, 123-124 (1941).

Missouri v. Holland was:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."

But Holmes immediately qualified this by saying:

"We do not mean to imply that there are no qualifications to the treaty making power * * * *."

And later in the opinion he said:

"The treaty in question does not contravene any prohibitory words to be found in the Constitution."9/

9/ The whole of this quotation reads: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. Andrews v. Andrews, 188 U.S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved." 252 U.S. 433-434 (Underscoring supplied)

But more importantly, reverting to the difference in descriptive phraseology for laws and for treaties in Article 6, clause 2, of the Constitution, to which Holmes merely alluded in passing, sight has been lost of the origin of the difference, and hence its true significance. In the constitutional convention of 1787 the first aspect of the treaty provisions to come up for discussion was that which became ultimately embodied in the supremacy clause. The Virginia resolutions had proposed that the national legislature have power to negate state laws contravening the Articles of Union. An amendment by Dr. Franklin added the power to negate state laws contravening "any Treaties subsisting under the authority of the union," and the proposal was initially agreed to without debate or dissent.[10/] Subsequently, the proposed power to negate state legislation was rejected. Those opposed to the provision argued that it would be offensive to the states and that a state law that could be negated would be set aside by the judiciary or, if necessary, could be repealed by a national law. Accordingly, in place of this provision there was proposed a supremacy clause, providing that all legislative acts of the United States and all treaties made and ratified under the authority of the United States should be the supreme law of the respective states, in so far as they related to such states or their citizens and inhabitants, and should be binding on the state judiciary. This proposal was unanimously adopted.[11/]

10/ 1 Farrand, Records of the Federal Convention, 47, 54, 61.

11/ 2 Farrand, Records of the Federal Convention, 21-22, 27-29.

Subsequently the supremacy clause was extended to "treaties made or which shall be made" under the authority of the United States, so as to "obviate all doubt concerning the force of treaties pre-existing."[12/]

Thus the framers of the Constitution wanted to be sure, and made sure as time proved, that the supremacy clause extended not only to treaties which might in the future be made under the new Constitution but also to treaties which had in the past been made under the Articles of Confederation. They therefore said "treaties made, or which shall be made" shall be binding. To have limited the clause only to treaties made "in pursuance" of the new Constitution would have defeated that purpose.

In that connection one of the principal concerns was the 1783 treaty of peace with Great Britain,[13/] and the ability of the new national government to comply with its obligations in spite of the recalcitrance of a number of the states.[14/] The treaty, among other things, protected British creditors and guaranteed against future confiscations or prosecutions of persons on account of their part in the Revolutionary War. The status of this treaty was among the first issues to come before the new Supreme Court, in Ware v. Hylton, decided in 1796.[15/] The Court held that the treaty of 1783 overrode Virginia wartime legislation discharging indebtedness to British creditors, also that the treaty operated to revive a debt owed by an American citizen. Similar holdings in the early 1800's were made by

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12/ 2 Farrand, Records of the Federal Convention, 417.

13/ 8 Stat. 80.

14/ 31 Journals of the Continental Congress 781-874.

15/ 3 Dall. 199 (1796).

the Court in Hopkirk v. Bell,[16] involving a state statute of limitations, and Higginson v. Mein,[17] involving state confiscation of property of a British subject. Still other and later cases sustained both the pre-1789 and the post-1789 treaties, in protecting alien ownership and transfer of real property.[18]

In none of these cases, nor in any case decided by the United States Supreme Court involving the construction or effect of a treaty, can one find or discern an intention or purpose to regard a treaty as above the Constitution. On the contrary, the Court has repeatedly emphasized the subordinacy of treaties to the Constitution. In Geofroy v. Riggs,[19] the Court said:

> "It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states * * *."

16/ 3 Cranch 454 (1806).

17/ 4 Cranch 415 (1808).

18/ E.g., Orr v. Hodgson, 4 Wheat. 453 (1819); Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464 (1823); Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 602 (1813); Chirac v. Chirac, 2 Wheat. 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1879).

19/ 133 U.S. 258, 267 (1890). The whole of the quotation reads: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 Dall. 199; Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U.S. 483; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California 381."

In Doe, et al. v. Braden,[20] the Court said:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States."

In The Cherokee Tobacco,[21] the Court said:

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

In Missouri v. Holland,[22] the case which is allegedly the motivating force for the proposed amendment, the Court said:

"We do not mean to imply that there are no qualifications to the treaty-making power. * * * The treaty in question does not contravene any prohibitory words to be found in the Constitution."

In United States v. Minnesota,[23] the Court said:

"Of course, all treaties and statutes of the United States are based on the Constitution; * * * The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution * * *."[24]

20/ 16 How. 635, 657 (1853).

21/ 11 Wall. 616, 620-621 (1870).

22/ 252 U.S. 416, 433 (1920).

23/ 270 U.S. 181, 207-208 (1926).

24/ See, to the same effect, Jones v. Walker, Fed. Cas. No. 7507, 13 Fed. Cas. at p. 1062; Amaya, et al. v. Stanolind Oil & Gas Co., 158 F. 2d 554, 556 (C.A. 5, 1946), certiorari denied, 331 U.S. 808; United States v. Thompson, 258 Fed. 257, 268 (E.D. Ark., 1919); Indemnity Insurance Co. of North America v. Pan American Airways, 58 F. Supp. 338, 339, 340 (S.D.N.Y., 1944).

In addition, the Supreme Court has dealt with specific issues involving claims that certain treaties violated express constitutional guaranties. In Prevost v. Greneaux,[25] the Court held that a tax which had accrued to a state was not divested by a subsequent treaty. Said the Court, "And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such an intention."

In Brown v. Duchesne,[26] the Court stated that a treaty could not provide for the taking of private property without just compensation.

In In re Ross,[27] it was contended that a treaty and implementing statute, providing for trial by a consular court of crimes committed by American citizens in Japan violated various constitutional guaranties of fair trial. The Court rejected the contention, not by stating that the treaty was above the Constitution, but by holding that the constitutional guaranties did not extend to crimes committed abroad.

On like reasoning, the Court has sustained extradition of American citizens.[28]

In Missouri v. Holland,[29] the contention that a treaty and implementing statute violated the Tenth Amendment was rejected on the ground that the treaty power was expressly delegated to the federal government, therefore its exercise did not infringe the reservation to the states

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25/ 19 How. 1, 7 (1856).

26/ 19 How. 183, 197 (1856).

27/ 140 U.S. 453 (1891).

28/ Neely v. Henkel (No. 1), 180 U.S. 109, 122-123 (1901); Wright v. Henkel, 190 U.S. 40, 53 (1903); Charlton v. Kelly, 229 U.S. 447 (1913).

29/ 252 U.S. 416 (1920).

of powers "not delegated." 30/

Not only does the Supreme Court regard treaties as subordinate to the Constitution, but it regards them as generally of the same dignity as statutes. Thus a treaty can be modified or repealed by a federal statute so far as its domestic effect is concerned. 31/ So, the Court has held, to the extent that a treaty is self-executing as to become the law of the land, "it can be deemed in that particular only the equivalent of a legislative act." 32/

If there is one argument, which should be put to rest, it is that there is need for this constitutional amendment because the Constitution does not protect against a treaty which might impair rights of free speech, press, or religion. The argument stems from the wording of the First Amendment which, unlike the rest of the Bill of Rights, refers only to the Congress--that is, it reads, "Congress shall make no law respecting an establishment of religion, etc. * * *."

30/ See also Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (N.D. Cal., 1944).

31/ Head Money Cases, 112 U.S. 580, 597-599 (1884); Chae Chan Ping v. United States, 130 U.S. 581, 600-603 (1889); see Moser v. United States, 341 U.S. 41, 45 (1951).

32/ Chae Chan Ping v. United States, supra, 130 U.S. at 600; see United States v. Minnesota, 270 U.S. 181, 208. Not only does it appear clear that treaties are subject to constitutional limitation, but it is equally clear that they are subject to judicial review. To hold otherwise would create the anomalous position that although the courts could deny enforcement of a treaty on the ground it was inconsistent with a later act of Congress they were without power to do so on the ground of inconsistency with the Constitution. The power of federal courts to invalidate acts of Congress contrary to the Constitution was implied from the propositions that a statute could not overrule the Constitution, that the federal judiciary had jurisdiction over cases arising under the Constitution, and that it was sworn to uphold the Constitution. Marbury v. Madison, 1 Cranch 137, 176-180 (1803). The same reasoning applies to treaties. Cf. Taylor v. Morton, Fed. Case No. 13,799, 23 Fed. Cases at 785 (C.C.D. Mass., 1855). But in any event from the decisions already cited it is obvious that the power to examine into the constitutional validity of treaties has been assumed by the Supreme Court.

The fact is that the First Amendment is not limited to action of the Congress. The courts have regarded it as prohibiting any action by the federal government, or any of its branches, impairing freedon of speech, press, or religion, or the rights of assembly and petition. In the cases arising under the President's Loyalty Order, Executive Order No. 9835, the First Amendment was assumed to be applicable to Presidential action. 33/ The First Amendment has been assumed to apply to orders of administrative agencies, 34/ to judicial proceedings punishing for contempt of court, 35/ to acts of a territorial legislature, 36/ and to the conduct of agencies for the District of Columbia. 37/ In the latter connection, only last year, the Supreme Court said that the First and Fifth Amendments "concededly apply to and restrict * * * the Federal Government," and held that an order of the Public Utilities Commission of the District of Columbia amounts to sufficient federal government action to make the First and Fifth Amendments applicable thereto. 38/

In addition, the liberties protected by the First Amendment have all been held to be encompassed in the liberties guarded from invasion

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33/ Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 135-136, 143, 199-200 (1951), reversing on other grounds Joint Anti-Fascist Refugee Committee v. Clark, 177 F. 2d 79, 84, 87-88 (C.A.D.C., 1949); Bailey v. Richardson, 182 F. 2d 46, 59-60, 71-74 (C.A.D.C., 1950) affirmed by an equally divided court, 341 U.S. 918 (1951).

34/ National Broadcasting Co. v. United States, 319 U.S.190, 226-227 (1943).

35/ Toledo Newspaper Co. v. United States, 247 U.S. 402, 419-420 (1918) (overruled on other grounds, Nye v. United States, 313 U.S.33, 47-52 (1941)).

36/ Davis v. Beason, 133 U.S. 333 (1890).

37/ Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

38/ 343 U.S. at 461-463.

on the part of the states by the "due process" clause of the Fourteenth Amendment. Thus freedom of speech,[39] freedom of the press[40] including motion pictures,[41] and freedom of religion,[42] are all within the "due process" protection of the Fourteenth Amendment. Hence they are presumably within the "due process" protection of the Fifth Amendment, which is a clear limitation upon the whole of federal governmental action. As Judge Edgerton stated in Joint Anti-Fascist Refugee Committee v. Clark,[43]

> "Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all state action, the due process clause of the Fifth must extend it to all federal action."

It is unlikely that any court has ever held otherwise, and no amendment of the Constitution appears to be needed to prevent abridgement by treaty or executive agreement of the essential liberties guaranteed by the Bill of Rights or by the Constitution as a whole.

Enactment of an amendment confirming that which is already the law would be a most unusual act in our constitutional history. Except for the first ten amendments, which for all intents and purposes were contemporaneously adopted as part of the original organic act, each of the subsequent amendments to the Constitution has been adopted to meet

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39/ Gitlow v. New York, 268 U.S. 652 (1925).

40/ Near v. Minnesota, 283 U.S. 697 (1931).

41/ Burstyn v. Wilson, 343 U.S. 495 (1952).

42/ Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); McCollum v. Board of Education, 333 U.S. 203 (1948).

43/ 177 F. 2d 79, 87; see note 45 supra.

an existing unequivocal deficiency or need. Not only is there a paucity of legal materials to make a case for the amendment, but it is significant to note from the hearings held in the past and the literature on the subject that the sponsors of S. J. Res. 1 are not seriously complaining about any treaty heretofore adopted by the United States. The complaints are addressed to the possibility that the United States might in the future consider adopting certain treaties or conventions, such as the human rights covenants, the freedom of information conventions, and the statute of an international criminal court, which are either in draft stage before certain bodies of the United Nations, or which have little chance of submission for adoption by the executive branch of this Government based on pronouncements already made by representatives of the United States.

But, more than being unusual and unprecedented, an amendment of the Constitution, which purports to be confirmatory or declaratory of that which is already the law, may be unexpectedly damaging. Reckoning, as we must, with the justifiable tendency of courts and others to give an altering significance to an amendment of the organic act, let us consider proposed section 1 of S. J. Res. 1. It was derived from the American Bar Association proposal of February 26, 1952, 44/ which reads as a whole:

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of

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44/ 38 ABA Jour. 435-436 (May 1952).

such treaty." (S. J. Res. 43 follows this language.)

The whole of this proposal had the more far-reaching purpose of altering the Constitution as it was adopted in 1789, and interpreted in the intervening years. That purpose was and is to reduce the constitutional scope of treaty making and the subjects of treaties, and to eliminate the self-executing effect of those treaties that can presently be self-executing, by requiring the legislative action of Congress but limited by the measurement of its delegated powers under the Constitution absent any treaty. The effect sought is a very definite change in the constitutional distribution of powers, by giving the federal government less than the whole of the treaty power and reserving part of it to the states. It would reverse Missouri v. Holland and predecessor cases and undoubtedly, among other things, make of the Tenth Amendment to the Constitution a limitation on the treaty power.

In such circumstances, it is quite conceivable that the partial adaptation of the American Bar proposal in section 1 of S. J. Res. 1 might be construed by a court to be more than confirmatory of existing law and to have some of the altering effect desired by the sponsors of the ABA proposal. A "right enumerated in this constitution" might be deemed to be a right or power allegedly "reserved to the States respectively, or to the people" under the Tenth Amendment.

The same criticism is of course true of the corresponding provision in S. J. Res. 43 which is the original American Bar Association proposal.

Whether or not these or different meanings would ultimately be attributed to the amendment by the courts, certain it is that there would be opened an enormous source of contest and litigation which would hamper the government at every step in the conduct of presently normal business, and render doubtful the actions taken.

The history of the past and the decisions of our courts are completely reassuring on the place of the treaty power in the constitutional scheme. They render unnecessary the amendment proposed. Combined with the constitutional checks and balances of two-thirds of the Senate on the President in treaty-making, of the Congress on both in erasing undesired domestic effects, and of the courts on all in judging the constitutionality of the results, they constitute as strong a legal guaranty against unbridled exercise of the treaty power as the ingenuity of man has devised in any effectively working political system.

"Sec. 2. No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States."

/S. J. Res. 43 has no similar provision./

The purpose of this section is said to be to prevent future adoption of certain kinds of treaties, such as the incompleted drafts of covenants on human rights.

However, it is conceivable that were section 2 in force now or earlier, it would have prevented this country entering a number of kinds of international agreements of importance to us.

The provision prohibiting a treaty (or, under section 4 which is hereafter discussed, any other international agreement) which would authorize or permit any foreign power or international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States would throw doubt upon, if not nullify, the use of mixed claims commissions to settle or adjudicate damage claims of United States citizens. An example of a number of these is found in the Claims Convention of 1868 between the United States and Mexico[45] under which an international commission, appointed by the President of the United States and by the President of the Mexican Republic, was given authority to finally determine claims for personal injuries and property damage inflicted on both sides of the border by authorities of one government or the other. The compiler's note to the Convention shows that the Commission concluded its work in 1876 rendering awards in favor of United States citizens of over four million dollars as against approximately $150,000 in favor of Mexican citizens.[46]

45/ 1 Malloy, Treaties, 1128.

46/ 1 Malloy, Treaties, 1131.

Were it in force, the proposed constitutional provision might have prevented or jeopardized American participation in international arbitration of claims of American citizens or of disputes involving the domestic jurisdiction, either on grounds that the arbitrators constitute an international commission or organization, or that foreign governments are participants in the choice of the arbitrators who variously supervise or control or adjudicate rights involved. A current example is the authorization in the President to conclude and give effect to agreements for the settlement of intercustodial conflicts involving enemy property.[47] These agreements, such as the Brussels Agreement of 1947 to which the United States is party with six other countries, involve among others the property rights of Americans by reason of their joint ownership of certain enemy property or of corporate stock controlling ownership of such property. In the event of a dispute, a conciliator from a panel of seven elected by the seven member countries shall formulate a solution which is binding.[48]

An example of an arbitration which might impinge on the domestic jurisdiction is contained in section 21 of the United Nations Headquarters Agreement,[49] concerning the headquarters located in this country and providing for arbitration of disputes respecting the interpretation and application of the Agreement.

The proposed constitutional provision would seriously affect boundary arrangements, past and present, with our northern and southern neighbors. It could invalidate the existing 1909 boundary treaty between the United States and Canada,[50] insofar as Articles III, IV, and VIII of the agreement give to the International Joint Commission (3 American and 3 Canadian members) ultimate approving power over

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47/ 64 Stat. 1079.

48/ See Article 37A of the Brussels Agreement, and the background described in H. Rept. 2770, 81st Cong., August 1, 1950.

49/ 61 Stat. 756, 764.

50/ 36 Stat. 2448, T.S. 548.

uses, obstructions, or diversions of waters on either side of the boundary line.

The provision that no treaty (or other international agreement) shall authorize or permit any foreign power or international organization to supervise, control, or adjudicate any matter essentially within the domestic jurisdiction of the United States may be particularly troublesome. Its alleged purpose is to "make effective, insofar as the United States is concerned, the prohibition of Article 2, paragraph 7, of the U. N. Charter forbidding U. N. intervention in purely domestic matters."[51/] Article 2, paragraph 7, of the United Nations Charter now provides

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Laying aside any question of conflict between the proposed constitutional amendment and the latter part of the quoted provision regarding Chapter VII (which deals with Security Council action in respect of threats to the peace, breaches of the peace, and acts of aggression), it should be observed that this provision of the Charter is part of our law,[52/] and is already an existing protection if needed against the United Nations. Elsewhere, when it was felt that such a safeguard was needed against a feared encroachment, it was included in the particular agreement, such as the United States acceptance of the so-called "compulsory" jurisdiction of the International Court of Justice under Article 36, paragraph 2,

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51/ 99 Cong. Rec. 161, January 7, 1953.

52/ 59 Stat. 1031.

of the Statute of the Court.[53] The acceptance (pursuant to Senate Resolution of August 2, 1946)[54] contains the reservation that the United States declaration shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[55]

The difficulty in freezing any such provision into the Constitution is that it becomes completely inflexible without any possibility of waiver by agreement when desirable. This would be true not only for the United Nations but regarding any other problem we may have with a foreign government or international organization. For example, in the past some of our consular conventions have allowed foreign consular officials certain judicial powers. The Convention with France of 1788[56] empowered French consuls in the United States to adjudicate all disputes arising within the United States between subjects of France (Art. 12) and to exercise police powers over French vessels (Art. 8). In Wildenhus's Case[57] the Supreme Court said that if such a treaty gave a consular official exclusive jurisdiction over a homicide committed on a vessel in port, the treaty would preclude prosecution for the offense by a state court; it held, however, that the treaty in question did not preclude prosecution by the state of New Jersey. It might be observed in this connection that the United States has treaties with other countries giving its consular officials judicial powers abroad

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53/ 59 Stat. 1031, 1060.

54/ T.I.A.S. 1598.

55/ 1 United Nations Treaty Series, p. 9; registration no. 3.

56/ 8 Stat. 106.

57/ 120 U.S. 1, 17-18 (1887).

which are regarded of great value.[58]

The proposed amendment might throw doubt upon our existing extradition treaties, or the extent to which we can grant extradition. To date the power to enter such treaties has never been questioned.[59] And it is well settled that, where the treaty so provides, an American citizen can be lawfully extradited to some other country to be tried in accordance with the laws of that country for an offense committed there.[60]

The host of agreements to which the United States has subscribed in the past in becoming a member of the many international organizations (such as the International Civil Aviation Organization, the International Telecommunications Union, the Universal Postal Union, the World Health Organization, the International Bank, and the International Fund, to mention but a few), all may require examination to ascertain the extent to which any such treaties or international agreements permit the international organization to supervise, control, or adjudicate a matter or matters "essentially within the domestic jurisdiction of the United States," let alone the rights of citizens of the United States. We can suppose that in a great measure this has been avoided by the several charters and agreements of the past. Nevertheless some of the useful and necessary techniques adopted would seem to infringe the constitutional amendment proposed, such as the Narcotic Drug Protocol of 1948,[61] under Article 1 of which the World Health Organization may add, to the list of drugs

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58/ Only recently the International Court of Justice had occasion to pass upon the extent of American consular court jurisdiction in Morocco, France v. United States of America, Case Concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27, 1952; I.C.J. Reports 1952, p. 176.

59/ Holmes v. Jennison, 14 Pet. 540, 569-570, 586, 588 (1840); Matter of Metzger, 5 How. 176, 187-188 (1847); Factor v. Laubenheimer, 290 U.S. 276 (1933).

60/ Neely v. Henkel (No. 1), 180 U.S. 109, 123 (1901); Charlton v. Kelly, 229 U.S. 447, 465-469 (1913); Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 7 (1936).

61/ T.I.A.S. 2308.

capable of producing addiction, newly discovered drugs or compounds or synthetics; whereupon their manufacture and distribution is to be limited by the member states in accordance with the 1931 Convention and 1946 Protocol.

One cannot help but speculate upon what such a constitutional amendment would do to any efforts of the United States to achieve genuine international control in important fields relating to the peace and safety of the world. For example, the United States proposal of 1946, rejected by the Soviet Union, of an international agency for the control and development of atomic energy, included broad powers in the international agency for the management and ownership of all atomic activities potentially dangerous to world security, as well as power to control, inspect, and license all other atomic activities.[62/] The system of international inspection, which lay at the heart of the plan, clearly would conflict with the proposed constitutional amendment.

The point need not be belabored by reciting other like problems that must one day be the subject of international solution. In their regard we can ill afford to immobilize the one great peacetime weapon this country possesses, namely, the treaty-making power.

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62/ See International Control of Atomic Energy, Growth of a Policy, State Department Publication 2702 (1946); Policy at the Crossroads, State Department Publication 3161 (1948).

"Sec. 3. A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress."

[On this subject, S. J. Res. 43 provides: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."]

The purpose of this provision is to prevent treaties, which are intended to be and capable of being self-executing, from becoming self-executing; and to require, in all cases, that a treaty cannot become effective as internal law in the United States except through the enactment of legislation by the Congress.

S. J. Res. 43, the American Bar Association proposal, would go even further and would prevent a treaty from becoming internal law except through legislation which Congress could validly enact under its powers in the absence of the treaty, thereby limiting the scope or subject matter of treaties to those matters which are within the enumerated legislative powers of the Congress.

The solution, evolved by the constitutional convention of 1787, of placing treaty making in the President with the advice and consent of two-thirds of the Senators present, was the result of a great deal of thought, discussion, and compromise. John Jay, in No. 64 of The Federalist, and Alexander Hamilton in No. 75, have set forth the reasons for placing the treaty power in the President and two-thirds of the Senate. Hamilton described it as "one of the best digested and most unexceptionable parts" of the constitutional plan.

Because the capacity and prestige of the Senate in treaty-making and treaty-law-making is under challenge by the present proposal for amendment, I would urge every member of the Senate to review carefully these two essays by Jay and Hamilton, among others. I would call attention especially to the following paragraph from Jay's paper, which

goes directly to the point proposed by this amendment:

> "Some are displeased * * * because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected." 63/

The point is as valid now as it was in 1788. Nevertheless, because treaties were to have the force of laws, proposals were made to require concurrence of the House in the treaty-making process. These were submitted first at the constitutional convention, 64/ then at a number of the

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63/ The Federalist, No. 64

64/ 2 Farrand, Records of the Federal Convention, 392-394, 481, 495, 522-525, 527-529, 538 (proposal defeated 10 to 1), 540-541, 547-550.

later state ratifying conventions, [65] and still later on a number of occasions since the adoption of the Constitution. [66] They have invariably been rejected or dropped.

The present proposal would require two steps before a treaty could have domestic effect, first, the approval of two-thirds of the Senate and, second, reconsideration by the Senate and approval by the House. This is unprecedented, anywhere. In a State Department memorandum, dated May 23, 1952, already made available to you, there is summarized the constitutional requirements of various other countries for giving effect to treaties as internal law. It is pointed out that no other country in the world is required by its constitution or constitutional practice to follow such a double procedure. Moreover in the countries where participation by the legislature is required, such as the United Kingdom, the composition of the executive branch of the government is determined by the legislative body. The government in power in those countries accordingly controls both the executive and legislative powers. The defeat of an important law or treaty normally results in the formation of a new government in which the executive and legislative authority are in agreement.

65/ Pennsylvania, 2 Elliott's Debates 546; South Carolina, 4 Elliott's Debates 265-267, 280; Virginia, 3 Elliott's Debates 610; North Carolina, 4 Elliott's Debates 115, 119, 125, 131, 246. Some of this was mere discussion, and none got beyond the stage of a recommendation to the First Congress.

66/ See, proposal of Virginia Assembly, growing out of Congressional debate of the Jay Treaty with Great Britain (5Annals of Congress 394, 400-401, 426-771), Acts of Virginia Assembly 1795, p. 55--no action taken on proposal; and see Proposed Amendments to the Constitution, H. Doc. 551, 70th Cong., 1st sess., 120-122; also H. J. Res. 60, 79th Cong., 1st sess. (H. Rept. 139), passed by the House May 9, 1945, 91 Cong. Rec. 4367-8. This last was a proposal to provide that treaties could be made by the President by and with the advice of both Houses of Congress, viz. a simple majority of both.

Not only is the double step unprecedented, but it is unnecessary. In the first place all treaties are not self-executing. And in the second place, existing law provides adequate means for participation by the House in cases where such participation is appropriate, without the necessity of a rigid requirement of such participation in all cases.

Looking at the law as it now stands, a treaty may, of its own force, be a law which binds the rights of individuals, and as such is to be regarded by a court as an act of Congress.[67] In that posture it is described as self-executing. As such it may override any inconsistent provision of a state constitution and law,[68] or municipal ordinance.[69] Also, it has an equal status with an act of Congress. Hence while so far as possible the treaty and statute will be construed to avoid inconsistency,[70] if there is clear inconsistency a later treaty will prevail over an earlier statute[71] and a later statute will prevail over an earlier treaty.[72]

But a treaty need not have a self-executing effect. The nature of the treaty obligation and the intention of the contracting states,

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67/ The Peggy, 1 Cranch 102, 110 (1801).

68/ Ware v. Hylton, 3 Dall. 199; Hauenstein v. Lynham, 100 U.S. 483.

69/ Asakura v. Seattle, 265 U.S. 332.

70/ United States v. Lee Yen Tai, 185 U.S. 213, 220-223; Pigeon River Co. v. Cox Co., 291 U.S. 138, 160-161.

71/ United States v. Lee Yen Tai, 185 U.S. 213, 220; Hijo v. United States, 194 U.S. 315, 324.

72/ The Cherokee Tobacco, 11 Wall. 616; Head Money Cases, 112 U.S. 580, 597-599; Chae Chan Ping v. United States, 130 U.S. 581, 599-603; see Pigeon River Co. v. Cox, 291 U.S. 138, 160; Moser v. United States, 341 U.S. 41, 45.

evidenced in the agreement, become important factors. Chief Justice Marshall stated it best in Foster v. Nielson:[73]

> "Our constitution declares a treaty to be the law of the land. It is, consequently, 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. But when the terms of the stipulation import a contract--when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

Therefore whether or not a treaty is self-executing is a matter primarily of construction of the treaty. This is no different than the construction of a statute. The courts have regarded statutes and treaties on a par in determining their immediate effectiveness; and a statute, like a treaty, may be so framed as to make it apparent that it does not become practically effective until something further is done by Congress itself, or by some officer or body.[74]

73/ 2 Pet. 253, 314 (1829)

74/ Judge Putnam said in United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842, 845 (C.A. 1, 1907); "An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective; * * *"

From this brief summation of existing law, it is apparent that there are at least three means by which participation of the House may be obtained where appropriate.

First, the treaty as drafted, may stipulate or require that it be regarded as not self-executing. If its implementation requires appropriations or criminal sanctions or similar domestic legislation, it will necessarily depend on legislation passed by both Houses. In other situations, where the treaty might have internal effect, its terms may prevent it from being self-executing. A notable example is Arts. 55 and 56 of the United Nations Charter, obligating the parties to "promote" stated social and economic objectives and pledging themselves "to take joint and separate action" for the achievement of these purposes. 75/ Recently, the California Supreme Court held these provisions were non-self-executing. 76/

75/ See, for other examples, the Convention for the Protection of Migratory Birds of August 16, 1916, 39 Stat. 1702, Art. VIII, legislation implementing which was involved in Missouri v. Holland, 252 U.S. 416, 431; the International Slavery Convention of Sept. 25, 1926, 46 Stat. 2185, obligating the parties to take "necessary steps," "adopt all appropriate measures," "take all necessary measures," etc. to achieve its objectives; the Genocide Convention, Senate Executive O, 81st Cong., which is cast in terms intended to make it non-self-executing; and present drafts of proposed conventions or covenants relating to human rights and to freedom of information, which are the alleged targets of the proposal to amend the Constitution and which are cast in non-self-executing terms.

76/ See Fujii v. State, 242 p. 2d 617 (Sup. Ct. Calif., 1952).

Second, the Senate, in the exercise of its power to impose reservations [77] may impose as a condition, to its consent to ratification, that the treaty shoudl not be considered self-executing. This should afford ample opportunity and scope for dealing with matters which the Senate feels ought not have a self-executing effect.

Finally, in an extreme case, there stands as a check on the President and Senate the power of Congress, by subsequent statute, to override the treaty insofar as its effect on domestic law is concerned.

77/ Haver v. Yaker, 9 Wall. 32, 35; see 98 Cong. Rec. March 20, 1952, pp 2602-3.

In general, these safeguards have worked well. The most conspicuous instance of dissatisfaction arose in connection with the Jay Treaty of 1794; but while the issue of the House's participation in commercial treaties was debated and a constitutional amendment was proposed by the Virginia legislature, no action was taken on that amendment by Congress or the other states.[78/]

A rigid requirement that no treaty can have domestic effect as law unless it goes through the second step of approval by both Houses of Congress would have seriously damaging consequences in those areas in which treaties have traditionally been self-executing. For example, treaties of commerce and friendship typically provide for the rights of aliens to hold, acquire, inherit, and dispose of property, to engage in businesses and professions, to be protected in their persons and property, to be free from burdensome taxation, and the like. Such treaties are almost invariably self-executing. When ratified by the Senate, they become domestic law. In case of conflict, they override inconsistent state law. No reason has been suggested why the efforts of the United States to secure adequate protection for the persons and property of its citizens abroad, whether transients or residents, should be impeded by making the process of adopting such treaties more burdensome and time-consuming than it now is. Nor have substantial objections been suggested to the long established practice respecting treaties of friendship and commerce and other types of treaties which have traditionally been self-executing.

It seems to me that the requirement of the double step in effectuating treaties would for all practical purposes debase the present constitutional

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78/ See note 66, *supra*.

function of the Senate in the treaty-making process. For, as a precaution against attack on provisions which might have some internal effect, it would become advisable, as a matter of practice, to submit all treaties for some form of legislative approval by both Houses. The separate two-thirds approval of the Senate would become merely an obstacle rather than an act of treaty making.

The American Bar Association addition (contained in S. J. Res. 43) to the change suggested by section 3 of S. J. Res. 1 would superimpose a major change in the relations between the federal and state governments, as well as seriously curtail the scope of the treaty power. The power to enter into treaties was granted by the Constitution without any express limitation as to the subject matter of possible treaties. At the constitutional convention of 1787, while there were suggestions that certain types of treaties, for example, treaties of peace, should receive different procedural treatment, there was no suggestion that the treaty power be limited as to subject matter. The framers were primarily impressed with the necessity, in the interest of national survival, of an adequate and effective power to make, and to enforce within the states, whatever treaties seemed appropriate to facilitate the conduct of foreign relations. At the constitutional convention it was generally agreed that the federal government should have the full and exclusive treaty power before any agreement was arrived at as to the scope of the legislative powers of Congress. The view of the framers is reflected in the letter from George Washington, dated September 17, 1787, transmitting the proposed Constitution to the Continental Congress: 79/

"The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying

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79/ 2 Farrand, Records of the Convention, 666-667.

money and regulating commerce, and the corresponding executive and judicial authorities should be fully and effectually vested in the general government of the Union."

The view of the Supreme Court has always been that, "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations."[80] Such treaties may have the force of domestic law, if they are self-executing, or may be implemented by legislation under the "necessary and proper" clause.

In Missouri v. Holland,[81] the Court expressly rejected a contention that the United States could not by treaty and implementing act of Congress regulate the subject of migratory birds unless that subject came within the legislative powers delegated to Congress.[82]

But that decision merely made explicit what had long been implicit, for in none of the cases involving treaty provisions had any question been raised as to whether the provision was within the general powers of Congress to legislate. It was enough that the matter was an appropriate subject for international negotiation.

The most usual types of treaties would be invalid if measured by the test of whether they came within the legislative powers of Congress.

80/ Geofroy v. Riggs, 133 U.S. 258, 266 (1890). See also Holmes v. Jennison, 14 Pet. 540, 569 (Opinion of Taney, C.J.) (1840); Holden v. Joy, 17 Wall. 211, 243 (1872); In re Ross, 140 U.S. 453, 463 (1891); Missouri v. Holland, 252 U.S. 416, 433-434 (1920); Asakura v. Seattle, 265 U.S. 332, 341 (1924); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

81/ 252 U.S. 416.

82/ As the Court stated (252 U.S. 433): "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."

For example, treaties relating to the rights of aliens to own land and personalty, to inherit property, and to transfer property by will or intestate succession;[83] treaties relating to rights of aliens to engage in trade or business, as applied to a business having no interstate character;[84] and treaties of extradition--where the crime was a purely domestic one within the foreign state.[85]

This does not mean that the treaty power is a "Trojan horse" which can bring about an unintended "change in the balance between federal and state power," as the American Bar Association Committee has contended.[86] It means simply that one of the powers which the Constitution delegated to the federal government, completely, was the treaty power. The framers clearly understood that the treaty power was very broad in scope and could reach many matters which would otherwise be solely of state concern. Nevertheless they gave that power exclusively to the federal government. It is the proposed denial to the federal government of a large part of the treaty power, granted by the Constitution and repeatedly exercised since the beginning of the Republic, which would produce "a change in the balance between federal and state power."

In this connection, reference has been made to the so-called Steel Seizure Case.[87] The Supreme Court held that the executive order of the President directing the Secretary of Commerce to seize and operate the

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83/ Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U.S. 483; Santovincenzo v. Egan, 284 U.S. 30.

84/ Asakura v. Seattle, 265 U.S. 332 (pawnbroker).

85/ Matter of Metzger, 5 How. 176, 187-188 (forgery); Charlton v. Kelly, 229 U.S. 447 (murder).

86/ Hearings p. 37. These are the hearings which were held in May, June 1952 on S.J. Res. 130 (82d Cong.) the predecessor of S.J. Res. 1 (83d Cong.)

87/ Youngstown Co. v. Sawyer, 343 U.S. 579 (1952).

steel mills which were then threatened with a strike, was not authorized by the Constitution or laws of the United States; and that the order and seizure could not stand. The vote of the Justices was six to three. Proponents of S. J. Res. 1 say,

"Mr. Chief Justice Vinson, dissenting in the Steel Seizure Cases, implied that the United Nations Charter and the North Atlantic Treaty gave the President power to seize private property. (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952).) Two other Justices joined with him in that opinion. Under the pressure of some future emergency, a majority of the Supreme Court may find that the treaty power authorizes action otherwise forbidden by the Constitution."[88/]

The reference to the United Nations Charter and the North Atlantic Treaty occurs in Part I of the dissent by Mr. Chief Justice Vinson and Mr. Justices Reed and Minton, 343 U.S. beginning at 667. The preface to the reference is this sentence: "In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised." The references to the Charter and North Atlantic Treaty follow, and appear in describing the historical background of world conflict which the United States has faced from the close of World War II through the Korean conflict. Reference is made to the United Nations Charter and the North Atlantic Treaty as "congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale." The dissent then proceeds to outline the congressional measures which followed the treaties chronologically, such as the Mutual Security Act, the Defense Production Act, and several appropriation acts. Then, after this recitation, the dissenters launch into their derivative

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88/ Bricker, "Safeguarding the Treaty Power," 13 Fed. Bar Journal 77, 79 (Dec., 1952).

conclusion with these opening words: "The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel."[89/]

It is, therefore, fairly clear that, whatever one's views may be on the merits of the dissent, certainly it rests on the view that the President's alleged power to seize the steel mills arose from his duty to execute the legislative programs of the Congress and not from any implication that any treaty gave the President power to seize private property. The adoption of S. J. Res. 1 or S. J. Res. 43 would not increase or diminish the chances that the minority's holding might some day become the majority holding.

The reason why the treaty power is not and should not be limited to matters which would otherwise be within the legislative powers delegated to Congress is clear. In regard to general legislative powers, those powers not delegated to the federal government are reserved to and may be exercised by the states under the Ninth and Tenth Amendments to the Constitution. Thus, there is no gap in powers. The power to make treaties is, however, expressly denied to the states by Art. I, Sec. 10 of the Constitution. Whenever a matter is an appropriate one for international negotiation and agreement, either the federal government must be capable of dealing with it by treaty, or the United States as a whole is lacking in an essential aspect of sovereignty and is seriously handicapped in its ability to deal with other nations. The point was succinctly stated by Attorney General Caleb Cushing, in 1857:[90/]

"The power, which the Constitution bestows on the President, with advice and consent of the Senate, to make treaties, is not

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89/ 343 U.S. 672, underscoring supplied.

90/ 8 Op. Atty. Gen. 411, 415.

only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the States. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign,--not sovereign,--nor in coequality of right with other admitted sovereignties of Europe and America."

The ABA proposal would therefore appear to be even more disruptive than the suggestion for change embodied in section 3 of S. J. Res. 1. Since any constitutional limitation of the scope of treaties would weaken the position of this nation at the international bargaining table, it is incumbent on the proponents of such a limitation to show a definite and compelling need for it. As I said at the outset of my statement, that showing is not made by pointing to particular treaties, not yet ratified or even submitted for ratification, which are said to be objectionable.

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"Sec. 4. All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article."

[The comparable provision in S. J. Res. 43 reads as follows:

"Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."]

Along with the above quoted provisions of proposed section 4, it is probably necessary to consider the proposed provisions of S. J. Res. 2, 83d Congress, which sets out the kind of limitations the sponsors of S. J. Res. 1 have in mind in providing that executive agreements shall be made only in the manner and to the extent to be prescribed by law. Thus in addition to being subject to the limitations imposed on treaties and the making of treaties by the first three sections of S. J. Res. 1, executive and other international agreements, other than treaties, would be subject to the following:

1. They shall be of no force or effect as laws or as authorizations until and unless they have been published in full in the Federal Register.
2. They shall be subject to such legislative action as the Congress, in the exercise of its constitutional powers, shall deem necessary or desirable.
3. They shall be deemed to terminate not later than six months after the end of the term of the President during whose tenure they were negotiated, unless extended by proclamation of the succeeding President.

4. Agreements or compacts entered into by the President with foreign governments or officials requiring secrecy shall be submitted to the Congress as treaties in accordance with the requirements of the Constitution, otherwise they shall be of no force or effect except as personal undertakings of the President.

Most of the executive agreements have been and are in fact congressional-executive agreements, based upon the cooperation of the Congress and the President and the merger of their powers.

A comparatively small number of the total agreements has rested upon the sole action of the President. These have related to his express and exclusive constitutional powers as commander in chief of the army and navy, and his diplomatic powers as the sole organ of the federal government in the field of international relations, including the power to receive ambassadors and other public ministers. Thus the power to give permission without legislative assent for the introduction into this country of foreign (Mexican) troops was assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States;[91] and recognition of a foreign government (USSR) with incidental settlement of outstanding claims rested on the President's powers to receive ambassadors and other public ministers.[92]

In contrast to these types, there is the large bulk of executive agreements either authorized or ratified by Congress. These include the postal conventions; the acquisitions of territories such as Texas, Hawaii, and certain islands in the Great Lakes; the arrangements with

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91/ Tucker v. Alexandroff, 183 U. S. 424, 435 (1902).

92/ United States v. Belmont, 301 U. S. 324 (1937); United States v. Pink, 315 U. S. 203 (1942); and see Fraser, Treaties and Executive Agreements, Sen. Doc. 244, 78th Cong., pp. 20-27.

foreign powers in relation to commercial reciprocity agreements and the suspension of discriminating duties; extension of the privileges of copyright and the protection of trade-marks; agreements with the Indian tribes, which since 1871 supplanted the use of formal treaties; arrangements respecting fishing privileges of American citizens in foreign waters; the settlement of pecuniary claims against foreign governments, and the submission of such claims to arbitration; adherence by this country to membership in a score or more of international organizations; the trade and financial agreements, and agreements affecting international communications and transportation consummated in the 1930's and 1940's under authorization or policies laid down by acts of Congress.

The fact that there could be international agreements other than treaties was recognized in the Constitution itself, which, in Article I, Section 10, provides that no state shall enter into "any Treaty, Alliance, or Confederation," nor, without the consent of Congress, enter into any "Agreement or Compact * * *with a foreign Power." It was recognized by the Congress during Washington's first administration. In establishing the Post Office, Congress authorized the Postmaster General to make arrangements with the postmaster in any foreign country for the reciprocal receipt and delivery of mail. 1 Stat. 232, 239. Pursuant to authority conferred by this and later statutes postal carriage arrangements with Canada and postal conventions with many countries of the world were consummated. Almost 100 years after the first postal act Solicitor General William Howard Taft ruled:

> "From the foundation of the Government to the present day, then, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster-General power to conclude

conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails." 93/

The frequency with which such agreements have been used is indicated by the fact that of the nearly 2,000 written international agreements entered into by the United States in the 150 years between 1789 and 1939, only some 800 were made by the formal treaty process. 94/

The Supreme Court has repeatedly recognized as well established "the power to make such international agreements as do not constitute treaties in the constitutional sense." 95/ The Court has said in connection with an executive agreement, not submitted to Congress, that an international compact is not always a treaty requiring participation of the Senate. 96/

The important fact is that under the broad grants of power in the Constitution to the Congress and to the President other procedures than

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93/ 19 Op. Atty. Gen. 513, 520 (1890).

94/ Letter of April 25, 1947, from Acting Attorney General McGregor to Senator Wallace H. White, Jr., Chairman of the Senate Interstate and Foreign Relations Committee, regarding S. 11, 80th Congress.

95/ United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936). Altman & Co. v. United States, 224 U.S. 583 (1912) (commercial agreement authorized by the tariff acts); United States v. Belmont, 301 U.S. 324 (Litvinov assignment); United States v. Pink, 315 U.S. 203 (same).

96/ "A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' Altman & Co. v. United States, 224 U.S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. See 5 Moore, Int. Law Digest, 210-221. The distinction was pointed out by this court in the Altman case, supra, which arose under §3 of the Tariff Act of 1897, authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this court." United States v. Belmont, 301 U.S. at 330-331.

formal treaty-making have developed and have been utilized throughout our history for entering into international agreements on important subject matters with more or less the same legal and practical consequences. Care must therefore be exercised, in any consideration of altering the full foreign affairs power, not to cut off, inadvertently or otherwise, functions, practices and methods of operation that have developed usefully and to our advantage, and without which our facility in dealing with other nations would be hampered and restricted.

Considering again the limiting effect of proposed section 2 of S. J. Res. 1, there would appear to be no more justification for such limitations on the scope or the subject matter of executive agreements than in the case of treaties. Each form of international agreement may be an appropriate means for the exercise of the federal power over foreign affairs--a power which because it is exclusive must be plenary.

As to the question raised by section 3 of S. J. Res. 1, whether an act of Congress ought to be required to give an international agreement domestic effect, most so-called executive agreements are either authorized or ratified by Congress. Hence section 3 of S. J. Res. 1 would seem to have little significance for such agreements. As to executive agreements not submitted to Congress, issues whether such agreements can override state law have seldom arisen and are not usually likely to arise because of the general external use and application of such agreements. In the Belmont and Pink cases, it was held that such agreements incident to recognition of a foreign government could override state policies; however, a like result has been reached as to declaration of federal policy incident to recognition or non-recognition even where no international agreement is involved, on the ground that the federal executive has the exclusive power to recognize or refuse to recognize foreign governments and to determine

the consequences of recognition or non-recognition.[97]

The legislative limitations proposed in S. J. Res. 2 raise certain problems. For example, there is the provision that executive and other agreements shall be subject to the legislative action of Congress in the exercise of its constitutional powers. As already noted, most executive agreements are either authorized or ratified by Congress. Moreover Congress has the power to supersede a treaty insofar as it declares rules of domestic law, and it seems obvious that Congress has like power as to agreements other than treaties. Viewed from this aspect, the proposed provision of law seems to state merely the obvious, and would not seem to be needed. If, however, the provision is intended to assert legislative control over international action taken by the President in the exercise of his constitutional powers as commander-in-chief, or his powers to conduct foreign affairs,[98] it would raise grave implications for the principle of separation of powers on which our Constitution is based.

The provision that executive agreements would terminate, unless extended, after the end of the term of the President within whose tenure they were negotiated, would impose crippling impediments to the effective negotiation of and adherence to all sorts of executive agreements, frequently of an administrative character, whose nature presupposes a relatively long term. The effect of such provisions on long-term agreements

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97/ Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F. 2d 1000 (C.A.D.C., 1951), certiorari denied, 342 U.S. 816.

98/ cf. United States v. Belmont, 301 U.S. 324.

relating to the administration of military bases, for example, has been pointed out in the memorandum submitted to last year's subcommittee by the Department of Defense.[99/]

99/ Hearings on S. J. Res. 130 (82d Cong.), pp. 365-367. A number of the other problems arising from section 4 of S. J. Res. 1 and the whole of S. J. Res. 2 are dealt with in papers that were submitted in regard to S. J. Res. 130 and S. J. Res. 122 of the 82d Congress, and are spotted in various places in the Hearings.

CONCLUSION

What I have stated in regard to the several sections of S. J. Res. 1 and S. J. Res. 43 can be summed up in a sentence: The proposed amendments are both unnecessary and damaging.

Our Constitution is a sacred document. We have a reverence for it that does not admit readily of changes. Its words, as Holmes has said, "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

Without any clear showing of abuse in the past, the proposals would change our constitutional standards which have worked well, over the years. They would substitute a new inflexible standard which would seriously restrict the ability of the United States to conduct foreign relations effectively. They would deny to the United States, in its dealings with other nations, rights of sovereignty which other nations exercise. They would make international agreements of all kinds more difficult to negotiate and enforce. S. J. Res. 43 particularly would seriously alter the existing balance of federal-state relations.

The proposals would impose these restrictions based upon an asserted likelihood that the treaty power might be abused. These dangers, we are told, flow mainly from agreements which have not been approved by the executive branch of the government let alone submitted to the Senate for ratification.

Whether those, or other agreements, should ever be accepted as good treaties or rejected as bad treaties would seem to be, as always, matters for executive and legislative judgment when the issues arise, case by case, in the future. That is the traditional way under our system of justice, based upon the English common law, to meet and cope with changing conditions.

In these times, our position in the world is relatively as fraught with peril as it was for the nation newly launched under the Constitution of 1789. On every hand we have need for friends and allies--the old who have dealt securely with us in the past, the new who can rely upon the example of the past. I think it is against the best interests of the country to inflexibly reduce the tried and proven means, or to dissipate our responsibility and authority, for meeting the world-wide issues which affect the welfare of the United States.