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# NEED FOR A CONSTITUTIONAL AMENDMENT ON TREATIES AND EXECUTIVE AGREEMENTS\*

FRANK E. HOLMAN†

In order to understand the dangers of "Treaty Law" and its threat to American rights and to the American form of government, it is appropriate to review briefly the nature of the American form of government as a constitutional republic and as a government of delegated powers.

Until the adoption of the United States Constitution, never had a government been organized on the principles that people as individuals are endowed by their Creator with certain inalienable rights as to life, liberty, and property (including the right to local self-government), and that these rights are inherent in the individual citizen, not a grant from government. *Theretofore in history we had frequently heard of the divine right of kings, but never of the divine rights of the people.* Governments had accorded freedom to the individual citizen and local self-government to the people only when forced to do so or when the sovereign for the time felt so inclined. The previous concept of the scope and power of a national government was that it had inherent powers of its own and might grant or withhold rights of the individual citizen as it saw fit. But by our Constitution and Bill of Rights only certain specific and limited functions were conferred upon the officials of our national government. It was to be a government of delegated powers, and the people forbade, and intended to forbid, the federal government from doing anything not authorized by the Constitution and Bill of Rights.

Although Lord Bryce, probably the greatest student of government of his generation, declared that the American Constitutional Convention was "the greatest body of men that ever sat in a single chamber," the Constitution was not in all respects a perfect instrument. Provision was made for its amendment from time to time as the country's needs and conditions might require. As of now, twenty-two amendments have been added to the Constitution.

We know that even the framers of the Constitution were in disagreement on certain points, both of substance and of language. Compromise was resorted to in order to get an instrument of constitutional government completed and adopted. This was particularly true in

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\* This is the author's reply to the article *The American Constitution and the Treaty Making Power* by the Honorable John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, which appeared in 1954 WASH. U.L.Q. 115.

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connection with the provisions of Article VI regarding the treaty-making power.<sup>1</sup> The article 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.

This treaty provision was subject to criticism from the beginning. Patrick Henry attacked it at the Virginia ratifying convention:

To me this power appears still destructive; for they can make any treaty. . . . Is it not paramount to the Constitution and every thing?<sup>2</sup>

However, in the early years of the Republic and practically until the organization of the United Nations, this treaty supremacy doctrine posed no great threat to American rights and the American form of government. Treaties were confined to their traditional purposes and were used to settle some pending dispute between nations, to make alliances, to terminate wars, or to deal with commercial and trade relations. Furthermore, they were negotiated and drafted by experts who understood the law and language of treaty-making. These experts were appointed for the negotiation of a particular treaty which actually involved some definite international dispute or specific matter under settlement. When Article VI was written into the Constitution the treaty provisions were not intended to be used to change domestic law for the citizens of this country or to change our form of government. Thomas Jefferson understood 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. . . . *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.* (Emphasis added).<sup>3</sup>

Even Alexander Hamilton, the great Federalist, said,

The power of making treaties . . . relates neither to the execution of the subsisting laws, nor to the enactment 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.<sup>4</sup>

1. See MACBRIDE, *TREATIES VERSUS THE CONSTITUTION* 25-38 (1955), for a history of the article at the Constitutional Convention.

2. 8 ELLIOT'S *DEBATES ON THE FEDERAL CONSTITUTION* 513 (2d ed. 1866).

3. JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE* 110 (1868). See also, Letter from Thomas Jefferson to James Madison, March 27, 1796, in *THE WRITINGS OF THOMAS JEFFERSON* 135 (Washington ed. 1861), setting forth Jefferson's and Madison's views.

4. *THE FEDERALIST* No. 75, at 557 (Hamilton ed. 1888) (Hamilton).

Today, however, acting under the broad grant of power contained in the Charter of the United Nations,<sup>5</sup> the Economic and Social Council, whose members have highly diverse concepts of law and government, as well as fundamentally different theories of economics, can propose practically any kind of treaty—world-wide as to scope and all-comprehensive as to subject matter. The Council or its commissions thus may constantly develop new proposals in the form of declarations, treaties, and pacts dealing with the internal affairs of all nations as to any economic, social, humanitarian, educational, cultural, or health matters.

As early as January 1948 Director John P. Humphrey of the Division of Human Rights, a subagency of the Economic and Social Council, disclosed that what the Commission on Human Rights was proposing constituted an intervention in matters within the domestic jurisdiction of the member states. He boldly stated the whole revolutionary nature of the program as follows:

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 supranational supervision of this relationship between the state and its citizens.<sup>6</sup>

Apparently, the theory of the Economic and Social Council is that world peace may be achieved if, somehow, economic, social, humanitarian, educational, cultural, and health conditions are by declarations, conventions, and treaties subjected to a world-wide standard of equality. This theory is advanced even though the result may be to bring the more advanced nations down to the level of the backward nations in rights, legal concepts, and form of government, as well as in economic, social, and other internal affairs.

Accordingly, the humanitarians in the Economic and Social Council immediately began to remold the world by trying to provide through such declarations, conventions, and treaties how each and every na-

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5. U.N. CHARTER art. 62 provides:

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

6. Humphrey, *International Protection of Human Rights*, 1948 ANNALS 21.

tion should conduct its internal affairs. One of the first documents produced under this program of world-wide reform was the so-called Declaration of Human Rights,<sup>7</sup> approved by the United Nations Assembly in Paris in December 1948. This Declaration, among other things, is a complete blueprint for socializing the world, including the United States. Articles 23 through 27, for example, contain provisions guaranteeing to everyone rights ranging from the right to "rest and leisure" to the right to an "adequate" standard of living, including food, clothing, housing, and medical care.

The Declaration was advertised as being only a declaration of aspirations, not a legal document. But there immediately arose a growing school of thought in the United Nations and elsewhere that the Declaration was an authoritative interpretation of the economic and social provisions of the Charter of the United Nations,<sup>8</sup> which has already been ratified as a treaty. Thus, the Declaration and the Charter would have the effect of establishing the extraordinary doctrine that,

[O]nce 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.<sup>9</sup>

In addition, it should be recognized that the Human Rights Commission has refused again and again to approve the inclusion of a provision in the proposed Covenant on Human Rights<sup>10</sup> covering the basic American right to own private property and be secure in its enjoyment against its arbitrary seizure by government. On March 3, 1954, the eighteen-nation Human Rights Commission voted to shelve indefinitely all discussion of property rights. Does this not disclose the extent to which the Commission is controlled by communists and international socialists? Under our concept of freedom no man can

7. U.N. GENERAL ASSEMBLY OFF. REC., 3d Sess., Resolutions, at 71 (1948).

8. U.N. CHARTER arts. 55-60. Article 55, for example, provides:

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.

9. Moskowitz, *Is the U.N.'s Bill of Human Rights Dangerous? A Reply to President Holman*, 35 A.B.A.J. 283, 285 (1949).

10. See *Draft Covenants on Human Rights*, 13 U.N. BULL. 253-57 (1952).

be *truly free* who lacks the right to own property and be secure in its enjoyment against arbitrary seizure by government.

It may properly be noted here that the news releases in April 1955<sup>11</sup> reported that the upper house of the Indian Parliament, by unanimous vote of all 139 members present, passed a constitutional amendment giving the legislature, rather than the courts, the right to fix the terms and conditions for the expropriation of private property and the amount of payment therefor, subject to no right of appeal to the courts. The point is, this right of the legislature to seize private property upon its own terms may be good for India because of the large estates that need to be rapidly broken up. In the United States, however, where our land ownership has largely developed through the acquisition of comparatively small holdings by our citizens, the Indian doctrine of arbitrary legislative seizure is contrary to our basic concept that private property shall not be taken for public use without due process and just compensation. This illustrates the basic difficulty of attempting, through such a treaty-making process as proposed by the Commission on Human Rights, to put all nations of the world on a so-called equality with respect to the rights and freedoms of citizens.

The Chairman of the United Nations Human Rights Commission, Mr. Charles Malik of Lebanon, as early as 1952, said, in regard to the Commission's approach to its work,

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.

For the second year an unsuccessful attempt was made to include an article on the right to own property. . . . The concept of property and its ownership is at the heart of the great ideological conflict of the present day. . . . 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.<sup>12</sup>

In December 1948 the United Nations Assembly also adopted the Genocide Convention<sup>13</sup> which defines certain domestic offenses as international crimes for which American citizens might be extradited—transported overseas for a trial without a jury before an international criminal court.<sup>14</sup> Other provisions touching the domestic rights

11. See, e.g., St. Louis Post-Dispatch, April 21, 1955, § 2, p. 1, col. 6.

12. Malik, *Human Rights in the United Nations*, 13 U.N. BULL. 248, 251 (1952).

13. U.N. GENERAL ASSEMBLY OFF. REC., 3d Sess., Annexes, Agenda Item No. 32, at 501 (Doc. No. A/760/C.2) (1948).

14. It has been stated that this convention,

[P]roposes ultimately to vest in an international criminal court jurisdiction to try, convict, and sentence Americans, and any others, charged with the offense of genocide, without the safeguards which our federal and state constitutions guarantee to persons charged with domestic crimes.

Fed. Legis., *A Case for the Bricker Amendment*, 42 GEO. L.J. 262, 274 (1954).

of American citizens are found in the Convention on Freedom of Information.<sup>15</sup> The above proposals, and similar ones advanced by the new school of internationalists, constitute a challenge to the basic rights of American citizens under the prevailing judicial interpretations of the treaty-making power.

In the early United States Supreme Court cases it was indicated that a treaty could not enlarge, amend, or override the Constitution of the United States. In *New Orleans v. United States*, the Court stated *obiter* that "Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."<sup>16</sup> This case, involving a United States claim under a treaty of cession with Louisiana to certain land which the City of New Orleans was preparing to sell, is sometimes referred to as having invalidated a treaty on the above ground, but the decision is explainable on the basis that no title passed to the United States under the treaty.<sup>17</sup> The Court's reasoning on the treaty-making power is in any event in conflict with its later decision in *Missouri v. Holland*.<sup>18</sup>

In *Doe v. Braden*<sup>19</sup> certain Florida land was claimed under a grant from Spain made before the property was acquired by the United States under a treaty of cession annulling the previous conveyance. The Supreme Court, in holding that such a claim was a political rather than a judicial question, indicated that the Constitution was superior to a treaty:

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*. (Emphasis added).<sup>20</sup>

And again, in *Hauenstein v. Lynham*,<sup>21</sup> where the Court determined that a Virginia statute regarding escheat of alien property had been nullified by an American-Swiss treaty, it was suggested that there were limitations upon the treaty-making power:

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.<sup>22</sup>

Ten years later, the Supreme Court again supported the doctrine of limited treaty powers in *Geofroy v. Riggs*.<sup>23</sup> The treaty in question permitted Frenchmen to inherit property if, under the applicable state law, aliens were permitted to hold real estate. In interpreting the

15. U.N. GENERAL ASSEMBLY OFF. REC., 7th Sess., Annexes, Agenda Item No. 29, at 25 (Doc. No. A/AC. 42/7/c.1) (1951).

16. 85 U.S. (10 Pet.) 662, 736 (1836).

17. *Id.* at 737.

18. 252 U.S. 416 (1920). See text supported by note 26 *infra*.

19. 57 U.S. (16 How.) 635 (1853).

20. *Id.* at 657.

21. 100 U.S. 483 (1879).

22. *Id.* at 490.

23. 133 U.S. 258 (1889).

treaty, Justice Field, after determining that inheritance was a proper subject for the exercise of the treaty power, clearly stated that the treaty-making power was not to be treated as unlimited.<sup>24</sup>

In two earlier cases,<sup>25</sup> an important limitation on the treaty power was recognized: a treaty may be abrogated by the enactment of a subsequent federal statute clearly inconsistent with the treaty. Such a limitation would, of course, have the salutary effect of preserving in the people, through their elected representatives in Congress, the ultimate power of preventing the President, with only the consent of the Senate, from making domestic law or supplementing or amending the Constitution of the United States in contravention of the intent of Congress. But even this limitation would always require a *two-thirds* vote of both Houses to override presidential opposition.

Whatever protection the people had, or would have had, under the developing judicial doctrine of the earlier decisions regarding proper limitations upon the treaty-making power was largely swept away by the broad language of Justice Holmes in *Missouri v. Holland*.<sup>26</sup> The State of Missouri had brought a bill in equity to prevent federal enforcement of the Migratory Bird Treaty Act of 1918, which was enacted in pursuance of a treaty between the United States and Great Britain. Previously, a federal statute, not in pursuance of a treaty, that attempted to protect migratory birds was held to be beyond the power of Congress by two federal district courts.<sup>27</sup> The Supreme Court held that, whereas congressional enactments must be made *in pursuance of the Constitution* to be the supreme law of the land, a treaty is the supreme law of the land if made merely *under the authority of the United States* (apparently meaning the President and two-thirds of the Senate present and voting).<sup>28</sup> Under the Holmes concept, a treaty, unlike a federal statute, will be valid and will be the supreme law of the land even though not made in pursuance of the Constitution. The language of Article VI requiring a treaty merely to be made under the authority of the United States, rather than in pursuance of the Constitution, thus resulted in the Supreme Court

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24. In discussing the limitations of the treaty power the Court pointed out that,

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.

*Id.* at 267.

25. *Botiller v. Dominguez*, 130 U.S. 238 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888).

26. 252 U.S. 416 (1920).

27. *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915); *United States v. Shauver*, 214 Fed. 154 (E.D. Ark. 1914).

28. Justice Holmes stated that, "it is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).



holding that Congress may exercise legislative powers under a treaty which it would have been constitutionally forbidden to exercise in the absence of the treaty. Thus, Congress, pursuant to a treaty, may pass any legislation that it deems "necessary and proper" to execute the powers of government,<sup>29</sup> regardless of the constitutional limitations on Congress apart from the treaty. Therefore, the logical result of *Missouri v. Holland* is that a treaty may enlarge and change the Constitution itself and sweep away state constitutions and state laws in the process.

Within a few years after the decision in *Missouri v. Holland*, the distinguished former Justice Charles Evans Hughes, soon to become Chief Justice, in an address before the American Society of International Law, said that there was in the Constitution "no explicit limitation" on the treaty power and that he would "[N]ot 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."<sup>30</sup>

Five years later, in *United States v. Reid*,<sup>31</sup> in answer to the argument that the treaty in question violated the Constitution to the extent that it deprived a minor child of citizenship without her consent, the court said,

It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a *causus [sic] belli* to the other contracting power.<sup>32</sup>

This doubt was further increased in *United States v. Curtiss-Wright Export Corp.*,<sup>33</sup> which concerned the validity of a statute delegating to the President the power to bar the sale of arms by Americans to foreign countries. Although the treaty-making power was not directly in issue, the Court declared that such power does not depend upon a grant in the Constitution but is an inherent power of the federal government—again the indication that the treaty power is unlimited.<sup>34</sup>

Notwithstanding the early judicial dicta that the treaty power cannot "authorize what the Constitution forbids," it seems clear that the Supreme Court, without a constitutional amendment controlling the effect of treaties, could hardly do otherwise than sustain almost any type of treaty provision. At least it has uniformly done so. In fact,

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29. See the discussion of the "necessary and proper" clause of the Constitution in *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

30. 1929 PROC. AM. SOC'Y INT'L L. 194.

31. 73 F.2d 153 (9th Cir. 1934).

32. *Id.* at 155.

33. 299 U.S. 304 (1936).

34. In *Asakura v. Seattle*, 265 U.S. 332 (1924), the Supreme Court held invalid a city ordinance confining the pawnbroking business to United States citizens because of its conflict with a treaty permitting Japanese citizens to carry on trade in the United States. This was the last case to repeat the dicta of the early cases regarding the constitutional limitations on the treaty power. *Id.* at 341.

the power of the courts to pass on the *validity* of treaties has been doubted from the earliest times. Justice Chase in 1796 said that, "If the court possesses a power to declare treaties *void*, I shall never exercise it, but in a very clear case indeed."<sup>35</sup> Courts have indicated that the power does not exist,<sup>36</sup> that the making of treaties "being an exercise of political power," the courts have no "official concern" therewith except as to their existence and construction.<sup>37</sup> The Supreme Court said in *United States v. Pink* that,

This Court, speaking through Mr. Justice Sutherland, held that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the exercise of that power is not open to judicial inquiry. . . .<sup>38</sup>

The assertion that no treaty offending the Constitution has ever been ratified overlooks the treaty proclaimed May 22, 1924,<sup>39</sup> between Great Britain and the United States permitting transportation of liquor in British ships within the territorial limits of the United States. Previously, this had been held by the Supreme Court to be "prohibited transportation and importation in the sense of the [Eighteenth] Amendment and the [National Prohibition] act."<sup>40</sup> Professor Arthur E. Sutherland, Jr., has commented that, "President Coolidge and the Senate evidently thought that a treaty could prevail over at least one amendment."<sup>41</sup> And it should be added, over an unqualified *constitutional prohibition*.

Perhaps the most outstanding and most alarming example of the effect of "Treaty Law" on our domestic law and Constitution, and upon the thinking of our judges, is to be found in the opinion of former Chief Justice Vinson in the decision dealing with the President's seizure of private property in the famous *Steel Seizure* case.<sup>42</sup> The Court held that the executive order directing the Secretary of Commerce to seize and operate the steel mills was not authorized by the Constitution or the laws of the United States. The Chief Justice, in his dissent, advanced the doctrine that the United Nations Charter and other international treaties and commitments, together with the statutes implementing these treaties, authorized the President of the United States to seize private property despite the lack of express con-

35. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796).

36. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Reid*, 73 F.2d 153, 155 (9th Cir. 1934).

37. *Z. & F. Assets Corp. v. Hull*, 114 F.2d 464, 468 (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941); *United States v. Domestic Fuel Corp.*, 21 C.C.P.A. (Customs) 600, 609, 71 F.2d 424, 430 (1934).

38. 315 U.S. 203, 222-23 (1942).

39. Treaty with Great Britain on Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, 43 STAT. 1761, T.S. No. 685.

40. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 130 (1923).

41. Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305, 1319 (1952).

42. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 667 (1952).

stitutional authorization.<sup>43</sup> Any analysis of the decision discloses that the Chief Justice rested his opinion in substantial part squarely on the duty of the President to execute treaties faithfully. His theory was that if there was no applicable legislation by which President Truman was bound, still, under the constitutional duty to "take care that the laws be faithfully executed," the President had the duty to execute faithfully the United Nations Charter and the NATO Treaty. The Chief Justice drew no distinction between the President's power in external and internal affairs, whereas Justice Jackson, in his concurring opinion,<sup>44</sup> indicated that the majority recognized internal and external affairs as being in separate categories. Of course the right to own property and be secure in its enjoyment within the United States is clearly an internal affair.

Thus, *Missouri v. Holland* and the subsequent cases have not only nullified the dicta of the earlier cases in the minds of federal expansionists, but have 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,<sup>45</sup> 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. Dulles, in a speech at Louisville, Kentucky, before a regional meeting of the American Bar Association in April 1952, summed up the whole matter of the dangers of treaties under the present supremacy clause of Article VI of the Constitution:

*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 Con-

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43. There has been a vigorous effort to deny that the dissenting opinion of the Chief Justice was based on "Treaty Law." Senator Hayden took occasion to make a strong attack against the writer, Dr. Clarence E. Manion, ex-dean of law, University of Notre Dame, and Ray Murphy, past commander of the American Legion, for allegedly misrepresenting the legal effect of this opinion. 100 CONG. REC. 1163 (daily ed. Feb. 3, 1954). For a detailed answer to this criticism see Standing Committee on Peace and Law Through United Nations, *Report*, 79 A.B.A. REP. 540, 555 (1954).

44. *Youngstown Co. v. Sawyer*, 343 U.S. 634, 635 n.2 (1952).

45. See note 8 *supra*.

gress 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 by their constitutional Bill of Rights.* (Emphasis added.)<sup>46</sup>

Under the American theory of government, our basic individual rights belong to the American people as safeguarded by the Constitution. They are retained by the people even as against the government itself and ought not to be subject to modification through the use of the treaty-making process. Our own Bill of Rights forbids Congress to change our basic rights, but as the Constitution now stands, it does not prevent our basic rights from being changed by a treaty which is made by the treaty-making agency, consisting merely of the President and two-thirds of the Senators present and voting. *This is the loophole in the Constitution that we now face and through which the internationalists propose to move to level out our American rights (both state and individual) and thereby change our form of government.* The new school of internationalists say a treaty can be made on any matter which international opinion deems to be of international concern and that "human rights," social, economic, and political, *are of international concern.*<sup>47</sup> This new concept has led our State Department to say officially that "there is no longer any real distinction between 'domestic' and 'foreign' affairs."<sup>48</sup> Because of this, and similar declarations by Mr. Humphrey<sup>49</sup> and Mr. Moskowitz,<sup>50</sup> the provision of Article 2 of the United Nations Charter,<sup>51</sup> that nothing contained therein shall authorize the United Nations to intervene in domestic affairs, *becomes meaningless.*

Because of this broad activity in the international field based on the growing doctrine of the "omnipotence of treaties," the American people, unless there is a constitutional amendment, are faced with the following legal predicament:

1. A treaty may completely nullify a provision in a state constitution without the people of that state having any voice in the matter, either directly or through their state legislature, because Article VI of the United States Constitution provides that a treaty is the

46. The speech is quoted in *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 83d Cong., 1st Sess. 862 (1953).

47. See, e.g., Moskowitz, *Is the U.N.'s Bill of Human Rights Dangerous? A Reply to President Holman*, 35 A.B.A.J. 283, 284 (1949).

48. U.S. DEP'T OF STATE PUB. NO. 3972, GENERAL FOREIGN POLICY SERIES 26, at 4 (1950).

49. See text supported by note 6 *supra*.

50. See note 47 *supra*.

51. U.N. CHARTER art. 2, para. 7 provides:

Nothing contained in the present Chapter 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.

"[S]upreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. A treaty may nullify a state statute or, for all practical purposes, enact new laws binding on a state.

3. A treaty may nullify or change the effect of a decision of a state supreme court.

4. A treaty may nullify or change the effect of existing federal legislation on the same subject.

5. A treaty may enlarge, amend, or override the United States Constitution and the Bill of Rights. It is the writer's view that it can, though this has been a question of great controversy.

Because of the grave threat to constitutional government in this country, and in order to set at rest the difficulties that may arise from the Supreme Court's new concept of "Treaty Law," it is not difficult to understand why the American Bar Association, after several years of consideration and full debate in its House of Delegates, concluded that a constitutional amendment was necessary to preserve American rights and the American form of government against the dangers of treaties and executive agreements.<sup>52</sup>

What is the general nature of the opposition to the proposal for a constitutional amendment on treaties and executive agreements?

One source of opposition seems to be largely based upon the idea that the American people can "trust" the administration now in power *not* to make any bad treaties. As a token of the present administration's good faith, Mr. Dulles has testified before the Senate Judiciary Committee that the present administration would not press for ratification of the Genocide Convention or the Covenant on Human Rights. But he has said nothing about abandoning any of the scores of other treaties being considered by the various agencies of the United Nations, the International Labor Organization, and other international groups.

Another source of opposition to the proposed amendment stems from the contention that it would interfere with the power of the President and the Department of State to negotiate treaties and other international agreements. Supposedly, they would be prevented from properly conducting our foreign affairs. It has even been broadly stated by some opponents that under such an amendment a treaty would have to be approved by the forty-eight states—that we would be returned to the conditions that existed under the Articles of Con-

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52. *Proceedings of the House of Delegates*, 38 A.B.A.J. 425, 435 (1952). The following constitutional amendment was recommended to Congress:

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 such treaty.

federation. An amendment limiting the treaty power would in no way interfere with the free negotiation of treaties by the President and the State Department and their subsequent ratification by the Senate. The President would be as free to negotiate as now, and every treaty so negotiated, when ratified by the Senate, would be immediately effective as an international agreement. The amendment would have no restrictive force whatever on treaties as international obligations, nor would it curtail the power of the President to negotiate them. The amendment would permit treaties to become effective as internal law within the United States to the extent that Congress legislates within the delegated powers it has in the absence of any treaty. Thus, Congress could bind the states, independently of their consent, to the terms of a treaty, but only in those areas in which Congress has delegated power. Naturally, this will exclude some areas in which treaties now become internal law under the supremacy clause, and here the desired result would have to be achieved by co-operation between Congress and the state legislatures. Thus, the real objection to the amendment in this area is that the constitutional relationship between the state and federal government would be subject to change only by the regular process of constitutional amendment. This could no longer be accomplished through the treaty power alone.<sup>53</sup> The amendment would only prevent treaties from violating the Constitution and from becoming internal law within the United States until implemented by appropriate legislation.<sup>54</sup>

Neither would the amendment affect the right of the President as Commander in Chief to conduct war, negotiate an armistice, or to perform any other acts properly belonging to him as such. The Senate Judiciary Committee which considered the matter found that such an amendment would not affect in the least the President's powers in this respect.<sup>55</sup>

None of the arguments of the opposition, therefore, effectively meets the issue that there exists a loophole in the Constitution whereby legislative authority, without limitation, can be delegated to international organizations. In a period of another twenty-five years, this may result in the transference to a variety of world organizations of extensive legislative authority to make regulations, laws, and codes for the American people in connection with many of their internal affairs.

Any draft of a constitutional amendment to protect American rights

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53. Deutsch, *The Need for a Treaty Amendment: A Restatement and a Reply*, 38 A.B.A.J. 793, 795 (1952); Finch, *The Treaty-Clause Amendment: The Case for the Association*, 38 A.B.A.J. 467, 527-30 (1952).

54. After extended hearings, the majority of the Senate Judiciary Committee of the Eighty-Third Congress reached such a conclusion. S. REP. No. 412, 83d Cong., 1st Sess. 33 (1953).

55. *Ibid.*

against the dangers of "Treaty Law" should, in my opinion, embody the following purposes and objectives.

1. It should remove any possible doubt that a treaty or executive agreement to be valid as domestic law *must be consistent* with the Constitution and not in conflict with it. Unequivocal constitutional effect should be given to judicial dicta to the effect that "Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."<sup>56</sup> In addition, it should be made clear that no provision of a treaty which violates any provision of the Constitution or which is inconsistent with the nature of the government of the United States or the relation between the states and the United States shall be valid. Any inferences drawn by some persons from *Missouri v. Holland* and *United States v. Curtiss-Wright Export Corp.* that the treaty power is unlimited in any field, regardless of the Constitution, *should be unqualifiedly negated by such amendment* so that any doubt on this score will be forever set at rest.

2. The amendment should prevent a treaty or executive agreement from becoming internal law in the United States by force of its self-executing terms. This would remove the issue as to whether a treaty is self-executing or non-self-executing from the realm of judicial speculation and make the effectiveness of the treaty within the United States depend exclusively on implementing legislation. In fact, the United States is one of the few countries of the world whose legislature is not free to decide when, and to what extent, it wishes to implement a treaty by the passage of legislation. In the United States, when an international agreement like the United Nations Charter, the Genocide Convention, or the Covenant on Human Rights is ratified as a treaty, it may supersede every city ordinance, county ordinance, state law, state constitution, and federal statute on the same subject. Furthermore, under the logical result of the Holmes doctrine in *Missouri v. Holland* it may enlarge and amend the *Constitution of the United States*.

3. The amendment should limit the language of the decision of *Missouri v. Holland* by making it clear that in legislating in respect to treaties Congress shall have no power which it does not already have under the Constitution. The amendment should abrogate the broad language in *United States v. Curtiss-Wright Export Corp.* regarding an unrestricted federal power in the field of international relations.

4. The amendment should make it inescapably clear that the limitations in the first amendment restricting the power of "Congress" can-

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56. *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836); see *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870).

not be escaped by use of the treaty-making power or executive agreement under the claim that the President and Senate are a separate agency for lawmaking, and thus not subject to constitutional limitations on "Congress."<sup>57</sup>

Several different drafts of amendments have been proposed. Whatever the language used, the following are the minimum provisions that should be included to protect American rights:

1. That no provision of a treaty or other international agreement which conflicts with any provision of the Constitution of the United States shall be valid.
2. That no provision of a treaty or other international agreement shall be effective as internal law until implemented by appropriate legislation.

One over-all purpose of the amendment should be to give life and effect to the provision in Article 2 of the United Nations Charter,<sup>58</sup> which was intended to preserve and protect our American rights and which has been ignored and nullified by the proposals of the United Nations itself. 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.

It is no mere rhetorical statement to say that America faces a great constitutional crisis—one that threatens the very foundations of the Republic. Lawyers, laymen, and the press are gradually rallying in support of a constitutional amendment. The effect of trying to incorporate in an international document the rights and freedoms which American citizens enjoy, and making them international rights subject to international interpretation—thus giving foreign governments, individuals, and pressure groups the right to challenge our own interpretation of our own rights and even to challenge our right to the protection of our own courts—constitutes, in my opinion, not only a grave threat to American rights but an actual and present threat to the independence of the United States. The internationalists and humanitarians have certainly discovered a loophole in our Constitution. As Henry St. George Tucker, a former president of the American Bar Association, has well stated, the present treaty clause is a "Trojan horse" which is about to unload its hidden soldiery in our midst.<sup>59</sup> As the Peace and Law Committee of the American Bar Association has asserted, we need a constitutional amendment that will "drive the beast outside the walls without more damage done, and with its remaining armored soldiery securely locked within."<sup>60</sup>

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57. Special Committee for Peace and Law Through United Nations, *Report*, 75 A.B.A. REP. 286, 306 (1950).

58. See note 51 *supra*.

59. TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER 339 (1915).

60. Standing Committee on Peace and Law Through United Nations, *Report*, 77 A.B.A. REP. 510, 520 (1952).