Buffalo Law Review

Volume 6 | Number 1 Article 49

10-1-1956

Treaties Versus the Constitution. Roger Lea MacBride.

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TREATIES VERSUS THE CONSTITUTION. Roger Lea MacBride. Caldwell, Idaho: The Caxton Printers, Ltd., 1955. Pp. 89.

Roger Lea MacBride is a young graduate of Harvard Law School with a fine flair for pamphleteering and some promise as a scholar. He has apparently studied treaty practices in the United States, and in *Treaties Versus The Constitution* his notions on the subject are publicly bared.

At the outset, author MacBride introduces a number of examples of treaties which, he says, testify that strict adherence to the standing constitutional treaty provisions[1] might well result in the enlargement of federal powers. He cites a familiar group including the Bogota Treaty of 1950, The UN Charter, The UN Genocide Treaty, the "Covenant on Human Rights", the Warsaw Convention, and the NATO Treaty.

While suggesting the potential evil of these international agreements, at no time is he able to establish that the Congress has acted under the color of a treaty to expand the power of the federal government beyond Constitutional limits. He points to the Warsaw Convention[2] and limitation upon the rights of recovery against international air carriers, but fails to note that the Congress, utilizing its power to regulate foreign commerce, could have enacted a similar statute without benefit of treaty had it wished so to do. In this connection, MacBride's thesis that the Executive Department operates under a theory that "A treaty empowers the President to commit the country to war without Congressional declaration even though the United States is not directly attacked,"[3] seems the grossest perversion of the work.

His failure to comprehend the nature of modern warfare—the extension of modern politics—is revealed in his opening remarks on the power to declare war. "It is perfectly clear," the author announces, "that if the United States is attacked, the President has constituted authority . . . to retaliate. It is equally clear . . . that if the United States is not directly attacked, only Congress may declare war."[4]

The relationship between the Congressional Act of declaring war[5] and the President, in his capacity as commander-in-chief,[6] directing the armed forces of the United States to repel a hostile penetration of national soil, is not only consti-

1. U. S. CONST., art. II, § 2; art. III, § 2; art. VI.
2. Convention for the Unification of Certain Rights Relating to International Transportation by Air, signed at Warsaw, Poland, Oct. 12, 1929, 49 STAT. 3,000 (effective July 31, 1934).
3. R. L. MACBRIDE, TREATIES VERSUS THE CONSTITUTION, p. 18.
4. *Loc. cit.*
5. U. S. CONST., art. I, § 8.
6. *Ibid.*, art II, § 2.

tutionally vague, but given the conditions of Mid-Twentieth Century battle, increasingly meaningless. When the Constitution was drafted, the techniques of war not only implied the opportunity to debate the interests of involvement, but the military defense of the nation did not rest upon such devices as permanent naval and air bases in friendly or allied countries ringing the perimeter of a suspected source of hostility. What is clearly important in defensive strategy today is not merely whether the territorial limits of the United States are invaded, but whether the overseas bases also remain inviolate. If a potential enemy attacks a country wherein lies an overseas American air base, that attack must be construed by the President of the United States as a direct attack upon the United States, and his Constitutional obligation thereupon to order his armed forces to safeguard the nation lies beyond the shade of doubt.

It is not the treaty with the base granting nation or ally that has created his authority to act, however. As Commander-in-Chief, he must extend his powers to meet, in Dicey's words, "the law of paramount necessity." Furthermore, his inability to declare war has never, and does not today, deprive him of that executive discretion necessary to determine the proper means of defending the nation when attacked, nor can the particular conditions of modern war be used as an excuse to negate that discretion.

Author MacBride is at his best when he dispassionately describes the skeins of history that have been woven into the cloth of Constitutional practice with respect to treaties. His summation of discussion on Article VI by the Federal Convention is brief but adequate, and his recapitulation of the primary treaty cases is well done. It is only when he attempts to skim some meaning from the words and events which he describes that he tends to leave serious scholarship in the backwash. Referring to recent treaty and foreign policy cases.[7] MacBride concludes that, "The position of the Supreme Court appears to have undergone a profound change in the last thirty-five years."[8] Using the "political question" rule as an excuse, he continues, the Court has repudiated the *"Marbury v. Madison*[9] doctrine where applied to constitutional questions—the Court is only saying that the final determination of the constitutionality of the act involved is left to the actor."[10]

MacBride leaves his reader with the clear implication that the Twentieth Century Court attitude with respect to treaties is the product of a conscious will on the part of the Court to reshape a significant area of constitutional law. This

7. *Missouri v. Holland,* 252 U. S. 416 (1920); *United States v. Pink,* 315 U. S. 203 (1942); *Chicago and Southern Airlines v. Waterman Steamship,* 333 U. S. 103 (1948); *United States v. Curtis-Wright Export Corp.,* 299 U. S. 304 (1936).
8. MACBRIDE, *op. cit. supra,* note 3, at 60.
9. 5 U. S. (1 Cranch) 137 (1803).
10. MACBRIDE, *op. cit. supra,* note 3, at 61.

neatly avoids consideration of the reasons why the Court has applied the label "political question" to an increasingly large area of foreign policy determination. Perhaps the best reading of the term "political question" is that it is an area in which the Court deigns not to enter because it knows, on balance of all factors, that it has no reasonable expectation of seeing its decisions enforced. The judges are students of *Realpolitik* as well as law. The extension of the President's power as chief negotiator and leader in the field of foreign policy has grown apace with the nation's involvement in international commitments. The Court will not, in its wisdom, restrain the Executive Branch in its treaty operations which now, far more than in the Nineteenth Century, are necessary for the preservation of the safety of the United States, nor—and this far more significant—could it, in most cases, hope to upset a treaty if the President was determined to enforce it. Judicial impotence in the field of foreign affairs is an element which Mr. MacBride cares not to mention.

One cannot but sympathize with the author's concern that a vast expansion of federal powers is possible—he never says imminent—if the treaty making power is not in some fashion restrained. Yet wars and depressions have wrought their mark on the Constitution. Is it to be supposed that numerous alliances and heavy commitments in international affairs would not do likewise? And the author is far from establishing that treaties have rendered the Constitution a vestigial remnant of a pleasant, though by-gone, era.

Mr. MacBride concludes his book with a brief explanation of proposed Constitutional amendments designed to clarify the treaty provisions. He skirts a protracted discussion of that portion of the Bricker Amendment which provides that an unconstitutional treaty shall be held unconstitutional, but he levels his defensive fire to cover the famous "which" clause.[11] The essence of MacBride's thesis is that the clause would rarely be invoked, "necessary only in the rare instance of a treaty beyond the federal legislative competence—dealing with a subject not traditionally one with which foreign affairs are concerned."[12] Aside from the fact that this completely destroys the first proposition of the book, that Congress has been doing all sorts of things under color of treaties which it had no Constitutional business doing, the thesis neatly begs the question, for what is not today a subject within the realm of foreign affairs may tomorrow be, and the Court still lacks a standard for determining what is a "treaty beyond federal legislative competence." It cannot be argued that racial segregation was fifty years ago a feature of American life, which in the context of international affairs, put the

11. The current version: "Sec. 1. A provision of a treaty or other international agreement which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or affect." 101 CONG. REC. 81 (daily ed. 1955).

12. MACBRIDE, *op. cit. supra,* note 3, at 83.

nation in jeopardy of its national existence. Fifty years hence, it may not be possible to argue the contrary. Leaving the Constitution in peace on the subject of treaties may be politically unpopular today, nor is it tenable that no improvement through amendment is possible, but Senator Bricker's proposal, not to mention author MacBride's substitute amendment, lead from the premise of reduced American involvement in world politics and the likely responsibilities such involvement will bring. Comment on this assumption seems superfluous.

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