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THE TREATY-MAKING POWER—A REAL AND PRESENT DANGER

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At the outset, I want to make it perfectly clear that this is not an attack upon the United Nations with respect to its primary function of preventing aggression and maintaining peace and order in the world. With respect to those functions, I have ardently supported the organization, both in public addresses and in written articles.

It may be well to preface this discussion with certain fundamental concepts with respect to which I think we may be in substantial agreement.

Our Federal government is, and should continue to be, one of delegated and limited powers. Its powers should be limited to matters that are national in scope and character and matters which are essentially local in character should be reserved to the states and the people, with the power to deal with them in the light of peculiar local conditions and problems which differ widely throughout the various sections of our great country.

In a country as vast as ours, with varying local conditions and problems, the expansion of Federal power with respect to matters not national in scope and character means inefficiency in administration, extravagance in expenditures of public funds, and an expansion of bureaucracy with its tendency to become a rule of men rather than of law, to promulgate a maze of rules and regulations, without regard, and in many instances, unsuited to local conditions and problems, and to become arbitrary and tyrannical in the administration and in the enforcement of such rules and regulations.

Because of these things, it is my firm conviction that the preservation of the rights and powers of the states and the principles of local self-government is essential to the maintenance of liberty and the fundamental freedoms of the individual.

Perhaps the question arises in your mind, why does the treaty-making power under provisions of our Federal Constitution, which have not been changed since its adoption, now give rise to questions of supreme importance. There are three 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; (2) A basic change of viewpoint is being carried into effect with respect to the functions and purpose of treaties. A veritable avalanche of new treaties is under consideration by the United Nations and its affiliated organizations in the social, economic, cultural, civil and political fields. It is reliably reported that they have 200 treaties "in the works";[1] and (3) Per-

[1] Jessup, *A Modern Law of Nations*.

sistent efforts have been made during the past two decades to find additional constitutional basis for expansion of the powers of the Federal government, and the treaty power has been seized upon as a conveniently available vehicle for such expansion.

The issue presented is whether a constitutional amendment limiting the treaty-making power is necessary to preserve the reserved powers of the states and the principle of local self government and to safeguard the rights and liberties of our people.

Until recently it was a fundamental concept of international law that it is a law between states and not between individuals or between individuals and states.

A treaty is primarily a compact between independent nations and depends for the enforcement of its provisions on the honor of the governments which are parties to it. If dishonored, its infraction becomes the subject of international reclamation and negotiation. At the time the Constitution was adopted and until recently, treaties entered into by the United States generally were compacts in that primary sense, imposing duties and obligations on the contracting states and not on individual citizens. True, under the supreme law provision of our Constitution, a self-executing treaty becomes municipal law in the United States and such a treaty may confer rights upon citizens or subjects of a signatory nation, residing in the United States, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts. An illustration is found in treaties which regulate the mutual rights of the citizens and subjects of the contracting parties with respect to the devolution of property to aliens by devise or inheritance.[2]

Mr. Hamilton in *The Federalist,* No. 75, referring to the treaty power, said:

> It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. 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.

Mr. Jefferson, 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.

But that view ceased to prevail with the decision of the Su-

[2] Head Money Cases, 112 U.S. 580, 598.

preme Court in *Missouri v. Holland,*[3] as I shall presently show.

Today, however, treaties are being proposed, and at least one has been submitted to the Senate for ratification, which impose civil and criminal liability for acts of citizens of the United States or which affect rights of and impose duties and obligations on citizens of the United States, in areas heretofore within the reserved powers of the states.[4]

This brings me to a consideration of the provisions of our Federal Constitution with respect to the treaty-making power.

Article II, Section 2, Paragraph 2, of the United States Constitution provides:

> He [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. * * *

It will be observed that the grant of power is general and the limitation is only on the manner of its exercise.

In *United States v. Curtiss-Wright Corporation,*[5] decided in 1936, the court held that the treaty-making power is not one granted by the states; that it does not depend upon an affirmative grant in the Constitution; that without such a grant it would have vested in the Federal government as necessary concomitants of nationality; and that the United States is vested with all the powers of government necessary to maintain an effective control of international relations.

In *United States v. Belmont,*[6] decided in 1937, the court said:

> The external powers of the United States to be exercised without regard to state laws or policies.

And in *United States v. Pink,*[7] decided in 1942, the court said:

> The field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.'

Dicta may be found in decisions of the Supreme Court to the effect that while the treaty-making power is not limited by any express provision in the Constitution, it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our government and the relation between the states and the United States.[8] But, to this good day, no treaty has been judicially declared to be beyond the treaty-making power of the national government.

May I now direct your attention to Article VI, Paragraph 2, of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States

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[3] 252 U.S. 416, 432, 433.
[4] Allen, *The Treaty as an Instrument of Legislation,* pp. 10, 11.
[5] 299 U.S. 304, 315-318.
[6] 301 U.S. 324, 331.
[7] 315 U.S. 203, 232.
[8] Asakura v. Seattle, 265 U. S. 332, 341;
Holden v. Joy, 84 U.S. 211; 243;
Geofroy v. Riggs, 133 U.S. 258, 267.

> 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.

It will be observed that under this provision, laws of the United States are the supreme law of the land only if made in pursuance of the Constitution while treaties are declared to be the supreme law of the land if they are made under the authority of the United States.

The last paragraph of Section 8 of Article I of the Constitution grants to Congress the power to make all laws necessary and proper for carrying into execution its enumerated powers and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Under that provision, the Congress may enact laws to implement and carry into effect a treaty made under the authority of the United States, although it would not have power under the Constitution to enact such laws in the absence of the treaty. Such was the holding of the Supreme Court in *Missouri v. Holland*,[9] where the Migratory Bird Treaty Act of July 3, 1918,[10] and the regulations made by the Secretary of Agriculture in pursuance thereof came before the Supreme Court. In its opinion the court referred to two prior cases holding that an earlier act of Congress which attempted by itself, and not in pursuance of a treaty, to regulate the killing of migratory birds within the states was invalid, and 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. . . . 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 . . .

The validity of the Congressional enactment implementing the treaty was upheld.

In an address before the American Society of International Law, on April 26, 1929, the late Chief Justice Charles Evans Hughes said:

> 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 a limitation to be implied.

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[9] *Supra.*

[10] 40 Stat. 755.

> 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.
>
> 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. 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.

But, the present State Department takes a position contrary to the implied limitation suggested by the late Chief Justice. In a statement released by the State Department, in September, 1950, it said:

> There is no longer any real distinction between "domestic" and "foreign" affairs.[11]

The growing tendency to undertake to create a basis for Congressional enactments under the treaty-making power, not within the Constitutional grant of legislative power in the absence of a treaty, is indicated by the report of the President's Committee on Civil Rights, from which I quote:

> "The Human Rights Commission of the United Nations at present is working on a detailed international 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." Report of Civil Rights Committee, Par. 10.

If the treaty-making power is not subject to the implied limitation suggested by Chief Justice Hughes, a treaty, in addition to creating broad power to enact implementing legislation by Congress, may perforce of the treaty itself, if self-executing by its terms, have the force and effect of a legislative enactment affecting matters of local concern and traditionally regarded as within the reserved powers of the states. A self-executing treaty, in addi-

[11] State Department Publication 3972, Foreign Affairs Policy Series 26.

tion to being an international contract, becomes municipal, *viz.* local, law of the United States in each of the several states and the judges of each state are bound thereby, anything in the constitution or laws of their state to the contrary notwithstanding.[12]

Only in the United States, and to a limited degree in France, does a self-executing treaty become municipal law without enabling legislation. Any other nation which enters into a treaty becomes bound thereby under international law, but the treaty does not become internal law in such nation, imposing duties or obligations upon its citizens, unless it is implemented by legislation enacted in accordance with its constitutional processes.

May I refer briefly to some of the proposed treaties which, if entered into, will affect individual rights and freedoms of our citizens or impose civil and criminal liability on individuals. Today, affiliated agencies of the United Nations have under consideration in excess of 150 proposed treaties dealing with a multitude of subjects, most of which have heretofore been regarded as within the reserve powers of the states. At least seventeen of such treaties are in the drafting stage—not by the Secretary of State, but by such affiliated agencies. Time will not permit a detailed discussion of many of these treaties. One is the proposed Convention on Gathering and International Transmission of News and Right of Correction. Mr. Carroll Binder, a Minneapolis newspaper man, says:

> There is no possibility of substantially increasing freedom of information through the United Nations under present conditions. On the contrary, there is danger that encroachment upon freedom of information now practiced by individual sovereign states may obtain legal or moral sanction through United Nations instruments or declarations.

Another is the proposed Covenant on Human Rights. Article 2 of that Covenant provides that "in the case of a state of emergency officially proclaimed by the authorities, a state may take measures derogating from its obligations" to preserve freedom of speech and of press, and Paragraph 3, Article 14, of that Covenant provides:

> The right to seek, receive and impart information and ideas carries with it special duties and responsibilities and may therefore be subject to certain penalties, liabilities, and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others.

Like provisions are embraced in the news-gathering convention.

It is obvious that the Oatis case and similar prosecutions would be legalized under a claim of national defense, national

[12] Valentine v. Neidecker, 299 U.S. 5, 10;
Whitney v. Robertson, 124 U.S. 190, 194.

security, public order, or emergency, and under it the United States could legalize peacetime censorship. He who writes the orders for national defense, national security, public order, or national emergency may control much of the thought of this and other countries.

In an article published in the January, 1948, issue of the Annals of the American Academy of Political and Social Sciences, Mr. John P. Humphrey, a Canadian, and the Director of the Division of Human Rights of the United Nations, said:

> 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.

The laws of the several states require as a qualification for admission to the bar United States citizenship. The treaty with Israel, recently transmitted to the Senate by the President, provides that nationals of either country shall not be barred from practicing professions in the other country by reason of their being aliens, if they comply with other requirements, such as residence and competence. Under the most favored nation clause, included in many treaties to which the United States is a party, the above provision in the Israel treaty, if it goes into effect, would be automatically applicable to the nationals of a very large number of countries. This is a typical example of an invasion of the reserve powers of the states.

Another is the Genocide Convention now before the Senate for ratification.

I am not unmindful that in the past, acts which this Convention undertakes to define as international crimes have been perpetrated against human groups which shocked the conscience of mankind, were contrary to moral law, and were abhorrent to all persons who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, or religious groups to which they belong, and that the end sought to be attained by this Convention is wholly desirable. But the definitions of Genocide in the Convention are vague and lacking in precision. They do not lay down a certain and understandable rule of conduct. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[13]

Moreover, the Genocide Convention proposes ultimately to vest in an international criminial tribunal jurisdiction to try, convict, and sentence American citizens charged with the offense of Geno-

[13] Connally v. General Construction Co., 269 U.S. 385, 391.

cide, without the safeguards which our Federal and State Constitutions guarantee to persons charged with domestic crimes.

A separate *ad hoc* United Nations committee of seventeen members was created by the General Assembly on December 12, 1950, to prepare a preliminary draft Convention for the establishment of an international criminal court. A draft statute was completed in August, 1951. It is significant that this statute expressly deprives a defendant of the right to be tried by a jury of his peers in the district in which the offense is charged to have been committed—a right we regard as fundamental, and affords no protection against the use of an involuntary confession as evidence against the accused, a device almost universally resorted to in the trial of persons accused of crime in the police states. Indeed, it is asserted in the Report of the Section of International and Comparative Law to the House of Delegates, Mid-Winter Meeting, February 25-26, 1952, that a United States citizen, although charged with an offense committed in the United States, if brought to trial by an international criminal court for an offense against international law, would not be entitled to the safeguards guaranteed by our Federal Constitution to persons charged with offenses against the United States, on the theory that such Constitutional safeguards have application only to domestic offenses and trials in our own domestic courts. I vigorously disagree with that concept, but it shows the extent to which this new notion with respect to the treaty-making power is being pressed.

What is the answer to our problem? For more than two years the committee of the American Bar Association on Peace and Law Through United Nations, a committee on which I have been privileged to serve since its creation, has engaged in a study of this problem. At the Mid-Winter Meeting of the American Bar Association, in 1952, the committee reported to the House of Delegates a proposed Constitutional amendment, which the House adopted on February 26 last. The amendment reads:

> 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.

If adopted, the amendment will prevent a treaty from becoming internal law in the United States by force of its self-executing terms. It will modify the holding of *Missouri v. Holland, supra,* and restrict the power of Congress in enacting legislation to implement a treaty to the legislative powers that it would have in the absence of such treaty, and will negative the inherent power theory laid down by the broad language of *United States v. Curtiss-Wright Corporation, supra.*

It should be noted particularly that the American Bar Association's proposed amendment does not prevent the President and the

Senate from making a treaty, otherwise valid under the Constitution, on any subject whatsoever, and renders all such treaties effective externally. But the proposal prevents such a treaty from becoming effective as internal law in the United States, except to the extent that Congress legislates within its delegated powers in the absence of such treaty.

It has been asserted that the proposed amendment would unreasonably limit the power of the Federal government in the international field. I disagree. Under its power to make war, Congress can conclude peace and it customarily does so by joint resolution. Under its power "to regulate commerce with foreign nations," Congress can implement treaties of friendship, commerce, and navigation—a field which embraces a large portion of the treaties negotiated between the nations. Congress has the power "to define and punish piracies and offenses on the high seas and offenses against the law of nations." Under that power, Congress can implement treaties dealing with such offenses or can define and provide for the punishment of such offenses without any antecedent treaty. The foregoing are but illustrations, which could be multiplied in other fields, such as extradition, judicial assistance, and the like, and such treaties will become the supreme law of the land to the extent they are made so by act of Congress legislating within its delegated powers.

It has been further asserted that the treaty-making power as it now exists is essential in a dual or Federal-State governmental system such as ours. That argument, in my opinion, is untenable. It may be that the proposed amendment would exclude some areas in which treaties are now made or proposed. But that presents no insoluble problem, as was pointed out by the Judicial Committee of the Privy Council in *Canada v. Ontario* (1937) Law Reports, Appeal Cases, pp. 326, 348, 353-4, wherein it held that when a treaty embraces provincial classes of subjects, they must be dealt with by the totality of powers, Dominion and Provincial legislatures together, in other words, by cooperation between the Dominion and the several provinces. Here, the same end can be attained by cooperation between the Federal government and the states. Such a procedure would give due recognition to the reserved powers of the states.

It is also suggested that the treaties to which I have referred and other like treaties will not receive approval by the Senate. I hope that is true. But the lessons of history tell us that unlimited power in the agents of government is dangerous and liable to be abused.

It is my firm conviction, after careful and painstaking consideration of the problem, that only by proper restriction of the treaty-making power, through Constitutional amendment, can we be sure that the rights of the states and the people and the precious liberties and fundamental freedoms of the individual citizen will be safeguarded and preserved.