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Moses H. Moses

The Treaty-Making Power is Not a Peril

*by Moses H. Thompson**

THE POWER TO MAKE TREATIES with foreign nations, as a sovereign right, has been exercised by our federal government under our Constitution for over one hundred and seventy years. It has been utilized as a fundamental part of our defense against aggression and has been exercised successfully in dealing with the other world powers in all matters. In times past a great nation could close its borders to cultural and economic introgression for extended periods by maintaining huge border armies to check the migration of people. It was probably a fear of ideas more than the fear of foreign tribes. Today isolationism in any form is but a fabulous dream. The populace no longer limit their thoughts to things that happen in the United States. We are living in an era of television, atomic development and supersonic speed; what happened in Budapest or Rome today is common conversation in United States tomorrow. Because of this international awareness, we realize that in order to remain leaders in world affairs we must live with the world and not as a *disjecta membra.* One of the primary sources of a nation's ability to live peaceably in this world is vested in the sovereign prerogative of making international agreements and sustaining diplomatic intercourse with its neighbors.

In the United States the treaty-making power is vested in our President and the Senate.[1] Many persons fear this power; they feel that it is so great that it could be used as an instrument to destroy our American democracy. They fear that by treaty the Constitution of the United States may be repealed and replaced by political concepts that are multifarious to our basic

* Moses H. Thompson is a former editor of the Cleveland-Marshall Law Review. He was graduated from Sandusky High School and attended West Virginia State College. During World War II he served in the European Theater of Operations with the United States Army Signal Corps. He is married and the father of two children.

1 U. S. CONST. Art. II § 2, clause 2. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

freedoms. Because of the structure of our government I feel that these fears are not well substantiated. Fears were voiced by our early leaders while the Constitution was in its embryonic state. James Madison, the "Father of the Constitution," ably defended the power by these words:

> "I think it (the treaty making power) rests on the safest foundation as it is. The objects 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 regulations would be necessary. Would it be right to define all cases in which congress could exercise its authority? The definition might, and probably would, be defective. They might be restrained by such a definition from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise." [2]

This statement is a partial revelation of the theory behind our Constitution which makes it one of the most magnificently constructed documents in the world. The words that best fit this theory are *flexibility* or *elasticity*. The Constitution is not a precise mold into which a nation has to be fitted. The Constitution allows for expansion, in social as well as political concepts. This elasticity gives the nation an opportunity to grow in a kaleidoscopic environment. Because of this idea the treaty power is not a precise power which can be measured by exacting language.

The treaty-making power does have its limits and restraints. The first of these can be found in Article II, section 2, clause 2 of the Constitution of the United States[3] which gives the President power to make treaties with the advice and consent of two-thirds of the Senate. The Senatorial concurrence that is necessary is a positive restriction. This is the only restriction contained in the Constitution; the other restrictions are found in the peculiar nature of the power itself in relation to our federal statutes and the decisions of our federal courts in regard to treaties. The restraints are there by implication.[4] As stated by Randolph Tucker:

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[2] 3 Eliot, Debates (2d ed. 1876) 514, 515.

[3] See note 1 *supra*.

[4] Swayne, Justice: "It need hardly be said a treaty cannot change the Constitution or be held valid if it be in violation of the instrument. This results from the nature and fundamental principles of our government. The effects of treaties and acts of Congress, when in conflict, is not settled by

> "A treaty, therefore, 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. We may suggest a further limitation. A treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will." [5]

As incomprehensible as the thought may be, there are those who feel that a treaty can abrogate the Constitution. The basis of their consternation is Article VI of the United States Constitution which states that treaties *"shall be the supreme law."* [6] The words of Article VI, clause 2 of the Constitution can have only one meaning which is that it, the Constitution, is the supreme law to which all other laws shall be subject and necessarily subordinate. The Constitution is the *law.* (Emphasis supplied.) All existing laws in the United States were made pursuant thereto and all future laws must be made pursuant thereto. If the laws were put in their order first in rank would be the Constitution, second, laws and treaties of the federal government, third, constitutions of the respective states, fourth, laws passed by state legislative bodies, and fifth, local laws (county, township and city ordinances).[7] Treaties are placed in the same category as federal statutes and have the same force and effect.[8]

This treaty-making power that is in the hands of the executive branch embraces numerous fields. The fields that may be embraced are to be considered as broad as the power itself appears to be. Usually it involves trade agreements between nations, agreements for non-aggression or mutual de-

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the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (Foster v. Neilson, 2 Pet. 314) and an act of Congress may supersede a prior treaty." The Cherookee Tobacco, 11 Wall. 616, 620 (U. S. 1870); Chinese Exclusion Cases, 130 U. S. 581, 600 (1889); Head Money Cases, 112 U. S. 580, 597, 599 (1884).

[5] 2 Tucker, *Constitution of the United States* (1899), p. 715.

[6] U. S. CONST. Art. VI clause 2. "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, anything in the Constitution or laws of any state to the contrary notwithstanding."

[7] Findlay, *Your Rugged Constitution* (Rev. ed. 1952), p. 185.

[8] Palmeri v. Stockton Theatres, 32 Cal. 53, 195 P 2d 103 (1948).

fense or the treatment to be granted the citizens of the contracting nations[9] while resident in the respective countries. It is used when new territory is acquired and provisions have to be made for the establishment of government.[10] Also this power was employed extensively when the government was dealing with the various Indian nations.[11] Problems arising from extradition of foreign citizens have been handled by treaties drawn up between nations.[12] Butler, in his work on the treaty-making power, strongly maintains that the national government may by treaty cede even an entire state, if it is necessary to preserve the interest of the whole nation.[13]

Individual states fear this treaty-making power because its ultimate effect might be to abrogate important parts of their Constitutions and negate some of their statutory laws.[14] There is a judicial requirement that a treaty be construed liberally so as to carry out the intention of the contracting nations but not so far as to infringe the Constitution of the United States or to invade the province of the state in matters which are inherently within the power of the state.[15] But this is not very clear reasoning in light of the famous case of *Missouri v. Holland*,[16] in which case the State of Missouri sought an injunction against the United States game warden. The State contended the statute was an unconstitutional interference with the reserved rights of the State and the acts of the defendant invaded the sovereign rights of the state. In his opinion Mr. Justice Holmes justified

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[9] De Geofroy v. Riggs, 133 U. S. 258, 267 (1890); Dorr v. United States, 195 U. S. 138, 140 (1904); *See Also* Chirac v. Chirac, 2 Wheat. 259 (U. S. 1817); Sullivan v. Kidd, 254 U. S. 433 (1921).

[10] Downes v. Bidwell, 182 U. S. 244, 279 (1901); *See Also* De Lima v. Bidwell, 182 U. S. 1 (1901); Goetze v. United States, 103 Fed. 72 (1900), *rev'd in* 182 U. S. 221 (1901).

[11] Jones v. Meecham, 175 U. S. 1 (1899), *citing* Johnson v. McIntosh, 8 Wheat. 543 (U. S. 1843); Mitchell v. United States, 9 Pet. 711, 748 (U. S. 1835); United States v. Brooks, 10 How. 422 (U. S. 1851); New York Indians v. United States, 170 U. S. 1 (1898).

[12] Glucksman v. Henkel, 221 U. S. 508 (1911); *See Also* Grin v. Shine, 187 U. S. 181 (1902); Pierce v. Creecy, 208 U. S. 616 (1908).

[13] 1 Butler, *Treaty-Making Power of the United States* (1902), 411-413: 2 id. 238 et seq., and particularly, 387-394.

[14] Martin v. Hunter, 1 Wheat. 304 (U. S. 1816).

[15] Antosz (Jantoz) v. State Compensation Com'r, 130 W. Va. 260, 43 S. E. 2d 397 (1947).

[16] 252 U. S. 416 (1919); 11 A. L. R. 984.

the right to abrogate the sovereign police powers of the state by Congress in executing the treaty by the President with the consent of the Senate, by writing:

> "To answer this question it is enough to refer to the 10th Amendment, reserving the powers not delegated to the United States, because by article 2, section 2, the power to make treaties is delegated expressly and by article 6, 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 1, section 8, as a necessary and proper means to execute the powers of government." [17]

This literally means that a statute which would be unconstitutional if enacted by Congress under its own delegated powers becomes constitutional through the exercise of the treaty-making power by the President.[18] But despite this decision it must be noted that even though an act of Congress is necessary to make some treaties operative, Congress has the power to pass a subsequent act which would nullify a previous act.[19] This is another indication of a restraint on the treaty-making power. Mr. Chief Justice White in *Raney v. U. S.*[20] wrote:

> "Treaties are contracts between nations, and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from any making change, but if it does not act its enactment becomes the controlling law in this country * * *"

This is consistent with other checks and balances that are positive elements of our governmental structure. The same idea is brought forth in *Hijo v. United States*[21]:

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[17] Id. at 423.

[18] *Contra*: Prevost v. Greneaux, 19 How. 1 (U. S. 1856).

[19] Harlan, Justice: "It is true that Congress did not, we assume, intend by the Foraker Act to modify the treaty, but, if that act were deemed inconsistent with the treaty, the act would prevail; for an act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject." Alvarez Y Sanchez v. United States, 216 U. S. 167, 175 (1908).

[20] 232 U. S. 310, 316 (1914).

[21] 194 U. S. 315, 324 (1904); *See Also* Thomas v. Gay, 169 U. S. 264, 271 (1898); Horner v. United States, 143 U. S. 570, 578 (1892); Kelley v. Hedden, 124 U. S. 196 (1888); Whitney v. Robertson, 124 U. S. 190, 194 (1888).

> "* * * for, it is settled that in case of a conflict between an act of Congress and a treaty,—each being equally the supreme law of the land,—the last one in date must prevail."

A treaty and an act of Congress are both declared to be a supreme law of the land; one is not considered superior to the other. If the subject matter to which they relate are the same the courts will construe them in such a way that they may both be sustained.[22] If they are construed to be inconsistent and the treaty is *self executing*[23] (emphasis supplied), the one later in date will control the subject matter.[24] A treaty like a federal statute can be nullified by a subsequent act of Congress. This was expressed in *United States v. Yee Tai*[25] by Justice Harlan in the following manner:

> "That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by a statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with other nations, so the United States may by treaty supersede a prior act of Congress on the same subject."

It is only natural that treaties should be superior to the laws of every state. There is also a plausible reason why many states fear this power they have delegated. Some state legis-

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[22] United States v. Larivier (43 Gallons of Whisky), 108 U. S. 491, 496 (1887).

[23] "Under the Constitution, a treaty is regarded as equivalent to an act of 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 becomes a rule of the court." Bolshanin v. Zlobin, 76 F. Supp. 281 (1948); *See Also* United States v. Percheman, 7 Pet. 51 (U. S. 1833).

[24] Davis, Notes, *United States Treaty Volume* (1776-1887), 1228, citing Cushing, At. Gen., 6. Op. 296; Foster v. Neilson, 2 Pet. 314; United States v. Arrendona, 6 Pet. 735, "Where a treaty cannot be executed without the aid of an act of Congress, it is the duty of Congress to enact such laws. Congress has never failed to perform that duty. But when it can be executed without legislation, the courts will enforce its provisions." Cook v. United States, 288 U. S. 102 (1933); Ex Parte Webb, 225 U. S. 263 (1912).

[25] 185 U. S. 213, 220 (1902); *See Also* La Abra Silver Mining Co. v. United States, 175 U. S. 423, 460 (1899), citing Head Money Cases 112 U. S. 580, 599 (1884).

latures have enacted legislation that has been nullified by the enforcement of treaty provisions. A good example of this can be found in the case of *Sei Fujii v. State.*[26] The dispute concerned the validity of the Alien Land Law of California. The statute required the escheat to the state of land owned by an alien who was neither eligible for citizenship nor protected by treaty. A resident of Japanese descent who was ineligible for naturalization brought action to determine whether an escheat of his land occurred. Judge Wilson in his first opinion held the act was valid apart from the *United Nations Charter*[27] which as a treaty was not pertinent. Later he declared that the Charter as a treaty was the supreme law of the land and bound all judges in every state and also:

> "The integrity and vitality of the Charter and the confidence which it inspires would wane and eventually be brought to naught by failure to act according to the announced purposes that the restrictions of the statute based on eligibility to citizenship, but which ultimately and actually are referable to race or color, must be and are therefore declared untenable and unenforcible."

And further on:

> "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 purposes announced therein by the framers * * *. Clearly such a discrimination against a people of one race is contrary both to the letter and the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Law must therefore yield to the treaty as the superior authority."

The powers of the President in relation to our international negotiations are not any more dangerous than the powers that were delegated by the people to Congress. This power, if it can be considered an evil, is a necessary one. Congressional enactments express the will of the people and that is all that a treaty does, even though the procedure that gives validity to their acts is different. Justice Wilson in *Ware v. Hylton*[28] expressed the idea by writing:

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[26] 217 P. 2d (Cal. App. 2d) 481, 488 (1950), *rehearing denied* 218 P. 2d (Cal. App. 2d) 595 (1950).

[27] 59 Stat. 1035-1218, June 26, 1945; ratified by the United States Senate, July 28, 1945.

[28] 3 Dall. 199, 280 (U. S. 1796).

> "Independent, therefore, of the Constitution of the United States (which authoritatively inculcates the obligation of contracts), the treaty is sufficient to remove every impediment founded on the law of Virginia. The State made the law; the State was a party to the making of the treaty; a law does nothing more than express the will of a nation, and a treaty does the same."

Justice Swayne also expressed the same viewpoint in *Hauenstein v. Lynham.*[29] It cannot be doubted that the Constitution is superior to all laws and cannot be relegated to a lesser importance. It is also safe to say that the same will of the people that is expressed in the federal statutes is expressed in the treaties made by the executive branch of our government. The only requirement is that it conform to the word and spirit of the Constitution.[30]

Federal courts have the power to construe the treaties as it does congressional enactments but the courts are bound by the construction put on the treaty.[31] Treaties, of course, are more liberally construed by the courts than are legislative enactments.[32] The judiciary will not venture beyond the treaty to discover the authority each contracting nation had to enter into the agreement because such investigation is political and not judicial. This reasoning was well developed in *Doe et al. v. Braden,*[33] which controversy arose from the treaty by which

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[29] Swayne, Justice: "It is the declared will of the People of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void but voidable only, by a repeal or nullification of a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." 100 U. S. 483, 489 (1890).

[30] "A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Constitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced." United States v. Yee Tai, *supra* note 25 at 222.

[31] United States v. Reynes, 9 How. 127 (U. S. 1850).

[32] "It is a canon of interpretation to so construe a law or treaty as to give effect to the object designed, and for that purpose all its provisions must be examined in the light of attendant and surrounding circumstances." Ross v. McIntyre, 140 U. S. 453, 475 (1891); *See Also* Dagno v. Cerri, 93 Ohio St. 345, 112 N. E. 1037 (1916); L. R. A. 1917A; Re. Faltosin, 33 Misc. 18, 67 N. Y. Supp. 1119 (1900).

[33] 16 How. 635, 657 (U. S. 1853); 3 Willoughby on the Constitution of the United States (2d ed. 1929) sec. 849, p. 1332.

Florida was ceded to the United States. The plaintiff claimed the land under a grant from the King of Spain to the Duke of Aragon; the court found that the treaty as a law of the United States prevailed and the action could not be maintained. In the words of Justice Taney:

> "It is said, however, that the King of Spain by the Constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.
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> "But these are political questions and not judicial. They belong exclusively to the Political Department of the government.
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> "By the Constitution of the United States, the President has the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. And he is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations; and is thereby enabled to obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty, and under what limitations, and how far the party who ratifies the Treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion, by treaty stipulations. And the Constitution declares that all treaties made under the authority of the United States should be the supreme law of the land.
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> "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 * * *"

And further on:

> "And it would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide when the person who ratified the treaty in behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered."

Also the court does not have the power to decide whether a particular treaty has been breached. Whether a treaty, a contract between nations, has been breached can only be con-

sidered when Congress emphatically declares it broken. Judge Swan in the *George Warren Corporation v. United States*[34] wrote:

> "It is not for a court to say whether a treaty has been broken or what remedy shall be given; this is a matter of international concern, which the two sovereign states must determine by diplomatic exchanges, or by such means as enables one state to force upon another the obligation of the treaty."

And further reasoning was presented when he wrote in the same case:

> "Obviously, it would not do for the courts to declare an act is a breach of treaty and results in this or that remedy. The remedy accorded might not content the foreign power or might bring about a conflict between the executive and judicial branches of our government."

Although no treaty has ever been declared unconstitutional by a court there is dictum to the effect that if called on to do so the courts would not hesitate to declare one beyond the powers granted by the Constitution. It may some day be the duty of our Supreme Court to take such a stand to preserve the Constitution and the nation. There should be no doubt that they would exercise this prerogative in the proper case. As Justice Angellotti wrote in his opinion in *Ex Parte Heikich Terui*:[35]

> "We are aware of no decision of the Supreme Court of the United States by which a treaty provision has been declared to be beyond the treaty power, but it may fairly be claimed that there are such matters."

The framers of our Constitution did not enter into the treaty matter without extensive debate. It was questioned in all its particulars and aspects and was found to be a necessary attribute of sovereignty. What foreign nation would have been foolhardy enough to have attempted to negotiate with thirteen states separately and expect to develop a satisfactory international relationship? Today with forty-eight states it would be even more discouraging and futile. The treaty-making power has its limitations and can be controlled; if the restrictions are not strict enough in written form they are well provided for

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[34] George Warren Corp. v. United States, 94 F. 2d 597, 599 (1938); Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185 (1920), *writ of certiorari denied in* 254 U. S. 643 (1920); Charlton v. Kelley, 229 U. S. 447 (1913).

[35] 187 Cal. 20, 200 P. 954, 956 (1921); 17 A. L. R. 630.

by implication. It is not a power that has to be feared as a menace to our way of life. Our democratic government is more than a mere body of laws; it is more of a living thing; a combination of laws, trust and people endowed with a profound love of freedom. The men who lead our nation are elevated to these positions of trust by those who believe they will serve their country faithfully.[36] Of course, if this trust is breached there are remedies that go beyond public censure. I do not conceive, in the light of this, that we should fear the treaty making power. One treaty or a series of treaties during one brief period in our history could not destroy the Constitution or even undermine it enough to upset our established form of government. By emasculating the treaty-making power we would be weakening our constitutional form of government in order to quell a fear that is abeyant.

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[36] Madison: *supra* note 2, "It is not to be presumed that, in transactions with foreign countries, those who regulate them will feel the whole force of national attachment of their country. The contract being between their own nation and a foreign nation, is it not presumable they will, as far as possible, advance the interest of their own country?"