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THE AMERICAN CONSTITUTION AND THE TREATY MAKING POWER

HONORABLE JOHN J. PARKER†

The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This sixth annual lecture was delivered on February 26, 1954.

I esteem it a great honor to be invited to deliver the Tyrrell Williams Lecture at this University; and I am doubly appreciative of the honor because you have permitted me to address you on what I consider the greatest legal question now confronting the people of this country, the question as to whether or not we shall amend our Constitution with respect to the treaty making power. Ordinarily, I should prefer as a judge to speak on some non-controversial subject; but I am glad to speak on this because some of the proposals that have been made seem to me to be fraught with grave danger to our constitutional structure and to the future of the nation. It is written in the Constitution of my state that a frequent recurrence to fundamental principles is necessary to preserve the blessings of liberty.[1] In what I shall have to say, I shall ask you to consider with me the fundamental principles of our Constitution, how those principles have been applied in setting up the treaty making power therein contained, how proposals which have been put forward conflict with our constitutional structure and how they would hamper us in meeting the problems and responsibilities of the dangerous new world into which we have moved.

The American Constitution was rightly described by Mr. Gladstone as ". . . the most wonderful work ever struck off at a given time by

† Circuit Judge, United States Court of Appeals, Fourth Circuit.
1. N.C. CONST. Art. I, § 29 (1868).

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the brain and purpose of man."[2] It is the charter of our liberties under which we have grown to greatness. From thirteen poverty stricken colonies fringing the Atlantic, with a population less than half the present City of New York, we have grown until our bounds stretch from ocean to ocean and one hundred and sixty millions of souls live beneath the flag. Not only has our country become the richest and most powerful nation on the face of the earth, but what is infinitely more important, she has guaranteed to our people a measure of freedom and a wealth of opportunity that no other people have ever known.

Our Constitution is the embodiment in the fundamental law of the country of the basic philosophy set forth in the Declaration of Independence. It sets up a framework of government based upon three fundamental concepts: (1) that government must respect and preserve the rights of the individual; (2) that government must rest upon the consent of the governed; and (3) that government must be based on law and not on arbitrary will. The first concept is spelled out in the bill of rights, in which we guarantee to every citizen of the country the fundamental rights of a freeman, not only against infringement by executive officers but against the entire power of the state. The second concept is embodied in the federal system under which the several states govern themselves in local matters while the federal government controls with respect to matters of national and international concern. The third concept is embodied in the separation of powers provided by the Constitution, giving executive power to the President, legislative power to the Congress and judicial power to the courts, with a system of checks and balances so adjusted that for none of them does there exist the possibility of arbitrary action. Congress can make laws but it cannot enforce or interpret them. The President can enforce the laws but he is dependent upon Congress to create the instrumentalities and provide the funds for enforcement. The courts interpret the laws but they are dependent upon the executive to enforce their decrees and upon the legislature to provide judicial machinery and the salaries of judicial officers.

In setting up the framework of government the Constitution does not give us a blueprint but vests power in general terms and depends upon the division of power and the system of checks and balances to guard against abuse. The President is vested in general terms with "the executive power" and the power of appointing public officers and is made Commander in Chief of the Army and Navy. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. The legislative power is vested in Congress with respect to matters within the juris-

2. Gladstone, *Kin Beyond the Sea*, N. AM. REV. 185 (1878).

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diction of the national government. The founding fathers realized the folly of attempting to prescribe in detail how governmental power should be exercised amid conditions of the future which not even the wisest could foresee. They thought, and thought rightly, that they had made the best possible provision against the dangers of the future when they laid down the general principles upon which governmental power was to be exercised and, by the division of power and the system of checks and balances, gave to different agencies of government the duty of checking upon the exercise of power by each other and seeing that these principles were observed. In this way they provided for adherence to correct principles while allowing the greatest flexibility in the application of governmental power.

The exercise of the treaty making power, the power of dealing with foreign nations, presents a subject of peculiar difficulty to a federal state such as ours in which the component states exercise sovereign power in local matters, for treaty making does not relate, as some persons seem to think, only to matters lying beyond the boundaries of the country. Treaties regulate our relationships with foreign nations and peoples; and these relationships concern matters which are subject to regulation at our end of the relationship by the several states of our union. Treaties of friendship, commerce and navigation relate to the rights of our citizens to trade, travel and carry on business in foreign countries and of the citizens of such countries to carry on like activities here. Some of the matters dealt with, such as foreign commerce and the navigation of rivers and other navigable waters, are matters which, in the absence of treaty, would be subject to the control of the federal government. Others, such as the right to own and inherit property, to carry on business in corporate form, to practice professions, etc., are matters which, in the absence of treaty, would be subject to the powers of the several states. Treaties must deal with all of these matters; but it is perfectly clear that it would never do to have the several states entering into treaties with foreign nations with regard thereto. The treaty making power must be centered in the national government which represents all of the states and must be exercised by it not only with respect to matters which, in the absence of treaty, would be subject to the control of the federal government, but also with respect to those, which in the absence of treaty would be within the control of the states. In no other way could a federal state deal satisfactorily with foreign nations; and the failure of the Confederation, which existed prior to the adoption of the Constitution, to provide some such centralized power for handling foreign affairs was one of the chief sources of its weakness and failure.

The Constitution deals with the subject briefly, but comprehensively, in line with the sound policy of laying down controlling principles and

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vesting power in general terms with such a system of checks and balances as will guard against abuse. Section 10 of Article I provides that "No state shall enter into any treaty, alliance or confederation." Having thus deprived the states of the treaty making power, the Constitution vests it in the President but subject to the control of the Senate, providing in Article II, Section 2, "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 then gives treaties, along with acts of Congress, precedence over state laws by the Supremacy Clause of Article VI which provides: "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." The difference between the language relating to treaties and that relating to laws is due to the fact that treaties made by the United States before the adoption of the Constitution, such as the treaties with Great Britain and France, were to be given supremacy under it. While such treaties were made under the authority of the United States, they were not made pursuant to the Constitution.[3]

Some persons seem to have become excited because they have recently discovered (what constitutional lawyers have known from the time of the adoption of the Constitution) that the treaty making power extends to matters which in the absence of treaty would be subject to the jurisdiction of the states under our federal system and that, when a treaty is adopted with respect to such a matter, Congress, under the "necessary and proper" clause of Article I Section 8, can pass legislation necessary to effectuate the treaty. They say that this constitutes a danger to our constitutional system and amounts to allowing treaties to amend the Constitution. There is no basis whatever for any such fear. Good lawyers ever since the adoption of the Constitution, and certainly since the decision in *Ware v. Hylton*,[4] have understood that treaties relating to matters otherwise within the jurisdiction of the states take precedence over state laws and that Congress has power to implement such treaties as it has power to enact any other laws necessary and proper to the functioning of the federal government and the enterprises into which it properly enters. This is no violation even of the Tenth Amendment to the Constitution. As said by Mr. Justice Holmes, speaking for the court in *Missouri v. Holland*:[5]

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal

3. See Ware v. Hylton, 3 Dall. 199 (U.S. 1796).
4. *Ibid.*
5. 252 U.S. 416 (1920).

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> with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act.[6]

Instead of revealing a danger or a "loophole" in the Constitution, the decision in *Missouri v. Holland* illustrates the wisdom of its provisions. That case dealt with a treaty between the United States and Canada with respect to the protection of migratory wild fowl; and the specific point decided was that, because of the treaty, Congress had power to pass statutes in protection of migratory wild fowl that it would not have had in the absence of treaty. Nobody would contend that under our federal system the power to enact hunting laws generally should not be vested in the states rather than in the federal government; and it is equally clear that the protection of migratory wild fowl is a proper subject for international agreement. The treaty was properly made, therefore, by the federal government in the exercise of the power vested in it by the states and was properly implemented by an act of Congress. If it could have been made effective only by legislation which would have been valid in the absence of treaty, as proposed by the Bricker Amendment, its enforcement would have depended upon legislation by the several states in which local influences might have prevented legislation. It is unthinkable that a sovereign nation should be limited and hamstrung in this way in dealing with matters which may be of the first importance to its national existence. To quote again from Mr. Justice Holmes in *Missouri v. Holland:*

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.[7]

The rights of the states are, of course, entitled to protection, but there is no basis in experience or in reason for denying to the federal government effective use of the treaty making power to meet situations which involve matters within state jurisdiction. The Constitution has wisely provided adequate protection for the rights of the states in requiring the assent of two thirds of the Senators present to the ratification of a treaty. Senators are elected by the people of the

6. *Id.* at 433.
7. *Id.* at 435.

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several states. They are almost invariably men of wide experience, great wisdom and profound attachment to the principles of our government. It is inconceivable that two thirds of them would ever give their consent to a treaty which would unjustifiably infringe upon the rights of the several states or would violate any of the principles embodied in our fundamental law. Advocates of constitutional amendments point to objectionable treaties that have been proposed by international groups; but they are unable to point to a single treaty ratified by the Senate that they would be willing to abrogate. It is right here that I base my principal argument that the present provisions of the Constitution are sufficient. If the time ever comes when the President and two thirds of the Senators are willing to enter into treaties which would impair our constitutional structure or surrender the rights of citizens of this country to foreign powers, we shall have reached such a stage of national deterioration that nothing that we might write in the Constitution would do us any good. It is said that bad treaties might slip by when Senators are not watching; but dangerous treaties will certainly be recognized as such by somebody, and, if one should slip by, a contingency that has not happened in the past, it would be a simple matter to abrogate it by a joint resolution of Congress. The concept of this great government of ours being a stupid giant without the wit to protect its essential interests is one which should make little appeal to intelligent and patriotic men.

There are other safeguards against subversive treaties in addition to the requirement of ratification by two thirds of the Senators. In the first place, it is perfectly well settled that a treaty which violates an express provision of the Constitution is void, just as an act of Congress which violates such a provision is void. As said by Mr. Justice Field speaking for the Supreme Court in *Geofroy v. Riggs*:[8]

> The treaty power, as expressed in the Constitution, is in terms unlimited *except by those restraints which are found in that instrument* against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. [Italics added.][9]

In the earlier case of *The Cherokee Tobacco*,[10] the Supreme Court, speaking through Mr. Justice Swayne, said:

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our govern-

8. 133 U.S. 258 (1890).
9. *Id.* at 267.
10. 11 Wall. 616 (U.S. 1870).

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ment. The effect of treaties and acts of Congress, when in conflict, is not settled by 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, [11] and an act of Congress may supersede a prior treaty.[12] [13]

Do you imagine for a moment that, if this government should enter into a treaty or series of treaties changing the basis of representation in Congress or abolishing the writ of habeas corpus, or the right to compensation upon the exercise of eminent domain, or limiting religious liberty or freedom of speech or of the press, the Supreme Court would uphold the treaties against the guaranties of the Constitution? To ask such a question is to answer it.

In the second place, in so far as they constitute domestic law, treaties are subject to Congressional action at any time; and, if the President and Secretary of State and two thirds of the Senate should foist upon the people a treaty which infringed their liberties, a proposition so remote as to be unthinkable, the Congress could nullify it at any time in so far as it constitutes domestic law by passing a statute to that effect. Of course it would require a two-thirds vote of Congress to override a presidential veto if the President should veto the act; but it is as absurd to assume that two thirds of Congress would not support constitutional rights as it is to assume that two thirds of the Senate would be willing to override them. The decisions leave no doubt that in so far as domestic law is concerned a subsequent act of Congress takes precedence over the provisions of a prior treaty. In the *Head Money Cases*,[14] the Supreme Court said:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced

11. Court footnote: "Foster & Elam v. Neilson, 2 Peters, 314."
12. Court footnote: "Taylor v. Morton, 2 Curtis, 454; The Clinton Bridge, 1 Walworth, 155."
13. The Cherokee Tobacco, 11 Wall. 616, 620, 621 (U.S. 1870).
14. 112 U.S. 580 (1884).

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in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

. . .

In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.[15]

And in the *Chinese Exclusion Case*,[16] the Supreme Court said:

The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.[17]

Treaties, however, are not the only means of dealing with foreign nations. As the President as chief executive of the country goes about the handling of the nation's affairs, he necessarily comes in contact with other nations. Treaties require time for the making and are generally negotiated to provide a *modus vivendi* over a considerable period of time. Situations are constantly arising, however, calling for immediate cooperation with foreign nations with respect to some matter for which treaties have not provided and these are handled by executive agreements. By far the greater number of these agreements are authorized in advance by acts of Congress, as in the case of agreements made pursuant to the reciprocal tariff acts. Others are made subject to subsequent approval by Congress. Some are made by the President under the powers conferred upon him as Commander in Chief of the Army and Navy, or under his power to see that the laws are faithfully executed or his power to receive ambassadors or other public ministers. All are in a very real sense subject to control by Congress since the money to carry out such agreements must come

15. *Id.* at 598, 599.
16. 130 U.S. 581 (1889).
17. *Id.* at 600.

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from appropriations made by Congress and certainly, as held by our court in the case of *United States v. Capps*,[18] they are void if they conflict with the Constitution or with laws passed by Congress in the exercise of its constitutional powers.

The executive agreements made by the President in the exercise of the powers inherent in his office as chief executive are of tremendous importance; and it seems perfectly clear that Congress may not be allowed to interfere with them without destroying the power which the chief executive of the nation must have to wage war or make peace successfully. It was an executive agreement that declared the armistice at the end of the Spanish American War. It was through executive agreements that we cooperated with our allies in the war of the Boxer Rebellion in China, in the first and second World Wars and in the war in Korea. It was by executive agreements that the first and second World Wars were ended, the armistice negotiations set up in Korea, conquered territory governed, war criminals tried, the Berlin airlift put in operation. Powers of this sort must be exercised by the President as Commander in Chief. To subject them to control by Congress would be to sacrifice the unity, the celerity and the resolution which are essential to their effective exercise.

In recent months proposals have been made to amend the Constitution so as to limit the treaty making power and the power of the President to enter into executive agreements. The reasons advanced are fears that the constitutional liberties of our people may be surrendered through treaties and that the nation may be committed to unwise undertakings through executive agreements. I find nothing in the history of the country which justifies the fears; and an examination of the proposals advanced shows that they would radically alter our constitutional structure, would weaken the executive and would so hamper the handling of our foreign affairs as to render it practically impossible for us to exercise that leadership of the free world which we must exercise if our own liberties and the liberties of other free peoples are to be preserved. I shall not deal with all the proposals which have been advanced but merely with those which have become identified as the Bricker proposals, *i.e.*, S. J. Res. 130 of the 82nd Congress,[19] S. J. Res. 1 as introduced in the 83rd Congress[20] and the same resolution as reported with amendments by the Senate Committee on the Judiciary.[21]

All of the resolutions referred to contained a clause providing for

18. 204 F.2d 655 (4th Cir. 1953).
19. S. J. RES. 130, 82nd Cong., 2nd Sess., 98 CONG. REC. 5223 (1952).
20. S. J. RES. 1, 83rd Cong., 1st Sess., 99 CONG. REC. 160 (1953).
21. SEN. REP. NO. 412, 83rd Cong., 1st Sess., 99 CONG. REC. 6989 (June 18 1953).

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the supremacy of the Constitution. This clause as contained in the resolution reported by the Senate Judiciary Committee is as follows:

> A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.[22]

This provision is merely declaratory of existing law as I have heretofore shown. The only objection to it is that, if interpreted in accordance with existing decisions, it is absolutely unnecessary. A solemn instrument like the Constitution ought not be amended to put at rest the groundless fears of the timid or uninformed. The only danger I see in it, is that the courts might interpret it as intended to limit the treaty making power by the Tenth Amendment so as to forbid the making of treaties with respect to matters which, in the absence of treaties, would be within the jurisdiction of the several states, a matter which I shall discuss hereafter in connection with the "which" clause. I regard this danger, however, as remote. The only real objection is that it is ridiculous to amend the Constitution for the purpose of saying what the courts have already said that it means to satisfy the fears of those who are afraid they might decide differently in the future. If you can't trust the President, the Senate, the Congress or the courts, who, in Heaven's name, can you trust?

S. J. Res. 130 and S. J. Res. 1 contained a provision outlawing international agreements which has been dropped from the resolution reported by the Senate Judiciary Committee. As contained in S. J. Res. 1, that provision was as follows:

> No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.[23]

This provision would outlaw the control by an international organization of the production of atomic energy as proposed by the Baruch plan. It would preclude agreements with our allies giving them control over their troops quartered in our territories. It would impair our power to make agreements with allies for the unification and direction of armed forces, since the control of our armed forces is essentially a matter within our jurisdiction. It would eliminate agreements for arbitration or juridical settlement of controversies of an international character to which our nationals are parties. If we are to establish a world order based on law, as distinguished from selfishness and force, arbitration and juridical process must have wider and wider acceptance. This amendment would have outlawed such simple arbitrations as that under which citizens of this country recovered an

22. *Id.* § 1.
23. S. J. RES. 1, *supra* note 20, § 1.

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award in the "Black Tom" litigation.[24] It would outlaw the agreements for juridical settlement contained in the Convention on International Civil Aviation. For this country to refuse to permit arbitration or the juridical settlement by an international tribunal of a dispute over which it has jurisdiction, is not essentially different from an attempt by one of the states of the union to preclude adjudication in a federal court of a dispute of which its state courts would have jurisdiction. Such narrow parochialism would be unworthy of this great country, and would definitely preclude it, in my opinion, from achieving successful world leadership. This provision has fortunately been dropped from consideration. The fact that it was ever proposed shows the confusion of thought that has attended efforts to amend the treaty making power.

S. J. Res. 130 and S. J. Res. 1 contained provisions which would outlaw self-executing treaties, *i.e.*, treaties which become effective upon ratification by the Senate without further action by Congress. The resolution as reported by the Senate Judiciary Committee went further and added the "which" clause that would require legislation by the states to give validity to such a treaty as was considered in *Missouri v. Holland, i.e.*, a treaty dealing with matters which in the absence of the treaty would be subject to the control of the states such as the right to own and inherit property, to carry on business, etc. There can be no question in the mind of any informed lawyer that this is what the proposed provision means. It is as follows:

> A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.[25]

Even without the "which" clause, this provision of the Bricker Amendment is most objectionable. It would give us the most cumbersome treaty making procedure in the world. It would mean that every treaty which would have effect as internal law, and most treaties contain provisions which would have such effect, after being negotiated by the President and Secretary of State and ratified by two thirds of the Senate, would have to be passed as laws by both houses of Congress and signed again by the President. It is worth noting that at the last session of Congress, twenty-three treaties were ratified, twelve of which would have been unconstitutional if the Bricker Amendment had been in effect. On eight of these treaties the vote was 86 for and 1 against. Of course, the legislative branch of the government should have a voice in the making of treaties. It is given this voice, however,

24. Lehigh Valley R.R. v. Germany, MIXED CLAIMS COMMISSION—UNITED STATES AND GERMANY, Decisions and Opinions 967 (1933), 25 AM. J. INT. LAW 147 (1931). See also, 27 AM. J. INT. LAW 345 (1933); HUDSON, CASES ON INTERNATIONAL LAW 1155 (2d ed. 1936).

25. SEN. REP. No. 412, *supra* note 21, § 2, *amending* S. J. RES. 1, *supra* note 20, § 2.

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in the provision requiring ratification by two thirds of the Senators. A provision requiring ratification by both houses of Congress was defeated in the Constitutional Convention by a vote of 8 to 1. Alexander Hamilton, in *The Federalist*, No. 75,[26] points out the unwisdom of bringing the lower house of Congress into the treaty making process; and the reasons which he gives are just as valid today as when he wrote that article. I see no reason to hamper the exercise of the treaty making power in this way when no dangers have resulted under the present constitutional system. We are told that other nations require approval of treaties by their legislative bodies; but the answer is that they do not require double approval. We have been getting along safely for more than a century and a half under a system that requires approval by two thirds of the Senate instead of the approval of the majority of both houses required by some other countries. If our safeguard is sufficient, there is no reason to encumber the treaty making power by requiring theirs in addition to ours.

The "which" clause would take us back to the evils which existed under the Confederation and which the Constitution was intended to remedy. Treaties would become effective as to matters otherwise within the jurisdiction of the states only through legislation which would be valid in the absence of treaty, which means action by state legislatures. In a memorandum attached to the testimony of the Secretary of State before the Senate Judiciary Committee the following statement was made with respect to such treaties:

> There are a large number of treaty provisions, many of which were concluded in the early days of this Government, which prevail over inconsistent State laws on subjects where, in the absence of treaty provisions, the authority of the Congress to legislate was considered nonexistent, or at least questionable.
>
> The number of subjects to which those provisions relate is relatively small, but each of them is important. The necessity for treaties on most of the subjects mentioned has long been recognized as an important factor in the development and maintenance of friendly relations with foreign nations.
>
> While not to be considered as all-inclusive, the following is a representative list of such subjects covered in treaties concluded by the United States:
>
> Real and personal property rights of aliens, especially in connection with the right to inherit and dispose of property and the proceeds thereof.
>
> Regulation of fisheries of international concern.
>
> Regulation of migratory birds and other wildlife of international concern.
>
> National treatment of aliens as to taxation.
>
> Exemption of consular officers of other nations from taxation.
>
> Rights of consular officers in the settlement of estates.

26. THE FEDERALIST No. 75 at 159, 160 (J. C. Hamilton ed. 1888).

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Rights of aliens to engage in trade and related activities, manufacturing, and professional activities.
Control of production and destruction of opium.

Section 3 of the Bricker Amendment, as revised by the Senate Judiciary Committee, is a follows:

> Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.[27]

The effect of this provision is twofold. Since it puts it within the power of Congress to forbid by general statute the making of agreements which it has not authorized in advance, the most important part of the executive power of the President is placed absolutely within the control of Congress. Executive agreements made by the President as Commander in Chief of the Army and Navy, executive agreements made in execution of the power to see that the laws are faithfully executed, executive agreements made in connection with receiving ambassadors and other public ministers, would all be subject to congressional control; and the unity, energy and resolution resulting from vesting control of foreign affairs in the head of the nation would be at an end. But this is not all. Executive agreements are by the amendment made subject to the limitations prescribed for treaties, *i.e.*, they would be effective as internal law only through legislation that would be valid in the absence of treaty. In other words, any executive agreement, even one made by the President in time of war as Commander in Chief of the Army with respect to cooperation with allies, control of conquered territory, the handling of prisoners of war or the signing of an armistice, would be subject to regulation by Congress. If it was to have effect as domestic law it would have to be ratified by legislation. If it related to matters within the jurisdiction of the states, such as the exemption of foreign troops from state laws, it would have to be ratified by state legislatures. Surely the President in the exercise of vital governmental power ought not be hampered and hamstrung by any such provision as this. In time of emergency and national danger the President must act promptly. He must not be held back by fear that what he is doing may be violative of congressional regulations or may not be approved by Congress when the emergency has passed. President Jefferson's purchase of Louisiana, President Roosevelt's swapping of old warships for needed land bases, the inauguration of the Berlin Air Lift—these are dramatic instances which we all remember of great national advantage which has resulted from the President's power to act promptly in an emergency. It would be supreme folly to destroy or hamstring that power.

It is argued that mistakes may be made by the President in the

27. See note 25 *supra*.

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exercise of the power. Of course that is so. Mistakes have been made by Presidents, mistakes have been made by Congress and mistakes have been made by the courts; but no mistake that has been made by any of them is as great as would be the mistake of depriving the President of the power to act promptly for the protection of the country in periods of national danger and emergency when prompt action by a President conscious of his responsibility may mean the difference between national safety and disaster. Proponents of the amendment refer to agreements made at Yalta and Potsdam. I haven't the time to discuss the wisdom or unwisdom of those agreements, made at a time when we were engaged in a life and death struggle, and when there was danger that Russia, who had been fighting as our ally, might leave us and side with Japan; but surely it would not be wise to take from the President the power to enter into executive agreements with allies when we are in the midst of war and the future of the country depends upon how we get along with our allies. It is well to remember here the aphorism attributed to Napoleon, "Wars have been won by good generals; wars have been won by bad generals; but no war ever yet was won by a debating society." I do not mean that Congress is a debating society. I do mean that all numerous bodies, composed of representatives of different sections and divergent interests, lack the unity and centralized responsibility necessary for carrying on a war or acting with the dispatch necessary for the meeting of national emergencies. It was for this reason that the framers of the Constitution centered all executive power in a single man.

I have not the time to discuss in detail the various amendments which have been offered in the course of the Senate debate. The one requiring a roll call vote on the adoption of treaties is harmless; but there seems no reason to amend the Constitution to take care of a matter that could be handled by a Senate rule. The amendment to the effect that ". . . no treaty made after the establishment of the Constitution shall be the supreme law of the land unless entered into pursuant to the Constitution," seems to me to be merely declaratory of existing law and unwise for that reason, as it might introduce confusion into a realm of the law that now seems well settled. An amendment to the effect that executory agreements should not be given effect as internal law until supported by an act of Congress might have the effect in a national emergency of dangerously limiting the powers of the President as Commander in Chief of the Army and Navy. The experience of General Washington and President Lincoln with congressional interference with the conduct of war is sufficient proof of the wisdom of leaving the President's power as Commander in Chief absolutely unfettered.

Let me say again, in conclusion, that in my judgment no tampering

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with the treaty making power under the Constitution or with the power of the executive to handle our foreign affairs is needed for the preservation of constitutional rights or for any other purpose. It will impair the efficiency of the government at a point where its efficiency is most needed at this time in our contest with communism, that is, in the handling of foreign affairs and the leadership of the free nations. This would be a calamity beyond the power of language to describe. It is true in the life of nations as it is in the life of the jungle that only the fit survive, and, if democracy is to survive in the world contest with communism, democracy must be efficient. We cannot afford to sacrifice that efficiency anywhere, least of all in the realm of our capacity to make war effectively and cooperate with foreign nations in preserving world peace.

We must not forget that in our lifetime the character of the world in which we are living has completely changed. Improvements in transportation and communication have made it into one great community. Any part of it can be reached from any other part in a few hours' time. Communication is a matter of seconds. A war starting anywhere can involve the entire world community. There is no longer any safety in isolation. The only hope of safety lies in cooperation with other nations and, if we are to avoid a super government, this cooperation must be exercised through treaties and executive agreements. Furthermore it is our country which must take the lead in this cooperation. The civilization of Europe was almost wiped out as a result of the last World War and the free countries of Europe in their attempt to re-establish their civilization look to us for leadership and assistance. All over the world economic and sociological change is under way and the underprivileged peoples everywhere are looking either to us or to Russia for guidance. There has been a greater shift of world power in the last few years than has occurred since the fall of Rome, and out of the chaos arises the sinister figure of Soviet Russia plotting and planning world domination and plunder. If human freedom is to be preserved, our country must form an effective alliance of the free nations; and it is idle to talk of her doing this if the government is to be shackled in handling foreign affairs through amendments of the Constitution which would render more difficult the making of treaties and would hamper the executive in dealing with the allies that we must have in opposing Russian aggression.

Those who advocate the amendments are afraid of the world forces whirling around us; but it should be clear to all thinking men that we must direct these forces or be wrecked by them. There is no safety in retreat into isolationism. We tried that at the time of the first and second World Wars, at the time when we refused to join the League of Nations and the World Court, at the time when we passed the Neu-

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trality Acts. It did not work then and it will not work now. Because we can be destroyed by world forces, we must grapple with them and we must do this when it can be done effectively. So far we have been going ahead manfully with that task. That is the meaning of Dumbarton Oaks and San Francisco, of our adhering to the International Court of Justice and setting up the International Military Tribunal at Nürnberg. It is the explanation of the great foreign policy which President Eisenhower has so eloquently championed before our people and before the nations of the world.

Some of the advocates of the amendments say that they are afraid that under our Constitution we may join in setting up a super government for the world. The truth is that it is only through cooperative effort on the part of the free nations, which involves the use of the treaty making power as we are exercising it, that the setting up of a super government can be avoided. It is unthinkable that the chaotic conditions now existing in world affairs should long continue. Somehow or other, unity and order in human affairs must be attained, either on the basis of reason as we are seeking to attain it, or on the basis of force, as Russia is seeking to attain it. If Russia is stopped, it is we who must stop her; and we cannot do this by ourselves. We can do it only through organizing an alliance of the free nations, and we cannot organize or maintain such an alliance if we shackle the executive head of the country in the handling of foreign affairs. God forbid we should make that mistake.

May I close by saying that in my thinking the real issue in this proposal to amend the treaty making power is whether we propose to take counsel of foolish fears and retreat into isolationism or whether we propose to accept courageously the leadership of the nations of the free world which has devolved upon us. Make no mistake about it, that is the issue; and I do not see how we can decline the challenge of that leadership. The blessed Savior has told us that "For unto whomsoever much is given, of him shall be much required. . . ."[28] We have come out of the greatest war of history with our strength unimpaired and with wealth such as no other nation has ever possessed. Think you they were given us for our own selfish use and enjoyment? It were shameful to think so. They were given us in the providence of Almighty God that we might lead the other free nations of the world in preserving God's greatest gift to man, the gift of human freedom. Let us do nothing which will impair our ability to exercise that leadership.

The arguments of those who favor the amendments are grounded in fear; but the foundations of this Republic have been based not upon fear but upon faith and courage. Under the present provisions of our

28. LUKE 12: 48 (King James ed.).

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Constitution we have grown to greatness. Now that we are great, there is no reason to think that we can no longer trust in them. The President and the Senate have not betrayed us in dealing with foreign nations in the past. There is no reason to think that they will betray us in the future.

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