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THE UNITED STATES TREATY POWER AND LIMITED GOVERNMENT*

The outstanding feature of the American constitutional system is original. In the words of De Tocqueville, the Constitution was based "upon a wholly novel theory which may be considered a great discovery in modern political science." For the first time in history, a people thoroughly imbued with the ideal of individual liberty, through their representatives in a constitutional convention, performed the difficult tasks of strengthening the existing government and at the same time imposing restraints upon that government, in the hope and belief that citizens, thus secured in their rights, would be free men. Those restraints typify the American revolt against the tyranny of government.

The delegates in the Constitutional Convention had learned by bitter experience the truth of the adage, "Misers there be but not of power." They knew that government, which ought to protect liberty and right, often is used to oppress and destroy. They feared above all things the tyranny of the temporary majority, a tyranny which is more intolerable than that of any potentate, because as Burke says, "it is multiplied tyranny." They were too wise to allow individual liberty to depend upon the benevolence of government, so they drew a sacred circle within which government should not penetrate. They set up a constitution which contained fundamental immunities against governmental power and which was intended to protect certain rights of all people, those in the minority as well as those in the majority; aliens as well as citizens.

This "first great experiment in limited government" created a legislative, an executive and a judicial branch subject to constitutional restraints. It is the purpose of this essay to determine whether the treaty power is also limited. Let it be understood at the outset that if this power be unlimited it may ultimately, in its exercise, consume and devastate all of the safeguards that have been so carefully erected to protect individual rights and to prevent arbitrary governmental acts.

In our attempt to establish the proposition that the treaty-making power is consistent with the idea of limited government, it is not necessary that we anticipate every possible use to which the treaty

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power might be applied and introduce a chart specifying in detail everything that can be done and everything that cannot be done by way of treaty. It is not necessary in the defense of our thesis to show that the treaty power is limited in exactly the same manner and to the same extent as the legislative power of Congress. All that *is* necessary is to show that the treaty power is *not unlimited*, either with respect to the degree of power or the number of objects subject to the power. For the purpose of this essay, we are not interested in the treaty power per se. We *are* interested in showing that the treaty power is consistent with limited government, that is to say, that this power rests in *grant* and is not inherent in sovereignty.

The clauses of the Constitution dealing with the treaty power are five in number and read as follows: Art. VI, Sec. 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;" Art. I, Sec. 10, Clause 1: "No state shall enter into any treaty, alliance or confederation," etc. Art. I, Sec. 10, Clause 2: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power," etc. Art. II, Sec. 2, Clause 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." Art. III, Sec. 2, Clause 1: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made *under their authority*."

There is one school of thought which, although ready to admit that our government is limited as far as legislative, executive and judicial powers are concerned, would maintain that the treaty power is unlimited. Their position is that the power to make treaties "is derived not only from the power expressly conferred by the Constitution but that it is also possessed by that government as an *attribute of sovereignty*."¹ The number of adherents to this point of view is apparently on the increase, and it is highly important that we carefully analyze their position and its necessary implications.

Senator Sutherland, now a member of the Supreme Court of the United States, is an exponent of this point of view. He says, "The

1. Butler, *The Treaty Making Power Under the Constitution*, Vol. 1, p. 5.

time is fast approaching, if it be not already here, when we must be able to assert and maintain for that government (our national government) the unimpaired powers of complete external sovereignty. *The complete powers of the governments of other nations must be matched by the complete powers of our own government.* To be obliged to confess, when called upon to deal with some novel but vital matter, that the government lacked sufficient authority, because of the absence of affirmative language in the Constitution, would be most humiliating and regrettable; and to find the power only after a microscopic search of that instrument, and a strained or doubtful interpretation of its words, would be almost as unfortunate. Any theory of constitutional construction which leads to such a result will not bear analysis and must be rejected.”²

What have we here? Substantially, a plea for unlimited power and a repudiation of any limitation by the Constitution of the United States as it relates to the treaty power. In the face of the fact that, except for constitutional restraints, we have a most irresponsible form of government, we are asked to give that government or some departments thereof unlimited power so that we can match the unlimited power of an absolute monarch, with whom we may have dealings. A careful analysis of the statement of Ex-Senator Sutherland will show, first, that in practice he would ignore the Constitution of the United States in the exercise of the treaty making power, and would set up in its stead an extra-constitutional standard, namely, the powers exercised by other nations. Second, the inevitable price that would be paid for this prerogative of unlimited power would be the sacrifice of the rights of the individual. We submit that the first would be highly “unfortunate” and “regrettable,” and as to the second, “Of what advantage are the fundamental rights of civil liberty secured to the people of the United States by their Constitution, which cannot be changed by law, if the treaty making power may take them away at its pleasure, to conciliate some foreign friend at the expense of the loss of such rights secured to American citizens in their own Constitution?”³

Another typical example of the sort of case that is presented to prove the existence of an unlimited treaty power is that of Congressman D. J. Lewis, made shortly before America’s entrance into the World War. He said, “Laws operate only on land over which our government is an exclusive sovereign, and it can thus always so formulate them as to conform to the Constitution. But treaties operate upon

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2. Sutherland, *Constitutional Power and the World Affairs*, p. 170-2.
 3. Tucker, *Limitations on the Treaty Power*, p. 141.

other nations, and therefore must conform to the wills of all the signatory powers. For example: our Constitution guarantees every state a republican form of government. But if a monarchical power were to occupy, say the state of Maine, and vanquish us in a war, the treaty of peace might have to convert such state to a monarchical form of government through conquest, and no court could nullify such treaty on the ground that it violated the Constitution. This was all within the ken of those who made the Constitution. Therefore, while only laws made in 'pursuance' of the Constitution are valid, yet all 'treaties made, or which shall be made under the authority of the United States are valid when properly ratified. Otherwise our first unsuccessful war, involving terms of peace disappointing to some alleged constitutional inhibitions, might find us institutionally impotent to make terms of peace with a superior force. In which event the government would perish, and the whole Constitution with it. In the nature of things, and ex necessitate in case of war, the treaty making right, or power, cannot be subject to any such limitations. It is the right of self-preservation and must be free-footed and free-armed."⁴

At first blush, this statement seems convincing, but upon further analysis it is found to be honeycombed with error. *First*: Congressman Lewis considers treaties only from the standpoint of international contracts. They must also be considered from the standpoint of municipal law by force of Art. VI of the Constitution of the United States making treaties the supreme law of the land. This distinction was recognized by Chief Justice Marshall⁵ and was clearly restated by Justice Miller⁶ as follows: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. It is obvious that with all this the judicial courts have nothing to do and can give no redress. 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. And when such rights are of a nature to be enforced 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." We shall later show that treaties, regarded as municipal law, are subject to constitutional limi-

4. Cong. Record, 64th Cong., 2 sess., p. 4205, Feb. 17, 1917.

5. *Foster vs. Nielson*, 2 Peters 313.

6. *Head Money Cases*, 12 U. S. 598.

tations which the courts can make effective. *Second*: the extreme illustration regarding the destruction of a republican form of government in one of the states by a victorious enemy does not establish the proposition that the treaty power is or should be unlimited. It is an irrelevant consideration. As well might we argue against the very idea of a written constitution in order more readily to accommodate a revolution that might be hatched some time in the indefinite future. The men who framed the Constitution of the United States were not contemplating a system of government for a dismembered union or for a vanquished people groveling under the heel of a conqueror, but they were laying the foundation for a free and independent member of the society of nations. *Third*: the argument that "the government would perish, and the whole Constitution with it" because we are "institutionally impotent" is so obviously a non-sequitur that it requires no further comment. Prof. Quincy Wright has said, "A treaty, although manifestly violating the Constitution, if necessary to secure peace, would, like revolution or intervention, be justified by its success in preventing a worse situation. It would have to be accepted as a *fait accompli* by the courts and the other organs of the government, but it would nevertheless be illegal in its origin."⁷

The chief argument relied upon by the advocates of an unlimited treaty power is the fact that the Constitution does not specifically enumerate the things that can be done by treaty, nor does it expressly prohibit the doing of any particular thing by treaty. It is true, as Mr. Elihu Root has said, "The treaty power is not distributed; it is all vested in the national government. No part of it is vested in or reserved to the states."⁸ But this is far from saying that the treaty power is unlimited. Calhoun has pointed out the reason why the Constitution enumerated the legislative power and why it did not do so with reference to the treaty power. "The reason is to be found in the fact that the treaty making power is vested exclusively in the government of the United States; and therefore nothing more was necessary in delegating it than to specify, as is done, the portion or department of the government in which it is vested. Very different is the case in regard to legislative powers. They are divided between the federal government and the state government; which made it absolutely necessary, in order to draw the line between the delegated and the reserved

7. Amer. Journ. of Inter. Law, Vol. 13, p. 250.

8. Am. Jour. of Inter. Law, Vol. 1, second quarter, p. 278.

powers, that the one or the other should be carefully enumerated and specified.”⁹

A distinguished commentator on the Constitution has said, “To define them (the subjects of the treaty power) would have been impossible and therefore a general term could only be made use of.”¹⁰

The advocates of unlimited power seem to think that this power to make treaties is a thing separate and distinct. They forget that the Constitution of the United States must be construed as a unit. Justice White in *Downes vs. Bidwell*¹¹ said, “It is conceded at once that the true rule of construction is not to accept one provision of the Constitution alone, but to contemplate all and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies and not by the letter which killeth.” Justice Story said, “A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other.”¹²

In order that there may be no misunderstanding as to the vital significance of the inherent sovereignty theory in its relation to American constitutionalism, the two following considerations should be emphasized: *First*, in ultimate theory, “If the treaty power is unlimited, then our government would not be a government under the Constitution, but a government under the treaty power.”¹³ In determining whether the treaty power is *unlimited*, it should be noted that the term “unlimited” may be used in two senses: (a) unlimited as to objects over which it may be exercised, and (b) unlimited in the extent of its operation on the objects within its scope.¹⁴ The exponents of the inherent sovereignty theory, in their eagerness to have the United States match its powers with the complete powers of the governments of other nations, will not be bothered by this distinction. *Second*: If the inherent sovereignty theory comes to be generally accepted in the field of treaty making, the entering wedge will have been driven, and we confidently predict that the next step will be the appli-

9. *Discourse on the Constitution and Government of the United States*, Vol. 1, p. 203.

10. Rawle, *View of the Constitution*, 2nd Edition, p. 64.

11. 182 U. S. 312.

12. Story on the Constitution, Sec. 1508.

13. Tucker, *Limitations on the Treaty Power*, p. 427.

14. See Senate Document No. 16, 67th Congress, 1st sess.

cation of the same theory in the field of legislation in order to justify certain acts which are now admittedly beyond the constitutional powers of Congress.¹⁵ When once the Supreme Court accepts the inherent sovereignty theory as the basis and justification for the exercise of governmental power generally, there will no longer be any need of profound exponents of the American Constitution on that highest bench. When that time comes, the judge who will be the most efficient and the most admired will be the one who is most steeped in the practices of other governments, the one who has mastered the international precedents, whether their source be in absolute monarchy, soviet or republic.

Before attempting to point out specific types of limitation on the treaty making power, we desire to introduce a few of the opinions of leading statesmen, jurists and specialists in the field of treaty making upon this subject.¹⁶ Although these statements are very general in their nature, they constitute, from the standpoint of authority, an important step in the analysis of our problem. It should be noted that these authorities represent all shades of political opinion and, what is more important, they represent both the strict and the liberal schools of constitutional construction. They are in agreement, at least in their opposition to the inherent sovereignty theory.

Alexander Hamilton, the great advocate of strong government, in a letter to Washington, July 9, 1795, said, "A treaty cannot be made which alters the Constitution of the country; or which infringes any express exceptions to the power of the Constitution of the United States."¹⁷ Henry Clay in 1820 said, "No safe American statesman will assign to it (the treaty power) a boundless scope." He concludes by declaring that if the President and the Senate have an unlimited power, "the melancholy duty alone might be left to Congress of recording the ruins of the Republic."¹⁸ In 1854 Secretary of State Marcy said, "The Constitution is to prevail over a treaty where the provisions of one come in conflict with the other. It would be difficult to find a reputable

15. In Chapter 4, "The Theory of the War Power Under the Constitution," ample evidence is introduced to show that the inherent sovereignty and other extra-constitutional theories of construction are already menacing the doctrine of limited government in the field of legislation.

16. The author is indebted to Mr. Henry St. George Tucker for many of the quotations. See Tucker, *Limitations on the Treaty Making Power*, pp. 4-56.

17. Hamilton's Works, Vol. IV, p. 342.

18. Speech in House of Representatives, May 4, 1820, on the Spanish Treaty concerning the boundary between Louisiana and Mexico.

lawyer in this country who would not yield a ready assent to this proposition."¹⁹

Calhoun said, "The treaty making power is limited by all the provisions of the Constitution which inhibit certain acts from being done by the government. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibits the contrary. . . . There still remains another and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government or to do that which can only be done by the Constitution making power, or which is inconsistent with the nature and structure of the government."²⁰

Senator Isador Rayner, one of the greatest constitutional lawyers of his day, declared, "The treaty making power . . . must be construed in *pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument, the treaty must yield, and the Constitution must prevail."²¹

Among the well-known commentators on the Constitution, we shall quote Story, Cooley, Von Holst and John Randolph Tucker. While differing on many points of constitutional construction, they are in agreement in their opposition to the inherent sovereignty theory.

Story²² said, "A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfill, the will of the people."

Cooley²³ said, "The Constitution imposes no restriction upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the government or any of the states of its constitutional authority."

Von Holst²⁴ said, "The power exists only under the Constitution, and every treaty stipulation inconsistent with such a provision is therefore inadmissible and, according to constitutional law, ipso facto null and void."

19. Letter to Mr. Mason, Minister to France, Moore's Inter. Law Digest, Vol. V, p. 167.

20. Calhoun, *Discourses on Government*, I, Works, 201.

21. Cong. Record, No. 8, p. 281, 59th Congress.

22. *Commentaries on the Constitution*, Sec. 1508.

23. *Principles of Constitutional Law*, p. 117.

24. *Constitutional Law of the U. S.*, p. 202.

John Randolph Tucker²⁵ said, "A treaty 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. A treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will." On another occasion he said, "If the treaty making power extends to the limits that are claimed for it by the advocates of an inherent right, then a treaty may borrow money, regulate commerce, coin money, establish post offices and provide for raising armies and navies of the United States and may thus annul or paralyze all the powers of Congress and admit a foreign nation, to exact, with the alternative of war, a compliance with those sweeping stipulations in the internal government of the people of the United States."²⁶

The Supreme Court of the United States has held that the treaty power rests in *grant*, and is not inherent in sovereignty.²⁷ In the case of *Kansas vs. Colorado*²⁸ our highest court emphatically repudiated the inherent sovereignty theory as incompatible with the fundamental principle of the American constitutional system. Justice Field, in *Goeffroy vs. Riggs*,²⁹ said, "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 and 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 part of the territory of the latter, without its consent."

Justice Swayne in the *Cherokee Tobacco* case³⁰ 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 government."

C. J. Taney in the *Passenger Cases*³¹ said, "It will hardly be said that such a power was granted to the general government in the *confidence* that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion."

25. *The Constitution*, Vol. 2, p. 725.

26. Report to 48th Congress, quoted in speech in U. S. Senate by Senator Raynor, Dec. 12, 1906.

27. *Holden vs. Joy*, 17 Wall 243.

28. 206 U. S. 46.

29. 133 U. S. 258-267.

30. 11 Wall. 616.

31. 7 Howard 474.

C. J. Murray of the Supreme Court of California, in *Siemens vs. Bofer*,³² says, "To assert the proposition that the President and Senate are above the Constitution would be destructive of the government; for under the cover of a resort to the treaty making power every outrage and injustice which illiberality can conceive or fanaticism execute may be perpetrated."

Among the special treatises on the treaty power, we find at the one extreme such writers as Butler³³ and Sutherland³⁴ advocating the inherent sovereignty theory. At the opposite extreme is Tucker,³⁵ who endeavors to show that the treaty power is limited in the same manner and to the same extent as the power of Congress. Prof. Corwin³⁶ takes a middle ground and maintains that the "reserved powers" of the states do not necessarily constitute a limitation on the treaty power. There is much to be said for his general position when he declares, "The sum and substance of the matter is this: The United States cannot at one and the same moment utilize its powers of negotiation to secure valuable rights for American citizens abroad, and plead incapacity to effect specific performance of its reciprocal engagements at home. It cannot have its cake and eat it too."³⁷ But Corwin rejects the inherent sovereignty theory and this is true of the great majority of the specialists in this field.³⁸

The two following quotations admirably express what we conceive to be the sound view. Prof. Quincy Wright, in his prize-winning monograph, "The Control of American Foreign Relations," rejects the proposition that the fact of "national sovereignty" may be used as a source of power in the international field. He says, "In the field of foreign relations, as in other fields, all national powers must be founded on express or implied delegation by the Constitution."³⁹ David Jayne Hill has said, "It cannot be maintained that merely because the United States is classed as a 'sovereign nation,' the government or any part of it can therefore perform a sovereign act beyond the scope of the purposes for which it was created, for although the nation is sovereign the government is not. Complete

32. 6 Calif. Repts., p. 50.

33. *The Treaty Making Power Under the Constitution*, 2 vols., Butler.

34. *Constitutional Power and World Affairs*, Sutherland.

35. *Limitations on the Treaty Making Power*, Tucker.

36. *National Supremacy*, Corwin, Chap. 5.

37. *Ibid.*, p. 165.

38. See Mikell, *Univ. of Pa. Law Review*, Vol. LVII, Nos. 7 and 8. Anderson, *Amer. Journal of Inter. Law*, Vol. 1, Part 2. Lewis, Wm. Draper, *American Law Register*, Vol. 80, p. 2. Burr, Chas. H., *Treaty Making Power in the United States*, 1912.

39. P. 132.

sovereignty resides in the people as a whole, and not in any or all of the public officers."⁴⁰

In concluding this essay, which has been written to show that the treaty power is not inconsistent with limited government, we shall attempt to state certain general principles of limitation and give illustrations of each. In this connection the opinions of statesmen and specialists and the obiter dicta of various judges quoted above should be helpful. We say obiter dicta advisedly, because the Supreme Court has never as yet declared a treaty to be null and void on the ground of unconstitutionality. We suggest the following limitations:

First: A treaty would violate the Constitution if it attempted to *alter the form of our government*. Examples: An attempt to set up a monarchy; to give one state three Senators; to abolish the judicial department; to change the amending process.

Second: A treaty would violate the Constitution if it attempted to *destroy the principle of the separation of powers*.

a. By changing the distribution of powers between the three departments of the federal government. Examples: A treaty giving to the *President* the power to appropriate money.⁴¹ A treaty giving to *Congress* the power to appoint an officer of the United States on an international body.⁴²

b. By attempting to exercise a power by way of treaty which has been expressly conferred by the Constitution on one or more of the three departments of government. Examples: A treaty providing in terms that on the happening of a certain event, the United States would be automatically at war.⁴³ A treaty providing that the United States should keep an army of a certain size in the field.⁴⁴ A treaty providing for a naturalization process.⁴⁵ A treaty was negotiated in 1854 at Caracas by the United States Minister and the Venezuelan Government, which provided in its 25th article that in case a citizen of either country should accept a commission in the service of an enemy at war with the other country he should be deemed a pirate and so punished. Mr. Marcy, Secretary of State, opposed the treaty, which was satisfactory in other respects, upon the ground that the Constitution provided that Congress should define the crime of piracy⁴⁶ and

40. Present Problems of Foreign Policy, p. 155, N. Y., 1919.

41. Art. 1, Sec. 9, Clause 7.

42. Art. 2, Sec. 2, Clause 21.

43. Art. 1, Sec. 8, Clause 11.

44. Art. 1, Sec. 8, Clauses 12 and 15.

45. Art. 1, Sec. 8, Clause 4.

46. Art. 1, Sec. 8, Clause 10.

its punishment, and that it could not be made the subject of a treaty. The treaty was not ratified.⁴⁷

c. The United States could not by treaty transfer to an International Prize Court, a tribunal not known to the Constitution, such part of its judicial power as would be represented by the establishment of appeals from the United States District Courts, sitting in prize cases, to the International Prize Court.⁴⁸

Third: A treaty must not violate *any specific prohibition* on national power found in the Constitution. Examples: A treaty would violate the Constitution if it attempted to confer a title of nobility⁴⁹; if it attempted to create a condition of slavery or involuntary servitude in "the United States or any place subject to their jurisdiction," except as a punishment for crime whereof the party shall have been duly convicted.⁵⁰

Fourth: A treaty must not interfere with the rights guaranteed to individuals (on the continental mainland of the United States)⁵¹ by the Constitution. The *Bill of Rights* generally would constitute a limitation and would protect individuals within the United States.⁵²

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47. Address of Judge Shackelford Miller, quoted in Tucker, pp. 21-22.

48. See Message of Pres. Taft, December, 1909, Corwin, *National Supremacy*, pp. 13-14.

49. Art. 1, Sec. 9, Clause 8.

50. Thirteenth Amendment.

51. See Chapter 4 for a discussion of the Insular Cases.

52. See Corwin, *National Supremacy*, p. 16, for discussion as to whether Claims Conventions violate the Fifth Amendment. Prof. Corwin says, "The validity of Claims Conventions is founded upon the fact that, owing to the maxim that a sovereignty can be sued only by its consent, claims against such sovereignty can be regarded as only rights inchoate, for which the Government, by its action in compounding them, is enabled to substitute something of REAL, though possibly of less NOMINAL, value."