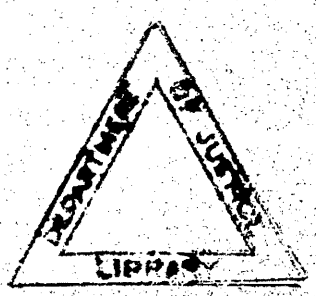

STATEMENT

by

HONORABLE HERBERT BROWNELL, JR.

ATTORNEY GENERAL OF THE UNITED STATES

before the

SENATE COMMITTEE ON THE JUDICIARY

on

S. J. Res. 1 (83d Cong.) a proposed Amendment to the Constitution of the United States relative to the making of treaties and executive agreements, and

S. J. Res. 43 (83d Cong.) a proposed Amendment to the Constitution of the United States relating to the legal effect of certain treaties.

Tuesday
April 7, 1953

Mr. Chairman and Members of the Committee:

On one premise, I am sure we all agree - both the proponents and opponents of the resolutions which are before you for consideration - namely, that our nation, or any nation, cannot maintain itself successfully in the family of nations unless it enjoys fully and coequally the capacity to make and stand by its treaties. The foremost deficiency of our government under the Articles of Confederation was a weakness in our treaty-making power. It led to the formation of our present Union under a Constitution which committed to the national government the whole of the treaty power and forbade its exercise by the states.

The Articles of Confederation, it is true, purported to confer upon the federal government the exclusive power to make treaties. But there was a qualification that no such treaty should restrain the legislative power of the respective states to impose certain imposts and duties or to prohibit certain exportations or importations. Furthermore, any treaty required the assent of nine states. Article VI provided that no state without the consent of the United States in Congress assembled, could "enter into any conference, agreement, alliance or treaty." The Articles, however, contained no provision for federal legislation to implement a treaty, no supremacy clause, and did not provide for a federal judiciary with power to construe and enforce treaties.

All of the principal plans for a new Constitution presented at the Constitutional Convention of 1787 -- the Virginia plan,[1/] the New Jersey

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1/ The Virginia plan, proposed that the national legislature and the national executive should enjoy, respectively, the legislative and exclusive rights vested in Congress by the Articles of Confederation, which, as we have seen, included the exclusive power to make treaties, and that in addition the national legislature should be empowered "to legislate in all cases in which the several States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation," and to negative any State Law contravening the Articles of Union. The federal judiciary was to be empowered to decide any "questions which may involve the national peace and harmony." 1 Farrand, Records of the Federal Convention, 21-22.

plan,[2] Hamilton's plan,[3] and Pinckney's plan[4] -- contained broad and effective treaty provisions, including the power in the Congress to legislate in support of treaties and a supremacy clause. The intention was, and there resulted from the clauses finally evolved, an investiture in the federal government of the full and exclusive treaty power. In respect of foreign affairs the federal government acquired the full powers of sovereignty, and our people have never since retreated or detracted from that grant.

The basic grant of the treaty-making power in the Constitution should be stated at this point. It is contained in Article II, Section 2, which provides that 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." Treaties so made may, if necessary or appropriate, be implemented by act of Congress adopted under the authority conferred by Article I, Section 8, empowering Congress "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As a corollary, Article I, Section 10, provides: "No State

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2/ The New Jersey plan would have given the federal government all the authority then vested in the Congress under the Articles of Confederation as well as authority over trade and commerce; it would have given the federal judiciary jurisdiction over the "construction of any treaty or treaties," and would have provided that all acts of Congress "and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens." 1 Farrand, Records of the Federal Convention, 243-245.

3/ The plan submitted by Alexander Hamilton would have given the Executive power, with the advice and approbation of the Senate, to make treaties, and would have contained a supremacy clause. 1 Farrand, Records of the Federal Convention, 292-293.

4/ The Pinckney plan would apparently have added to the treaty provisions of the Articles of Confederation a provision giving a federal Supreme Court power to review state court decisions involving treaties. 3 Farrand, Records of the Federal Convention, 608.

shall enter into any Treaty, Alliance, or Confederation," and further prohibits any state from entering without the consent of Congress "into any Agreement or Compact * * * with a foreign Power."

Article VI provides that "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." Article III, Section 2, provides that "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; * * *."

Throughout the years since the adoption of the Constitution there has been general agreement with the statement of Mr. Justice Story that, "had the framers of the Constitution done nothing more than to securely vest the treaty-making power in the Central Government they would have been entitled to immortality and to unending gratitude of the American people." 5/

Every generation or so, this treaty-making power of the federal government comes up for critical analysis and review, especially whenever the President or the Senate or the Supreme Court applies it to a new set of facts in a changing world. Such analysis and review are healthy, for if our basic Constitutional principles do not meet modern needs, consideration should always be given to changing them.

The proposals for amendment now before you emanate from two groups. One group desires to severely limit the treaty-making power of the federal government by confining it to matters which are not "domestic" or "internal." It would revoke the doctrine of the case of Missouri v. Holland, which I propose

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5/ 2 Butler, "Treaty-Making Power of the United States," 403.

to discuss later. Senator Bricker, as I understand it, does not agree with the views of this first group on this point.

With the agruments of the first group, I wholly and totally disagree. Rather, I present with approval the statement of the late Chief Justice Charles Evans Hughes:

> "I take the view which I understand to be that of the Supreme Court that this is a sovereign nation; that the States, in relation to foreign affairs, are not sovereign States; that if this nation exercises its sovereign power in regulating by agreement its relations to other nations, it must be done through the exercise of the treaty-making power and in that relation there are no states, there is but one country. * * *
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> "Now I quite agree with the suggestion * * * that, as it has been found in connection with interstate and intrastate commerce, there may be such an intermingling of activities that it would be necessary in order to support the supremacy of the national power to subordinate the local power with respect to a matter of intermingled local and national concern to the exercise of the national power.
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> "In the case of interstate and intrastate commerce where the supremacy of the Federal Government was sustained, it was because, if the intrastate rates that discriminated against interstate rates as established by the Interstate Commerce Commission were allowed to be maintained, then the States would be dominant in the federal field and the national supremacy would be subordinated within its own field, the national field, to the power of the State. There was no escape from the alternative. Either the national power must be sacrificed to the States or it must be exerted within its field. If it were allowed to be exerted within its field, then it must be supreme, and anything that

"I imagine that the same doctrine would be sustained in regard to the treaty-making power where concerns, which perhaps under former conditions had been entirely local, had become so related to international matters that an international regulation could not appropriately succeed without embracing the local affairs as well."[6/]

The second group of proponents, headed by Senator John W. Bricker, raise a problem that deserves most serious study. Senator Bricker himself has performed a great service by calling attention forcibly to the trend, in the executive branch of our government during the last twenty years, to negotiate treaties which it has been claimed deal primarily with domestic matters. Fortunately, none of those treaties has been ratified. Our federal system did not contemplate having treaties deal with matters exclusively domestic in their nature. Largely as a result of Senator Bricker's vigorous activity, this trend in the Executive Branch has been halted. This Committee is now faced with the problem of whether a constitutional amendment can be drafted which will prevent possible misuse of the treaty-making power without, at the same time, unduly restricting its legitimate exercise.

As to the arguments of the second group of proponents, my position is that by and large, our constitutional system of treaty-making, adopted in 1789 and developed to this day, has worked well; and it therefore devolves upon the proponents of change to show a definite and compelling need for the change. That showing is not made by pointing to drafts of treaties, not yet ratified or even submitted for ratification, which rightly or wrongly are said to be objectionable. There are several proposed conventions, in various stages of draft by organs of the United Nations, to which objections have been made by some of the proponents

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6/ Proceedings, 1929 American Society of International Law, 194-195.

of these amendments. If these proposed treaties are as bad for America as they are said to be, they will not be approved by two-thirds of the Senate, or for that matter even be submitted by the President to the Senate. Certainly there is no basis in our history for assuming that the President and the members of the Senate, all of whom are bound by oath to support the Constitution, will seek to undermine the Constitution.

Furthermore, I propose to demonstrate later in this discussion that if a President and a Senate do adopt a treaty which seeks to override a right expressly confirmed to our citizens by the Constitution, such as is contained in the Bill of Rights, the judicial holdings of our federal courts to date indicate clearly that the treaty provision would be stricken down. But if this be true, the proponents of the change argue, why not amend the Constitution to say so. My answer is that no one has yet succeeded in devising language to amend the Constitution to guard against such a hypothetical treaty provision which does not also jeopardize the federal government's necessary and proper treaty-making powers.

I would now like to consider with you the four substantive sections of S. J. Res. 1 and the corresponding provisions of S. J. Res. 43.

"SECTION 1. A provision of a treaty which denies or abridges any right enumerated in this Constitution shall not be of any force or effect."

/The corresponding provision in S. J. Res. 43 reads:

"A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect."/

This amendment is said to be necessary in order to establish that a treaty is not superior to the Constitution, particularly the provisions of the Bill of Rights. The possibility of the contrary, advanced by the sponsors of the constitutional amendment, is derived from a crucial difference, as they see it, in the phraseology of Article 6, clause 2, the supremacy clause, where it is provided that the Constitution and the laws of the United States made in pursuance of the Constitution and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land. It is said that laws in pursuance of the Constitution, as distinguished from treaties under the authority of the United States, places laws and treaties on a different plane in regard to the superiority of the Constitution. In support, reference is made to what Mr. Justice Holmes said for the Supreme Court in Missouri v. Holland,[7] in the course of reaching the conclusion that the Tenth Amendment was not a limitation upon the treaty power, which is vested expressly by the Constitution in the federal government.[8] The Holmes statement in

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7/ 252 U.S. 416 (1920).

8/ The Supreme Court reached a similar conclusion 21 years later in holding that the Tenth Amendment was not a limitation on the federal commerce power, United States v. Darby, 312 U.S. 100, 123-124 (1941).

Missouri v. Holland was:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention."

But Holmes immediately qualified this by saying:

"We do not mean to imply that there are no qualifications to the treaty making power * * * *."

And later in the opinion he said:

"The treaty in question does not contravene any prohibitory words to be found in the Constitution."[9/]

9/ The whole of this quotation reads: "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. 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 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. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved." 252 U.S. 433-434 (Underscoring supplied)

But more importantly, reverting to the difference in descriptive phraseology for laws and for treaties in Article 6, clause 2, of the Constitution, to which Holmes merely alluded in passing, sight has been lost of the origin of the difference, and hence its true significance. In the constitutional convention of 1787 the first aspect of the treaty provisions to come up for discussion was that which became ultimately embodied in the supremacy clause. The Virginia resolutions had proposed that the national legislature have power to negate state laws contravening the Articles of Union. An amendment by Dr. Franklin added the power to negate state laws contravening "any Treaties subsisting under the authority of the union," and the proposal was initially agreed to without debate or dissent.[10/] Subsequently, the proposed power to negate state legislation was rejected. Those opposed to the provision argued that it would be offensive to the states and that a state law that could be negated would be set aside by the judiciary or, if necessary, could be repealed by a national law. Accordingly, in place of this provision there was proposed a supremacy clause, providing that all legislative acts of the United States and all treaties made and ratified under the authority of the United States should be the supreme law of the respective states, in so far as they related to such states or their citizens and inhabitants, and should be binding on the state judiciary. This proposal was unanimously adopted.[11/]

10/ 1 Farrand, Records of the Federal Convention, 47, 54, 61.

11/ 2 Farrand, Records of the Federal Convention, 21-22, 27-29.

Subsequently the supremacy clause was extended to "treaties made or which shall be made" under the authority of the United States, so as to "obviate all doubt concerning the force of treaties pre-existing."[12/]

Thus the framers of the Constitution wanted to be sure, and made sure as time proved, that the supremacy clause extended not only to treaties which might in the future be made under the new Constitution but also to treaties which had in the past been made under the Articles of Confederation. They therefore said "treaties made, or which shall be made" shall be binding. To have limited the clause only to treaties made "in pursuance" of the new Constitution would have defeated that purpose.

In that connection one of the principal concerns was the 1783 treaty of peace with Great Britain,[13/] and the ability of the new national government to comply with its obligations in spite of the recalcitrance of a number of the states.[14/] The treaty, among other things, protected British creditors and guaranteed against future confiscations or prosecutions of persons on account of their part in the Revolutionary War. The status of this treaty was among the first issues to come before the new Supreme Court, in Ware v. Hylton, decided in 1796.[15/] The Court held that the treaty of 1783 overrode Virginia wartime legislation discharging indebtedness to British creditors, also that the treaty operated to revive a debt owed by an American citizen. Similar holdings in the early 1800's were made by

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12/ 2 Farrand, Records of the Federal Convention, 417.

13/ 8 Stat. 80.

14/ 31 Journals of the Continental Congress 781-874.

15/ 3 Dall. 199 (1796).

the Court in Hopkirk v. Bell,[16] involving a state statute of limitations, and Higginson v. Mein,[17] involving state confiscation of property of a British subject. Still other and later cases sustained both the pre-1789 and the post-1789 treaties, in protecting alien ownership and transfer of real property.[18]

In none of these cases, nor in any case decided by the United States Supreme Court involving the construction or effect of a treaty, can one find or discern an intention or purpose to regard a treaty as above the Constitution. On the contrary, the Court has repeatedly emphasized the subordinacy of treaties to the Constitution. In Geofroy v. Riggs,[19] the Court said:

> "It would not be contended that it [the treaty power] 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 * * *."

16/ 3 Cranch 454 (1806).

17/ 4 Cranch 415 (1808).

18/ E.g., Orr v. Hodgson, 4 Wheat. 453 (1819); Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464 (1823); Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 602 (1813); Chirac v. Chirac, 2 Wheat. 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1879).

19/ 133 U.S. 258, 267 (1890). The whole of the quotation reads: "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. Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware v. Hylton, 3 Dall. 199; Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U.S. 483; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California 381."

In Doe, et al. v. Braden,[20] the Court said:

"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."

In The Cherokee Tobacco,[21] the Court 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."

In Missouri v. Holland,[22] the case which is allegedly the motivating force for the proposed amendment, the Court said:

"We do not mean to imply that there are no qualifications to the treaty-making power. * * * The treaty in question does not contravene any prohibitory words to be found in the Constitution."

In United States v. Minnesota,[23] the Court said:

"Of course, all treaties and statutes of the United States are based on the Constitution; * * * The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution * * *."[24]

20/ 16 How. 635, 657 (1853).

21/ 11 Wall. 616, 620-621 (1870).

22/ 252 U.S. 416, 433 (1920).

23/ 270 U.S. 181, 207-208 (1926).

24/ See, to the same effect, Jones v. Walker, Fed. Cas. No. 7507, 13 Fed. Cas. at p. 1062; Amaya, et al. v. Stanolind Oil & Gas Co., 158 F. 2d 554, 556 (C.A. 5, 1946), certiorari denied, 331 U.S. 808; United States v. Thompson, 258 Fed. 257, 268 (E.D. Ark., 1919); Indemnity Insurance Co. of North America v. Pan American Airways, 58 F. Supp. 338, 339, 340 (S.D.N.Y.,

In addition, the Supreme Court has dealt with specific issues involving claims that certain treaties violated express constitutional guaranties. In Prevost v. Greneaux,[25] the Court held that a tax which had accrued to a state was not divested by a subsequent treaty. Said the Court, "And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such an intention."

In Brown v. Duchesne,[26] the Court stated that a treaty could not provide for the taking of private property without just compensation.

In In re Ross,[27] it was contended that a treaty and implementing statute, providing for trial by a consular court of crimes committed by American citizens in Japan violated various constitutional guaranties of fair trial. The Court rejected the contention, not by stating that the treaty was above the Constitution, but by holding that the constitutional guaranties did not extend to crimes committed abroad.

On like reasoning, the Court has sustained extradition of American citizens.[28]

In Missouri v. Holland,[29] the contention that a treaty and implementing statute violated the Tenth Amendment was rejected on the ground that the treaty power was expressly delegated to the federal government, therefore its exercise did not infringe the reservation to the states

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25/ 19 How. 1, 7 (1856).

26/ 19 How. 183, 197 (1856).

27/ 140 U.S. 453 (1891).

28/ Neely v. Henkel (No. 1), 180 U.S. 109, 122-123 (1901); Wright v. Henkel, 190 U.S. 40, 53 (1903); Charlton v. Kelly, 229 U.S. 447 (1913).

29/ 252 U.S. 416 (1920).

of powers "not delegated." 30/

Not only does the Supreme Court regard treaties as subordinate to the Constitution, but it regards them as generally of the same dignity as statutes. Thus a treaty can be modified or repealed by a federal statute so far as its domestic effect is concerned.31/ So, the Court has held, to the extent that a treaty is self-executing as to become the law of the land, "it can be deemed in that particular only the equivalent of a legislative act." 32/

If there is one argument, which should be put to rest, it is that there is need for this constitutional amendment because the Constitution does not protect against a treaty which might impair rights of free speech, press, or religion. The argument stems from the wording of the First Amendment which, unlike the rest of the Bill of Rights, refers only to the Congress--that is, it reads, "Congress shall make no law respecting an establishment of religion, etc. * * *."

30/ See also Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (N.D. Cal., 1944).

31/ Head Money Cases, 112 U.S. 580, 597-599 (1884); Chae Chan Ping v. United States, 130 U.S. 581, 600-603 (1889); see Moser v. United States, 341 U.S. 41, 45 (1951).

32/ Chae Chan Ping v. United States, supra, 130 U.S. at 600; see United States v. Minnesota, 270 U.S. 181, 208. Not only does it appear clear that treaties are subject to constitutional limitation, but it is equally clear that they are subject to judicial review. To hold otherwise would create the anomalous position that although the courts could deny enforcement of a treaty on the ground it was inconsistent with a later act of Congress they were without power to do so on the ground of inconsistency with the Constitution. The power of federal courts to invalidate acts of Congress contrary to the Constitution was implied from the propositions that a statute could not overrule the Constitution, that the federal judiciary had jurisdiction over cases arising under the Constitution, and that it was sworn to uphold the Constitution. Marbury v. Madison, 1 Cranch 137, 176-180 (1803). The same reasoning applies to treaties. Cf. Taylor v. Morton, Fed. Case No. 13,799, 23 Fed. Cases at 785 (C.C.D. Mass., 1855). But in any event from the decisions already cited it is obvious that the power to examine into the constitutional validity of treaties has been assumed by the Supreme Court.

The fact is that the First Amendment is not limited to action of the Congress. The courts have regarded it as prohibiting any action by the federal government, or any of its branches, impairing freedon of speech, press, or religion, or the rights of assembly and petition. In the cases arising under the President's Loyalty Order, Executive Order No. 9835, the First Amendment was assumed to be applicable to Presidential action. 33/ The First Amendment has been assumed to apply to orders of administrative agencies, 34/ to judicial proceedings punishing for contempt of court, 35/ to acts of a territorial legislature, 36/ and to the conduct of agencies for the District of Columbia. 37/ In the latter connection, only last year, the Supreme Court said that the First and Fifth Amendments "concededly apply to and restrict * * * the Federal Government," and held that an order of the Public Utilities Commission of the District of Columbia amounts to sufficient federal government action to make the First and Fifth Amendments applicable thereto. 38/

In addition, the liberties protected by the First Amendment have all been held to be encompassed in the liberties guarded from invasion

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33/ Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 135-136, 143, 199-200 (1951), reversing on other grounds Joint Anti-Fascist Refugee Committee v. Clark, 177 F. 2d 79, 84, 87-88 (C.A.D.C., 1949); Bailey v. Richardson, 182 F. 2d 46, 59-60, 71-74 (C.A.D.C., 1950) affirmed by an equally divided court, 341 U.S. 918 (1951).

34/ National Broadcasting Co. v. United States, 319 U.S.190, 226-227 (1943).

35/ Toledo Newspaper Co. v. United States, 247 U.S. 402, 419-420 (1918) (overruled on other grounds, Nye v. United States, 313 U.S.33, 47-52 (1941)

36/ Davis v. Beason, 133 U.S. 333 (1890).

37/ Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

38/ 343 U.S. at 461-463.

on the part of the states by the "due process" clause of the Fourteenth Amendment. Thus freedom of speech,[39] freedom of the press[40] including motion pictures,[41] and freedom of religion,[42] are all within the "due process" protection of the Fourteenth Amendment. Hence they are presumably within the "due process" protection of the Fifth Amendment, which is a clear limitation upon the whole of federal governmental action. As Judge Edgerton stated in Joint Anti-Fascist Refugee Committee v. Clark,[43]

> "Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all state action, the due process clause of the Fifth must extend it to all federal action."

It is unlikely that any court has ever held otherwise, and no amendment of the Constitution appears to be needed to prevent abridgement by treaty or executive agreement of the essential liberties guaranteed by the Bill of Rights or by the Constitution as a whole.

Enactment of an amendment confirming that which is already the law would be a most unusual act in our constitutional history. Except for the first ten amendments, which for all intents and purposes were contemporaneously adopted as part of the original organic act, each of the subsequent amendments to the Constitution has been adopted to meet

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39/ Gitlow v. New York, 268 U.S. 652 (1925).

40/ Near v. Minnesota, 283 U.S. 697 (1931).

41/ Burstyn v. Wilson, 343 U.S. 495 (1952).

42/ Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); McCollum v. Board of Education, 333 U.S. 203 (1948).

43/ 177 F. 2d 79, 87; see note 45 supra.

an existing unequivocal deficiency or need. Not only is there a paucity of legal materials to make a case for the amendment, but it is significant to note from the hearings held in the past and the literature on the subject that the sponsors of S. J. Res. 1 are not seriously complaining about any treaty heretofore adopted by the United States. The complaints are addressed to the possibility that the United States might in the future consider adopting certain treaties or conventions, such as the human rights covenants, the freedom of information conventions, and the statute of an international criminal court, which are either in draft stage before certain bodies of the United Nations, or which have little chance of submission for adoption by the executive branch of this Government based on pronouncements already made by representatives of the United States.

But, more than being unusual and unprecedented, an amendment of the Constitution, which purports to be confirmatory or declaratory of that which is already the law, may be unexpectedly damaging. Reckoning, as we must, with the justifiable tendency of courts and others to give an altering significance to an amendment of the organic act, let us consider proposed section 1 of S. J. Res. 1. It was derived from the American Bar Association proposal of February 26, 1952, 44/ which reads as a whole:

> "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of

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44/ 38 ABA Jour. 435-436 (May 1952).

such treaty." (S. J. Res. 43 follows this language.)

The whole of this proposal had the more far-reaching purpose of altering the Constitution as it was adopted in 1789, and interpreted in the intervening years. That purpose was and is to reduce the constitutional scope of treaty making and the subjects of treaties, and to eliminate the self-executing effect of those treaties that can presently be self-executing, by requiring the legislative action of Congress but limited by the measurement of its delegated powers under the Constitution absent any treaty. The effect sought is a very definite change in the constitutional distribution of powers, by giving the federal government less than the whole of the treaty power and reserving part of it to the states. It would reverse Missouri v. Holland and predecessor cases and undoubtedly, among other things, make of the Tenth Amendment to the Constitution a limitation on the treaty power.

In such circumstances, it is quite conceivable that the partial adaptation of the American Bar proposal in section 1 of S. J. Res. 1 might be construed by a court to be more than confirmatory of existing law and to have some of the altering effect desired by the sponsors of the ABA proposal. A "right enumerated in this constitution" might be deemed to be a right or power allegedly "reserved to the States respectively, or to the people" under the Tenth Amendment.

The same criticism is of course true of the corresponding provision in S. J. Res. 43 which is the original American Bar Association proposal.

Whether or not these or different meanings would ultimately be attributed to the amendment by the courts, certain it is that there would be opened an enormous source of contest and litigation which would hamper the government at every step in the conduct of presently normal business, and render doubtful the actions taken.

The history of the past and the decisions of our courts are completely reassuring on the place of the treaty power in the constitutional scheme. They render unnecessary the amendment proposed. Combined with the constitutional checks and balances of two-thirds of the Senate on the President in treaty-making, of the Congress on both in erasing undesired domestic effects, and of the courts on all in judging the constitutionality of the results, they constitute as strong a legal guaranty against unbridled exercise of the treaty power as the ingenuity of man has devised in any effectively working political system.

"Sec. 2. 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."

/S. J. Res. 43 has no similar provision./

The purpose of this section is said to be to prevent future adoption of certain kinds of treaties, such as the incompleted drafts of covenants on human rights.

However, it is conceivable that were section 2 in force now or earlier, it would have prevented this country entering a number of kinds of international agreements of importance to us.

The provision prohibiting a treaty (or, under section 4 which is hereafter discussed, any other international agreement) which would authorize or permit any foreign power or international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States would throw doubt upon, if not nullify, the use of mixed claims commissions to settle or adjudicate damage claims of United States citizens. An example of a number of these is found in the Claims Convention of 1868 between the United States and Mexico[45] under which an international commission, appointed by the President of the United States and by the President of the Mexican Republic, was given authority to finally determine claims for personal injuries and property damage inflicted on both sides of the border by authorities of one government or the other. The compiler's note to the Convention shows that the Commission concluded its work in 1876 rendering awards in favor of United States citizens of over four million dollars as against approximately $150,000 in favor of Mexican citizens.[46]

45/ 1 Malloy, Treaties, 1128.

46/ 1 Malloy, Treaties, 1131.

Were it in force, the proposed constitutional provision might have prevented or jeopardized American participation in international arbitration of claims of American citizens or of disputes involving the domestic jurisdiction, either on grounds that the arbitrators constitute an international commission or organization, or that foreign governments are participants in the choice of the arbitrators who variously supervise or control or adjudicate rights involved. A current example is the authorization in the President to conclude and give effect to agreements for the settlement of intercustodial conflicts involving enemy property.[47] These agreements, such as the Brussels Agreement of 1947 to which the United States is party with six other countries, involve among others the property rights of Americans by reason of their joint ownership of certain enemy property or of corporate stock controlling ownership of such property. In the event of a dispute, a conciliator from a panel of seven elected by the seven member countries shall formulate a solution which is binding.[48]

An example of an arbitration which might impinge on the domestic jurisdiction is contained in section 21 of the United Nations Headquarters Agreement,[49] concerning the headquarters located in this country and providing for arbitration of disputes respecting the interpretation and application of the Agreement.

The proposed constitutional provision would seriously affect boundary arrangements, past and present, with our northern and southern neighbors. It could invalidate the existing 1909 boundary treaty between the United States and Canada,[50] insofar as Articles III, IV, and VIII of the agreement give to the International Joint Commission (3 American and 3 Canadian members) ultimate approving power over

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47/ 64 Stat. 1079.

48/ See Article 37A of the Brussels Agreement, and the background described in H. Rept. 2770, 81st Cong., August 1, 1950.

49/ 61 Stat. 756, 764.

uses, obstructions, or diversions of waters on either side of the boundary line.

The provision that no treaty (or other international agreement) shall authorize or permit any foreign power or international organization to supervise, control, or adjudicate any matter essentially within the domestic jurisdiction of the United States may be particularly troublesome. Its alleged purpose is to "make effective, insofar as the United States is concerned, the prohibition of Article 2, paragraph 7, of the U. N. Charter forbidding U. N. intervention in purely domestic matters."[51/] Article 2, paragraph 7, of the United Nations Charter now provides

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Laying aside any question of conflict between the proposed constitutional amendment and the latter part of the quoted provision regarding Chapter VII (which deals with Security Council action in respect of threats to the peace, breaches of the peace, and acts of aggression), it should be observed that this provision of the Charter is part of our law,[52/] and is already an existing protection if needed against the United Nations. Elsewhere, when it was felt that such a safeguard was needed against a feared encroachment, it was included in the particular agreement, such as the United States acceptance of the so-called "compulsory" jurisdiction of the International Court of Justice under Article 36, paragraph 2,

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51/ 99 Cong. Rec. 161, January 7, 1953.

52/ 59 Stat. 1031.

of the Statute of the Court.[53] The acceptance (pursuant to Senate Resolution of August 2, 1946)[54] contains the reservation that the United States declaration shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[55]

The difficulty in freezing any such provision into the Constitution is that is becomes completely inflexible without any possibility of waiver by agreement when desirable. This would be true not only for the United Nations but regarding any other problem we may have with a foreign government or international organization. For example, in the past some of our consular conventions have allowed foreign consular officials certain judicial powers. The Convention with France of 1788[56] empowered French consuls in the United States to adjudicate all disputes arising within the United States between subjects of France (Art. 12) and to exercise police powers over French vessels (Art. 8). In Wildenhus's Case[57] the Supreme Court said that if such a treaty gave a consular official exclusive jurisdiction over a homicide committed on a vessel in port, the treaty would preclude prosecution for the offense by a state court; it held, however, that the treaty in question did not preclude prosecution by the state of New Jersey. It might be observed in this connection that the United States has treaties with other countries giving its consular officials judicial powers abroad

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53/ 59 Stat. 1031, 1060.

54/ T.I.A.S. 1598.

55/ 1 United Nations Treaty Series, p. 9; registration no. 3.

56/ 8 Stat. 106.

57/ 120 U.S. 1, 17-18 (1887).

which are regarded of great value.[58]

The proposed amendment might throw doubt upon our existing extradition treaties, or the extent to which we can grant extradition. To date the power to enter such treaties has never been questioned.[59] And it is well settled that, where the treaty so provides, an American citizen can be lawfully extradited to some other country to be tried in accordance with the laws of that country for an offense committed there.[60]

The host of agreements to which the United States has subscribed in the past in becoming a member of the many international organizations (such as the International Civil Aviation Organization, the International Telecommunications Union, the Universal Postal Union, the World Health Organization, the International Bank, and the International Fund, to mention but a few), all may require examination to ascertain the extent to which any such treaties or international agreements permit the international organization to supervise, control, or adjudicate a matter or matters "essentially within the domestic jurisdiction of the United States," let alone the rights of citizens of the United States. We can suppose that in a great measure this has been avoided by the several charters and agreements of the past. Nevertheless some of the useful and necessary techniques adopted would seem to infringe the constitutional amendment proposed, such as the Narcotic Drug Protocol of 1948,[61] under Article 1 of which the World Health Organization may add, to the list of drugs

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58/ Only recently the International Court of Justice had occasion to pass upon the extent of American consular court jurisdiction in Morocco, France v. United States of America, Case Concerning Rights of Nationals of the United States of America in Morocco, Judgment of August 27, 1952; I.C.J. Reports 1952, p. 176.

59/ Holmes v. Jennison, 14 Pet. 540, 569-570, 586, 588 (1840); Matter of Metzger, 5 How. 176, 187-188 (1847); Factor v. Laubenheimer, 290 U.S. 276 (1933).

60/ Neely v. Henkel (No. 1), 180 U.S. 109, 123 (1901); Charlton v. Kelly, 229 U.S. 447, 465-469 (1913); Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 7 (1936).

61/ T.I.A.S. 2308.

capable of producing addiction, newly discovered drugs or compounds or synthetics; whereupon their manufacture and distribution is to be limited by the member states in accordance with the 1931 Convention and 1946 Protocol.

One cannot help but speculate upon what such a constitutional amendment would do to any efforts of the United States to achieve genuine international control in important fields relating to the peace and safety of the world. For example, the United States proposal of 1946, rejected by the Soviet Union, of an international agency for the control and development of atomic energy, included broad powers in the international agency for the management and ownership of all atomic activities potentially dangerous to world security, as well as power to control, inspect, and license all other atomic activities.[62/] The system of international inspection, which lay at the heart of the plan, clearly would conflict with the proposed constitutional amendment.

The point need not be belabored by reciting other like problems that must one day be the subject of international solution. In their regard we can ill afford to immobilize the one great peacetime weapon this country possesses, namely, the treaty-making power.

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62/ See International Control of Atomic Energy, Growth of a Policy, State Department Publication 2702 (1946); Policy at the Crossroads, State Department Publication 3161 (1948).

"Sec. 3. A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress."

[On this subject, S. J. Res. 43 provides: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."]

The purpose of this provision is to prevent treaties, which are intended to be and capable of being self-executing, from becoming self-executing; and to require, in all cases, that a treaty cannot become effective as internal law in the United States except through the enactment of legislation by the Congress.

S. J. Res. 43, the American Bar Association proposal, would go even further and would prevent a treaty from becoming internal law except through legislation which Congress could validly enact under its powers in the absence of the treaty, thereby limiting the scope or subject matter of treaties to those matters which are within the enumerated legislative powers of the Congress.

The solution, evolved by the constitutional convention of 1787, of placing treaty making in the President with the advice and consent of two-thirds of the Senators present, was the result of a great deal of thought, discussion, and compromise. John Jay, in No. 64 of The Federalist, and Alexander Hamilton in No. 75, have set forth the reasons for placing the treaty power in the President and two-thirds of the Senate. Hamilton described it as "one of the best digested and most unexceptionable parts" of the constitutional plan.

Because the capacity and prestige of the Senate in treaty-making and treaty-law-making is under challenge by the present proposal for amendment, I would urge every member of the Senate to review carefully these two essays by Jay and Hamilton, among others. I would call attention especially to the following paragraph from Jay's paper, which

goes directly to the point proposed by this amendment:

> "Some are displeased * * * because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected." 63/

The point is as valid now as it was in 1788. Nevertheless, because treaties were to have the force of laws, proposals were made to require concurrence of the House in the treaty-making process. These were submitted first at the constitutional convention, 64/ then at a number of the

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63/ The Federalist, No. 64

64/ 2 Farrand, Records of the Federal Convention, 392-394, 481, 495, 522-525, 527-529, 538 (proposal defeated 10 to 1), 540-541, 547-550.

later state ratifying conventions,[65] and still later on a number of occasions since the adoption of the Constitution.[66] They have invariably been rejected or dropped.

The present proposal would require two steps before a treaty could have domestic effect, first, the approval of two-thirds of the Senate and, second, reconsideration by the Senate and approval by the House. This is unprecedented, anywhere. In a State Department memorandum, dated May 23, 1952, already made available to you, there is summarized the constitutional requirements of various other countries for giving effect to treaties as internal law. It is pointed out that no other country in the world is required by its constitution or constitutional practice to follow such a double procedure. Moreover in the countries where participation by the legislature is required, such as the United Kingdom, the composition of the executive branch of the government is determined by the legislative body. The government in power in those countries accordingly controls both the executive and legislative powers. The defeat of an important law or treaty normally results in the formation of a new government in which the executive and legislative authority are in agreement.

65/ Pennsylvania, 2 Elliott's Debates 546; South Carolina, 4 Elliott's Debates 265-267, 280; Virginia, 3 Elliott's Debates 610; North Carolina, 4 Elliott's Debates 115, 119, 125, 131, 246. Some of this was mere discussion, and none got beyond the stage of a recommendation to the First Congress.

66/ See, proposal of Virginia Assembly, growing out of Congressional debate of the Jay Treaty with Great Britain (5 Annals of Congress 394, 400-401, 426-771), Acts of Virginia Assembly 1795, p. 55-- no action taken on proposal; and see Proposed Amendments to the Constitution, H. Doc. 551, 70th Cong., 1st sess., 120-122; also H. J. Res. 60, 79th Cong., 1st sess. (H. Rept. 139), passed by the House May 9, 1945, 91 Cong. Rec. 4367-8. This last was a proposal to provide that treaties could be made by the President by and with the advice of both Houses of Congress, viz. a simple majority of both.

Not only is the double step unprecedented, but it is unnecessary. In the first place all treaties are not self-executing. And in the second place, existing law provides adequate means for participation by the House in cases where such participation is appropriate, without the necessity of a rigid requirement of such participation in all cases.

Looking at the law as it now stands, a treaty may, of its own force, be a law which binds the rights of individuals, and as such is to be regarded by a court as an act of Congress. 67/ In that posture it is described as self-executing. As such it may override any inconsistent provision of a state constitution and law, 68/ or municipal ordinance. 69/ Also, it has an equal status with an act of Congress. Hence while so far as possible the treaty and statute will be construed to avoid inconsistency, 70/ if there is clear inconsistency a later treaty will prevail over an earlier statute 71/ and a later statute will prevail over an earlier treaty. 72/

But a treaty need not have a self-executing effect. The nature of the treaty obligation and the intention of the contracting states,

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67/ The Peggy, 1 Cranch 102, 110 (1801).

68/ Ware v. Hylton, 3 Dall. 199; Hauenstein v. Lynham, 100 U.S. 483.

69/ Asakura v. Seattle, 265 U.S. 332.

70/ United States v. Lee Yen Tai, 185 U.S. 213, 220-223; Pigeon River Co. v. Cox Co., 291 U.S. 138, 160-161.

71/ United States v. Lee Yen Tai, 185 U.S. 213, 220; Hijo v. United States, 194 U.S. 315, 324.

72/ The Cherokee Tobacco, 11 Wall. 616; Head Money Cases, 112 U.S. 580, 597-599; Chae Chan Ping v. United States, 130 U.S. 581, 599-603; see Pigeon River Co. v. Cox, 291 U.S. 138, 160; Moser v. United States, 341 U.S. 41, 45.

evidenced in the agreement, become important factors. Chief Justice Marshall stated it best in Foster v. Nielson:[73]

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the 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 can become a rule for the court."

Therefore whether or not a treaty is self-executing is a matter primarily of construction of the treaty. This is no different than the construction of a statute. The courts have regarded statutes and treaties on a par in determining their immediate effectiveness; and a statute, like a treaty, may be so framed as to make it apparent that it does not become practically effective until something further is done by Congress itself, or by some officer or body.[74]

73/ 2 Pet. 253, 314 (1829)

74/ Judge Putnam said in United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 Fed. 842, 845 (C.A. 1, 1907); "An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective; * * *"

From this brief summation of existing law, it is apparent that there are at least three means by which participation of the House may be obtained where appropriate.

First, the treaty as drafted, may stipulate or require that it be regarded as not self-executing. If its implementation requires appropriations or criminal sanctions or similar domestic legislation, it will necessarily depend on legislation passed by both Houses. In other situations, where the treaty might have internal effect, its terms may prevent it from being self-executing. A notable example is Arts. 55 and 56 of the United Nations Charter, obligating the parties to "promote" stated social and economic objectives and pledging themselves "to take joint and separate action" for the achievement of these purposes.[75/] Recently, the California Supreme Court held these provisions were non-self-executing.[76/]

75/ See, for other examples, the Convention for the Protection of Migratory Birds of August 16, 1916, 39 Stat. 1702, Art. VIII, legislation implementing which was involved in Missouri v. Holland, 252 U.S. 416, 431; the International Slavery Convention of Sept. 25, 1926, 46 Stat. 2185, obligating the parties to take "necessary steps," "adopt all appropriate measures," "take all necessary measures," etc. to achieve its objectives; the Genocide Convention, Senate Executive O, 81st Cong., which is cast in terms intended to make it non-self-executing; and present drafts of proposed conventions or covenants relating to human rights and to freedom of information, which are the alleged targets of the proposal to amend the Constitution and which are cast in non-self-executing terms.

76/ See Fujii v. State, 242 p. 2d 617 (Sup. Ct. Calif., 1952).

Second, the Senate, in the exercise of its power to impose reservations [77] may impose as a condition, to its consent to ratification, that the treaty shoudl not be considered self-executing. This should afford ample opportunity and scope for dealing with matters which the Senate feels ought not have a self-executing effect.

Finally, in an extreme case, there stands as a check on the President and Senate the power of Congress, by subsequent statute, to override the treaty insofar as its effect on domestic law is concerned.

77/ Haver v. Yaker, 9 Wall. 32, 35; see 98 Cong. Rec. March 20, 1952, pp 2602-3.

In general, these safeguards have worked well. The most conspicuous instance of dissatisfaction arose in connection with the Jay Treaty of 1794; but while the issue of the House's participation in commercial treaties was debated and a constitutional amendment was proposed by the Virginia legislature, no action was taken on that amendment by Congress or the other states.[78/]

A rigid requirement that no treaty can have domestic effect as law unless it goes through the second step of approval by both Houses of Congress would have seriously damaging consequences in those areas in which treaties have traditionally been self-executing. For example, treaties of commerce and friendship typically provide for the rights of aliens to hold, acquire, inherit, and dispose of property, to engage in businesses and professions, to be protected in their persons and property, to be free from burdensome taxation, and the like. Such treaties are almost invariably self-executing. When ratified by the Senate, they become domestic law. In case of conflict, they override inconsistent state law. No reason has been suggested why the efforts of the United States to secure adequate protection for the persons and property of its citizens abroad, whether transients or residents, should be impeded by making the process of adopting such treaties more burdensome and time-consuming than it now is. Nor have substantial objections been suggested to the long established practice respecting treaties of friendship and commerce and other types of treaties which have traditionally been self-executing.

It seems to me that the requirement of the double step in effectuating treaties would for all practical purposes debase the present constitutional

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78/ See note 66, supra.

function of the Senate in the treaty-making process. For, as a precaution against attack on provisions which might have some internal effect, it would become advisable, as a matter of practice, to submit all treaties for some form of legislative approval by both Houses. The separate two-thirds approval of the Senate would become merely an obstacle rather than an act of treaty making.

The American Bar Association addition (contained in S. J. Res. 43) to the change suggested by section 3 of S. J. Res. 1 would superimpose a major change in the relations between the federal and state governments, as well as seriously curtail the scope of the treaty power. The power to enter into treaties was granted by the Constitution without any express limitation as to the subject matter of possible treaties. At the constitutional convention of 1787, while there were suggestions that certain types of treaties, for example, treaties of peace, should receive different procedural treatment, there was no suggestion that the treaty power be limited as to subject matter. The framers were primarily impressed with the necessity, in the interest of national survival, of an adequate and effective power to make, and to enforce within the states, whatever treaties seemed appropriate to facilitate the conduct of foreign relations. At the constitutional convention it was generally agreed that the federal government should have the full and exclusive treaty power before any agreement was arrived at as to the scope of the legislative powers of Congress. The view of the framers is reflected in the letter from George Washington, dated September 17, 1787, transmitting the proposed Constitution to the Continental Congress:[79/]

"The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying

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79/ 2 Farrand, Records of the Convention, 666-667.

money and regulating commerce, and the corresponding executive and judicial authorities should be fully and effectually vested in the general government of the Union."

The view of the Supreme Court has always been that, "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations."[80] Such treaties may have the force of domestic law, if they are self-executing, or may be implemented by legislation under the "necessary and proper" clause.

In Missouri v. Holland,[81] the Court expressly rejected a contention that the United States could not by treaty and implementing act of Congress regulate the subject of migratory birds unless that subject came within the legislative powers delegated to Congress.[82]

But that decision merely made explicit what had long been implicit, for in none of the cases involving treaty provisions had any question been raised as to whether the provision was within the general powers of Congress to legislate. It was enough that the matter was an appropriate subject for international negotiation.

The most usual types of treaties would be invalid if measured by the test of whether they came within the legislative powers of Congress.

80/ Geofroy v. Riggs, 133 U.S. 258, 266 (1890). See also Holmes v. Jennison, 14 Pet. 540, 569 (Opinion of Taney, C.J.) (1840); Holden v. Joy, 17 Wall. 211, 243 (1872); In re Ross, 140 U.S. 453, 463 (1891); Missouri v. Holland, 252 U.S. 416, 433-434 (1920); Asakura v. Seattle, 265 U.S. 332, 341 (1924); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931).

81/ 252 U.S. 416.

82/ As the Court stated (252 U.S. 433): "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 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."

For example, treaties relating to the rights of aliens to own land and personalty, to inherit property, and to transfer property by will or intestate succession;[83] treaties relating to rights of aliens to engage in trade or business, as applied to a business having no interstate character;[84] and treaties of extradition--where the crime was a purely domestic one within the foreign state.[85]

This does not mean that the treaty power is a "Trojan horse" which can bring about an unintended "change in the balance between federal and state power," as the American Bar Association Committee has contended.[86] It means simply that one of the powers which the Constitution delegated to the federal government, completely, was the treaty power. The framers clearly understood that the treaty power was very broad in scope and could reach many matters which would otherwise be solely of state concern. Nevertheless they gave that power exclusively to the federal government. It is the proposed denial to the federal government of a large part of the treaty power, granted by the Constitution and repeatedly exercised since the beginning of the Republic, which would produce "a change in the balance between federal and state power."

In this connection, reference has been made to the so-called Steel Seizure Case.[87] The Supreme Court held that the executive order of the President directing the Secretary of Commerce to seize and operate the

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83/ Chirac v. Chirac, 2 Wheat. 259; Hauenstein v. Lynham, 100 U.S. 483; Santovincenzo v. Egan, 284 U.S. 30.

84/ Asakura v. Seattle, 265 U.S. 332 (pawnbroker).

85/ Matter of Metzger, 5 How. 176, 187-188 (forgery); Charlton v. Kelly, 229 U.S. 447 (murder).

86/ Hearings p. 37. These are the hearings which were held in May, June 1952 on S.J. Res. 130 (82d Cong.) the predecessor of S.J. Res. 1 (83d Cong.)

87/ Youngstown Co. v. Sawyer, 343 U.S. 579 (1952).

steel mills which were then threatened with a strike, was not authorized by the Constitution or laws of the United States; and that the order and seizure could not stand. The vote of the Justices was six to three. Proponents of S. J. Res. 1 say,

"Mr. Chief Justice Vinson, dissenting in the Steel Seizure Cases, implied that the United Nations Charter and the North Atlantic Treaty gave the President power to seize private property. (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952).) Two other Justices joined with him in that opinion. Under the pressure of some future emergency, a majority of the Supreme Court may find that the treaty power authorizes action otherwise forbidden by the Constitution."[88/]

The reference to the United Nations Charter and the North Atlantic Treaty occurs in Part I of the dissent by Mr. Chief Justice Vinson and Mr. Justices Reed and Minton, 343 U.S. beginning at 667. The preface to the reference is this sentence: "In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised." The references to the Charter and North Atlantic Treaty follow, and appear in describing the historical background of world conflict which the United States has faced from the close of World War II through the Korean conflict. Reference is made to the United Nations Charter and the North Atlantic Treaty as "congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale." The dissent then proceeds to outline the congressional measures which followed the treaties chronologically, such as the Mutual Security Act, the Defense Production Act, and several appropriation acts. Then, after this recitation, the dissenters launch into their derivative

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88/ Bricker, "Safeguarding the Treaty Power," 13 Fed. Bar Journal 77, 79 (Dec., 1952).

conclusion with these opening words: "The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel." 89/

It is, therefore, fairly clear that, whatever one's views may be on the merits of the dissent, certainly it rests on the view that the President's alleged power to seize the steel mills arose from his duty to execute the legislative programs of the Congress and not from any implication that any treaty gave the President power to seize private property. The adoption of S. J. Res. 1 or S. J. Res. 43 would not increase or diminish the chances that the minority's holding might some day become the majority holding.

The reason why the treaty power is not and should not be limited to matters which would otherwise be within the legislative powers delegated to Congress is clear. In regard to general legislative powers, those powers not delegated to the federal government are reserved to and may be exercised by the states under the Ninth and Tenth Amendments to the Constitution. Thus, there is no gap in powers. The power to make treaties is, however, expressly denied to the states by Art. I, Sec. 10 of the Constitution. Whenever a matter is an appropriate one for international negotiation and agreement, either the federal government must be capable of dealing with it by treaty, or the United States as a whole is lacking in an essential aspect of sovereignty and is seriously handicapped in its ability to deal with other nations. The point was succinctly stated by Attorney General Caleb Cushing, in 1857: 90/

"The power, which the Constitution bestows on the President, with advice and consent of the Senate, to make treaties, is not

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89/ 343 U.S. 672, underscoring supplied.

90/ 8 Op. Atty. Gen. 411, 415

only general in terms and without any express limitation, but it is accompanied with absolute prohibition of exercise of treaty-power by the States. That is, in the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the States. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign,--not sovereign,--nor in coequality of right with other admitted sovereignties of Europe and America."

The ABA proposal would therefore appear to be even more disruptive than the suggestion for change embodied in section 3 of S. J. Res. 1. Since any constitutional limitation of the scope of treaties would weaken the position of this nation at the international bargaining table, it is incumbent on the proponents of such a limitation to show a definite and compelling need for it. As I said at the outset of my statement, that showing is not made by pointing to particular treaties, not yet ratified or even submitted for ratification, which are said to be objectionable.

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"Sec. 4. All executive or other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent to be prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article."

[The comparable provision in S. J. Res. 43 reads as follows:

"Executive agreements shall be subject to regulation by the Congress and to the limitations imposed on treaties by this article."]

Along with the above quoted provisions of proposed section 4, it is probably necessary to consider the proposed provisions of S. J. Res. 2, 83d Congress, which sets out the kind of limitations the sponsors of S. J. Res. 1 have in mind in providing that executive agreements shall be made only in the manner and to the extent to be prescribed by law. Thus in addition to being subject to the limitations imposed on treaties and the making of treaties by the first three sections of S. J. Res. 1, executive and other international agreements, other than treaties, would be subject to the following:

1. They shall be of no force or effect as laws or as authorizations until and unless they have been published in full in the Federal Register.
2. They shall be subject to such legislative action as the Congress, in the exercise of its constitutional powers, shall deem necessary or desirable.
3. They shall be deemed to terminate not later than six months after the end of the term of the President during whose tenure they were negotiated, unless extended by proclamation of the succeeding President.

4. Agreements or compacts entered into by the President with foreign governments or officials requiring secrecy shall be submitted to the Congress as treaties in accordance with the requirements of the Constitution, otherwise they shall be of no force or effect except as personal undertakings of the President.

Most of the executive agreements have been and are in fact congressional-executive agreements, based upon the cooperation of the Congress and the President and the merger of their powers.

A comparatively small number of the total agreements has rested upon the sole action of the President. These have related to his express and exclusive constitutional powers as commander in chief of the army and navy, and his diplomatic powers as the sole organ of the federal government in the field of international relations, including the power to receive ambassadors and other public ministers. Thus the power to give permission without legislative assent for the introduction into this country of foreign (Mexican) troops was assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States;[91] and recognition of a foreign government (USSR) with incidental settlement of outstanding claims rested on the President's powers to receive ambassadors and other public ministers.[92]

In contrast to these types, there is the large bulk of executive agreements either authorized or ratified by Congress. These include the postal conventions; the acquisitions of territories such as Texas, Hawaii, and certain islands in the Great Lakes; the arrangements with

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91/ Tucker v. Alexandroff, 183 U. S. 424, 435 (1902).

92/ United States v. Belmont, 301 U. S. 324 (1937); United States v. Pink, 315 U. S. 203 (1942); and see Fraser, Treaties and Executive Agreements, Sen. Doc. 244, 78th Cong., pp. 20-27.

foreign powers in relation to commercial reciprocity agreements and the suspension of discriminating duties; extension of the privileges of copyright and the protection of trade-marks; agreements with the Indian tribes, which since 1871 supplanted the use of formal treaties; arrangements respecting fishing privileges of American citizens in foreign waters; the settlement of pecuniary claims against foreign governments, and the submission of such claims to arbitration; adherence by this country to membership in a score or more of international organizations; the trade and financial agreements, and agreements affecting international communications and transportation consummated in the 1930's and 1940's under authorization or policies laid down by acts of Congress.

The fact that there could be international agreements other than treaties was recognized in the Constitution itself, which, in Article I, Section 10, provides that no state shall enter into "any Treaty, Alliance, or Confederation," nor, without the consent of Congress, enter into any "Agreement or Compact * * *with a foreign Power." It was recognized by the Congress during Washington's first administration. In establishing the Post Office, Congress authorized the Postmaster General to make arrangements with the postmaster in any foreign country for the reciprocal receipt and delivery of mail. 1 Stat. 232, 239. Pursuant to authority conferred by this and later statutes postal carriage arrangements with Canada and postal conventions with many countries of the world were consummated. Almost 100 years after the first postal act Solicitor General William Howard Taft ruled:

> "From the foundation of the Government to the present day, then, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster-General power to conclude

conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails." 93/

The frequency with which such agreements have been used is indicated by the fact that of the nearly 2,000 written international agreements entered into by the United States in the 150 years between 1789 and 1939, only some 800 were made by the formal treaty process. 94/

The Supreme Court has repeatedly recognized as well established "the power to make such international agreements as do not constitute treaties in the constitutional sense." 95/ The Court has said in connection with an executive agreement, not submitted to Congress, that an international compact is not always a treaty requiring participation of the Senate. 96/

The important fact is that under the broad grants of power in the Constitution to the Congress and to the President other procedures than

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93/ 19 Op. Atty. Gen. 513, 520 (1890).

94/ Letter of April 25, 1947, from Acting Attorney General McGregor to Senator Wallace H. White, Jr., Chairman of the Senate Interstate and Foreign Relations Committee, regarding S. 11, 80th Congress.

95/ United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936). Altman & Co. v. United States, 224 U.S. 583 (1912) (commercial agreement authorized by the tariff acts); United States v. Belmont, 301 U.S. 324 (Litvinov assignment); United States v. Pink, 315 U.S. 203 (same).

96/ "A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' Altman & Co. v. United States, 224 U.S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. See 5 Moore, Int. Law Digest, 210-221. The distinction was pointed out by this court in the Altman case, supra, which arose under §3 of the Tariff Act of 1897, authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a 'treaty' within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this court." United States v. Belmont, 301 U.S. at 330-331.

formal treaty-making have developed and have been utilized throughout our history for entering into international agreements on important subject matters with more or less the same legal and practical consequences. Care must therefore be exercised, in any consideration of altering the full foreign affairs power, not to cut off, inadvertently or otherwise, functions, practices and methods of operation that have developed usefully and to our advantage, and without which our facility in dealing with other nations would be hampered and restricted.

Considering again the limiting effect of proposed section 2 of S. J. Res. 1, there would appear to be no more justification for such limitations on the scope or the subject matter of executive agreements than in the case of treaties. Each form of international agreement may be an appropriate means for the exercise of the federal power over foreign affairs—a power which because it is exclusive must be plenary.

As to the question raised by section 3 of S. J. Res. 1, whether an act of Congress ought to be required to give an international agreement domestic effect, most so-called executive agreements are either authorized or ratified by Congress. Hence section 3 of S. J. Res. 1 would seem to have little significance for such agreements. As to executive agreements not submitted to Congress, issues whether such agreements can override state law have seldom arisen and are not usually likely to arise because of the general external use and application of such agreements. In the Belmont and Pink cases, it was held that such agreements incident to recognition of a foreign government could override state policies; however, a like result has been reached as to declaration of federal policy incident to recognition or non-recognition even where no international agreement is involved, on the ground that the federal executive has the exclusive power to recognize or refuse to recognize foreign governments and to determine

the consequences of recognition or non-recognition.[97]

The legislative limitations proposed in S. J. Res. 2 raise certain problems. For example, there is the provision that executive and other agreements shall be subject to the legislative action of Congress in the exercise of its constitutional powers. As already noted, most executive agreements are either authorized or ratified by Congress. Moreover Congress has the power to supersede a treaty insofar as it declares rules of domestic law, and it seems obvious that Congress has like power as to agreements other than treaties. Viewed from this aspect, the proposed provision of law seems to state merely the obvious, and would not seem to be needed. If, however, the provision is intended to assert legislative control over international action taken by the President in the exercise of his constitutional powers as commander-in-chief, or his powers to conduct foreign affairs,[98] it would raise grave implications for the principle of separation of powers on which our Constitution is based.

The provision that executive agreements would terminate, unless extended, after the end of the term of the President within whose tenure they were negotiated, would impose crippling impediments to the effective negotiation of and adherence to all sorts of executive agreements, frequently of an administrative character, whose nature presupposes a relatively long term. The effect of such provisions on long-term agreements

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97/ Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F. 2d 1000 (C.A.D.C., 1951), certiorari denied, 342 U.S. 816.

98/ cf. United States v. Belmont, 301 U.S. 324.

relating to the administration of military bases, for example, has been pointed out in the memorandum submitted to last year's subcommittee by the Department of Defense.[99/]

99/ Hearings on S. J. Res. 130 (82d Cong.), pp. 365-367. A number of the other problems arising from section 4 of S. J. Res. 1 and the whole of S. J. Res. 2 are dealt with in papers that were submitted in regard to S. J. Res. 130 and S. J. Res. 122 of the 82d Congress, and are spotted in various places in the Hearings.

CONCLUSION

What I have stated in regard to the several sections of S. J. Res. 1 and S. J. Res. 43 can be summed up in a sentence: The proposed amendments are both unnecessary and damaging.

Our Constitution is a sacred document. We have a reverence for it that does not admit readily of changes. Its words, as Holmes has said, "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

Without any clear showing of abuse in the past, the proposals would change our constitutional standards which have worked well, over the years. They would substitute a new inflexible standard which would seriously restrict the ability of the United States to conduct foreign relations effectively. They would deny to the United States, in its dealings with other nations, rights of sovereignty which other nations exercise. They would make international agreements of all kinds more difficult to negotiate and enforce. S. J. Res. 43 particularly would seriously alter the existing balance of federal-state relations.

The proposals would impose these restrictions based upon an asserted likelihood that the treaty power might be abused. These dangers, we are told, flow mainly from agreements which have not been approved by the executive branch of the government let alone submitted to the Senate for ratification.

Whether those, or other agreements, should ever be accepted as good treaties or rejected as bad treaties would seem to be, as always, matters for executive and legislative judgment when the issues arise, case by case, in the future. That is the traditional way under our system of justice, based upon the English common law, to meet and cope with changing conditions.

In these times, our position in the world is relatively as fraught with peril as it was for the nation newly launched under the Constitution of 1789. On every hand we have need for friends and allies—the old who have dealt securely with us in the past, the new who can rely upon the example of the past. I think it is against the best interests of the country to inflexibly reduce the tried and proven means, or to dissipate our responsibility and authority, for meeting the world-wide issues which affect the welfare of the United States.