EDITORIAL COMMENT

TREATIES, THE SENATE, AND THE CONSTITUTION: SOME CURRENT QUESTIONS

It may be useful to record briefly in the JOURNAL three relatively unpublicized contemporary problems of treaty law. These developments present unusual aspects of the relationship of the Senate's treaty powers to the making or changing of Federal statutory law. It may well be that the ways in which these problems, or some of them, are approached and solved may come to have a place in the Constitutional history of the treaty power in the United States.

1. *Senator Bricker and the Conservationists: The Senate and the Courts*

A publication of the Wildlife Management Institute reported recently [1] a correspondence with Senator Bricker regarding the effect of his proposed Senate Joint Resolution 3 upon the Migratory Bird Treaty between the United States and Canada. The Senator pronounced himself as opposed to "any amendment which would make it impossible for the United States to fulfill its obligations under that treaty" and continued:

> The Migratory Bird Treaty would not be affected by Section 1 because it was made in pursuance of the Constitution; involved a subject of genuine international concern; and did not conflict with any constitutional provision. The Migratory Bird Treaty required implementing legislation by both Houses of Congress. Congress provided that legislation when it passed the Migratory Bird Treaty Act. If Section 2 of my amendment had been in effect at that time, the same legislation could have passed and that legislation would have been valid even though the power to enact such legislation might not have existed in the absence of the treaty. Section 3 of the amendment deals only with international agreements other than treaties.[2]

It is interesting to note that Senator Bricker thus seems to accept the result of *Missouri* v. *Holland* [3] as of continued validity under an altered Constitution. This would certainly seem to mark a difference in viewpoint between Senator Bricker and those supporters of his earlier proposals who have concentrated their criticism upon the "centralist" philosophy of the *Holland* decision.

However, the real importance of the Senator's reported answer lies in what it implies with respect to the interpretation of the Constitution, should his amendment become a part of it. It will be recalled that before the Migratory Bird Treaty and its implementing legislation, a Federal legislative effort to deal with the problem without a treaty had been struck

[1] Outdoor News Bulletin, Vol. 11, No. 6, March 29, 1957, issued bi-weekly by the Wildlife Management Institute, 709 Wire Bldg., Washington 5, D. C.

[2] *Ibid.*, p. 2.

[3] 252 U. S. 416 (1920).

down by the lower Federal courts.[4] The opinion of Holmes, J., in the *Holland* case turned on the difference in language between the supremacy clause for Acts of Congress ("in pursuance of the Constitution") and for treaties ("made under the authority of the United States"). It has been commonly assumed that Senate Joint Resolution 3,[5] Section 1, which provides that "a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect," had meant to remove the differentiation now present in the supremacy clause between "treaty law" and ordinary Federal legislation. In his answer to the conservationists Senator Bricker suggests another concept of "in pursuance," one which would not overrule *Missouri* v. *Holland.*

What branch of the Government is to decide whether a treaty and its implementing legislation are "in pursuance" of the Constitution and hence valid, or not "in pursuance" and hence invalid, and by what tests? The normal answer to this question, under the generality of Section 1 of Senate Joint Resolution 3 would be: "The Supreme Court of the United States, *Marbury* v. *Madison,* etc." But Senator Bricker's answer to the conservationists does not mention the principle of judicial review. Perhaps he meant only to give his view of what he understands the proposal to mean. Perhaps the suggestion is that the legislative history of Senate Joint Resolution 3 will make his point of view on the scope of the treaty power clear—certainly clearer than any such "liberal" viewpoint has previously been made in hearings on the predecessors of Senate Joint Resolution 3.

Perhaps Senator Bricker's reply to the conservationists merely gives his view that Federal regulation which once could only have been upheld under the treaty power ("authority of the United States") can now be supported with assurance under the commerce power; *i.e.,* the Supreme Court probably would hold now that a Federal statute (with or without a treaty) dealing with migratory bird regulation would be "in pursuance" of the Constitution. If this is the case, then those who (unlike Senator Bricker) object to the Federal regulation of migratory birds and other like extensions of Federal power might well query what Article of the

[4] The opinion in Missouri *v.* Holland cites U. S. *v.* Shauver, 214 Fed. 154 (1914) and U. S. *v.* McCullagh, 221 Fed. 288 (1915), both as supported by the rationale of Greer *v.* Connecticut, 161 U. S. 519 (1895).

[5] 85th Cong., 1st Sess., introduced Jan. 7, 1957, read twice and referred to the Committee on the Judiciary. The operative portions of this latest version of the so-called "Bricker Amendment" read:

"*Section 1.* A provision of a treaty or other international agreement not made in pursuance of this Constitution shall have no force or effect. This section shall not apply to treaties made prior to the effective date of this Constitution.

"*Section 2.* A treaty or other international agreement shall have legislative effect within the United States as a law thereof only through legislation, except to the extent that the Senate shall provide affirmatively, in its resolution advising and consenting to a treaty, that the treaty shall have legislative effect.

"*Section 3.* An international agreement other than a treaty shall have legislative effect within the United States as a law thereof only through legislation valid in the absence of such an international agreement."

[*Section 4* deals with voting procedure in the Senate on advising and consenting to treaties.]

Constitution ought to be amended, the commerce clause or the supremacy clause.[6]

On the face of it Senator Bricker seems to be laying down a new, threefold (or possibly fourfold) test for the constitutionality of a treaty under the proposed amendment, and he appears to be applying the test as a part of the legislative history of Senate Joint Resolution 3. Some portions of the suggested test have been mentioned in *dicta* by the Supreme Court ("conflict with any Constitutional provision"), and other portions of the test have been asserted to be good law by commentators and argued in cases ("subject of genuine international concern").[7] Senator Bricker adds to these his interpretation of "in pursuance of the Constitution" and the intimation that a treaty which specifically provides that it shall not be self-executing is of a somewhat higher order of Constitutional acceptability.[8] The foregoing opens the questions: (a) Where and in what detail should the tests be laid down, and (b) What institution (or institutions) of government shall have the power to rule specifically on the constitutional acceptability of particular treaties? These are fascinating and important questions.

2. *New York and Niagara Power: The Senate and the House of Representatives*

Under the Federal Water Power Act of 1920[9] the Federal Power Commission is given jurisdiction to license power projects on any stream over which there is Federal jurisdiction, except such streams as Congress might expressly remove from the jurisdiction of the Federal administrative agency. The Senate had referred to it for its advice and consent a new treaty between the United States and Canada, signed in 1950, providing for the joint development of the scenic values of Niagara Falls and for an increased utilization of water flow for power production purposes. The Senate qualified its consent to the treaty by attaching a reservation:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress.[10]

[6] U. S. Constitution, Art. VI, 2nd par.

[7] Charles Evans Hughes, as President of the American Society of International Law, 1929 Proceedings A.S.I.L. 194, as recorded in Bishop, International Law 83 (1953); see also part 2 of this editorial.

[8] Senator Bricker's reference to the fact that the Migratory Bird Treaty was not self-executing but was implemented may imply that Sec. 2 of his proposal, as well as Sec. 1, is to be applied retrospectively as well as prospectively. See the last sentence of Sec. 1 (note 5 above) and compare the quotation from the Senator's statement to the conservationists, *supra*, p. 606.

[9] Now part of the Federal Power Act, codified, 16 U.S.C. § 791a, *et seq.*

[10] Treaty between the United States and Canada Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694, 699.

The Power Authority of the State of New York applied to the Federal Power Commission for a license covering the new flow made available under the treaty, contending that the Senate's action was incompetent to remove the Niagara (as to the new water fall) from the jurisdiction of the Commission. The Federal Power Commission dismissed the application on the ground that it as a creature of Congress could not resolve the disputed issue of its jurisdiction raised by the Senate reservation.[11] Review is now pending before the Court of Appeals for the District of Columbia.

A key issue in the case is whether the Senate reservation suffices to bring into operative effect (with respect to the substance of the reservation) the familiar principle of United States treaty law that conflicts between Acts of Congress and treaties are resolved in favor of the latter in time. The New York Power Authority contends that the Senate reservation does not relate to a matter of international concern and hence cannot partake of the treaty power in relationship to prior legislation. The power of the Senate has been defended.[12]

Thus, once again the substantive content of "of international concern" comes into issue, as does the rôle of the courts *versus* other institutions of government with respect to the making of the determination as to a particular treaty or reservation. Issues such as these may well be settled soon by judicial decision, and further comment while they are *sub judice* will be foregone here.

There is, however, another question, one which does not seem within the ambit of the current litigation. It is the question of the respective rôles of the Senate and the House of Representatives in the law-making process, where under the Constitution (now or as amended) the Senate has a treaty function which the House does not have, but where the House can never legislate alone. There is an interesting parallel between the assumptions of the Senate in the case of the Niagara reservation and Section 2 of Senate Joint Resolution 3.[13] The latter formulation for Constitutional change gives the Senate the power to prevent a self-executing treaty from superseding a prior inconsistent Act of Congress; it also permits the Senate to do just the opposite and by two-thirds vote provide that a treaty shall have self-executing legislative effect.

We know from precedent and the practices of treaty negotiators that treaties as signed do not always make it entirely clear whether they are intended to be self-executing or not; hence the "grammar test" of the United States Supreme Court.[14] Heretofore instances in which the Senate by reservation has attempted to decide the issue have been rare. The rôle of the courts has become well established.

Should the Senate by virtue of Constitutional amendment be given a

[11] JA 33–42, Nov. 30, 1956, dismissing application for license in project No. 2216.

[12] Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation," 56 Columbia Law Rev. 1151 (1956).

[13] The parallel does not lose in interest when one reflects that very likely the Senators who sponsored the Niagara reservation do not see eye to eye with Senator Bricker on his proposals to change the treaty power.

[14] Robertson *v.* General Electric Co., 32 F.2d 495 (4th Cir., 1929); Foster and Elam *v.* Neilson, 2 Peters 253 (1829); U.S. *v.* Percheman, 7 Peters 51 (1833).

clear power to do that which is uncertain and disputed, namely, the competence to determine as between a prior bicameral act and its own unicameral act as to which is the law? Certainly the amendment would generally resolve in favor of Senate power what is now at issue for a narrower situation in the litigation between the State Power Authority and the Federal Power Commission.

Despite the lack of any concrete evidence that the House of Representatives does concern itself about the steady increase of Senate power *de facto* throughout the field of lawmaking—an increase sometimes almost as much at the expense of executive power as of the legislative power of the "popular" branch of the national legislature—the policy question, and it is a big one, remains for decision: How much actual legislative power is it wise to lodge in one House at the expense of the other, either by Constitutional change or by toleration?

3. *World War II and the Italian Extradition Treaty: The Senate, the Executive and the Courts*

Argento resisted extradition to Italy,[15] arguing that no valid international agreement existed under which he could be extradited, because: (a) World War II extinguished, rather than merely suspended, the Extradition Treaty of 1868, as amended; (b) Article 44 of the Italian Peace Treaty, providing that such bilateral treaties as each of the Allied and Associated Powers should desire "to keep in force or revive" should be notified to Italy, and the ensuing notification by the U. S. Department of State were ineffectual since the notification was not submitted to the Senate for its approval.

The Circuit Court of Appeals for the Sixth Circuit held against Argento. It accepted the proposition that if war had extinguished the Extradition Treaty, its revival under Article 44 of the Italian Peace Treaty without Senate concurrence would not have been possible. Then, coming to grips with that "subject in respect of which there are widely divergent opinions," the effect of war on treaties, the court found that war merely suspended an extradition treaty. Remarking that the question of the effect of war on an extradition treaty seemed to be one of first impression and that neither of the classifications of *Karnuth* v. *United States*[16] fitted, the court found the solution to its problem in ". . . the actual conduct of the two nations involved, acting through the political branches of their governments." The actual conduct of the political branches of the American and Italian governments indicated suspension and revival, not extinguishment and remaking, it was found. The court added:

> . . . There is, to be sure, a certain circuity of reasoning in deciding that the parties did not need to make a new treaty of extradition for the reason that they did not in fact make one. Yet it is exactly that pragmatic and cautious approach that, if the question is doubtful, the authorities enjoin. Terlinden v. Ames, 184 U. S. 270. . . .

[15] Argento *v.* Horn, 241 F.2d 258 (6th Cir., 1957); digested below, p. 634.

[16] Political treaties, on the one hand, and treaties for wartime conduct, boundary and private rights to lands on the other, 279 U.S. 231, 236 (1929).

One factor mentioned by the court probably has greater weight than its mere mention might suggest: The court found the Senate had ratified Article 44 of the Italian Peace Treaty without raising any question or expressing any point of view about the notification procedure. Suppose the Senate had in giving its consent to the Peace Treaty recorded its "understanding": (a) that war terminates extradition treaties; or, (b) that the list of treaties notified under Article 44 would have to receive Senate concurrence. The approach of the opinion suggests that either Senate action would have changed the picture markedly. It is also of possible significance that court and counsel assumed throughout that as to extradition the international agreement which would justify the power would have to be a Senate-consented type of international agreement:

> That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. Valentine v. United States, ex rel. Neidecker, 1926, 299 U.S. 5 . . . ; see Factor v. Laubenheimer, 1933, 290 U.S. 276 . . .
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> While Congress might conceivably have authorized extradition in the absence of a treaty it has not done so. The law is clear . . .

This recalls another area in which the executive agreement had been foreclosed.[17] It is also an area where in practice the House has had no say, except to provide for the implementation of the action agreed between the Executive and the Senate.[18]

But under this decision the courts still have the last say on some rather important questions. Query, the extent to which this judicial rôle could have been foreclosed or cut down by the Senate's use of its power to qualify its consent to treaties by means of reservations, understandings and interpretations.

Taken together, the three contemporary situations suggest that the questions for discussion, should proposals for Constitutional change in the treaty power again come up for serious attention, might well include questions other than those principally discussed in 1953–55.

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SOME QUESTIONS OF LEGAL RELATIONS BETWEEN COMMONWEALTH MEMBERS

The emergence of Ghana as the ninth member of the British Commonwealth and the eighty-first Member of the United Nations draws attention anew to a unique and continuing experiment. There is a prospect of four additional members of the Commonwealth in the near future.[1] Already

[17] Editorial, "Executive Agreements and Emanations from the Fifth Amendment," 49 A. J. I. L. 362 (1955).

[18] *Cf.* Arthur Krock, editorial on the proposed Senate "understanding" on the International Atomic Energy Agency Treaty, New York Times, June 18, 1957, p. 32, col. 5. Mr. Krock supports the use by the Senate of "understandings" that treaties be not self-executing as a simple and desirable alternative to Senator Bricker's proposed amendment. But see the discussion, *infra* Part 3.

[1] Malaya, the British West Indies, Nigeria, and the Federation of the Rhodesias and Nyasaland.