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SOME LEGAL ASPECTS OF AMERICAN SOVEREIGNTY

THE advocates of a post-war world security organization are squarely up against the question of "sovereignty." There has been little audible dissent from proposals for an association of "sovereign" nations to preserve world peace, although there is wide divergence of opinion concerning the organization powers and responsibilities of such an association. Those who have specifically criticized the suggestion have done so for the reason that it does not go far enough to accomplish its purpose. They contend that the word "sovereign" should be lifted out of all such proposals for the reason that its inclusion will neutralize the effectiveness and destroy the continuity of the proposed association.

To these people an association of "sovereign" nations with power to enforce its decrees upon its own constituent members is self-contradictory.¹ Sovereignty, we are told, means or implies independence, self-sufficiency and insubordination. A "sovereign" nation by its very nature takes orders from nobody but its own constituency. If the new world association is to be effective it must have the right to give orders to its membership and, if necessary, to enforce them. Such en-

¹ Wendell Willkie, writing in *Collier's Magazine*, September 16, 1944.

forcement procedure directed against a "sovereign" nation would be war, the very thing that the Association is organized to prevent.

Others equally devoted to the idea of effective and permanent world security organization reply to this criticism substantially as follows:

Granting that the association is to be made up only of "sovereign" nations, that is precisely as it should be. A state less than sovereign, i.e., a colony, dependency or protectorate, is obviously not eligible for full and charter membership. Only "sovereign" nations come to the Association with full power to act. The very subjection of a nation to the tenets and agreements of the Association requires "sovereignty" as a prerequisite. This prerequisite sovereignty is immediately qualified, *ipso facto*, upon entrance into the Association. It is thus contended that the ability to subject itself to the restraints of such association is one of the attributes of sovereignty, just as the freedom and competency of a man to marry, and thus subject himself to the subsequent restraints and obligations of the marriage state, is a prerequisite to a valid marriage. It should be remembered that when such a marriage has been entered into it is thereafter binding upon *both* parties.

To these two points of view must be added a third which, properly or not, is held by what is probably a great majority of those who now think that some such form of world association is both desirable and inevitable. This group believes that the constituent members of the proposed Association are now and will continue to be sovereign nations; that as sovereigns, they will and can agree to be bound by the decisions of the Association in the area of world security; that as long as they are members of the Association they may be required (forced) to abide by Association decisions. *But*, as sovereign nations each may get out of the Association by the exercise of its own judgment through its own exclusive processes at any future time.

There is a fourth possibility, namely, the organization not of a mere association of nations, but of a new world state. This plan would achieve what none of the advocates of a mere "association" goes so far as to suggest, namely, an individual personal responsibility of each citizen of all constituent states directly to the new world government. Whereas "association" would at best establish merely a compulsory co-operation between corporate political bodies (States and Nations), the World State would proceed directly against "aggressive" *individuals* very much as our own Federal Government now proceeds against a citizen of Indiana who fails to pay his Federal Income Tax. Advocates of this new world government have despaired of the effectiveness of "compulsory" co-operative associations and cite as an example the hectic history of our own original states before the adoption of our Federal Constitution.²

All of these proposals involve the question of the "sovereignty" of the United States. Assuming that we are willing or even anxious to join a post-war security organization of nations on any one of the four previously outlined theories, are we *competent* to do so? Does the power of United States Government (sovereign power if you will) enable it to make a binding commitment to join in the forceful suppression of aggression all over the world?

"The Fathers of the Constitution did not believe in the sovereignty of the State in the sense of absolute power, nor did they believe in the sovereignty of the people in that sense. The word sovereignty will not be found in the Constitution or the Declaration of Independence."

In the American conception of government there is no absolute sovereignty. "The powers of government, especially those vested in the Federal Government by the Constitution are limited, *and beyond those limits the Government*

² Union Now, p. 6 and Union Now With Great Britain, pp. 33 and 125, by Clarence K. Streit, Harpers.

may not impose its will upon the individual."³ (Italics mine.) This would seem to be an accurate general statement of American sovereignty *as it relates to the individual citizen*. In this respect the Government of the United States can neither claim a power nor exercise any jurisdiction over the individual citizen that is not granted to it by the Federal Constitution.⁴ The Tenth Amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

In its jurisdiction over the individual citizen therefore the Federal Government operates with a great deal less than absolute or "sovereign" authority. Even within the restricted field of its designated operations positive and specific prohibitions against certain procedures, policies and actions are leveled at all branches of the Federal Government.⁵ All representatives of the Government of the United States, whether executive, legislative or judicial, separately or in concert, would thus seem to be definitely limited in their power to pledge the adherence of this country to any plan whereby the *individual citizen* of the United States would, directly or indirectly, be subjected to the orders of some body not created by the Constitution of the United States itself.

If Congress, the President and the Courts are required to operate within the definitely limited sphere of enumerated governmental powers,⁶ how may they or any of them create

³ The Constitution of the United States, James M. Beck. George H. Doran Co. pp. 213-221.

⁴ *Martin v. Hunters Lessee*, 1 Wheaton (U. S.) 304; *Gibbons v. Ogden*, 9 Wheaton, (U. S.) 1; *United States v. Cruikshank*, 92 U. S. 542.

⁵ Article 1, Section 9, Amendments I to XI inclusive, United States Constitution.

⁶ *Marbury v. Madison*, 1 Cranch (U. S.) 137.

⁶ "It becomes unnecessary to enlarge upon so plain a proposition as it is removed beyond all doubt by the tenth article of the Amendments to the Constitution . . . the ratification of the Constitution by the convention of this state (New York) was made with the explanation and understanding that 'every power, jurisdiction and right which was not clearly delegated to the general government remained to the people of the several states or to their respective state governments.'" Kent, C. J., in *Livingston & Fulton v. Van Ingen et al*, 9 Johns 507 (1812).

an agency with powers superior to and more far reaching than those possessed by its creators? For instance, since no branch of the Federal Government may take the life, liberty or property of an American citizen "without due process of law,"⁷ how might Congress, the President, or both, empower a world association so to do?

Aside from the inherent disability of the agent (Federal Government) to give its sub-agent (the world association) more power than the agent itself possesses, such an attempt to do so would probably violate the *delegatus non potest delegare* principle.⁸ The Constitution gives to Congress the power "to declare war . . . (and) to raise and support armies."⁹ It is conceivable, however, that the effectiveness of a World Security Association would require the centralization of such power over all countries exclusively in the Association. Could Congress thus delegate and, *ipso facto*, abdicate its Constitutional power in these respects?¹⁰

It will be urged, however, that the Constitutional limitations set forth in all of the cases heretofore cited are lifted if the indicated steps are taken through the medium of a treaty with foreign nations; that treaties made *upon the authority of the United States* are valid and binding, constitutional limitations to the contrary notwithstanding. It is to be observed, however, that the principal case supporting this contention had to do with a conflict between the provisions of a treaty and state laws dealing with the same subject matter.¹¹ A treaty between the United States and Great

The broad statements that the Federal Government can exercise no powers except those specifically enumerated in the constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. *United States v. Curtis Wright Export Corporation*, 299 U. S. 316.

⁷ United States Constitution, 5th Amendment.

⁸ *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, and cases cited therein.

⁹ Article 1, Section 8, United States Constitution.

¹⁰ *Panama Refining Company v. Ryan*, 293 U. S. 388; *A. L. A. Schechter v. U. S.*, 295 U. S. 495.

¹¹ *Missouri v. Holland*, 252 U. S. 416.

Britain (December 8, 1916) was designed to protect and limit the shooting of certain migratory birds. Congress subsequently passed a law on July 3, 1918, implementing the treaty with appropriate fines and punishments and providing for its enforcement by Federal game wardens. The State of Missouri brought a bill in equity to prevent one of these wardens from enforcing the provisions of the Congressional Act. It was the contention of the State of Missouri that the jurisdiction over game birds was reserved to the States by the provisions of the Tenth Amendment to the Constitution of the United States. In the course of the court's opinion Justice Holmes declared:

"No doubt the great body of private relations usually fall within the territorial limits of the state, but a treaty may override its power . . . 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 . . . *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.

Missouri v. Holland thus decided simply that acts of Congress enforcing treaty provisions, which in the absence of the treaty would be unconstitutional *as infringing upon powers reserved to the states*, are constitutional, and can be reinforced regardless of whether or not the Congressional acts conflict with state laws or state constitutions. This is far from concluding that *anything* may be accomplished through the medium of the treaty power. Although the decision went further than many commentators thought proper¹² it merely settled in the Federal Government a power that would otherwise have rested in the state government. It did not touch upon the possibility that a treaty might call into being a power which the constitution, expressly or by implication, denied to *either* the state or federal government. Justice Holmes was careful to point out that the treaty in question did not "contravene any prohibitory words to be found in

¹² Forrest R. Black, "Missouri v. Holland — a Judicial Milepost on the Road to Absolutism," 25 Ill. Law Rev. 911.

the constitution." This leaves unsettled the question as to whether or not the restrictions contained in section 9, of article I or specific prohibitions contained in the Bill of Rights (Amendments 1 to 9) could be validly violated by treaty provisions. It is undoubtedly true, however, that the doctrine of *Missouri v. Holland* goes far toward the establishment of sovereignty in treaties made "under the authority of the United States" and "makes more important than ever the political check which resides in the Senate on the treaty-making power."¹³

It is possible, as one writer says, that an effect of this decision will be the establishment of "a third legislative branch of the government, composed of the President and some foreign nation, with the veto power vested in the Senate, which is authorized to enact local police regulations governing the affairs of our citizens. In this day of internationalism the possibilities inherent in such a system are not lightly to be disregarded."¹⁴

By this construction a treaty may conceivably bind the citizen in a matter or manner that, in the absence of the treaty, no state or federal law could accomplish. Such a treaty would be to all intents and purposes, an amendment to the constitution of the United States. Its serious consequences would thus seem amply to justify the constitutional requirement that treaties be ratified by "two-thirds of the Senators present."¹⁵ Present proposals to change the method of their ratification so as to make the conclusion of treaties simpler and easier of accomplishment should be carefully considered for what they are, namely, a drastic relaxation of the amending procedures outlined in the Constitution itself.¹⁶

If the fullest implications of the decision in *Missouri v. Holland* are admitted, then these would seem to exist under

¹³ Edward S. Corwin in 15 Amer. Pol. Science Rev. p. 54.

¹⁴ L. L. Thompson, 11 Calif. Law Rev. 250.

¹⁵ Article II, Section 2, United States Constitution.

¹⁶ Article V of the United States Constitution.

“the authority of the United States” exercised through appropriately ratified treaties, the power to put this country into an association of nations with full power to act. That power may or may not be “sovereignty” depending upon the sense in which that term is used. It is definitely settled, however, that an act of Congress passed subsequently to the treaty could validly and immediately take us out of such an association. There is, in other words, a complete equality in the binding character of a law and treaty respectively, and in case of conflict, the last, in point of time takes legal precedence.¹⁷

Thus, other members of the proposed association could never be certain that a subsequent Congress might not repudiate some or all of the obligations of our membership. The activities, orders and policies of the association would certainly be a continuously open political question in the United States.

It has likewise been decided that wide as the field of treaty action undoubtedly is, it is subject, theoretically at least, to constitutional limitations. The constitutionality of treaties, like the constitutionality of acts of Congress, is a matter for judicial determination by the Supreme Court.¹⁸ Sooner or later, the validity of our entrance into any permanent association of World Powers is certain to be questioned in our courts and while the prospects of an ultimate determination of unconstitutionality is remote, the consequences of such a determination would be infinitely more serious than an abrogation of our membership by Congressional legislation. Leg-

¹⁷ *Foster v. Neilson*, 2 Pet. 253. *Head Money Cases*: 112 U. S. 580, *Whitney v. Robertson*, 124 U. S. 190, *Chinese Exclusion Cases*: 130 U. S. 581, *Sanches v. United States*, 216 U. S. 167.

¹⁸ *Jones v. Meehan*, 175 U. S. 1, *Chase v. United States*, 222 Fed. 593.

¹⁹ *Norton v. Shelby County*, 118 U. S. 425.

islation would end our obligations as of the date of the repealing enactment but a judicial determination of unconstitutionality would have the effect of nullifying our membership from its inception.

In deciding the case of *United States v. Curtis Wright Export Corporation*²⁰ Justice Sutherland makes an impressive collection of precedents which seem to support the contention that in the field of foreign relations the United States is completely sovereign and that its activities in this field are unrestricted by those constitutional limitations, doctrines and rules of construction that would belabor its functions in purely domestic affairs. He concluded that "as a member of the family of nations the *right and power of the United States in that field are equal to the right and power of the other members of the international family.* (Italics mine.) Otherwise the United States is not completely sovereign."

It is important to note that this case did not involve a treaty but a mere joint resolution of Congress by which the President was empowered to prohibit the sale of arms *in the United States* to those countries then engaged in armed conflict in the Chaco.

A strong reliance upon this opinion will undoubtedly be made by those who contend that the provisions for international post-war security should be made by joint resolution of Congress rather than by means of a treaty. This procedure would by-pass the difficulty of securing the ratification of the treaty by the concurrence of two-thirds of the Senators present.

The italicized portion of the foregoing quotation is challenging to say the least. Unlike the United States, other

²⁰ *United States v. Curtis Wright Export Corporation*, 299 U. S. 316.

members of the "international family" are now and will probably continue to be completely unrestricted in their powers. Their governments are unrestricted and their citizens unprotected by bills of right, separation of powers principles or a political philosophy based upon the theory of unalienable individual rights. If through the instrumentality of a treaty, or an executive agreement made pursuant to a joint Congressional resolution or otherwise, the United States government may suddenly take on the full "sovereign" qualities of other members of the international family then that result should be frankly and seriously considered in all our discussions of post war settlements.

Clarence Manion.