THE BRICKER AMENDMENT

TREATY LAW VS. DOMESTIC CONSTITUTIONAL LAW

A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity who never look backward to their ancestors.¹

The present Senate Joint Resolution 1 is designed to prevent abuse of the treaty-making and other international agreement-making powers.² After extensive hearings, the Senate Committee on the Judiciary amended and reported S. J. Res. 1 with a favorable recommendation, only four of its fifteen members dissenting.³

Critics of S. J. Res. 1 assert that the proposed amendment was born in a reckless spirit of innovation. They say, for example, that the amendment "would leave the United States only partially sovereign."⁴ The amendment, it is charged, would "virtually abolish" the traditional treaty-making power "as it was conferred on the Federal Government 164

¹ BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 47, 48 (5th ed. 1797).
² S. J. Res. 1 was introduced in the Senate on January 7, 1953 and co-sponsored by this writer and 63 other Senators. 99 Cong. Rec. 160, 161 (Jan. 7, 1953). Many similar joint resolutions are pending before the House Committee on the Judiciary.
⁴ Id. at 35. (Minority opinion)
years ago." Proponents of S. J. Res. 1 are accused of an evil design to "reduce the President to a mere figurehead in foreign affairs. . . ." In short, opponents of any treaty-control amendment represent themselves as conservative guardians of the sovereignty and the Constitution of the United States. Analysis of constitutional history has seldom been so superficial or the posture of intelligent men so awkward.

Many opponents of S. J. Res. 1, among them Professor Philip Jessup, are avowed enemies of the concept of national sovereignty. Thus their contention that S. J. Res. 1 undermines national sovereignty has a peculiar grace. Professor Jessup, for example, has described national sovereignty as "the root of the evil," a root which should "first be loosened by digging around it and cutting the rootlets one by one" rather than pulling up the root "by one mighty revolutionary heave," as advocated by many world government enthusiasts. Professor Jessup has urged such "restrictions on sovereignty as are necessary to meet the legitimate aspirations of peoples who have never attained a reasonably good life" meaning, of course, unlimited restrictions. Those who pose as defenders of national sovereignty in fighting any treaty-control amendment have advocated the use of United Nations treaties to effect a massive surrender of national sovereignty.

Equally hypocritical is the argument that S. J. Res. 1 would hamstring our traditional treaty power to meet an imaginary danger. That danger was never more accurately described than by Mr. John Foster Dulles in his Louisville, Kentucky speech of April 12, 1952. Mr. Dulles said:

The treatymaking power is an extraordinary power, liable to abuse. Treaties make international law and also they make

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5 Id. at 35, 43.
6 Id. at 48.
8 Id. at 5.
9 Id. at 13.
10 Reprinted in Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 1 and S. J. Res. 43, 83d Cong., 1st Sess., 862 (1953).
domestic law. Under our Constitution, treaties become the
supreme law of the land. They are, indeed, more supreme than
ordinary laws for congressional laws are invalid if they do not
conform to the Constitution, whereas treaty law can override
the Constitution. Treaties, for example, can take powers away
from the Congress and give them to the President; they can
take powers from the States and give them to the Federal
Government or to some international body, and they can cut
across the rights given the people by their constitutional Bill
of Rights.

Scores of United Nations treaties in various stages of
preparation would, if ratified, produce the tragic results de-
picted by Mr. Dulles. Many of those treaties conflict with the
Constitution of the United States. They inspired the intro-
duction of S. J. Res. 1. However, many of the self-styled
conservative opponents of any constitutional change endorse
those treaties. For example, the UN draft Statute for an
International Criminal Court would permit an American
citizen to be sent overseas for trial before an international
tribunal without the constitutional protections to which he
would be entitled in Federal and State courts.\footnote{Report of the 1953 Committee on International Criminal Jurisdiction, UN
Document A/Ac.65/L.13 (Aug. 24, 1953).} Two leading
opponents of S. J. Res. 1, Judge John J. Parker and Professor
Jessup, have advocated the adoption of this treaty. The latter
has written:\footnote{Jessup, A Modern Law of Nations 92 (1948).}

In the relatively simple question of adopting fair procedures
for the Nürnberg Tribunal for the trial of the major German
war criminals, American lawyers had to reconcile their views,
their traditions, and their prejudices to the different views,
traditions, and prejudices of European lawyers. It may be true
that jury trials are necessary to the well-being of every tribe in
Africa; but they are not utilized in every western country,
and it may be that they should not be used. Throughout its
work the Commission on Human Rights will be tossed from
substantive problems to the procedures for their enforcement.
It would do well to avoid seeking to impose as universal con-
cepts those which are historically local phenomena.
The Traditional Treaty Power of the United States

S. J. Res. 1 would merely apply to the treaty-making power the constitutional restraints that were originally intended to govern its exercise. Prior to the nation-wide debate on S. J. Res. 1, opponents of the amendment boasted of their plans to revolutionize the treaty power.

The traditional scope of the treaty power was thus described by Alexander Hamilton:

The power of making treaties relates neither to the execution of the subsisting laws, nor to the enaction of new ones. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

No responsible student of international and constitutional law has challenged Hamilton's statement on the traditional function of the treaty power. Even Professor Jessup has described as "the fundamental tenet of traditional international law... that [a treaty] is a law only between states, not between individuals or between individuals and states." A basic purpose of S. J. Res. 1 is to preserve the traditional tenets of international law. Professor Jessup, on the other hand, has written a book repudiating the traditional concept of international law in which the following statement appears:

Once it is agreed that sovereignty is divisible and that it therefore is not absolute, various restrictions on and relinquishments of sovereignty may be regarded as normal and not stigmatizing. The slow but steady development of majority rule in international organizations bears witness to the change which is taking place... Notable also are those numerous provisions in the Charter which recognize that the treatment of the individual citizen is no longer a matter solely of domestic concern.

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13 See testimony of Dr. George A. Finch, Hearings, supra note 10, at 1111-13, 1121-26, 1133-40.
14 The Federalist, No. 75 at 486 (Modern Library ed. 1937).
16 Id. at 41.
and that the denial of fundamental human rights to a citizen can no longer be shrouded behind the impenetrable cloak of national sovereignty.

The argument that the traditional treaty power has worked well for 164 years and should not be changed collapses under the facts of international life. A plan to regulate by treaty the fundamental human rights of people everywhere did not exist prior to the formation of the United Nations Organization. The departure of the UN's human rights program from traditional treaty concepts was explained in 1948 by Mr. John P. Humphrey, then the Director of the UN Division of Human Rights. Mr. Humphrey said:

What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of supernational supervision of this relationship between the state and its citizens.

Many opponents of S. J. Res. 1, including Professor Jessup, seek to elevate treaty law above domestic constitutional law. They seek to ground the whole spectrum of human rights — civil, political, economic, social, and cultural — in a law superior to that of the nation. Obviously, the correlative duties would also be made independent of national law. Revolutionary proposals seldom inspire constitutional amendments. The Constitution is already an effective barrier in most cases. Having identified some of the self-styled conservatives who would revolutionize the world by treaty, we may proceed to inquire to what extent the Constitution protects us from their undesirable schemes.

**Effect of A Treaty Authorizing What the Constitution Expressly Forbids**

The fears of Mr. Dulles expressed in Louisville are shared by the overwhelming majority of American lawyers. A treaty-

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control amendment has been advocated by the American Bar Association, the National Association of Attorneys General, and more than 20 State bar associations. Basically, the concern of the legal profession stems from an ambiguity in the treaty supremacy clause. Article VI, Section 2, of the Constitution reads:

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. [Emphasis added]

In Missouri v. Holland, Mr. Justice Holmes pointed to the language of Article VI requiring laws, but not treaties, to be made "in pursuance" of the Constitution. He suggested that "under the authority of the United States" might mean nothing "more than the formal acts prescribed to make the convention."  

Following the decision in Missouri v. Holland, Charles Evans Hughes, a former Secretary of State and Chief Justice of the United States, stated that the treaty-making power "has no explicit limitation attached to it, and so far there has been no disposition to find in anything relating to the external concerns of the Nation the limitation to be implied." He went on to say: "I should not care to voice any opinion as to an implied limitation on the treaty-making power." In early dicta, the Supreme Court said that the treaty power does not extend "so far as to authorize what the Constitution forbids..." and that Federal jurisdiction cannot "be enlarged

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18 252 U.S. 416 (1920).
19 Id. at 433.
20 Address before the American Society of International Law reprinted in part in Hearings, supra note 10, at 52.
21 Geofroy v. Riggs, 133 U.S. 258, 267 (1890). For an example of the change in judicial dicta, see United States v. Curtiss-Wright Corp., 299 U.S. 304, 316-319 (1936), wherein the treaty-making power is regarded as an undelegated, inherent power of sovereignty. See also United States v. Reid, 73 F.2d 153, 155 (9th Cir. 1934), expressing a doubt whether "courts have power to declare the plain terms of a treaty void and unenforceable..."
THE BRICKER AMENDMENT

under the treaty-making power." 22 Those reassuring statements were repudiated in Missouri v. Holland. To prevent treaties, in the words of Mr. Dulles, from "cutting across the rights given the people by their constitutional Bill of Rights," Section 1 of S. J. Res. 1 provides:

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

With such a provision in the Constitution, the United States could not become a party to the UN draft Covenants on Human Rights except, of course, by further amending the Constitution. Some provisions of the Human Rights Covenants contravene express constitutional prohibitions. For example, Article 14 permits the right to a public trial to be denied in many cases. 23 In addition, Article 2 (1) permits that dangerously qualified right to be withdrawn completely during a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."

On the other hand, the Sixth Amendment to our Constitution provides for the right of public trial in all cases without any qualification whatsoever. Because of this unequivocal guaranty the Supreme Court was able to write in 1948: 24 "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."

Stripped of all flowery abstractions, the naked question raised by a universal bill of rights is whether or not nations are willing to subordinate domestic constitutional law to a higher treaty law. Those who realistically approach the ambitious assignment of governing mankind and re-writing the law of nations recognize this fact. Hersh Lauterpacht, Whewell Professor of International Law in the University of

24 In re Oliver, 333 U.S. 257, 266 (1948).
Cambridge, points out that a universal bill of rights "worthy of the name is not a consummation which can be achieved without some States [nations] giving up practices and constitutional principles in a way necessary to ensure an irreducible minimum standard of respect for fundamental human rights. . . ."  

Professor Jessup has written in the same vein:  

The human rights to be defined and protected must be considered not in a vacuum of theory, but in terms of the constitutions and laws and practices of more than seventy states of the world. Not every personal guarantee which is congenial to the constitution of the United States of America is necessarily well adapted to other civilizations.

To insure the supremacy of constitutional law, S. J. Res. 1 plugs the loophole through which the advocates of treaty law supremacy propose to crawl. Those who profess a great dislike for constitutional innovation except by treaty have done much to prove the need for a treaty-control amendment.

*The Need to Make Treaties*

*Non-Self-Executing as Domestic Law*

Section 2 of S. J. Res. 1 reads as follows:

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

The words underscored above make all treaties non-self-executing insofar as they are intended to make domestic law. The provision would not apply, of course, to treaties dealing with the nation's external affairs. The proposed amendment would have no effect whatever on treaties such as the North Atlantic Treaty, or on the recent Mutual Defense Treaty between the United States and Korea. The making of treaties of this type would not be affected by passage of the amendment.

THE BRICKER AMENDMENT

The treaty supremacy clause has often made it impossible for the Senate to know whether or not, and to what extent, a treaty supersedes federal and state laws. The need to make all treaties non-self-executing as domestic law became apparent more than a century ago. In 1833, for example, the Supreme Court held to be self-executing a treaty which it had held non-self-executing only four years before. Not until novel treaties began to roll off the UN assembly lines, however, did the domestic problem of self-executing treaties become acute.

Prior to the formation of the United Nations Organization most treaties having a domestic law effect were bilateral. It was not too difficult for the negotiators to state their objectives in precise language. In addition, the Senate had a relatively free hand in interpreting the treaty by way of reservations without undue risk of incurring misunderstanding or ill-will abroad. All this was changed when multipartite treaties dealing with purely domestic affairs began to pour forth from various UN catacombs.

When a treaty has several scores of signatories, ambiguities in language are required to insure the maximum number of ratifications. Particularly where the multipartite treaty deals with essentially domestic matters vague language is necessary to obscure radically different concepts of human rights. In considering such treaties the Senate does not have, as a practical matter, a free hand in writing reservations. Attempted exercise of the right of reservation would require renegotiation of the treaty with all other parties. It is ex-


29 What definite meaning, for example, can be ascribed to Article 1 (3) of the UN Covenant of Civil and Political Rights providing: "The right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources."

tremely doubtful that other parties would accede to any substantial reservation to a multipartite UN treaty. Some treaties expressly provide that reservations shall not be permitted.\textsuperscript{31} By interpretation of the International Court of Justice, it may be impossible for the Senate to make effective reservations to other multipartite treaties such as the Genocide Convention.\textsuperscript{32} Thus, in dealing with United Nations treaties, the Senate must give its consent on virtually an "all or nothing" basis and thereby run the risk of later judicial interpretation contrary to its own. For example, the relevant history on Senate ratification of the United Nations Charter proves conclusively that no reservation to the Charter could be made. No opponent of S. J. Res. 1 has ever suggested that the Senate will be free to attach reservations to any amendments that may be adopted at the UN Charter Revision Conference in 1956.

Our treaty supremacy clause is unique. Only in Mexico, and possibly in France, do treaties become internal law without legislative action.\textsuperscript{33} As a result the United States is at a terrible disadvantage in negotiating treaties with a domestic law aspect. Other countries do not have anything comparable to our supremacy clause. Their citizens are not bound by a treaty unless and only to the extent that the treaty is made domestic law by their own legislative bodies. American citizens, on the other hand, may be subjected to far-reaching and unintended changes in their way of life depending on how the Supreme Court eventually interprets the obscure verbiage of a self-executing treaty. The Senate, in advising and consenting to ratification of a self-executing treaty, performs an executive rather than a legislative function. S. J. Res. 1 will

\begin{itemize}
\item \textsuperscript{31} Universal Copyright Convention, Art. 20, Executive M, 83d Cong., 1st Sess. (1953).
\item \textsuperscript{32} Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28, 1951.
\item \textsuperscript{33} See Hearings, supra note 10, at 1113-21 for relevant provisions of the Constitutions of other nations.
\end{itemize}
insure equality of international obligation as between the United States and other countries.

Articles 55 and 56 of the United Nations Charter contain some extremely vague human rights provisions. They illustrate the need to make all treaties non-self-executing as domestic law. It is uncertain, for example, whether Articles 55 and 56 are obligatory on UN member nations or whether they are merely a statement of high aspiration and purpose.\textsuperscript{34} If obligatory, it is uncertain whether or not these Articles are self-executing.\textsuperscript{35} If the Supreme Court holds Articles 55 and 56 obligatory and self-executing, thousands of federal and state laws will be nullified even though not one of the 89 Senators who voted for the UN Charter expected any such result.

Needless to say, many opponents of S. J. Res. 1 believe that Articles 55 and 56, despite their ambiguity, and without legislative implementation, should be used to alter radically the rights and obligations of the States and of the people. For example, the American Association for the United Nations filed an \textit{amicus} brief\textsuperscript{36} in \textit{Shelley v. Kraemer}\textsuperscript{37} urging that these two Articles had transformed the fundamental human rights of the American people from matters of domestic concern to matters of international concern. Collaborating in the writing of this remarkable brief were Alger Hiss, Asher Bob Lans, Philip C. Jessup, Joseph M. Proskauer, Myres S. McDougal and Victor Elting.

During the Senate debate on S. J. Res. 1, the non-self-executing feature of Section 2 was modified to permit the

\textsuperscript{34} See Sayre, \textit{Shelley v. Kraemer and United Nations Law}, 34 Iowa L. Rev. 1 (1948), contending that Articles 55 and 56 are obligatory and self-executing.


\textsuperscript{36} \textit{Hearings}, supra note 10, at 659-670.

\textsuperscript{37} 334 U.S. 1, 3 (1948).
Senate by a two-thirds vote to make a treaty immediately effective as domestic law. This modification eliminated the objection that the requirement of implementing legislation in all cases might unnecessarily delay the effectiveness of certain treaties.

The "Which Clause" — States Rights

Section 2 of S. J. Res. 1 not only requires legislation to make a treaty effective as internal law but further provides that the legislation must be "legislation which would be valid in the absence of treaty." The "which clause" would no longer permit treaties, in the words of Mr. John Foster Dulles, to "take powers from the States and give them to the Federal Government or to some international body. . . ." 38 It reverses the doctrine of Missouri v. Holland. It places on the treaty-making power the restrictions originally intended to govern its exercise.

In answer to the fears expressed by Patrick Henry39 and others, Thomas Jefferson, after the Tenth Amendment became part of the Constitution, said in his Manual of Parliamentary Practice:40

By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated.

It must have meant to except out all those rights reserved to the States; for surely the President and the Senate cannot do by treaty what the whole Government is interdicted from doing in any way.

38 Hearings, supra note 10, at 862.

39 Speaking in the Virginia ratifying convention prior to the adoption of the Bill of Rights, Henry said: "Sure I am, if treaties are made infringing our liberties, it will be too late to say our constitutional rights are violated." 3 Elliot's Debates on the Federal Constitution 502 and 315-16 (2d ed. 1836). Henry's prophetic example was a treaty authorizing Americans to be tried abroad for alleged crimes committed in the United States. The UN draft Statute for an International Criminal Court does just that.

The principal argument advanced against the "which clause" is that it would require some treaties to be ratified by 48 state legislatures or that it would give every state a foreign policy veto power. Under no circumstances would any treaty on any subject require state ratification. If a treaty concerns only the nation's external affairs, no legislation, federal or state, is required. If a treaty seeks to regulate some local state problem such as divorce or lynching, S. J. Res. 1 would not prevent the treaty from being made. To conform to the Constitution, however, the treaty would have to provide that it would become effective only through state legislation.

The necessity of state legislation to implement some treaties has inspired the reckless charge that S. J. Res. 1 would force a return to the treaty practice under the Articles of Confederation. The fact is that the United States has made scores of treaties in the past 100 years which became effective as internal law only through state acquiescence.\textsuperscript{41}

Because of the erroneous charges leveled against the so-called "which clause," it was eliminated during the Senate debate so as not to prejudice favorable action on more vital portions of the amendment. The "which clause" was not designed to protect States' Rights as such. Proponents of a treaty-control amendment have attempted to draw a line of demarcation between subject matter appropriate for treaty negotiation and matters of purely domestic concern never until recently considered within the purview of the treaty power.

In reporting S. J. Res. 1 with the "which clause," the Senate Judiciary Committee drew the line of demarcation to correspond with that dividing federal and state authority. No better line of demarcation was suggested during the hearings on S. J. Res. 1. Whatever the final outcome of S. J. Res. 1

\textsuperscript{41} See Article VII of the Treaty of 1853 between the United States and France, \textit{S Stat.} 178, 182 (1853), which was considered in Geofroy v. Riggs, 133 U.S. 258, 266 (1890).
in the present Congress, advocates of a treaty-control amend-
ment must continue to wrestle with the difficult problem thus
defined by Judge Florence E. Allen:42

The root of the difficulty lies in the lack of demarcation
between domestic and international legislation. A line must be
drawn beyond which the international organizations know they
cannot pass. The United Nations should draw the line in a reso-
lution of the General Assembly and should facilitate a judg-
ment on the question by the International Court. The United
States should draw the line by amendment to the Federal
Constitution.

A possible solution was recently advanced by Mr. Walter
Brown.43 Pointing out that the domestic law aspects of a
treaty were intended to be merely incidental to its con-
tractual function, Mr. Brown suggested that "the answer is
to limit the treaty power to domestic law which directly
affects the interests of a foreign state or its nationals."44

Section 2 of S. J. Res. 1, as modified during the debate,
provided:

A treaty or other international agreement shall become
effective as internal law in the United States only through legis-
lation by the Congress unless in advising and consenting to a
treaty the Senate, by a vote of two-thirds of the Senators
present and voting, shall provide that such treaty may become
effective as internal law without legislation by the Congress.

The above provision was rejected by the Senate on February
25, 1954, by a vote of 50 to 42.45

Protection of National Sovereignty Against Treaty Law

A treaty surrendering legislative, executive, or judicial
powers of the United States to a world or regional govern-
ment would "conflict" with the Constitution within the mean-
ing of Section 1 of the amendment.

This interpretation of the word "conflicts" was not ques-
tioned during the Senate debate on S. J. Res. 1. The Admin-

44 Id. at 139.
istration did not oppose Section 1 of the amendment denying any effect to treaties or other international agreements in conflict with the Constitution. Moreover, Senators supporting the Administration viewpoint conceded that Section 1 would prevent United States participation in any world or regional government by treaty or executive agreement. Senator Ferguson, for example, said: 46

Mr. President, I wish to repeat that this amendment will prevent the delegation of executive, legislative, or judicial power to an international organization, for under the Constitution these powers are vested exclusively in the President, the Congress, and the Federal courts.

Thus, Section 1 of the amendment embeds in the Constitution the reassuring dicta of the Supreme Court in the Chinese Exclusion Cases: 47

The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. . . . The exercise of these public trusts is not the subject of barter or contract.

Those who yearn for the domination of a supra-national government fall into various classes. Some would surrender national sovereignty immediately; others would destroy national sovereignty gradually by means of UN treaties and by fanciful interpretation of the UN Charter. Some would organize a superstate on a global scale while others would first establish a regional government. All these groups have one thing in common. They oppose S. J. Res. 1 which would preserve the sovereignty they are pledged to destroy. Though opposing S. J. Res. 1, the United World Federalists 48 and the Atlantic Union advocates 49 have disavowed any intent to attain their respective goals by the treaty method. The permanence of this renunciation is questionable to say the least.

46 100 Cong. Rec. 1, 244 (Feb. 4, 1954).
47 Chan Ping v. United States, 130 U.S. 581, 609 (1889).
48 Hearings, supra note 10, at 735, 736.
However commendable this temporary respect for the spirit of the Constitution, it is doubtful that the Constitution in its present form would prevent United States participation in world government by treaty.\(^5\)

Some opponents of S. J. Res. 1 contend, however, that the present Constitution prevents our joining in a treaty creating a world or regional government. Such a government obviously would have to be empowered to regulate a host of matters essentially domestic in character. Secretary of State Dulles contends, however, that the word “treaty” as used in the Constitution does not mean an international agreement “to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.”\(^6\)

He also ventured the opinion that the treaty-making power should not be “to effectuate reforms, particularly in relation to social matters. . . .”\(^7\) Mr. Dulles concluded, however, that the arousing of public concern “was a correction of the evil,” making a treaty-control amendment unnecessary. It is the ancient plea of men in power for a government of men rather than one of constitutional restraints.

Professor Jessup has taken a much more realistic view of the treaty-making power. Moreover, he has succeeded far better than other world government enthusiasts in charting a path to that goal. He would, of course, employ treaties and other international agreements in a manner which would be prevented by S. J. Res. 1. In general, Professor Jessup’s plan is that followed by the American Association for the United Nations. The United Nations would be transformed gradually into a world government by wider utilization of the treaty power\(^8\) and by a series of flexible Charter interpretations subjecting UN members to “majority rule.”\(^9\)

\(^6\) Id. at 824.
\(^7\) As pointed out in Jessup, A Modern Law of Nations 91 (1948): “It is immaterial to this discussion whether such international legislation takes the form of
THE BRICKER AMENDMENT

Professor Jessup deftly punctures bubble-headed visions of a constitutional convention representing the peoples of the world. He makes the incontestable point that "a world constitution . . . can be achieved only through the action of governments and their representatives." What could possibly be more oppressive than life under a world constitution and world legislation enacted by non-elected representatives of the people? The One World Government of Professor Jessup is to be highly un-democratic, regimented by an international police force equipped with atomic bombs, and perhaps consoled by the thought that civil war inside the global prison would be better than one between sovereign states since the outcome "would be the strengthening of world government." Such is the magnitude of the issues at stake in the nationwide debate on a treaty-control amendment.

Need for Congressional Regulation of Executive Agreements

Section 3 of S. J. Res. 1 reads as follows:

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

What is the distinction between treaties and other international agreements? What did the Founding Fathers have in mind when they used the word "treaty" and took such pains to see that this vast power was not centered in one

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additional treaties entered into by the Members of the United Nations as states, or whether, as is urged by many advocates of 'world government,' it takes the form of real legislation enacted by a world parliament composed of representatives not of states but of peoples."


man? \(^{58}\) All available evidence as to the framers' intent shows that they intended the word "treaty" to encompass all international agreements known to them as treaties and all agreements thereafter made possessing comparable characteristics and importance. \(^{59}\)

As late as 1939, Assistant Secretary of State Francis B. Sayre said: \(^{60}\)

International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.

In the past ten years the effort to use treaties and executive agreements interchangeably has been intensified. Dr. Wallace McClure, one-time chief of the Treaty Division, Department of State, wrote in 1941: \(^{61}\)

The President, acting with Congress, where simple majorities prevail, can, in the matter of international acts, legally accomplish under the Constitution anything that can be legally accomplished by the treaty-making power as specifically defined in the Constitution. . . .

The result is that for controversial international acts the Senate method may well be quietly abandoned, and the instruments handled as executive agreements. But for large numbers of purely routine acts, about which no public opinion exists and no question as to their acceptability arises, the present (treaty) method is desirable as saving the time of the House of Representatives.

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\(^{58}\) As Hamilton explained in *The Federalist*, No. 75 at 487 (Mod. Library ed. 1937): "This history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."


Senators know only too well that the McClure theory received at least partial acceptance in the Department. Many international agreements have been made by the President alone or approved by the Congress which were many times more important than treaties submitted to the Senate during the same period. Before reviewing the present administration’s opposition to congressional regulation of executive and other agreements, it should be clearly understood that neither President Eisenhower nor Secretary of State Dulles subscribes to the McDougal-Lans-McClure theory that treaties and executive agreements are wholly interchangeable.

Speaking in opposition to congressional regulation of executive agreements, Secretary Dulles said: 62 “It has long been recognized that there is an undefined, and probably undefinable, borderline between Executive agreements which may be made by the President alone and those that require validation by the Senate as treaties, or the Congress as laws.” Mr. Dulles conceded that this “undefined” border line had caused controversy between the executive and legislative branches of government. He did not explain his reason for believing that the President was better able than the Congress to respect the “undefinable border line.”

The State Department’s opposition to the executive agreements section of S. J. Res. 1 is based on a number of misconceptions. First, it was argued that S. J. Res. 1 as introduced would prevent the President from making any agreement for which Congress had not given prior authorization. 63 Although rather farfetched, this objection has been overcome in the revised text recommended by the Senate Judiciary Committee.

A second misconception is Mr. Dulles’ belief that the danger attached to agreements not ratified by either House of Congress “cannot be great” because such agreements “cannot

62 *Hearings, supra* note 10, at 828.
63 *Hearings, supra* note 10, at 827.
constitutionally become law of the land." 64 The Secretary of State apparently overlooks the decision in United States v. Pink 65 holding that the unratified Roosevelt-Litvinov Assignment superseded the law of the State of New York. The Supreme Court said: 66 "A treaty is a 'law of the land' under the supremacy clause . . . of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

A third misconception is that Congress cannot be trusted to legislate wisely with respect to the making of international agreements other than treaties. 67 The fact is that Congress in recent years has authorized in advance or subsequently approved approximately 85 per cent of all major executive agreements. 68

Basically, the administration's objection to congressional regulation of executive agreements as a matter of right stems from an unsound view of the constitutional separation-of-powers doctrine. For example, Mr. Dulles asserted that the President had "exclusive jurisdiction in relation to the current conduct of foreign affairs." 69 A memorandum prepared by the Legal Adviser of the State Department reveals this basis for that conclusion: 70

Perhaps the unique feature of our Constitution is the provision for the separation of powers between the legislative, executive, and judicial, each supreme in its field, the whole constituting a system of checks and balances. The proposal amendment would destroy this separation insofar as it relates to the President's constitutional authority in the realm of foreign affairs.

Almost all students of government know that executive, legislative, and judicial powers are not contained in hermet-

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64 Id. at 828.
66 Id. at 230.
67 Hearings, supra note 10, at 867.
68 Hearings before a Subcommittee of the Senate Judiciary Committee on S. J. Res. 130, 82d Cong., 2d Sess., 82 (1952).
69 Hearings, supra note 10, at 827.
70 Id. at 837.
ically sealed compartments. Each branch, though primarily responsible in its own field, participates to a considerable degree in the work of the other two branches. The President, for example, is a partner in the legislative process and a very significant factor in the judicial process. The Constitutional system of checks and balances was designed to ensure cooperation between three branches of federal government. It was not intended to inspire competition for power among three branches of government, each exercising a supreme and exclusive authority in its own field. This cooperative concept of governmental separation of powers is particularly important in foreign relations. All Americans recognize today that foreign policy decisions represent life-and-death issues. They insist that the determination of foreign policy, insofar as practicable, be made the responsibility of the President and all 531 members of Congress.\textsuperscript{71}

During the Senate debate, Section 3 was stricken from the text reported by the Senate Judiciary Committee. The purpose of the second sentence of Section 3 was retained, however, by including the words "other international agreement" in preceding sections.

The provision confirming Congress' power to regulate the making of executive agreements was eliminated in the belief that this controversial feature was merely declaratory of Congress' existing power under the "necessary and proper" clause of the Constitution. The Senate Foreign Relations Committee is considering several resolutions calling for some measure of Congressional control over international agreements other than treaties.\textsuperscript{72}

\textsuperscript{71} Many lawyers and members of Congress believe that section 3 of S. J. Res. 1 is merely declaratory of existing law. For example, regulation of executive agreements under the existing power of Congress is provided for in the McCarran Resolution, S. J. Res. 2, 83d Cong., 1st Sess. (1953). See testimony of Alfred J. Schewpee, Chairman, American Bar Association Committee on Peace and Law Through United Nations, \textit{Hearings}, supra note 10, at 1243-54.

\textsuperscript{72} \textit{E.g.}, S. J. Res. 2 introduced on January 7, 1953, by Senator McCarran for himself and Senator Bricker, \textit{99 Cong. Rec.} 156 (1953).
Prior to the vote on final passage of S. J. Res. 1, the Senate adopted the substitute text of Senator George reading as follows:

Section 1. A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect.

Section 2. An international agreement other than a treaty shall become effective as internal law in the United States only by an Act of the Congress.

Section 3. On the question of advising and consenting to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.

The George substitute failed by one vote to receive the necessary two-thirds.73 As of the time this article is written, the Senate's adverse vote is subject to reconsideration on the motion filed by Senator Lennon.74

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Charles A. Webb**

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73 100 CONG. REC. 2251 (Feb. 26, 1954).
74 100 CONG. REC. 2330 (March 2, 1954).
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