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Brunson MacChesney

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THE BRICKER AMENDMENT
THE FALLACIES IN THE CASE FOR
THE BRICKER AMENDMENT

Introduction

The existing constitutional arrangements for the making and enforcing of treaties and the present constitutional powers of the President to make executive and other agreements with foreign countries have recently been under severe attack. Since these arrangements and powers have on the whole served us remarkably well under changing circumstances for more than a century and a half, it is proposed to examine the development of this campaign and to analyze the arguments that have been used to support it.

The principal goal of this forensic effort has been the adoption of the Bricker amendment as reported out by the Senate Judiciary Committee on June 4, 1953.¹ The amendment did not of course emerge suddenly out of a vacuum. Advocacy of such a proposal was initiated chiefly by groups in the American Bar Association,² and by Senator Bricker and other Senators associated with him. In the American Bar Association, former President Frank E. Holman and the Standing Com-

¹ Under the title of Senate Joint Resolution 1, it was reported favorably by a vote of nine to five, the Chairman of the Senate Foreign Relations Committee being one of the dissenters. The text of the operative sections is as follows:

SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

SECTION 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.

SECTION 3. 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.

² The text reported out is essentially the language proposed by the American Bar Association rather than that of the resolutions Senator Bricker originally introduced. The American Bar Association and numerous state bar associations are on record as favoring the proposal. The Section of International and Comparative Law of that Association, the Association of the Bar of the City of New York, the Philadelphia, Boston and St. Louis Bar Associations, The Federal Bar Association, and the State Bars of Delaware, Missouri, and New Jersey are opposed. Lawyers are thus divided on this important issue.

mittee on Peace and Law through United Nations have been the leaders in pointing out the alleged "dangers of treaty law." These forces have urged vigorously the necessity of this constitutional amendment to prevent their fears from being realized.³

Any proposal to amend the Constitution warrants careful scrutiny. Proponents of constitutional change should have the burden of demonstrating that their amendment is required in order to correct known evils. The existing amendments to the Constitution were adopted to overcome specific abuses which had been clearly demonstrated in practice. Have there been abuses of such importance to justify adoption of the Bricker amendment or similar proposals? The Bricker amendment calls for drastic changes in our traditional constitutional arrangements in this area. What facts, legal rulings, and arguments can be marshalled to support such a radical proposal as the Bricker amendment?

United Nations Activities Creating Fear

The proponents have constantly argued that their amendment is necessary to preserve the Constitution and the Bill of Rights.⁴ The reasons for believing no amendment is necessary to achieve these laudable objectives are developed hereafter. So far as the Bill of Rights is concerned, it is ironic that the campaign for the Bricker amendment derived its initial impetus from fears created in their minds by certain activities of the United Nations that were intended to promote a greater realization of human rights throughout the world. The proposals on which they have based their fears will be discussed briefly.

³ Finch, *The Treaty Clause Amendment: The Case for the Association*, 38 A.B.A.J. 467 (1952).

⁴ SEN. REP. NO. 412, 83d Cong., 1st Sess. 3 (1953). See also the statements of Senator Bricker 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. 3 (1953). S. J. Res. 43 embodies the language of the American Bar Association.

The first measure was the passage in December, 1948, by the General Assembly, without a dissenting voice and with the United States voting affirmatively, of a Resolution proclaiming the "Universal Declaration of Human Rights." The Resolution was intended to be a recital of goals rather than a legally binding commitment. The Declaration contained not only provisions relating to what we call basic civil and political rights but also statements of economic and social objectives. The Declaration was not a treaty but a resolution of the General Assembly which in legal theory does not have the force of law. This was the position of our government as to both its international and internal effects.⁵

Further cause for alarm was found in the adoption of the Genocide Convention by the General Assembly at that same time, an agreement which pledged the signers to prevent mass annihilation of religious, racial, national and ethnical groups. That Convention, in treaty form, was opened for signature and ratification, and became effective on January 12, 1951, after ratification by twenty States. Subsequently, additional States have ratified. The United States is a signatory but has never ratified the Convention. Hearings have been held by a subcommittee of the Senate Foreign Relations Committee,⁶ but thus far neither the full committee nor the Senate itself has considered the matter. In arguments for the Bricker amendment, allegations have been made that the Convention, after approval by the Senate, would immediately supersede state law without further action by Congress. Is this contention sustainable?

Article V of the Convention reads in part as follows:⁷

⁵ For a development of this viewpoint and also a discussion of the Genocide Convention and the Covenants on Human Rights discussed later in the text, see MacChesney, *International Protection of Human Rights in the United Nations*, 47 N.W.U.L. REV. 198, 206-14 (1952).

⁶ *Hearings before a Subcommittee of the Senate Committee on Foreign Relations on the Genocide Convention*, 81st Cong., 2d Sess. (Jan. 23-Feb. 9, 1950).

⁷ The text of the Convention is reprinted in 45 AM. J. INT'L L. 7, 8 (Supp. 1951).

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention. . . .

This provision was clearly intended by our State Department representatives to require additional legislation by Congress before the Convention became effective as internal law. This intent was made clear to the other signatories. If there is any doubt raised by the language used, an "understanding"⁸ to that effect at the time of ratification would surely achieve this result.

Another charge made against the Convention is that it provides for the trial of American citizens before an international criminal court. The language of Article VI is sufficient to negate such a contention; the relevant parts thereof providing:⁹

Persons charged . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by *such* international penal tribunal as *may* have jurisdiction with respect to *those contracting parties* which *shall have accepted* its jurisdiction. [Emphasis supplied]

No such tribunal has yet been created, and the United States has certainly not accepted any such jurisdiction. The United States has participated in the drafting of a Draft Statute for an International Criminal Court,¹⁰ but this project has not been completed. No decision has been made as to signing such a statute, let alone submitting it to the Senate for approval.

The United Nations program which has aroused the most alarm is also still in the drafting stage. The Covenants on Human Rights, in draft treaty form, are in two parts.¹¹ One

⁸ An "understanding" as distinguished from a "reservation" which would require the consent of the other parties that have ratified and perhaps of the other signatories.

⁹ See *supra* note 7, at 8.

¹⁰ The text of the draft is reprinted in 39 A.B.A.J. 1103 (1953). For arguments pro and con on this proposal, see Parker, *An International Criminal Court: The Case for its Adoption*, and Finch, *An International Criminal Court: The Case Against its Adoption*, both printed in 38 A.B.A.J. 641 and 644 (1952).

¹¹ 18 DEP'T STATE BULL. 195 (1948).

Covenant deals with civil and political rights. A second Covenant contains so-called economic and social rights. It has been frequently charged that these Covenants, if adopted as treaties by the United States, would have an immediate revolutionary impact¹² on the domestic law of this country, especially the asserted reserved rights of the individual states with respect to the relations between the individual and the government. The further allegation is made that the adoption of the Covenants would result in a "downgrading" of the protections afforded the individual by our own Bill of Rights.

Determined efforts were made by our government to meet these objections to the Covenants by drafting changes, but the criticisms continue with respect to their present language. Do these objections have merit? So far as the claim that the Covenants, if approved by the Senate, would be immediately effective as internal law, Art. 2, Par. 2 of the Civil Covenant is designed to avoid this result. If the language remains ambiguous, more specific expression of this purpose could be adopted, or an "understanding" as in the case of the similar provision in the Genocide Convention would be effective. Article 2, Par. 1 of the Economic Covenant makes clear that further legislation after ratification would be required.¹³

The more substantial objection that the Covenants would invade the reserved rights of the individual states is not warranted in view of the present language of the "federal-state" clause as proposed by the United States in draft Article 50 of the Civil Covenant and draft Article 28 of the Economic

¹² The charge is frequently based on remarks by John P. Humphrey, then Director of the Human Rights Division of the U.N. Secretariat. Humphrey, *International Protection of Human Rights*. 255 ANNALS 15 (Jan. 1948). The full text of his remarks shows that he believed enactment of a human rights program was an essential element of a program for peace. He emphasized its "revolutionary" character in portraying the difficulties to be surmounted. See typical use of his remarks in SEN. REP. *supra* note 4, at 6.

¹³ The text of the 1952 draft may be found in the Department of State Bulletin of July 7, 1952, at p. 23 *et seq.* Mimeographed 1953 draft shows no changes in the articles referred to in the text.

Covenant.¹⁴ Both articles make explicit that the Federal Government would acquire no additional power to legislate by the adoption of the Covenants. This is the alleged objective of the "which" clause in the Bricker amendment.

The further claim that the Covenants "downgrade" our Bill of Rights is without substance in light of the specific provisions against "downgrading" in Article 5 of the Civil Covenant and in Article 5 of the Economic Covenant.¹⁵ Even if there were merit in these various objections, they do not serve to justify enactment of a constitutional amendment since the Eisenhower administration has stated officially that it will not sign either of the Covenants regardless of what provisions they contain upon completion.¹⁶ Such an advance adamant position was probably adopted for the purpose of defeating the serious dangers involved in the Bricker amendment. This announcement did not serve to lessen the campaign for that amendment, but it seems an adequate answer to claims based on the draft Covenants.

The proponents of constitutional change relied heavily on one other development connected with these programs of the United Nations. In *Sei Fujii v. State*,¹⁷ an appellate court in California held its Alien Land Law invalid, relying principally on the argument that Articles 55 and 56 of the United Nations Charter, as a treaty, had the effect under the Supremacy Clause of our Constitution of superseding the state law. This holding was contrary to the position our government had officially taken on this question. On appeal, the Supreme

¹⁴ In meetings of the Human Rights Commission since the writing of this text, it is reported that the United States did not support a federal-state clause, and that the Commission by a vote of eight to seven adopted the following clause: Draft Article 71: "The provisions of the Covenant shall extend to all parts of federal Statutes without any limitations or exceptions." See discussion in 16 U.N. BULL. 298 (April 15, 1954).

¹⁵ Article 5 of the Civil Covenant (1953), is unchanged from Article 4 of the 1952 draft cited in note 13, *supra*.

¹⁶ Statements by Secretary of State Dulles, *Hearings, supra* note 4, at 825.

¹⁷ 217 P.2d 481, *rehearing denied*, 218 P.2d 595 (Cal. App. 1950).

Court of California upheld this *decision*¹⁸ on the basis that the state law violated the Fourteenth Amendment of our Constitution. In its opinion, that court specifically rejected the *reasoning* below as to the self-executing nature of these charter provisions. The view of the highest California court seems clearly right to the writer but it has not stilled the proponents' fears based on these provisions of the Charter, as will be noted hereafter.

Judicial Interpretations

This, in brief, was the immediate origin of the campaign for the Bricker amendment. In addition to the developments concerning the United Nations just discussed, the advocates of a change in the treaty provisions of the Constitution have urged vigorously that there is a "gap" in those provisions and that recent Supreme Court decisions construing the treaty power have made clear the need for closing this "gap." The "gap" is said to arise from the language of the Supremacy Clause¹⁹ providing that statutes must be in "pursuance" of the Constitution whereas treaties need be made only on the "authority" of the United States. The difference in language is emphasized despite the historic reason for this difference in the desire to maintain the validity of treaties entered into under the Confederation prior to the Constitution.²⁰

Their most basic contention is essentially that amendment is necessary in order to preserve federal constitutional government. In effect, they urge that the present scope of the treaty power constitutes a change in our form of government

¹⁸ 38 Cal.2d 718, 242 P.2d 617 (1952).

¹⁹ U.S. CONST., Art. VI, Cl. 2, reads as follows: "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."

²⁰ See Myers, *Treaty and Law Under the Constitution*, 26 DEP'T STATE BULL. 371 (1952).

from that envisaged by the framers of our Constitution. Basic to this broad charge are their propositions that the existing treaty power is unlimited; that treaties can override the Constitution; and that the use of an allegedly unlimited treaty power can completely absorb the rights of the states and thus lead inevitably to an all-powerful central government.²¹

In support of these claims much is made of the opinion of the Supreme Court rendered by Mr. Justice Holmes in the famous migratory bird case, *Missouri v. Holland*,²² decided in 1920 with two justices dissenting. In that case, the State of Missouri challenged the validity of regulations promulgated by the Secretary of Agriculture pursuant to an act of Congress based on the Migratory Bird Treaty with Great Britain, acting for Canada. Prior to the negotiation of this treaty, a similar act of Congress not based on a treaty had been declared unconstitutional by two lower federal courts. Pending appeal of these earlier cases, the treaty had been ratified. Thus the general problem was raised as to whether matters could be effectively regulated under the treaty power that could not be validly regulated under the powers of Congress in purely domestic affairs. In opposition, it was vigorously urged by Missouri that to sustain this national power would deprive the states of control over their internal affairs and that the treaty was forbidden by the Tenth Amendment. These contentions were rejected.

While the opinion of Mr. Justice Holmes contains broad language, it does not say that the treaty power is unlimited.

²¹ *Hearings, supra* note 4. The statements of the individual proponents appear by page number as follows: Senator Bricker p. 2; Holman, pp. 129, 1216; Schweppe, pp. 33, 1186, 1128; Rix, pp. 75, 1024; Finch, p. 1104; Deutsch, p. 115; Hatch, p. 83; Ober, p. 167 and Judge Phillips, pp. 984, 1022. With the exception of Senator Bricker and Mr. Holman, these gentlemen are members of the Peace and Law Committee of the American Bar Association. The references above are to their complete testimony, and further reference will not be made thereto when the text refers in general terms to the views of the proponents.

²² 252 U.S. 416 (1920). Admirers of the late Mr. Justice Holmes will note with interest Sen. Bricker's reference to the author of this opinion. "It was a Democratic judge that wrote the opinion." *Hearings, supra* note 4, at 1263.

The decision in itself makes clear that the validity of an exercise of the treaty power is ultimately determined by the Supreme Court. From this and other opinions of the Supreme Court,²³ the conclusion can be properly drawn that there are real limits to the treaty power. These are that the treaty must deal in good faith with a question of international concern and that no provision of the treaty may violate any fundamental constitutional guarantees.²⁴

This opinion is nonetheless constantly cited by the Bricker proponents as standing for the proposition that treaties can override the Constitution and that the decision did not reflect the intent of the framers. This latter view is difficult to understand. The reverse would seem to be true. In several important early treaties provisions inconsistent with state law were included, and these provisions were upheld by the Supreme Court.²⁵ This is surely persuasive contemporaneous evidence that treaties were intended to be superior to state law. To cite one example, the Jay Treaty of 1794 with Great Britain, the first important one under the Constitution, provided for reciprocal confirmation of land titles.²⁶ It would be hard to find a clearer case than title to land as a matter governed by state law in the absence of treaty.

The contention that the decision means that treaties can override the Constitution is equally difficult to maintain. The power to make treaties was specifically conferred on the national Government, while the states were explicitly excluded from foreign affairs. Concentration of the treaty power in the

²³ E.g., *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890), and *The Cherokee Tobacco*, 11 Wall. 616, 620-21 (U.S. 1870).

²⁴ For fuller development of this and other arguments made in this article in opposition to the Bricker amendment, see *The Treaty Power and the Constitution: The Case Against Amendment*, by the writer in collaboration with Professors McDougal of Yale, Mathews of Ohio State, Oliver of California, and Dean Ribble of Virginia. 40 A.B.A.J. 203 (1954).

²⁵ See Chafee, *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 359-364 (1952).

²⁶ This provision was upheld by the Supreme Court in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (U.S. 1813).

national Government is a necessity of federalism if it is to operate effectively in this area. The treaty power is in truth a delegated power. Like the power over interstate commerce,²⁷ it is supreme within its proper scope, and the Tenth Amendment does not stand in the way. From a practical, as distinguished from a legal standpoint, it is only sensible that the national Government should be able to deal efficiently with matters that the individual states are unable to control. In the migratory bird case, the national interest in the preservation of an essential food supply was properly not sacrificed for abstractions concerning states' rights. The decision in *Missouri v. Holland* was not a revolutionary development. It merely confirmed the framers' intention that the nation should speak with one voice when dealing with other nations on matters requiring international regulation and adjustment.

The "Which" Clause Coverage

In place of this desirable arrangement the Bricker proponents, in the famous "which" clause, would require action by the individual states whenever a provision of a treaty dealt with a matter normally governed by state law in the absence of a treaty. It has been frequently pointed out that the "which" clause would require state action with respect to the implementation of many typical treaty provisions. Most important are those contained in the numerous commercial treaties which we have negotiated with other nations. These contain reciprocal privileges to engage in business, to own or rent land, to form corporations, to have access to state courts, and to other matters within state power in the absence of treaty. Several such provisions were included, for example, in our treaty with Italy in 1948,²⁸ and in many other treaties from the beginning of the government.

²⁷ See *United States v. Darby*, 312 U.S. 100 (1941), discussing the Commerce clause.

²⁸ For further discussion, see Chafee, *supra* note 25, at 364-68.

When confronted with this evidence of the deleterious effect of their proposed "which" clause on the negotiation and enforcement of these desirable and typical provisions in commercial treaties, they point to the fact that some commercial treaties, current and past, contained provisions giving reciprocal privileges only to the extent the law of each state permitted.²⁹ On the basis of this occasional practice, they claim that such an arrangement should be made mandatory for every treaty by their amendment. Quite the reverse is true. When the national government can achieve national objectives in this way, it may do so. But when the national interest requires the granting of reciprocal privileges in all the states in order to obtain similar privileges for Americans abroad, then the national Government should have the power to agree to such a provision. Their argument on this point makes even clearer their fundamental belief that the states, and not the nation, should determine the national interest in foreign affairs.

The "which" clause might similarly affect special problems, such as the right of inspection under the Baruch plan, control of poppy-growing within a state under narcotics treaties, and various detailed phases of international civil aviation. If such a clause were in the Constitution, the Federal Government would first have to determine with respect to every doubtful treaty provision whether it or the states had the power of enforcement. This determination would be subject to a lengthy process of litigation to settle finally the boundaries of power under the amendment which in turn would create confusion and delay with respect to typical and desirable treaty provisions.

Faced with all these objections, the proponents of the "which" clause have argued that many of these provisions

²⁹ See Linder, *Treaties of Friendship, Commerce, and Navigation*, 26 STATE DEP'T BULL. 881 (1952), discussing post-World War II treaties of this type. See also 1853 treaty with France, 10 STAT. 992, 996 (1855).

would not require action by the states if the Supreme Court gave a broad construction to the commerce power. It is very doubtful if this power could properly be extended far enough to achieve this result. It is a strange argument indeed that the Constitution should be amended to prevent the expansion of the Federal Government under the treaty power if it is to be so extended under the commerce power.³⁰ If it were, it would be expanded for all purposes, and not merely where necessary to implement a valid treaty. Such a development would be clearly undesirable.

Pressed with this contention, the proponents fall back ultimately on the proposition that it is all right to leave the decision on enforcement of such provisions to the states.³¹ As previously stated, this would mean that the individual states rather than the national Government would determine the national policy towards adoption of this type of treaty provision. Stated thus baldly, the basic unworkability and intent of the "which" clause is apparent.

"Parity" and the Treaty Power

A second major contention that an amendment of the treaty power is necessary rests on the reiterated assertion that the United States is not on a parity with other nations in its procedures for giving internal effect to treaties. Reference is most frequently made to the requirement in Great Britain for parliamentary action before British treaties have internal effect.

The alleged defect in our present constitutional arrangement is said to rest on the construction that the Supreme

³⁰ See Schweppe, *Hearings, supra* note 4, at 70: "If they go too far, [in extending the commerce power] maybe sometime we will have to amend the Constitution again. But I do look for that sort of expansion."

³¹ See Schweppe, *Hearings, supra* note 4, at 69, 70: "I think the State of Washington should have the right to determine whether Frenchmen or Russians or anybody else can own land in the State of Washington and not the State Department with the consent of the Senate."

Court has given to the Supremacy Clause of the Constitution. Under that clause, treaties, once duly approved by two-thirds of the Senators present, and ratified by the President, become operative internally at once if the terms of the treaty show such an intention. If the terms show a contrary intent then further legislation is required before internal effectiveness can be achieved. Under existing law and practice, terms requiring further legislation can be inserted in the course of negotiation, or later by the Senate itself as a condition of its approval. Furthermore, the President can postpone proclaiming the treaty effective until the other signatories have acted. Moreover, under international law, the nation undertakes an obligation to enforce the treaty and a failure to do so constitutes a breach of the treaty under international law.³²

Despite these considerations, the Bricker amendment provides that *any* treaty provision having *internal* effect must be authorized by legislation in addition to the existing requirement of approval by the Senate. No necessity for these additional steps in *every* case has been shown. Under our present practice, many treaties, especially the conventional commercial treaties previously referred to, do not require these additional steps. These treaties are in our national interest, and our current procedures for making them effective are convenient, expeditious, and facilitate their negotiation.

The assertion that such a cumbersome procedure is necessary to put us on a parity with other countries cannot be sustained.³³ No fair comparison can be made with countries having a parliamentary form of government. In such countries, the executive and the legislative functions are ordinarily combined in the majority party. Having negotiated a treaty, parliamentary approval, concurrently with its ratification or

³² See 5 BACKWORTH, DIGEST OF INTERNATIONAL LAW 177-85 (1943).

³³ For a thorough discussion see Preuss, *On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties*, 51 MICH. L. REV. 1117 (1953).

thereafter, is usually easier to obtain than the approval of two-thirds of the Senators present under our system. Furthermore, this Senate approval is a legislative act³⁴ in the same sense as approval by a majority of Parliament in Great Britain.

Comparison of these procedures must also take into account whether the government in question is unitary or federal. Under the unitary form of government, no problem of state law is involved. In a federal system such as ours, it is necessary that the treaty provisions become effective within the states. The very purpose of the Supremacy clause was to ensure that the national policy embodied in treaties should override inconsistent state law.

The framers of our Constitution rejected decisively a proposal that participation by the House of Representatives in the treaty process should be required before a treaty could become binding internationally or internally.³⁵ While the Bricker provision on legislation is technically directed only to internal effectiveness, similar considerations as to the desirability of House participation would seem applicable.³⁶ In any case, if the greater complexity of modern treaties and the frequent necessity for appropriations in which the House has the major role make desirable the re-examination of this question, then an amendment requiring majority approval of a treaty by both branches of Congress in place of approval by the Senate alone would be more reasonable than the Bricker proposal of imposing *both* steps for *every* provision having internal effect. Such an amendment has been proposed by the House in the past, but has never won the approval of the Senate.³⁷

³⁴ THE FEDERALIST, No. 64 (Jay), presents an early assertion of this point.

³⁵ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 392, 538 (1911).

³⁶ See treatment of this question in the article by members of the American Bar Association's Peace and Law Committee — Mess'rs Hatch, Finch and Ober, *The Treaty Power and the Constitution: The Case for Amendment*, 40 A.B.A.J. 207 (1954).

³⁷ E.g., H.J. RES. 60, 79th Cong., 1st Sess. (1954), discussed in Borchard, *The Proposed Constitutional Amendment on Treaty-Making*, 39 A.J. INT'L L. 537 (1945).

If this Bricker requirement of additional legislation for every provision having internal effect is coupled with the "which" clause in that same amendment, state legislation would also be mandatory for each provision having internal effect in a matter governed by state law in the absence of a treaty. These combined requirements would give this country the most unworkable procedure in the world for the enforcement of treaties rather than putting us on a parity, as the proponents assert.

Canada is the only other country which now has a procedure for enforcing treaties that embodies either of the requirements of the Bricker amendment. Since 1937, the Canadian Parliament has not been able to enforce treaty provisions concerning matters subject to Provincial competence apart from treaty. Canada has the usual provision in a parliamentary form of government requiring legislation before treaties have internal effect. Unlike the Bricker amendment, there is no requirement that a branch of the national legislature should pass on the same treaty twice with differing majorities. One approval by a majority of Parliament suffices.

Any comparison with the Canadian procedure should take note of the fact that Canadian federalism differs from ours. Their national government has all powers not assigned to the Provinces. Secondly, this system is relatively new in Canada and was the result of a decision³⁸ by the Privy Council composed of British, and not Canadian judges. Appeal to the Privy Council has now been abolished in Canada. Finally, Canadian professional opinion is overwhelmingly opposed to this arrangement.³⁹ It should not be copied. It has not been anywhere else.⁴⁰

³⁸ Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326.

³⁹ E.g., MacDonald, *The Canadian Constitution Seventy Years After*, 15 CAN. B. REV. 401 (1937); Scott, *Centralization and Decentralization in Canadian Federalism*, 29 CAN. B. REV. 1095 (1951).

⁴⁰ See Young, *Treaty Provisions in Foreign Constitutions*, 38 A.B.A.J. 513 (1952), where it is stated that India once had a system similar to Canada's present

The Bricker proponents have defended their suggested method for making treaties internally effective by pointing out correctly that international law is not directly concerned with the ways in which an individual nation complies with its obligation under international law to honor its treaty commitments. Starting from this proposition, they have made the further assertion that this provision of their amendment has no effect on our *international* treaty-making process. But the effective negotiation of treaties requires that our Government be able to assure the other contracting parties that we are in a position to give effect to the treaty with reasonable promptness. The enforcement of a treaty is just as, if not more, important than its initial negotiation. The cumbersome nature of their proposal has been pointed out. Unless it is designed to make the negotiation of treaties more difficult, what other useful purpose can the additional requirements serve? We are still bound by international law to honor our commitments. Their proposal would increase the possibility that we would not. To assert, under these circumstances, that their proposed procedure for giving treaties internal effect will not interfere with the ability of the President to negotiate treaties is a dangerous half-truth. In practice, it would impede dangerously our ability to negotiate and honor necessary and desirable commitments.

Executive Agreements and Separation of Powers

The discussion thus far has concerned the proposed changes in our treaty-making procedure. The Bricker amendment also undertakes to alter the existing constitutional arrangements for the making of international agreements other than treaties. These other international commitments are commonly referred to as executive agreements. That amendment gives power to Congress to control all agreements. It also pro-

cedure on matters of provincial law, but has changed it so that their present system resembles our constitutional methods on this federal-state question.

vides that the restrictions placed on treaties by requiring Congressional legislation before any provision can have internal effect as well as state legislation when a provision concerns matters governed by state law in absence of treaty, should also apply to executive agreements. For reasons stated more fully elsewhere,⁴¹ it is believed that these procedures would needlessly hamper proper uses of executive agreements. They would certainly interfere with the ability of the President in his role as "Commander-in-Chief" and "organ for foreign affairs" to act decisively in emergency situations in war and peace.

There is no specific provision for the making of executive agreements in the Constitution. The Constitution, however, expressly forbids⁴² the individual states from entering into "agreements" as well as treaties, thus showing the familiarity of the framers with agreements other than treaties. Furthermore, such agreements have been a common practice from the very beginning of our government under the Constitution.

The Constitution furnishes no explicit guide as to the circumstances under which the treaty process would be required.⁴³ Practice and the opinion of some competent authorities⁴⁴ suggest that the treaty procedure is normally necessary in matters involving important policy issues, whereas executive agreements based exclusively on independent Presidential authority deal typically with less basic questions except in emergencies. Other competent authorities⁴⁵ have argued that

⁴¹ The reasons may be found in MacChesney, Mathews, McDougal, Oliver and Ribble, *supra* note 24.

⁴² U.S. CONST. Art. I, § 10: "No State shall enter into any Treaty, Alliance, or Confederation. . . . No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ."

⁴³ U.S. CONST. Art. II, § 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ."

⁴⁴ See 2 HYDE, INTERNATIONAL LAW 1416 (2d ed. 1945).

⁴⁵ See McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 364, 386 (1941); McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agree-*

the executive agreement procedure is "interchangeable" with the treaty process. The Supreme Court has never had occasion to decide which view is correct. It has never seemed reasonable to this writer that the specific constitutional requirements for treaty approval are not mandatory in proper cases. Otherwise, why put the treaty procedure specifically in the Constitution? The hard problem is of course to determine the proper cases.

The existence of some differentiation is understandable. It is extra-ordinarily difficult, however, to suggest a distinction that would not shackle the existing power of the President to act independently in emergencies and in borderline cases. The Bricker amendment would vest in Congress power to control *all* "executive and other agreements." "Other agreements" would include power to control the making of treaties as well. The proponents urge that this broad authority is necessary in order to prevent the use of executive agreements "in lieu" of treaties. It should be emphasized that the proposed amendment itself makes no effort to furnish the proper formula for resolving this difficult question. On the contrary, the amendment asserts abstractly the power of Congress to determine this fundamental matter. The ultimate solution would rest with future Congresses.

The proponents argue that their amendment merely restates the existing power of Congress. This assertion is untenable. Unquestionably, Congress possesses the power to supersede the internal effect of any international agreement.⁴⁶ It may also authorize the President to enter into international commitments. This is a far cry from the power to direct the President as to what international agreements he must or

ments: Interchangeable Instruments of National Policy, 54 YALE L.J. 181 and 534 (1945); Cf. Borchard, *Treaties and Executive Agreements — A Reply*, 54 YALE L.J. 616 (1945).

⁴⁶ Clark v. Allen, 331 U.S. 503, 508-09 (1947). Cf. Moser v. United States, 341 U.S. 41, 45 (1951), one of the latest cases to recognize this principle though not used in deciding that case.

must not make.⁴⁷ Nor is it equivalent to the power to control the independent Presidential authority in foreign affairs. The amendment is not restricted to the internal effect of agreements. Consequently, it does not merely restate the power of Congress. In actuality, it is a drastic and radical attempt to change the existing balance of power in this area under the Constitution.

In practice, the Congress either authorizes in advance or approves by appropriations or otherwise the overwhelming majority of agreements. It has been estimated that the proportion reaches 85 per cent or more.⁴⁸ The critical question concerns the balance. Many of these are routine. In wartime and other emergencies, the President should be able to act decisively in the national interest. The Berlin air lift is an excellent example. The advocates of amendment argue that Yalta and Potsdam prove their thesis. The issue is whether we should amend the Constitution and not over the merits of these particular past agreements. The real question is what restrictions Congress would make in advance of a conference with fighting allies that would curb the authority of the President to make commitments. In war, no authorization to agree might be worse than permitting action, however unwise in retrospect.

Different Shades of "Pink"

The proponents argue that their proposal on executive agreements is necessary because of past abuses. In addition to the arguments already cited, they point with alarm to certain Supreme Court decisions as having made the use of the executive agreement more dangerous now than it was origin-

⁴⁷ See Schweppe, *Hearings, supra* note 3, at 74, where he makes clear that "regulate" in the amendment is intended to include "prohibit."

⁴⁸ E.g., SEN. REP., *supra* note 4, at 31. See also, *Hearings, supra* note 4, at 247 n. 56, for report on S. J. Res. 130 (earlier Bricker proposal) of Association of the Bar of the City of New York — Committee on Federal Legislation and Committee on International Law.

ally. Chief reliance is placed on *United States v. Pink*,⁴⁹ involving the Roosevelt-Litvinov exchange of letters in connection with the recognition of the Soviet Government by the United States in 1933. Recognition is admittedly an exclusive Presidential function. In connection with the recognition, however, an assignment by Russia to the United States of whatever claims Russia had in the United States was made. Acting purportedly in pursuance of that assignment, the United States initiated litigation involving the distribution of *surplus* funds of the New York branch of a Russian insurance company that had been nationalized by the Soviet Government by a decree that attempted to cover the New York assets. All creditors who had done business with the New York branch had been paid. The controversy was between creditors who had dealt with branches outside of the United States and the claim of the United States under the assignment. The highest New York court had ordered distribution to these foreign creditors.⁵⁰ On appeal to the Supreme Court, it was held that the executive agreement coupled with the assignment expressed our national policy and that this policy was supreme over state law to the contrary. This result was reached by giving to executive agreements the overriding effect of the Supremacy Clause although executive agreements are not mentioned in that Clause. Chief Justice Stone, in a dissent joined by Justice Roberts, disagreed.⁵¹ The principal basis for their dissent was that the agreement did not constitute a clear expression of a national policy to overrule state law on such a question. If not so expressed, state law should prevail. They agreed it would override state law if

⁴⁹ 315 U.S. 203 (1942). They also cite *United States v. Belmont*, 301 U.S. 324 (1937), containing broad language by Mr. Justice Sutherland in a case dealing with the same assignment as the *Pink* case; and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), again containing broad language by Mr. Justice Sutherland. The latter case involved, however, only a delegation of power to the President by Congress.

⁵⁰ *United States v. Pink*, 284 N.Y. 555, 32 N.E.2d 552 (1940).

⁵¹ *United States v. Pink*, 315 U.S. 203, 242, 249 (1942).

such a consequence had been intended and had been made explicit.

The proponents of the Bricker amendment not only have criticized the case on this supremacy aspect but have vigorously asserted that the case also held that the executive agreement was superior to the Fifth Amendment. If true, this would support their other arguments that international agreements can override the Constitution. This contention is inaccurate. The majority opinion denied specifically any such doctrine.⁵² What the Court asserted was that the Fifth Amendment was not applicable on the ground the assignment marshalled claims of all American creditors of Russia in preference to creditors whose claims arose outside of the United States. This was analogized to the similar preference of local creditors by one state as against creditors in other states which has been held a valid discrimination under similar provisions of the Fourteenth Amendment. It is significant that the lower federal courts in similar situations arising subsequent to the principal decision have followed the supremacy aspect of the case but have not regarded the opinion as holding that executive agreements can override the Fifth Amendment.⁵³

While executive agreements are supreme over inconsistent state law if so intended, it is doubtful that executive agreements have similar validity if inconsistent with prior Congressional action. This particular question has not been considered by our highest tribunal. In a recent case in the Fourth Court of Appeals,⁵⁴ now pending on appeal in the Supreme

⁵² *Id.*, 315 U.S. at 228.

⁵³ See Note, *United States v. Pink — a Reappraisal*, 48 COL. L. REV. 890 (1948), for discussion and citation of cases. The statement in the text is believed accurate even though two of these lower court decisions gave relief when there were local creditors. This was not because the Fifth Amendment was overridden, but because the National policy was held to have set aside the state policy as to local creditors.

⁵⁴ *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir.), *cert. granted*, 74 Sup. Ct. 135 (1953). See also, Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953).

Court, it was held that executive agreements are subject to *prior* federal policy enunciated by Congress. This policy must be within Congress' power to determine. Such a result would be desirable, and it is to be hoped that the Supreme Court will so decide.

The existing law on executive agreements would seem to be reasonably satisfactory, especially if, as the writer believes, Chief Justice Stone's opinion in the *Pink* case is followed. Such a view is a necessary implication of federalism, wholly apart from the Supremacy Clause. Certainly no case has been made for an amendment drastically changing the existing balance of powers, and transferring responsibility for the direction of foreign policy from the President to Congress. The current difficulties in France, where the executive power has lost effective control over foreign policy, should demonstrate the folly of making such a radical change in our present workable arrangements.

Substitute Proposals and Minor Provisions

While this article is devoted primarily to the Bricker amendment as reported out by the Judiciary Committee of the Senate, a milder substitute amendment for regulating executive agreements was introduced by Senator George and had substantial support failing by only one vote from receiving the necessary two-thirds.⁵⁵ Unlike the Bricker amendment, it did not touch the traditional procedure for making and enforcing treaties. It provides that other international agreements shall have internal effect only by act of Congress.⁵⁶ This would still interfere with the independent Presidential authority as "Commander-in-Chief" and as "the

⁵⁵ 100 CONG. REC. 2251 (Feb. 26, 1954).

⁵⁶ Section 2 of the George Amendment reads as follows: "An international agreement other than a treaty shall become effective as internal law in the United States only by an act of the Congress." A similar proposal by McCarran uses "legislation" in place of "act of the Congress." This raises the danger of state legislation as under the "which clause."

organ for foreign affairs”⁵⁷ which is requisite for dealing with emergencies in war and peace, to say nothing of periods of “cold war.” Limitations of space prevent further discussion of this proposal. There have been no hearings on it that would give light as to its probable effect. Adoption of the late Chief Justice Stone’s opinion in the *Pink* case would provide adequate safeguard against improvident overruling of state law. No further restrictions on this necessary executive authority in emergencies should be adopted without full hearings.

A new proposal by Senator Bricker, introduced in the Senate on February 4, 1954, combines in a new Section 3⁵⁸ the George mandatory requirement of legislation by Congress before *any* executive agreement can have internal effect with a similar requirement for treaties unless a two-thirds vote of the Senate on a *treaty* provides specifically to the contrary. His new proposal abandons the “which” clause, the assertion of power in Congress to control both external and internal aspects of all agreements, and the *mandatory* non-self-executing clause as applied to *treaties*.

There remain serious objections. As discussed hereafter, there is danger of reintroducing the “which” clause idea in the apparently harmless provision that international agreements shall not conflict with the Constitution. Furthermore, as with the George proposal previously mentioned, the effect of the new Section 3 on the powers given by the Constitution to the President as “Commander - in - Chief” and as “the organ for foreign affairs” are uncertain and could interfere seriously with this necessary power for use in emergencies.

⁵⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁵⁸ Section 3 of the new Bricker proposal reads as follows: “A treaty or other international agreement shall become effective as internal law in the United States only through legislation 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.”

As with the George proposal, it should not be adopted without full hearings.

Finally, both the Bricker amendment and his new proposal provides that no provision of a treaty or other international agreement may conflict with the Constitution. This of course ought to be the law. While the Supreme Court has never found a treaty to be unconstitutional, the course of decision throughout its history indicates clearly that fundamental constitutional guarantees will be protected. One case⁵⁹ involving the prohibition amendment raised the question but the case did not reach the Supreme Court, on the ground the objectors did not have the necessary direct interest to raise the point. Thus there is no substantial basis for the claim that the Bill of Rights is endangered by "treaty law."⁶⁰

The proponents argue that, if there is any doubt, the Constitution should be amended to make certain that this is the law. Our common law tradition reflects the conviction that it is unwise to codify the course of decision, especially in a Constitution. A more important objection is the possibility that this provision might be construed in the future as intended to reverse the doctrine of *Missouri v. Holland*. Although it has been shown that this decision did not in any way violate the Constitution, the constant assertion to the contrary by the proponents raises this danger. Since the course of debate thus far in the Senate has revealed that the "which" clause will undoubtedly not be accepted in its present form, it is important that this dangerous proposal should not reappear in an apparently harmless provision. Some recent alternative proposals introduced on the floor of the Senate without hear-

⁵⁹ *Milliken v. Stone*, 16 F.2d 981 (2d Cir. 1927), *cert. denied*, 274 U.S. 748 (1927).

⁶⁰ In the early stages of the debate, it was argued that the First Amendment only restricted "Congress." For fuller statement of reasons why this textual argument is unwarranted, see article cited MacChesney, *etc.*, *supra* note 24. There is not even this textual basis for any other provision of the Bill of Rights. The text has discussed their claim as to the Fifth Amendment in the *Pink* case, and the Tenth Amendment in *Missouri v. Holland*.

ings provide that treaties must be made "in pursuance" of the Constitution.⁶¹ This language suggests an even greater danger of an indirect reintroduction of the "which" clause idea based on the proponent's construction of *Missouri v. Holland*. Such a provision should also be rejected. The Constitution should only be amended when the need is clearly demonstrated. There is no more need in this instance than there would be for the inclusion of a restatement of the doctrine of *Marbury v. Madison*.⁶²

Much Ado About Very Little

Only the major contentions of the Bricker proponents have been discussed. Many of their other arguments that are constantly advanced both in the hearings and in debates do not warrant extended treatment. Frequent reference is made to "over 200" treaties pending in the United Nations.⁶³ In response to an inquiry from the New York Times, the State Department has stated that the number of pending treaties that have been concluded with the sponsorship of the United Nations is fifty-four rather than two hundred. Of this total of fifty-four, only six have been signed by the United States. All six deal with conventional treaty subjects. Eighteen of these treaties that have been opened for signature we have refused to sign.⁶⁴

Another constant reference⁶⁵ is to a recent State Department pamphlet called "Our Foreign Policy"⁶⁶ designed to

⁶¹ E.g., Section 1 of Senator McCarran reads as follows: "After the ratification of this amendment no treaty shall be the supreme law of the land unless made in pursuance of this Constitution." This is coupled with a Section 2 which is identical with Section 1 of the Bricker Amendment. Under these circumstances, "pursuance" presents a real danger of being intended to overrule *Missouri v. Holland*.

⁶² 1 Cranch 137 (U.S. 1803), instituting the doctrine of judicial review of legislation.

⁶³ E.g., SEN. REP., *supra* note 4, at 5; *Hearings*, *supra* note 4, at 10. (Sen. Bricker).

⁶⁴ Inquiry by Arthur Krock to the State Department, N.Y. Times, Feb. 5, 1954, § 1, p. 18, col. 5.

⁶⁵ E.g., Holman, *Hearings*, *supra* note 4, at 144, 147; SEN. REP., *supra* note 4, at 5.

acquaint the general public with our goals and problems in foreign affairs. It opens with a sentence that "there is no longer any real distinction between domestic and foreign affairs." President Truman wrote a foreword recommending the pamphlet to the American people. This statement is used to imply that the government was officially abolishing as a matter of law the distinction between domestic and foreign affairs in our governmental system. In context, it carries no such inference. The pamphlet attempts to show that our position as the leading world power makes everything we do and say and what we do or do not do a matter of world interest. World reactions to our statements and actions affect our foreign policy. This is true. It is not true that the pamphlet is a statement of a new juristic position.

Another favorite argument⁶⁷ is based on the dissenting opinion of the late Chief Justice Vinson and two other Justices in the Steel Seizure case.⁶⁸ Here again, the impression is created that the opinion stated that the United Nations Charter was the principal legal basis for the seizure. A fair reading of the whole dissenting opinion would suggest that the Charter and other treaties were referred to as part of the background on which Congress had legislated, and that the dissent in fact relied on Congressional acts as the legal ground for upholding the seizure.

Finally, great stress is laid on the remarks made at Louisville by Mr. Dulles while a private citizen and *before* becoming Secretary of State.⁶⁹ While his opening remarks⁷⁰ on that occasion were indeed broad and in my opinion erroneous, no

⁶⁶ State Dep't Publication No. 3972 (Foreign Affairs Policy Series 26, Sept. 1950).

⁶⁷ *E.g.*, SEN. REP., *supra* note 4, at 5; Senator Bricker, *Hearings*, *supra* note 4, at 234.

⁶⁸ *Youngstown Co. v. Sawyer*, 343 U.S. 579, 667 (1952).

⁶⁹ *E.g.*, SEN. REP., *supra* note 4, at 5; *Hearings*, *supra* note 4, at 49 (Schwepppe) and 147 (Holman).

⁷⁰ Pertinent parts of Dulles' Louisville, Ky., speech are reprinted in *Hearings*, *supra* note 4, at 862 *et seq.*

reference is ever made by the Bricker proponents to a subsequent statement in the same speech that there was room for honest differences of opinion as to the need for a constitutional amendment and that the whole problem should be "thoroughly explored."⁷¹ Further capital is sought in the fact that Mr. Dulles has opposed the amendment since becoming Secretary of State.⁷² Such "inconsistency" is thoroughly deplored. No mention is made of the fact that neither Senator Bricker's original bill nor his revised version introduced in 1953⁷³ contained the "which" clause and that Sen. Bricker had opposed its inclusion,⁷⁴ although now it is the heart of his amendment.

Two Good Arguments Overstated

Despite the character of some of the arguments the proponents have made for their amendment, two contentions of substance remain that warrant further discussion. One is the nature of the treaty power. While their constant assertion that the treaty power is unlimited is not sustainable, it remains true that agreements regulating matters of genuine international concern and which do not violate any fundamental constitutional guarantees may gradually extend the area of national control over matters formerly governed by the states. This same expansion has of course also taken place under the purely domestic powers of Congress. Both developments are the result of the growing complexity of the world in which we live rather than the fruit of some dark plot.

On the basis of this probable gradual expansion of national functions, the proponents have pushed the point to its utmost logical end. Using Articles 55 and 56 of the United Nations

⁷¹ *Id.* at 863.

⁷² *Id.* at 823 *et seq.*, testimony of Secretary of State Dulles.

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 117 (Senator Bricker); Dispatch by William S. White quoting alleged private correspondence of Senator Bricker to other Senators in February of 1953 specifically opposing the "which" clause. N.Y. Times, Feb. 11, 1954, p. 20, col. 2.

Charter which pledge the members of the United Nations to take joint and separate action for the promotion of long-range goals in the social, economic, cultural, and human rights fields, they argue that this authorizes legislation taking over control of all business, all education, all labor, all civil rights, and all professions.⁷⁵ Articles 55 and 56 have been held to be non-self-executing as previously stated.⁷⁶ They might nonetheless in theory be the basis of some future Congressional action. There is certainly no duty to enact specific legislation under these Articles. The only answer to the fears generated by this possibility is a sense of balance, and confidence in the American people and their officials. Whenever the objective of proper international regulation can be achieved through the use of a "federal-state" clause,⁷⁷ as in the International Labor Organization practice,⁷⁸ this expansion of national power can be avoided. Our government has already refused to sign numerous UN treaties which, if adopted, would have expanded federal power.⁷⁹ Logic is never pushed to extremes in the practical affairs of men.

The other question of substance lies in the area of executive agreements. The failure of the Constitution to define the line between the proper use of executive agreements and the situations where the treaty process requiring Senate approval should be mandatory has been noted. The proposed amendment would vest in Congress the entire power to determine this line and answer this very difficult question.⁸⁰ Under our

⁷⁵ SEN. REP., *supra* note 4, at 14, 15; *Hearings, supra* note 4, at 76.

⁷⁶ *Sei Fujii v. State*, 38 Cal.2d 718, 242 P.2d 617 (1952).

⁷⁷ For discussion of the "federal-state" clause, see Sorenson, *Federal States and the International Protection of Human Rights*, 46 AM. J. INT'L L. 195 (1952).

⁷⁸ See Turlington, *The Human Rights Commission at the Crossroads*, 45 AM. J. INT'L L. 534 (1951), urging the use of this approach for the Human Rights Covenants.

⁷⁹ See note 64 *supra*.

⁸⁰ Compare the earlier statement of Senator Bricker in *Hearings, supra* note 4, at 29: "Should the executive branch be unduly restricted, one of two things would happen. Observance of an unduly rigid constitutional provision might seriously interfere with the conduct of the Nation's foreign affairs. This fact would tend to place a high premium on evasion of the Fundamental law." (emphasis supplied).

existing constitutional arrangements, the question is left in doubt. On the one hand, there is the general constitutional system in domestic affairs whereby the power to legislate and appropriate is delegated to the legislative branch. On the other hand, the Constitution delegates the executive power to the President in his role as the "Chief Executive." The President under the Constitution is also "Commander-in-Chief" of the armed forces and the "organ for foreign affairs," derived from his power to send and receive diplomatic officers. The latter two are the chief sources of presidential authority in this area. This apparent conflict between different objectives and different parts of the Constitution is not unique nor is it new. Throughout our history there has been a constant struggle between the executive and the legislative branches for the power to control foreign policy.

The same struggle has occurred in the purely domestic arena with the same results. An accommodation of such controversies has been reached in practice. The nature of this adjustment varies with the problems and times. A similar problem of a domestic nature concerns the power of the President to remove officers of the Government. The power to remove could be regarded as a function of the execution of the laws, as an incident of the appointing authority, as a "necessary or proper" function of Congress, or, finally, as nonexistent save for the power of impeachment, the only specific reference to the question in the Constitution.⁸¹ Despite the fundamental nature of the problem, it was not until 1926 that the Supreme Court first dealt directly with the question. In *Myers v. United States*,⁸² the Court held that the President had the power to remove a postmaster appointed with the consent of the Senate. The breadth of the holding

These are wise remarks and they would seem equally applicable to "unduly rigid" statutory regulation under the Bricker Amendment.

⁸¹ See discussion of this question in *THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, Revised and Annotated, 455-460 (Corwin ed. 1952).

⁸² 272 U.S. 52 (1926).

suggested the President could remove any officer he had appointed except United States judges. This threatened the independence of the regulatory commissions created by Congress. In 1935, in *Humphrey v. United States*,⁸³ the Supreme Court decided that the President's power did not extend to the removal of a member of the Federal Trade Commission. In this holding, the Court stressed the nature of the office held. Which officers in the Federal Government come within the *Myers* case and which are governed by the *Humphrey* ruling is uncertain. Other questions in this area also remain unsettled. In dealing with governmental problems of this character, whether in domestic or foreign affairs, this practical course is workable and wise. Here again, logical abstractions should be avoided.

*Bricker Objectives — No "New" Treaties and
Congressional Control of Foreign Policy*

This discussion of the proposals and arguments of the Bricker proponents suggests that their broad objectives are twofold. With respect to the treaty-making process, their primary complaint is as to the "new type of treaty" with particular reference to treaties originating in the United Nations. These "new" treaties are asserted to deal with economic, social, and human rights questions which were not formerly the subject of international agreement. They claim these matters are not proper subjects of international regulation.⁸⁴ Their presentation reveals no serious objection to the conventional bilateral commercial treaties. Early in the 1953 Hearings, Senator Bricker suggested putting the word "Multipartite"⁸⁵ into the wording advocated by the American Bar Association in order to permit commercial treaties to be adopted under the present constitutional procedure. This was

⁸³ 295 U.S. 602 (1935).

⁸⁴ *Hearings*, *supra* note 4, at 219, 395, 729 (Senator Dirksen) and 1263 (Schweppé).

⁸⁵ *Id.* at 8, 15.

apparently not acceptable to the spokesmen for the American Bar Association. In order to prevent what they consider as "bad" treaties, they are content to make more difficult the negotiation and enforcement of non-controversial treaties. As Father Conway has said in *America*, the Bricker amendment would not prevent us from making treaties: it would only prevent us from making *effective* treaties.⁸⁶ If "bad" treaties are negotiated, the place to stop them is in the Senate. The Senate has always been cautious in approving treaties. The Constitution does not need amendment to achieve this objective.

The second broad purpose of the proponents is to curb the authority of the President over the direction of foreign policy and vest this control in Congress and even in the state legislatures on matters normally governed by state law. The reasons for believing this view unsound have been stated previously. The present agreement-making process is subject to adequate controls. Congress can immediately supersede by statute the internal effect of any international agreement they consider unwise.⁸⁷ The Supreme Court will invalidate any provisions of an international agreement that violate basic constitutional guarantees.⁸⁸ No amendment is needed to prevent abuse of the necessary Presidential control over the direction of foreign policy.

Conclusion

The present is no time to cripple the power of the nation in foreign affairs. The Bricker proposals are essentially negative. They would prevent us from playing our vital and necessary role as the leader of the free world struggle against the threat of international Communism. No obstacle should be erected that would prevent our effective use of the agree-

⁸⁶ Conway, "*Darling Daughter*" Amendment, 90 AMERICA 415 (Jan. 23, 1954).

⁸⁷ See note 46 *supra*.

⁸⁸ MacChesney, *etc.*, *supra*, note 24. See note 60 *supra*.

ment-making process in forming and maintaining the alliances necessary to win that struggle. Nor should obstacles be placed in the way of negotiating through the United Nations or elsewhere agreements that would help to alleviate basic conditions of poverty and misery that are the ultimate causes of war. These are times that call for constructive, courageous, and imaginative leadership.⁸⁹ If the rule of law which we cherish at home is to be gradually extended to the world order, an effective agreement-making power is essential for its achievement. Force should not be the only effective means for adjusting differences. Peace and justice under law has been our fortunate heritage. Fate has made it our destiny to be the leader in seeking to make this heritage the prized possession of all mankind.⁹⁰

*Brunson MacChesney**

⁸⁹ What better forum than the United Nations could there have been for President Eisenhower's recent challenging proposals for an international pool of fissionable materials for peaceful uses?

⁹⁰ Since the original writing of this article last Winter all pending amendments were rejected in the Senate, the proposal of Senator George losing by one vote, see note 55 *supra*. A motion for reconsideration has been filed, but as of the middle of August, no action had been taken thereon.

* Professor of Law, Northwestern University School of Law.