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Mr. President, Distinguished Guests, Ladies and Gentlemen:

It is a privilege I greatly esteem to be permitted to discuss with you a subject, which, in my humble opinion, is today one of transcendent importance: The Treaty-Making Power — A Real and Present Danger.

At the outset, I want to make it perfectly clear that this is not an attack upon the United Nations with respect to its primary function of preventing aggression and maintaining peace and order in the world. With respect to those functions, I have ardently supported the organization, both in public addresses and in written articles.

It may be well to preface this discussion with certain fundamental concepts with respect to which I think we may be in substantial agreement.

First: Our Federal government is, and should continue to be, one of delegated and limited powers. Its powers should be limited to matters that are national in scope and character and matters which are essentially local in character should be reserved to the states and the people, with the power to deal with them in the light of peculiar local conditions and problems which differ widely throughout the various sections of our vast country.

Second: It should not be possible through the exercise of the treaty-making power to deprive an American citizen of any of his fundamental rights or freedoms.

Third: It should not be possible through the exercise of the treaty-making power to change the essential nature of our

*Chief Judge, 10th Federal Circuit Court of Appeals. Address delivered before Montana State Bar Association, Great Falls, Montana, August 14, 1953.

government nor to delegate to any international organization any of the legislative, executive and judicial powers that by our Federal Constitution are respectively vested in the Congress, the President and the national courts.

I trust my approach to the subject at hand will not be that of a partisan. I shall endeavor to speak from the viewpoint of an American, an American who loves his country and its institutions, who is deeply appreciative of the opportunities, liberties and privileges he has enjoyed and who is genuinely concerned about the future welfare of his country.

Perhaps the question arises in your mind: Why does the treaty-making power under provisions of our Federal Constitution, which have not been changed since its adoption, now give rise to questions of supreme importance? There are three reasons:

(1) In what is otherwise a government of limited and delegated powers under the Constitution, no express limitation exists on the treaty power, and the existence of any implied limitations is shrouded in doubt;

(2) A basic change of viewpoint has developed with respect to the functions and purposes of treaties. A veritable avalanche of new treaties is under consideration by the United Nations and its affiliated organizations in the social, economic, cultural, civil and political fields; and

(3) Persistent efforts have been made during the past two decades to find additional constitutional basis for expansion of the powers of the Federal government, and the treaty power has been seized upon as a conveniently available vehicle for such expansion.

The issue presented is whether a constitutional amendment limiting the treaty-making power is necessary to preserve the reserved powers of the states and the principle of local self-government, to insure that the essential character of our national government shall not be changed except by the constitutional process of amendment, and to safeguard the rights and liberties of our people.

Until recently it was a fundamental concept of international law that it is a law between states and not between individuals or between individuals and states.

A treaty is primarily a compact between independent nations and depends for the enforcement of its provisions on the honor of the governments which are parties to it. If dishonored, its infraction becomes the subject of international reclamation and negotiation. At the time the Constitution was adopted and until

recently, treaties entered into by the United States generally were compacts in that primary sense, imposing duties and obligations on the contracting states and not on individual citizens.

Mr. Hamilton, in *The Federalist*, No. 75, referring to the treaty power, said:

> "It 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."

Mr. Jefferson, in his *Manual of Parliamentary Practice*, had this to say:

> "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."

But that view ceased to prevail with the decision of the Supreme Court in *Missouri v. Holland*,[1] dealing with the Migratory Bird Treaty with Canada, as I shall presently show.

This brings me to a consideration of the provisions of our Federal Constitution with respect to the treaty-making power.

Article II, Section 2, Paragraph 2, of the United States Constitution provides:

> "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *."

It will be observed that the grant of power is general and the limitation is only on the manner of its exercise.

Article VI, Paragraph 2, of the United States Constitution provides:

> "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

[1] 252 U.S. 416, 432, 433.

> 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."

It will be observed that under this provision, laws of the United States are the supreme law of the land, only if made in pursuance of the Constitution; while treaties are declared to be the supreme law of the land, if they are made under the authority of the United States.

The last paragraph of Section 8 of Article I of the Constitution grants to Congress the power to make all laws necessary and proper for carrying into execution its enumerated powers and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Under that provision, the Congress may enact laws to implement and carry into effect a treaty made under the authority of the United States, although it would not have power under the Constitution to enact such laws in the absence of the treaty. Such was the holding of the Supreme Court in *Missouri v. Holland,*[2] where the Migratory Bird Treaty Act of July 3, 1918,[3] and the regulations made by the Secretary of Agriculture in pursuance thereof came before the Supreme Court. In its opinion the court referred to two prior cases holding that an earlier act of Congress which attempted by itself, and not in pursuance of a treaty, to regulate the killing of migratory birds within the states was invalid, and stated:

> "Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. * * * there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, * * *."

and upheld the validity of the Congressional enactment implementing the treaty.

In an address before the American Society of International Law, on April 26, 1929, the late Chief Justice Charles Evans Hughes said that the treaty-making power "has no explicit limitation attached to it" and that "there has been no disposition to find in anything relating to the external concerns of the nation

[2]252 U.S. 416, 432, 433.
[3]40 Stat. 755.

a limitation to be implied. * * * But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power." But he also said: "I should not care to voice any opinion as to an implied limitation on the treaty power. The Supreme Court has expressed a doubt whether there could be any such."

Moreover, the State Department, during the preceding administration, took a position contrary to the implied limitation suggested by the late Chief Justice. In a statement released by the State Department, in September, 1950, it said:

> "There is no longer any real distinction between 'domestic' and 'foreign' affairs."[4]

The growing tendency to undertake to create a basis for Con gressional enactments under the treaty-making power, not within the Constitutional grant of legislative power in the absence of a treaty, is indicated by the Report of President Truman's Committee on Civil Rights, from which I quote:

> "The Human Rights Commission of the United Nations at present is working on a detailed international bill of rights designed to give more specific meaning to the general principles announced in Article 55 of the Charter: If this document is accepted by the United States as a member state, an even stronger base for congressional action under the treaty power may be established." Report of Civil Rights Committee, Par. 10.

Should the United States become a party to the Covenant on Human Rights, then under the doctrine of *Missouri v. Holland,* Congress could take over the entire field of human rights and completely upset the normal division between state and Federal power in that field.

Moreover, in addition to creating broad power to enact implementing legislation by Congress, a treaty itself, if self-executing by its terms, may have the force and effect of a legislative enactment affecting matters of local concern and traditionally regarded as within the reserved powers of the states. A self-

[4]State Department Publication 3972, Foreign Affairs Policy Series 26.

executing treaty, in addition to being an international contract, becomes municipal, viz., local, law of the United States in each of the several states and the judges of each state are bound thereby, anything in the constitution or laws of their state to the contrary nothwithstanding.[5]

Only in the United States does a self-executing treaty become municipal law without enabling legislation. Any other nation which enters into a treaty becomes bound thereby under international law, but the treaty does not become internal law in such nation, imposing duties or obligations upon its citizens, unless it is implemented by legislation enacted in accordance with its constitutional processes.

May I refer briefly to some of the proposed treaties which, if entered into, will affect individual rights and freedoms of our citizens or impose civil and criminal liability on individuals. Today, affiliated agencies of the United Nations have under consideration in excess of 150 proposed treaties dealing with a multitude of subjects, most of which have heretofore been regarded as within the reserved powers of the states. At least 17 of such treaties are in the drafting stage—not by the Secretary of State, but by such affiliated agencies. Time will not permit a detailed discussion of many of these treaties.

One is the Covenant on Human Rights, to which I have already referred. With respect to that treaty, in an article published in the January, 1948, issue of the Annals of the American Academy of Political and Social Sciences, Mr. John P. Humphrey, a Canadian, and the Director of the Division of Human Rights of the United Nations, 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."

Another is the proposed Convention on Gathering and International Transmission of News and Right of Correction. With respect to that treaty, Mr. Carroll Binder, a Minneapolis newspaperman, says:

> "There is no possibility of substantially increasing freedom of information through the United Nations un-

[5]Valentine v. Neidecker, 299 U.S. 5, 10;
Whitney v. Robertson, 124 U.S. 190, 194.

> der present conditions. On the contrary, there is danger that encroachment upon freedom of information now practiced by individual sovereign states may obtain legal or moral sanction through United Nations instruments or declarations."

The danger to which he refers arises from the fact that such Convention, as well as the Convention on Human Rights, as proposed, contains limitations subjecting the rights dealt with therein to penalties, liabilities, and restrictions for the protection of the national security, public order, safety, health and morals.

The treaty with Israel, which was transmitted to the Senate by President Truman, provides that nationals of either country shall not be barred from practicing professions in the other country by reason of their being aliens, if they comply with other requirements, such as residence and competence. Under the most favored nation clause, included in many treaties to which the United States is a party, the above provision in the Israel treaty, if it goes into effect, would be automatically applicable to the nationals of a very large number of countries. This is a typical example of an invasion of the reserved powers of the states.

Another of these treaties is the Genocide Convention now before the Senate for ratification.

I am not unmindful that in the past, acts, which this Convention undertakes to define as international crimes, have been perpetrated against human groups, which shocked the conscience of mankind, were contrary to moral law, and were abhorrent to all persons who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, or religious groups to which they belong, and that the end sought to be attained by this Convention is wholly desirable. But, the definitions of Genocide in the Convention are vague and lacking in precision. They do not lay down a certain and understandable rule of conduct. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[6]

Moreover, the Genocide Convention proposes ultimately to vest in an international criminal tribunal jurisdiction to try, convict, and sentence American citizens charged with the offense of Genocide, without the safeguards which our Federal and State Constitutions guarantee to persons charged with domestic crimes.

A separate *ad hoc* United Nations committee has prepared

[6]Connally v. General Construction Co., 269 U.S. 385, 391.

a draft Convention for the establishment of an international criminal court. It is significant that this statute expressly deprives a defendant of the right to be tried by a jury of his peers in the district in which the offense is charged to have been committed—a right we regard as fundamental, and affords no protection against the use of an involuntary confession as evidence against the accused, a device almost universally resorted to in the trial of persons accused of crime in the police states.

The Warsaw Convention drastically limits the liability for negligence resulting in death or personal injury to passengers on international airplane flights, although the accident occurs within the territorial limits of the United States.

The proposed Rome Convention would drastically limit liability for damages to persons and property on the earth's surface, resulting from the crash of an airplane on an international flight, although the crash occurs within the territorial limits of the United States—a crash damaging your airport, for example.

What is the answer to our problem? For more than three years the Committee of the American Bar Association on Peace and Law Through United Nations, a committee on which I have been privileged to serve since its creation, has engaged in a study of this problem. At the Mid-Winter Meeting of the American Bar Association, in 1952, the committee reported to the House of Delegates a proposed Constitutional amendment, which the House adopted on February 26, 1952. Senate Joint Resolution No. 1, as revised and approved by the Senate Judiciary Committee on June 4, 1953, by a vote of 10 to 4, incorporates without substantial change the American Bar Association proposal, and reads 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.
>
> "*Section 4.* The Congress shall have power to enforce this article by appropriate legislation.
>
> "*Section 5.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the sev-

eral States within seven years from the date of its submission."

If adopted, the amendment will prevent a treaty from becoming internal law in the United States by force of its self-executing terms; it will modify the holding of *Missouri v. Holland,* and restrict the power of Congress in enacting legislation to implement a treaty to the legislative powers that it would have in the absence of such treaty; and it will establish the supremacy of the Constitution over treaty law.

Certain arguments have been advanced by opponents of this proposal. Among them are: (1) That the dangers to which we have referred are hypothetical; (2) that bad or dangerous treaties will be prevented by Senate non-concurrence; (3) that the present administration will not make or press for concurrence by the Senate the treaties to which I have referred; (4) that a bad treaty can be nullified by subsequent legislation; and (5) that the proposal would handicap the conduct of our foreign relations.

Our distinguished Secretary of State, Mr. Dulles, stated, in effect, at the hearing before a subcommittee of the Senate Judiciary Committee, on April 6, last, that he had checked the dangerous trend of the State Department in the treaty field and that our proposed amendment is unnecessary and itself dangerous.

I want to read to you what he said in an address at Louisville, Kentucky, on April 12, 1952. I quote:

> "The treaty-making power is an extraordinary power liable to abuse. Treaties make international law and also they make 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 state and give them to the Federal Government or to some international body and *they can cut across the rights given the people by the constitutional* Bill of Rights." (Italics mine.)

The argument he made on April 6 has a striking parallel in our Constitutional history. When the issue of whether the first ten amendments to the Federal Constitution, commonly called the Bill of Rights, should be added to the Constitution was being debated, Hamilton, in the 184 *Federalist,* made the argument

that a Bill of Rights was both unnecessary and dangerous. Thank God, his views did not prevail in that great debate.

May I take up the first sentence of the text proposed by the American Bar Association: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect." It is true there are certain statements in decisions of the Supreme Court, which are pure dicta, to the effect that a treaty which violates the Constitution or is inconsistent with the nature of our government or the relation between the states and the United States would be invalid.[7] But, those propositions have never been laid down in any decision that arises, as distinguished from mere dicta, to the dignity of judicial precedent. And other pronouncements of the courts cast doubt on the existence of such limitations and on the power of the Supreme Court to hold a treaty invalid, which has been made under the authority of the United States and consented to by the Senate in accordance with the Constitutional process.[8]

No one, so far as I am advised, has been bold enough to assert that a treaty which violates the Constitution should be valid. What possible objection then can there be to a Constitutional amendment affirmatively declaring that "a provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect"—removing any possible doubt of the supremacy of the Constitution over treaty law?

The second sentence of the American Bar Association's proposal reads: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

To that provision objection has been raised by the Secretary of State and others on the ground that it would unreasonably limit the powers of the Federal government in the international field.

It should be noted particularly that the American Bar Asso-

[7]Asakura v. Seattle, 265 U.S. 332, 341;
Holden v. Joy, 84 U.S. 211, 243;
Geofroy v. Riggs, 133 U.S. 258, 267.

[8]There are judicial expressions to the effect that what the President and Senate do in foreign relations is a political question "not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); U.S. v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936); U.S. v. Sandoval 167 U.S. 278; U.S. v. Domestic Fuel Corporation, 71 F.2d 424, 430-431; Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 442; Z. & F. Assets Realization Corporation v. Hull, 114 F. 2d 464, 468. And there are other judicial expressions found in the adjudicated cases from Ware v. Hylton, 3 Dall. 199, 237 (1796), to U.S. v. Reid, 9 Cir., 73 F.2d 153, that "It is doubtful whether the courts have the power to declare the plain terms of a treaty unconstitutional."

ciation's proposed amendment does not prevent the President and the Senate from making a treaty, otherwise valid under the Constitution, on any subject whatsoever, and renders all such treaties effective externally. But, the proposal prevents such a treaty from becoming *effective as internal law in the United States,* except to the extent that Congress legislates within its delegated powers in the absence of such treaty.

The United States can enter into treaties to preserve peace and prevent aggression and war, for mutual defense, for reduction in armaments, for control of atomic energy and atomic weapons, and with respect to other related matters to insure our continued existence as a nation and the preservation of our liberties, and the Congress, under the war power, which the Supreme Court has said is "well-nigh limitless," and under its power to provide for the national defense, can implement such treaties by legislation. Under its power "to regulate commerce with foreign nations," Congress can implement treaties of friendship, commerce and navigation—a field which embraces a large portion of the treaties negotiated between the nations. Congress has the power "to define and punish piracies and offenses on the high seas and offenses against the law of nations." Under that power, Congress can implement treaties dealing with such offenses or can define and provide for the punishment of such offenses without any antecedent treaty. The foregoing are but illustrations, which could be multiplied in other fields, and such treaties will become the supreme law of the land and effective internally through legislation enacted by Congress, legislating within its well-settled delegated powers.

All of the classes of treaties to which I have just referred can be implemented effectively without state action because they all fall within the delegated powers of Congress in the absence of treaty; and I respectfully submit that any assertion to the contrary is utterly unsound.

It may be that the proposed amendment would exclude some small areas in which treaties are now made or proposed. But that presents no insoluble problem. The end can be attained by cooperation between the Federal government and the states. Such a procedure would give due recognition to the reserved powers of the states. It has been followed in treaties entered into by the United States. Under the Consular Convention with France of 1853, the interpretation of which was involved in *Geofroy v. Riggs,* 133 U.S. 258, the rights of Frenchmen to own, possess and enjoy personal and real property in the several states of the United States were made to depend upon legislative action

by the states, and the rights of citizens of the United States to own, possess and enjoy personal and real property in France were made to depend upon such reciprocal action by our states.

Likewise, in the treaty with China, signed November 4, 1946, and effective November 30, 1948, the rights of Chinese nationals, corporations and associations to acquire, hold and dispose of real property in the several states of the United States were made to depend upon legislation by such states, and the rights of nationals, corporations and associations of the United States to acquire, hold or dispose of real property in China were conditioned upon reciprocal legislative action by the state of the United States in which such national of the United States is domiciled, or in which such corporation or association of the United States was created or organized.

However, it should be kept in mind that the "which clause" has absolutely no application unless the treaty would affect domestic law not otherwise within Federal legislative competence. *Only* when the treaty would affect domestic law beyond Federal legislative competence in the absence of treaty, would the "which clause" have any effect. Only then would state legislation be necessary.

Another groundless objection urged by opponents of the proposed amendment is that it would subject troops or war vessels of a friendly nation, stationed in or moving through the territory of the United States, to the limitations and impediments of state law. They envision an enemy invading the United States by way of Alaska and a Canadian motorized division being rushed to our aid through United States territory and imagine dire consequences that would arise from impediments of state law. But their fears are wholly groundless. It was settled by Chief Justice Marshall in *The Schooner Exchange v. McFaddon,* 7 Cranch., 11 U.S. 116, that troops and warships of a friendly nation, stationed within or passing through our territory, are entitled to the immunities of the sovereign himself and his diplomatic representatives while in our country, and that they are subject only to their own country's laws and regulations, and are not in anywise subject to our local law.

It is asserted that the proposed amendment would probably prevent the United States from entering into an agreement embracing the Baruch Plan to control atomic energy.

As stated above, the Federal government possesses today, under its specific war powers and its power to provide for the national defense, ample Constitutional authority to legislate con-

trol of atomic energy. Furthermore, it has done so. (Atomic Energy Act of August 1, 1946.)

No treaty on the subject, therefore, whether made before or after the adoption of the proposed amendment would be invalid, unless as an incident to its control measures it involved such a surrender of sovereign powers of the United States to an international or supranational organization as would be condemned as an unconstitutional bartering away of those powers. The Supreme Court has said:

> "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." (Chinese Exclusion Case, 130 U.S. 581, 609.)

An effective system of international inspection to prevent violation of a treaty on atomic energy would not be objectionable on this ground.

The Baruch proposal, advanced seven years ago, however, consisted of a general outline, of which international inspection was but an incident. Under it absolute ownership and control of all fissionable material and of its uses, both military and civilian, as well as of the sources and potential sources of the raw materials, would have been surrendered by the United States to a supranational body in which, although contributing the maximum in atomic properties and developments, the United States would have had at most a small minority representation, and which would have been completely free of any authority of the United States government. (Mr. Baruch's Statement, June 14, 1946, Dept. of State Pub. 2702, pp. 138-147; United States Memoranda 1, 2 and 3, l. c. pp. 148-165.)

In so far as such a plan, envisaging complete abrogation of the sovereignty of the United States in favor of a supranational world organization, might achieve constitutionality through the treaty-making power, it would and should be barred by §1 of the proposed amendment.

The subject matter of the Baruch proposal, advanced in 1946, has now been combined by the General Assembly of the United Nations by resolution of April 8, 1953, with a larger study of disarmament. (State Dept. Bulletin, April 20, 1953, p. 584.)

Any plan involving surrender of the sovereign governmental powers of the United States to what must inevitably become a supranational body having control of the world, should not be

effected by treaty, and should be possible only through unequivocal change in our Constitution, achieved through the affirmative voice of the people of the entire nation.

The statement of Mr. Dulles that he has checked the dangerous trend of the State Department in the treaty field is reassuring for the moment. But what of the future? Who knows or can predict what position future administrations will take with respect to these dangerous treaties? The time to lock the barn is before the horse is stolen. The admonition of Thomas Jefferson should be ever kept in mind:

> "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."

The argument that the Senate will stop dangerous or undesirable treaties by withholding concurrence is equally without validity and is controverted by the fact that Senator Bricker and 64 other Senators as co-sponsors have introduced a joint resolution to limit the treaty-making power.

The suggestion that a bad treaty can be abrogated by a subsequent legislative act overlooks the fact that such treaty must have been proposed by the President and concurred in by two-thirds of the Senators present and that to override a presidential veto of the abrogating legislation would take a two-thirds vote of the Senate and House. Moreover, we should not be put in the position of welching on a treaty we have solemnly entered into. We have heretofore in our history castigated another nation for regarding a treaty as a mere scrap of paper.

It is my firm conviction, after careful and painstaking consideration of the problem, that only by proper restriction of the treaty-making power, through Constitutional amendment, can we be sure that the essential character of our national government, the rights of the states and the people, and the precious liberties and fundamental freedoms of the individual citizen will be safeguarded and preserved.