

1953

## A Proposed Amendment to the Constitution; Senate Joint Resolution 130

John M. Kearney

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### Recommended Citation

John M. Kearney, *A Proposed Amendment to the Constitution; Senate Joint Resolution 130*, 3 Cath. U. L. Rev. 43 (1953).

Available at: <https://scholarship.law.edu/lawreview/vol3/iss1/6>

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# *A Proposed Amendment to the Constitution;* *Senate Joint Resolution 130*

The paramount issue to be discussed in this comment is the preservation of the ultimate authority of the Constitution.<sup>1</sup> Because of recent concepts of international law, it is possible for the constitutional supremacy to be surrendered by treaty, e.g., become subservient to the United Nations Charter. There is a real possibility that because of a generous treaty power—Art. II, sec. 2, cl. 2,<sup>2</sup> and Art. VI, cl. 2<sup>3</sup>—the rights and freedoms of the American people protected by the Constitution can be entirely altered, and that the legal relationship of the States to their federal government can be abridged by treaty.<sup>4</sup>

An effort is being made to re-define the treaty power to prevent its possible use as an instrument amounting to domestic legislation. This effort has resulted in Senate Joint Resolution 130, which is a proposed amendment to the U. S. Constitution. Sixty of the ninety-six members of the United States Senate have united behind this resolution.<sup>5</sup>

Section 1 of S. J. Res. 130 provides that no treaty shall abridge the free exercise of rights enumerated in the Constitution.<sup>6</sup> This provision would prohibit the making of treaties in matters essentially within the domestic jurisdiction of the United States. The purpose of such a provision is to curb what the American Bar Association terms a dangerous constitutional loophole.<sup>7</sup> For explanation of the term "loophole", we need to refer to the Constitution. Art. VI, par. 2, requires that laws be made "in pursuance" of the Constitution. However, treaties need only be made "under the authority of the United States." Advocates of S. J. Res. 130, and the American Bar Association point out that a loophole exists because there is no deterrent, e.g., such as the words "in pursuance" of the Constitution to check the treaty power. An additional definition can also be given in the words of one of the chief sponsors of the proposed amendment:

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<sup>1</sup> S. J. Res. 130, 82nd Cong. (1952), Sec. 1, *infra*, note 6.

<sup>2</sup> "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."

<sup>3</sup> "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, and any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."

<sup>4</sup> Hearings before the Committee on the Judiciary, U.S. Senate, on S. J. Res. 130, 82nd Cong. 2nd Sess. (1952).

<sup>5</sup> Resolution, note 1.

<sup>6</sup> Sec. 1. No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof.

<sup>7</sup> A.B.A. Report of Standing Committee on Peace and War Through United Nations, pp. 4-18, Mar. 15, 1952.

"This constitutional loophole arises from Article VI of the Constitution which makes treaties the supreme law of the land. The treaty-making power is unlimited in scope. Moreover, treaties, unlike Acts of Congress, are not subject to the phrase 'in pursuance' of the Constitution as a condition to their becoming the supreme law. No provision of any treaty has ever been held unconstitutional."<sup>8</sup>

Section two of S. J. Res. 130<sup>9</sup> "is designed to prevent United States participation in world or regional government by treaty or executive agreement."<sup>10</sup> Advocates of the resolution say the revolutionary goals should have the approval of the people.

Section three of S. J. Res. 130 would make all treaties inoperative as internal law pending approval by both houses of Congress.<sup>11</sup> This third section and the foregoing two sections comprise the more controversial portions of the proposed amendment. They are designed to plug the "loophole."<sup>12</sup>

The constitutional loophole springs from recent innovations in international law which are so vast that they no longer operate merely between nation and nation, but extend to the internal affairs of our nation.<sup>13</sup> One of these is that there is no longer any distinction between domestic and foreign affairs. This innovation results from the utilization of a treaty as an instrument of legislation in internal affairs.<sup>14</sup> There is a glaring lack of demarcation between the use of a treaty for external international matters and its use in internal domestic affairs of our nation.<sup>15</sup> There are those who contend that the constitutional rights of the American people are appropriate subjects of treaty negotiation.<sup>16</sup> Those who follow this line of thought deny that "the Charter's provisions on human rights have not been incorporated into the municipal law of the United States so as to supersede inconsistent State legislation because they are *not self-executing* (underscoring by the writer)."<sup>17</sup> This language of Manley O. Hudson refers to Articles 55 and 56 of the Charter which are as follows:

The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>18</sup>

<sup>8</sup> Cong. Digest, Vol. 31, No. 11, p. 268, Nov. 1952.

<sup>9</sup> Sec. 2. No treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested in this Constitution in the Congress, the President, and in the courts of the United States, respectively. See also, Hearings, *supra*, at 27.

<sup>10</sup> *Id.* at 270.

<sup>11</sup> Sec. 3. No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or the laws of the several States unless, and then only to the extent that, Congress shall provide by act or joint resolution.

<sup>12</sup> Cong. Digest, *supra*.

<sup>13</sup> State Dept. Publication 3972 (1950).

<sup>14</sup> Allen, *The Treaty as an Instrument of Legislation* (1952).

<sup>15</sup> *Ibid.*

<sup>16</sup> Wright, *National Courts and Human Rights*, 45 *Am. J. Int. Law* 62 (1950). Moskowitz, *Is the United Nation's Bill of Human Rights Dangerous?* 35 *A.B.A.J.* 283, 285 (1949).

<sup>17</sup> Hudson, *Charter Provisions on Human Rights in American Law*, 44 *Am. J. Int. Law*, 543 (1950).

<sup>18</sup> U.N. Charter 59 Stat. 1031 (1945).

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.<sup>19</sup>

It is not to be denied that a Treaty which is spelled out in detail and made under the authority of the United States is both self-executing and the supreme law of the land.<sup>20</sup> But it is equally strongly established that a Treaty couched in such broad language as Articles 55 and 56 of the Charter does not purport to operate of and by itself, that implementing legislation is needed before the Treaty is executed.<sup>21</sup> The provisions in the Charter set forth broad aims and objectives in promoting observance of the fundamental freedoms. They are framed as a promise of future action.<sup>22</sup>

Serious consideration is timely. As one writer states, ". . . the United Nations and its affiliated organizations have proposed over two hundred treaties . . . in the social, economic and political field."<sup>23</sup>

Recent decisions have had their impact upon the judicial mind; and such decisions were influenced very definitely by the "moral commitments" of the United Nations Charter.<sup>24</sup> It is important to recognize that the Supreme Court of California in its decision of April 17, 1952 (reversing the District Court of Appeals) in *Fujii v. California* does not give the United Nations Charter controlling effect. However, it would appear that the Charter projected itself into the thinking of the court in a new construction of the equal protection clause of the Fourteenth Amendment, to the extent that earlier decisions upon identical law that have stood the test of time have now been swept away.<sup>25</sup>

Although the aims and objectives of the Charter are undoubtedly highly desirable, there is still solid reasoning upon which to base an examination of the legal means which some would seek to employ to attain these objectives.

When the Constitution was framed, international law was universally looked upon as dealing with external affairs among nations. Richard Henry Lee and Patrick Henry, both of Virginia, strongly objected to the treaty clause at the time of its adoption. These two great Americans feared that the treaty power would be used to affect the internal affairs of this nation. Although Jefferson, by reason of his ambassadorship to France, did not in his absence, partake of this treaty clause discussion as a member of the Constitutional Convention, he did have this to say:

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<sup>19</sup> Id.

<sup>20</sup> *Ware v. Hylton*, 3 Dall 199 (U.S. 1794). *Foster v. Neilson*, 2 Pet 253 (1829).

<sup>21</sup> *Fellows v. Blacksmith*, et al, 19 How 366 (1856).

<sup>22</sup> Gibson, J., *Fujii v. California*, 242 P. 2d 617 (1952).

<sup>23</sup> Deutsch, The Need for a Treaty Amendment: A Restatement and a Reply, 38 A.B.A.J. 735, Sept., 1952.

<sup>24</sup> *Fujii v. California*, 242 P. 2d 617 (1952. See review in 38 A.B.A.J. 559, July 1952. *Perez v. Lippold*, 198 P. 2d 17 (1948); Power County Press, American Falls, Idaho, June 19, 1952, p. 4; reprinted in Congr. Rec., June 24, 1952, p. A4169.

<sup>25</sup> In re *Fujii*, *supra* note 22.

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.<sup>26</sup>

Thus, the founding fathers did have an insight into the Constitutional loophole whereby the balance between the State and federal power could be upset by the exercise of treaty power.<sup>27</sup>

Contrast with this balance of power the primary weakness of the forerunner of the Constitution—the Articles of Confederation. Under this latter document, although Congress had the power to enter into treaties and alliances, it could not compel their observance by the States. The veto power which each State enjoyed operated as a dynamic deterrent to the establishment of satisfactory relations with foreign countries for the national good.<sup>28</sup> The Constitution was so framed that the central government should have the sole power to deal with other nations. The question then posed by the framers of the Constitution was how to provide for the exercise of the treaty power without making it cumbersome and impractical. The choice narrowed to action by the President and Senate. Madison, Jay, and Hamilton, all proponents of the supremacy clause, had prevailed.<sup>29</sup> From their deliberations we can gather that the new treaty power was not to be extended to matters of purely domestic concern for which it was never intended.<sup>30</sup>

Today, a way has been found to change the rights guaranteed by the Constitution, without changing the Constitution.<sup>31</sup> The generous grant of treaty power, implanted by the founding fathers in our Constitution for the purpose of making a new nation fully sovereign, has now come to mean, for some, a means of legislation for states by treaty.<sup>32</sup> By a treaty fiat, the balance of rights reserved to the States by the Tenth Amendment should not be upset.<sup>33</sup> It is rather ironical that the treaty power which was meant to make this new nation fully sovereign, can now come to be the means through which it can lose its Constitutional supremacy.<sup>34</sup>

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<sup>26</sup> Jefferson, *Manual of Parliamentary Practice*; 2 Farrand, *Records of the Federal Convention* (Rev. Ed. 1937) p. 370; see also 3 Farrand 136, 286-287; 1 Farrand 164, 245; 2 Farrand 297.

<sup>27</sup> *Ibid.*

<sup>28</sup> See *Journal of Continental Congress, 1774-1789*, XXXII, pp. 124, 181-182. See, Myers, *Treaty and Law Under the Constitution*. Dept. of State Bulletin, p. 371, Mar. 10, 1952.

<sup>29</sup> Farrand, *The Records of the Federal Convention*, 1911 Ed. Vol. 3, pp. 162, 166, 251-252, 347-349, 523.

<sup>30</sup> *Ibid.*

<sup>31</sup> Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution* (1950), 36 A.B.A.J. 707. See also, Holman, *Treaty Law-Making*, 25 Wash. L. Rev. 382 (1950).

<sup>32</sup> *Id.* at 709.

<sup>33</sup> *Cong. Digest*, note 8, at 284-286.

<sup>34</sup> See note 8 *supra*, at 270-272.

Chief Justice Holmes declared in *Missouri v. Holland*

" . . . 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 when under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with, but a treaty followed by such an act could, and it is not lightly to be assumed that in matters requiring national action 'a power which must belong to and somewhere reside in every civilized government' is not to be found."<sup>35</sup>

Under a treaty, Congress, by virtue of Art. I, sec. 8, can pass all laws necessary and proper to implement treaties,<sup>36</sup> even though, in the absence of such treaty, Congress would not have power under the Constitution to pass such legislation.<sup>37</sup> This power is not to be denied if Congress chooses to make use of it. There is actually nothing new in the holding that the treaty power prevails over the reserved powers of the states.<sup>38</sup> But such a holding has not been construed as an invasion of the right of a state to control its land, or state police powers, or affairs of state having a strictly internal function.<sup>39</sup>

In *Missouri v. Holland*, a federal statute protecting migratory birds, which had been passed to implement a treaty with Great Britain on behalf of Canada, was held constitutional by virtue of treaty power, although a similar federal statute passed before the treaty had been held unconstitutional (by lower courts) as dealing with a subject matter over which no power in the legislative field had been delegated to Congress by the Constitution.<sup>40</sup> This same treaty principle was reaffirmed in *Asakura v. City of Seattle*, wherein a treaty was held to have overridden a city ordinance.<sup>41</sup> In exercising legislative powers, Congress is expressly confined by the Tenth Amendment to the subject matter enumerated in Art. I, sec. 8; whereas, in exercising the treaty powers granted by Art. I, sec. 2, cl. 2, the President and Senate are not limited with regard to subjects which may be dealt with in treaties. These constitutional provisions, plus the "necessary and proper" clause, produce the conclusion reached in *Missouri v. Holland*.<sup>42</sup>

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<sup>35</sup> 252 U.S. 416 (1920).

<sup>36</sup> *Ibid.*

<sup>37</sup> This statement represents the agreed views of the American Bar Association's Committee. See report of Committee on Peace and Law, Sept. 1, 1951, p. 36.

<sup>38</sup> In *Ware v. Hylton*, 3 Dall 199 (1796), it was held that certain provisions of the treaty ending the Revolutionary War were self-executing, and being inconsistent with a Virginia state law, held superseded it.

<sup>39</sup> *Terrence v. Thompson*, 263 U.S. 225 (1922).

<sup>40</sup> 252 U.S. 416 (1920).

<sup>41</sup> 265 U.S. 332 (1924).

<sup>42</sup> *Supra* note 42.

See also *United States v. Curtiss-Wright Corporation*, 299 U.S. 304, 316-19 (1936). U.S. Const., Art. I, sec. 8. The inclusion of the so-called "necessary and proper" clause was a recognition that the subject matter of treaties might transcend the specific powers delegated to Congress, and that it was in the national interest that Congress be able to enact legislation implementing a treaty which it would be unable to enact in the absence of a treaty. It followed as a corollary that the Supreme Court would hold, as it did in *Missouri v. Holland*, that Congress in implementing treaties might enact legislation which was beyond its ordinary delegated powers.

It is at precisely this point of the legal process of treaty development that United States Senator John W. Bricker,<sup>43</sup> Frank E. Holman,<sup>44</sup> past president of the American Bar Association, and William Fleming,<sup>45</sup> a layman, have all expressed concern about the present views of some to extend treaty making powers to internal affairs of the States.<sup>46</sup> These advocates of a constitutional amendment—to make treaties dealing with internal affairs subject to vote by both houses of Congress—allege that it has taken approximately 150 years for the constitutional loophole to attain menacing proportions. They reiterate that, when the Constitution was framed, international law was universally recognized as limited to the nation's external affairs only. They hasten to point out that the basic premise of proposed new international law is that relationship among citizens of a government, and between the individual and the government are appropriate subjects of a treaty. Therefore, proposed legislation to place domestic affairs beyond the range of treaty power has found its way into Congress.<sup>47</sup>

There is a thread of dictum running through opinions of the Supreme Court of the United States which says "that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument;<sup>48</sup> that the treaty power, as expressed in the Constitution", is limited "by those restraints which are found in that instrument," and does not extend "so far as to authorize what the Constitution forbids;"<sup>49</sup> and that it remains "subject to prohibitions within that Constitution." But in the latest opinion of the Supreme Court on the subject matter, this thread has been snapped.<sup>50</sup> For it was in *Missouri v. Holland* that the Supreme Court declared that "it is obvious that 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." It is against this concept, with its inherent dangers that writers have expressed alarm.<sup>51</sup> Nor has any satisfaction and peace of mind been expressed because of limitation imposed by Art. II, par. 7<sup>52</sup> of the United Nations Charter which forbids the United Nations from interfering in matters essentially within the domestic jurisdiction of its members. The novel concept that once the United Nations has started

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<sup>43</sup> Senate Joint Resolution 130, 82nd Congress. A.B.A. Report of Standing Committee on Peace and Law Through the United Nations, Feb. 1, 1952.

<sup>44</sup> *Ibid.*

<sup>45</sup> 98 Cong. Record 924 (Feb. 7, 1952). See also, Fleming, *Danger to America: The Draft Covenant on Human Rights*, 37 A.B.A.J. 739-742, 816-820, 855-860 (1951).

<sup>46</sup> Hearings before Committee on the Judiciary, U.S. Senate, on S. J. Res. 130, 82nd Cong., 2nd Sess. (1952).

<sup>47</sup> Hearings, *supra*.

<sup>48</sup> *Cherokee Tobacco v. United States*, 11 Wall. 616, 620-621 (U.S. 1871).

<sup>49</sup> *De Geoffroy v. Riggs*, 133 U.S. 258, 267 (1890). *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1941).

<sup>50</sup> *Amaya v. Stanolind Oil and Gas Co.*, 158 F. 2d 544, 556 (C.A. 5th 1947).

<sup>51</sup> *Missouri v. Holland*, *supra*.

Deutsch, *The Treaty Making Clause; A Decision for the People of America*, 37 A.B.A.J. 659 (1951).

<sup>52</sup> "Nothing contained in the present Charter shall authorize the U.N. to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter."

to act, the issue ceases to be a domestic issue has caused great criticism.<sup>53</sup> The advocates of amendment say that the United Nations has ignored this limitation of its power.<sup>54</sup> With a sharp eye to the future, one part of the American Bar Association proposal for amendment to the Constitution is as follows:

A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect.<sup>55</sup>

Zacharia Chafee, one of the opponents of a Constitutional amendment, states that Art. II, par. 7<sup>56</sup> of the Charter merely refers to the compulsory powers of the United Nations; it does not, he says, wipe out the long practice of nations to make treaties which alter laws within their domestic jurisdiction. Furthermore, it is urged by him that all this concern about a Constitutional amendment is quite unnecessary,<sup>57</sup> that the present treaty enforcing machinery, Art. II, sec. 2, cl. 2 of the Constitution, is quite adequate and ample enough to provide a remedy against the risk from treaties.<sup>58</sup> Chafee is not alone. He has many co-advocates whose general views result in the following conclusions:

1. The assumption is unwarranted that the President, the Senate and some of the Courts would abuse the treaty power and alienate the constitutional liberties of American citizens.
2. S. J. Res. 130 is not clear, as now drafted.
3. S. J. Res. 130 would seriously handicap this nation in dealing in foreign relations.
4. That this resolution would alter the fundamental division of power between the executive, legislative, and judicial branches.<sup>59</sup>

This type of thinking has been converted into action (consider the two hundred or more treaties pending in the United Nations, note 23) by those who look upon implementation of the United Nations Charter—particularly Articles 55 and 56—“as a continuing process”, wherein most of the human rights provisions can be taken care of by federal or state legislation without reference to treaty. The argument is made by Chafee that the proposed Covenant of Human Rights is only a minimum set of standards which domestic legislation can implement. This is in keeping with the view that constitutional amendment is therefore unnecessary.<sup>60</sup>

## CONCLUSION

Two well defined and opposed groups have developed in this country regarding the desirability of a constitutional amendment making all treaties and

<sup>53</sup> Cong. Digest, note 8, at 280.

<sup>54</sup> Id.

<sup>55</sup> A.B.A. Report of Standing Committee on Peace and Law Through United Nations, Mar. 15, 1952.

<sup>56</sup> Note 52.

<sup>57</sup> Cong. Digest, note 8, at 281-283.

<sup>58</sup> Chafee, Stop Being Terrified of Treaties: Stop Being Scared of the Constitution, 38 A.B.A.J. 731 (1952).

<sup>59</sup> Cong. Digest, note 8, at 273.

<sup>60</sup> Chafee, Amending the Constitution to Cripple Treaties, 12 La. L. Rev. 345 (1952).



executive agreements non self-executing.<sup>61</sup> Proponents of such an amendment to the Constitution look upon the treaty provision of Art. VI, cl. 2 as a loophole by which treaties and executive agreements might be used to change the internal law of the United States,<sup>62</sup> and even extend to the changing of our form of government.<sup>63</sup> Opponents warn that an amendment will diminish the ability of the government of the United States to carry out its agreements with other nations.<sup>64</sup>

What then can or should be done? The American Bar Association Section of International and Comparative Law has had this to say:

We concur in the wisdom of further study of the proposed amendment, but we of the Section committee are not convinced of the necessity, nor of the correctness of its proposed terms to carry out the announced purpose.<sup>65</sup>

In view of the diametrically opposed groups and the conflict in treaty concepts, patient and mature deliberations are in order. It is the avowed purpose of the advocates of the proposed amendment to stimulate discussion and to focus attention on these complex issues of international and constitutional law in order to preserve our Constitution.

JOHN M. KEARNEY

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<sup>61</sup> See Con Arguments, Cong. Digest, note 8.

<sup>62</sup> See Pro Arguments, Cong. Digest, note 8.

<sup>63</sup> Tucker, Limitations on the Treaty-Making Power (1951). See also, Wilson, 28 Harvard L. Rev. 826 (1915).

<sup>64</sup> Chafee, Federal and State Powers Under the United Nations Covenant on Human Rights, Wis. L. Rev. 389-473, 623-656 (1951). Assoc. of the Bar of the City of New York, Committee on Federal Legislation and Committee on International Law. See report on "Joint Resolution Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements."

<sup>65</sup> Proceedings of the American Bar Assoc. Section of International and Comparative Law, 38 (Sept. 19, 1951).

See, The Bricker Amendment and The Proposed United Nations Human Rights Covenant. Govt. Printing Office, Washington (1952).