

The Treaty Making Power

In regards to treaties, the United States Constitution makes the following stipulations:

“No State shall enter into any Treaty, Alliance, or Confederation;...” (Article I, Section 10)

“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; ...” (Article 2, Section 2)

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all cases affecting...” [the Section goes on to enumerate the scope of the power granted]. (Article III, Section 2)

“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;...” (Article VI)

In 1803, St. George Tucker, one of the preeminent constitutional scholars of the founding era of the United States, published his monumental work: *View of the Constitution of the United States*. In that volume, he painstakingly reviews the form of government created by the United States Constitution, the powers granted within that document, and the scope and limits within which each component of the government is to operate. In his writings, Tucker briefly touches upon the exercise of the treaty-making power, an area wherein the United States has strayed into dangerous territory in recent decades.

The danger lies in the false perception that by the power to make treaties, the Constitution can be modified or amended. This recent “interpretation” is that simply by having the President agree to, and the Senate ratify treaties with other nations (as required in Articles II and VI of the United States Constitution), the United States Constitution may be modified as though it had been amended by the process defined in Article V of the Constitution. Tucker is careful to note that such a position is wholly inconsistent with the intent and purposes specified within the Constitution, and that such a position or action would subvert and completely destroy the deliberative amendment process which is outlined in Article V of the Constitution.

Article V states that amendments to the Constitution occur when two thirds of both Houses of Congress have agreed on a proposed amendment, and three fourths of all States agree to those changes. Thereby, Congress may not change the Constitution without the concurrence of the people.

One of the prime foundational principles of the American experiment is found in the Declaration of Independence (“...it is the Right of the People to alter or to abolish” their government), and the people would be left out of any constitutional modification if it were allowed to occur with

actions taken solely by the President and the Senate. George Washington touched upon this issue in his monumental Farewell Address, saying:

“This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government....

“If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.”¹

Tucker quotes a contemporary congressional resolution pertaining to the treaty making power of the President and Senate which notes their reservations to treaties which go beyond their view of the constitutional scope, and which would appear to require constraint :

“That when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency, or in expediency, of carrying such treaty into effect, and to determine and act thereon, as in their judgment, may be most conducive to the public good.”²

Tucker proceeds to note the impeccable logic of such a congressional position:

“...A contrary construction would render the power of the President and Senate paramount to that of the whole Congress, even upon those subjects upon which every branch of Congress is, by the Constitution, required to deliberate. Let it be supposed, for example, that the President and Senate should stipulate by treaty with any foreign nation, that in case of war between that nation and any other, the United States should immediately declare against that nation: Can it be supposed that such a treaty would be so far the law of the land, as to take from the House of Representatives their constitutional right to deliberate on the expediency or in expediency of such a declaration of war, and to determine and act thereon, according to their own judgment?”³

It would seem today that Tucker’s prediction of the Nation being drawn into war without adhering to the Constitutional requirement of a congressional declaration of war was almost

prophetic—in view of the numerous modern instances of that mantra being the national justification in so momentous a matter!

More succinctly, Thomas Jefferson makes the point:

“By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and cannot be otherwise regulated....It must have meant to except out of these the rights reserved to the states, for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.”⁴

Jefferson felt that the Constitution must be strictly held to the words written in the document:

“Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.

“I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. Whatever of these enumerated objects is proper for a law, Congress may make the law; whatever is proper to be executed by way of a treaty, the President and Senate may enter into the treaty; whatever is to be done by a judicial sentence, the judges may pass the sentence.”⁵

As he debated the treaty making power which was granted to the President and Senate as found in the Constitution, James Madison addressed the logical limits to the treaty making power, and made this statement:

“Does it follow, because this power is given to Congress, that it is absolute and unlimited? I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right. I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation.”⁶

The Founding Fathers of this Nation unquestionably felt that the power to make treaties did not embrace the power to modify the Constitution. In their view, the treaty-making power was a limited grant of power that could not undermine or destroy individual God-given rights, or the structure or framework of the limited, carefully defined government they established.

It is astonishing that in recent decades efforts to destroy the sovereignty of the Nation and the United States Constitution have been undertaken through the treaty process; and those efforts have been expanded through “Executive Agreements” which the President makes with foreign powers, and with “trade agreements” such as NAFTA, GATT, WTO, CAFTA which are not treaties (and which would have never passed the Senate by the required two-thirds vote had they been presented as treaties). None of these methods can modify the United States Constitution in any way, shape or form, but they are treated by those in power as having done so. Tragedy will follow if the Nation continues along this path.

The current false philosophy regarding treaty power, as promoted by those who would usurp authority within this Nation, will lead to the destruction of the United States Constitution and result in the loss of our liberty if the citizens of this Nation are not willing to expose and derail these attempts. Authority is not granted within the Constitution to de-construct the Constitutional authority of the land by treaty.

—Scott N. Bradley

1 - Washington's Farewell Address, September 17, 1796. Messages and Papers of the Presidents, George Washington, Vol 1, Pg.205-216

2 - Resolution of the House of Representatives, April 6, 1796, Tucker, View Pg 277

3 - Tucker, View Pg. 277

4 - Thomas Jefferson, Writings of Thomas Jefferson. Manual of Parliamentary Practice. Bergh 2:442. [1801]

5 - Thomas Jefferson, Writings of Thomas Jefferson, Bergh 10:418-419. [1803]

6 - James Madison, Jonathan Elliot, Debates on the Adoption of the Federal Constitution, Vol. 3, p.514