

# Treaties and the Constitution

*by George C. Detweiler*

**Contrary to current internationalist misrepresentations, the Founding Fathers never intended that treaty law supersede the Constitution.**

Nearly 50 years ago, John Foster Dulles, secretary of state under President Dwight Eisenhower, asserted that "treaty law can override the Constitution. Treaties, for example ... can cut across the rights given the people by their constitutional Bill of Rights." Leaving aside the fact that the Constitution and Bill of Rights *protect* rights, rather than *grant* them, Dulles' calculated misrepresentation of the treaty-making power serves as a timely warning today, as a globalist political elite tirelessly promotes UN treaties and conventions that imperil long-cherished American freedoms.

Perhaps the most suitable example of a UN treaty that would "cut across" rights protected by the Constitution is the International Criminal Court (ICC) statute, which would create a permanent, 18-judge tribunal with a mandate over every living human being. Dr. Charles Rice of the University of Notre Dame Law School describes the ICC treaty as a measure that would "cancel the Fourth of July" by making all Americans subject to trial, in a foreign land, before foreign judges empowered to make "law" according to their whims. This arrangement would recreate one of the key offenses of the British Crown cited in the Declaration of Independence —that of subjecting Americans "to Jurisdiction foreign to our Constitution, and unacknowledged by our Laws...."

Lee Casey, a former Justice Department Counsel, has pointed out that the ICC treaty "contains no habeas corpus provisions, no right to bail, and no other means of compelling the [court] to conduct a speedy trial." Under the "international standards" that may govern the ICC, Casey further points out, suspects may be detained for five years or more without being charged with a crime. In addition,

those arraigned before the UN tribunals established to prosecute "war crimes" in Yugoslavia and Rwanda —which serve as precedent-generating models for the permanent ICC —have been denied nearly all of the protections and immunities guaranteed by the U.S. Bill of Rights.

Defendants before those tribunals have been denied the right to defense counsel of their choice; they have been denied the right to confront their accusers; they have been required to offer self-incriminating testimony, and informed that refusal to do so would be considered evidence of guilt. Even more outrageous is the Stalinesque means used by these UN tribunals to carry out their judgments. British legal activist Barry Crawford, who has been an observer at the UN' s tribunal for Rwanda, warns that "in order to enforce its edicts, people have been quite literally kidnapped and detained in secret locations and denied access to defense counsel." Identical criminal methods have been used by officials at the UN' s tribunal for Yugoslavia. But the most outrageous aspect of the ICC treaty is this: After the pact has been signed and ratified by 60 nations, it will go into effect, thereby claiming world-wide jurisdiction —including the power to arrest and try citizens of nations (including Americans) that refuse to participate in the court.

Critics of the ICC treaty, particularly those in the Pentagon who are understandably concerned that U.S. military personnel could find themselves subject to vindictive prosecution, have urged the president not to sign the treaty, and the Senate not to ratify the document should it be signed. However, relatively few of the ICC' s opponents have criticized the premise that the president and Senate have the power to commit our nation to a treaty that would inflict upon our nation the horrors described above. Indeed, most commentary about the ICC and similar UN treaties reflects the same misunderstanding of the Constitution' s "Supremacy Clause" that was propagated by John Foster Dulles so long ago.

### **Treaties and Rights**

The "Supremacy Clause" of the U.S. Constitution is contained in Article VI:

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.

As the Constitution was being constructed at the Philadelphia Convention of 1787, the experience of the previous few years made it abundantly clear that it was essential to establish the central government' s power to conduct foreign affairs. It was necessary that the United States speak with one voice in matters of international diplomacy. To have 13 individual and separate states each conducting its own foreign policy, making its own treaties and sending and receiving its own ambassadors would have been an invitation to chaos; to have 50 states doing so today would be the quintessence of insanity.

But the powers delegated to the federal government to conduct foreign affairs—including the treaty-making power—are carefully limited and checked by the Constitution. The Framers did not present the federal government with vast, unenumerated, or unaccountable powers in either domestic or foreign policy. It was certainly never intended, as Dulles and others of his ilk insist, that the federal government could use the treaty-making power to evade constitutional limits upon its powers. And it is the purest absurdity to believe that statesmen who had just wrested our nation' s independence from a globe-spanning empire would create a treaty-making provision through which our independence could be signed away.

Addressing the scope and limits of the Constitution' s treaty power, James Madison—often described as the father of the Constitution—said the following:

I do not conceive that power is given to the President and the Senate to dismember the empire, or 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.

Thomas Jefferson emphatically agreed with Madison's depiction of the limits placed upon the treaty power. If the treaty-making power is "boundless," warned Jefferson, "then we have no Constitution." On another occasion, Jefferson elaborated:

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 those 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.* [Emphasis added.]

Alexander Hamilton was in perfect agreement with both Madison and Jefferson. "The only constitutional exception to the power of making treaties is, that it shall not change the Constitution.... *On natural principles, a treaty, which should manifestly betray or sacrifice primary interests of the state, would be null.*" (Emphasis added.)

The observations of Jefferson and Hamilton are particularly valuable in light of the danger posed by the ICC treaty. Since the president and Senate are strictly and explicitly forbidden by the Constitution to deny the protections and immunities guaranteed by the Bill of Rights, they have no authority to conclude a treaty that would have the same result. To paraphrase Hamilton, any such treaty signed by the president and ratified by the Senate would, on "natural principles," be null and void.

### **Laws of the Land**

The language of Article VI clearly states that in the event of a conflict between a treaty and a state constitution or statute, the treaty trumps the state enactments. Analysis of the relationship between the Constitution and treaties and federal statutes requires some resort to the rules of grammar and punctuation and to history.

Two separate categories of laws are declared to be the supreme law of the land. Category one is the Constitution and laws of the United States *made in pursuance thereof*. The history of the Republic is replete with examples of U.S. laws which are not made in pursuance of the Constitution and which the courts hold to be void. Although the Constitution is (to use an academic legal term) the "super supreme" above all other law, the Founders expanded the term "supreme law of the land" to include constitutionally sound laws enacted to carry out the specific functions assigned to the federal government. Pockets of misunderstanding have developed when the second category is considered —treaties.

The Founders were learned men, well versed in the use of language, the law, and politics. They wrote clearly and precisely. Note that it is not *all* treaties that are declared to be the supreme law of the land, but only those *made under the authority of the United States*. Popular misconceptions center around trying to apply the language "made in pursuance thereof" to treaties as well as to laws of Congress. Under this misreading, it would become laws of Congress and treaties made in pursuance of the Constitution which are the supreme law. That is not the way the Constitution was written. The reference to *enactments* made "in pursuance thereof" is limited to laws of Congress. A semicolon follows, which sets apart and establishes the second category, treaties, made under the authority of the United States. What is the reason and the effect of creating the two categories? Did the Founders intend that treaties were supreme over the Constitution or statutes passed by Congress? In addition to the Founders' insights cited above, history and decisions of the U.S. Supreme Court answer both questions in the negative.

Hostilities between England and the United States during the War of Independence came to a formal end with the approval of the Treaty of Paris in 1783 when the Articles of Confederation were still in effect, six years before the Constitution was approved in 1789. In creating the Constitution, the Framers wanted to preserve the viability of the Treaty of Paris and perhaps other treaties already in existence when the Constitution was adopted. They knew that if the Constitution were worded so that only treaties made pursuant to the Constitution were supreme, it would

have voided all treaties made *before* the Constitution became effective. This they clearly did not want to do.

In order to preserve the earlier treaties, the Framers composed wording which gives supremacy to treaties made under the authority of the United States. Since the earlier treaties *were* made under such authority, their efficacy was preserved. Had those treaties not existed, the founders could have written Article VI to provide that the Constitution, federal statutes, and treaties made pursuant thereto would be the supreme law of the land. What, then, does a treaty made under the authority of the United States mean in post-Constitution times? Decisions by the Supreme Court suggest that the meaning of requiring treaties to be made "under the authority of the United States" can be read as identical to the requirement that federal statutes be "made in pursuance thereof [the Constitution]."

The Founders' foresight was vindicated in one of the first decisions by the Supreme Court applying the Supremacy Clause, *Ware v. Hylton* (1793). During the war years, British creditors were unable to bring suit for debts owed them by citizens of Virginia and other states. Virginia passed laws that permitted debtors to pay into the treasurer of the state amounts owed to these creditors. The defendant had made such a payment and, under Virginia law, been discharged of his obligation to pay his British creditor. The Treaty of Paris provided that creditors on both sides of the conflict could recover money owed to them despite any state law to the contrary. The treaty and the Virginia statutes were in direct conflict. Applying Article VI, the Court found that the treaty prevailed and the creditors could proceed to recover the amounts owed them.

Later cases developed the rule that treaties, like federal statutes and state constitutions and statutes, which violate the Constitution are void. Chief Justice of the United States Joseph Story expressed the consensus of constitutional scholars of the previous century when he wrote: "[T]hough the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the state. A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument.... A treaty to change the organization of the Government, or to annihilate its sovereignty, to overturn its

republican form, or to deprive it of its constitutional powers, would be void; because it would destroy what it was designed merely to fulfill, the will of the people."

### **Defying Constitutional Limits**

Many of the cultivated misunderstandings about the Supremacy Clause so prevalent today were prefigured in the Supreme Court's opinion in *United States v. Curtiss-Wright Export Corp.* (1936). That decision dealt with the scope of presidential power in conducting foreign policy and foreign relations. The Court held: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." Dispensing with the Founders' understanding that the federal government has only those powers specifically granted to it, the Court declared that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."

Rather than deriving its powers from specific constitutional assignments, continued the Court, the central government can claim powers as it deems them to be "inherently inseparable from the conception of nationality." Such powers include those necessary "to acquire territory by discovery and occupation ...to expel undesirable aliens ...to make such international agreements as do not constitute treaties in the constitutional sense...." Although none of these powers "is expressly affirmed by the Constitution," the Court concluded that they are supposedly legitimate because they are "in the law of nations" —or what is now referred to as "international law."

### **Other Precedents**

Subsequent federal court decisions have essayed a sounder constitutional course. In 1947, in *Amaya v.*

*Standard Oil & Gas Co.*, a federal appeals court found that "the treaty-making power does not extend ' So far as to authorize what the constitution forbids.' " In 1957, in *Reid v. Covert*, the Supreme Court clearly ruled that constitutional guarantees cannot be abolished by either treaty or statute, stating: "no agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution."

In its review of the Supremacy Clause in *Reid v. Covert*, the Court offered a compelling demolition of the idea that treaties can be used to "cut across" constitutionally protected rights:

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision of Article VI make it clear that the reason treaties were not limited to those made in ' pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights —let alone alien to our entire constitutional history and tradition —to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.

"There is nothing new or unique about what we say here," concluded the Court' s ruling. "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." Although *Reid v. Covert* remains the controlling precedent, the excerpt cited above from the Court' s ruling in *United States v. Curtiss-Wright Export Corp.* suggests that the Court hasn' t been entirely consistent in upholding the supremacy of the Constitution — which is why those committed to preserving our Constitution and our national independence cannot confide in the

wisdom and restraint of the Supreme Court.

### **Congress Is the Key**

The true purpose of the Article VI Supremacy Clause is to designate the Constitution as the "super supreme" to which all other enactments —treaties, federal statutes, state constitutions or statutes —must conform. In keeping with the federalist structure of the Constitution, treaties can only be used to carry out the "few and defined" powers conferred upon the federal government; otherwise, they are, from a constitutional perspective, null and void.

Treaties are on a par with federal statutes. They supersede prior statutes and may, in turn, be superseded by later ones. Why, then, are so many acts of the federal government which are done in compliance with treaties or international agreements, yet are in violation of the Constitution, allowed to go unchallenged? One example of this is the frequency with which presidents have cited U.S. treaties with the UN and its subsidiaries (such as NATO and SEATO) to justify sending our troops to war without a congressional declaration.

Although the Supreme Court has seen fit to declare "the order of priorities" under Article VI, it has been reluctant to declare any given treaty to be unconstitutional. Additionally, since courts only decide cases and controversies, a dispute between an injured party and the purported perpetrator is necessary to get any government action before the federal courts. Military actions, like the examples cited above, do not give rise to private disputes that result in justiciable issues so as to present the courts with an opportunity to decide the constitutionality of these actions.

However, a reasonable conclusion from the decisions of the Supreme Court is that a treaty may be abrogated in its entirety by statute. This would mean that Congress has the power to change or abolish any treaty by enacting legislation superseding it.

With American liberties now imperiled in unprecedented ways by the ICC statute and scores of other UN treaties, it is more important than ever that citizens become educated and mobilized to compel Congress to use its power to

protect our Constitution. An excellent place to begin would be passage of H.R. 1146, the "American Sovereignty Restoration Act" —a measure sponsored by Rep. Ron Paul (R-Texas) which would terminate all U.S. participation in the United Nations. Americans must write their congressmen to support and co-sponsor the American Sovereignty Restoration Act —before the treaty trap is sprung and our liberties are but a cherished memory.

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