Treaties do not override the Constitution

By Don Fotheringham

In anticipation that our president may sign one or more treaties that conflict with the U.S. Constitution's limited grant of power, several voices of alarm are contending that a treaty can override, or in effect amend, our Constitution. Although that view has gained some currency, it is a myth that contradicts the intent of those who framed the Constitution. And it violates any reasonable interpretation of that document.

Origin of the Myth

The frightful idea that U.S. treaties with foreign nations supercede the Constitution has been regularly promoted since the Eisenhower era.[1] It was given a big boost in 1952 when Secretary of State John Foster Dulles, a founding member of the Council on Foreign Relations (CFR), made the following statement:[2]

> ... congressional laws are invalid if they do not conform to the Constitution, whereas treaty laws can override the Constitution. Treaties, for example, can take powers away from Congress and give them to the President; they can take powers from the states 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.[3]

It would be hard to find a more preposterous assertion. Sadly, however, many citizens have been led to believe that treaties do override the Constitution. Could anyone really think our founding fathers spent four months in convention, limiting the size, power and scope of government, and then provided for their work to be destroyed by one lousy treaty?

But one might object, what about Article VI? Article VI establishes the supremacy of U.S. laws and treaties made *within the bounds of the Constitution*. It is called the Supremacy Clause, because it places federal laws and treaties that are made pursuant to the Constitution *above state* constitutions, laws. and treaties.

Some Important History

This was needed because, contrary to their agreement under the Articles of Confederation, certain states had violated their trust and entered into treaties with foreign powers. During the convention, Madison said: "Experience had evinced a constant tendency in the States to encroach on federal authority; to violate national Treaties, to infringe the rights and interests of each other."[4]

State-made pacts often conflicted with peace and trade treaties wanted by the Confederation Congress for the benefit of all thirteen states, making it hard for Congress to consummate better agreements with other nations. This also led to fierce contention between the states in their effort to monopolize the import of goods from Europe and the Indian tribes. But more serious dangers arose in matters of security, for should one state be at war with a foreign power while a sister state honors its peace agreement with the same enemy, the security of the entire Confederation would be threatened.[5]

In an effort to head off such dangers, the Confederation Congress frequently attempted to nullify

state-made treaties in the state courts (there were no federal courts). But as might be expected, the state judges ruled inevitably in favor of their own states, pursuant to the state laws and constitutions.

The 1787 Convention corrected that problem by making certain only federal treaties would be recognized as valid. In this light, it is not hard to understand why paragraph two of Article VI is worded 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.

Upon ratification of the Constitution, the state treaties were nullified. Thereafter, only federal treaties were recognized as supreme, regardless of any remaining state provisions to the contrary. Moreover, under the new Constitution the founders established a Supreme Court, granting it original jurisdiction over treaty controversies, and thereby removing from state judges jurisdiction over treaty cases. In addition to quelling strife among the states, Article VI accomplished a major objective of the Convention, mainly that of placing the United States in a position to speak to the world with one voice.

United States treaties are created when proposed by the President, with the advice and consent of the Senate. The power of the President and the Senate, in their treaty-making capacity, was never intended to be a power greater than the Constitution.

Citizens who met in the state ratifying conventions (1787 to 1790) to examine with great care the provisions of the proposed Constitution had a correct understanding of the Supremacy Clause. During the ratifying debates, James Madison answered questions regarding the new national charter and commented on the extent of the treaty-making power under Article VI:

> "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 its delegation."[6]

In the same discussion Madison said: "Here, the supremacy of a treaty is contrasted with the supremacy of the laws of the states. It cannot be otherwise supreme." That is, a treaty cannot in any other manner or situation be supreme.

Thomas Jefferson: "I say the same as to the opinion of those who consider the grant of treaty-making to be boundless. If it is, then we have no Constitution."

But we do have a Constitution. Its life and viability depend entirely on the small number of citizens who 1) understand the document, and 2) who equally understand the forces at work to destroy it. At this point enough time has passed, and enough false teachings have been promulgated, to cause modern Americans to fall for the treaty power ploy. It is not surprising that John Foster Dulles, a ranking member of the CFR, should in 1952 circulate the treaty-power heresy that yet prevails.

It is time for serious reflection on the words of Edmond Burke, "The people never give up their liberties but under some delusion." Those who seek to preserve the sovereignty of the United States must work energetically to expose the Dulles delusion — the ridiculous idea that treaties have intrinsic powers greater than the Constitution.

[1] In decades immediately prior to the Dulles speech, Supreme Court decisions had already begun to enunciate the idea (see, for example, *Missouri v. Holland* in 1920 and *United States v. Pink* in 1942).

[2] Dulles actually made this statement during a speech in Louisville on April 2, 1952, shortly before Eisenhower appointed him Secretary of State.

[3] Quoted by Frank E. Holman, *Story of the Bricker Amendment*, (New York Committee for Constitutional Government, Inc., 1954), pp. 14, 15.

[4] *The Records of the Federal Convention of 1787*, Farrand, Vol. I, p. 164.

[5] *Benjamin Franklin's Plan of Union, America,* Vol. 3, p. 47.

[6] *Debates on the Federal Constitution*, Jonathan Elliot, ed., second edition, Philadelphia, J.B. Lippincott Company, 1907, Vol. III, p. 514.