Treaties and the Constitution

Article VI, paragraph 2 of the Constitution for the United States of America reads 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.

What does this Article indicate about the relation of treaties to the Constitution? What happens when a provision of a treaty conflicts with the Constitution? What is the supreme law of the land?

Some people see in Article VI a loophole in the Constitution, which allows the U. S. Government to override the Constitution by making a treaty, such as by ratifying the United Nations Charter. This paper will demonstrate that the U. S. Constitution is supreme over every law and treaty made by the President and Congress.

The words of this Article must be understood, both as to their meaning at the time the Constitution was written. In particular, what is a Treaty, what defines the Authority of the United States, and what is meant by the word Constitution in the last phrase of Article VI? Let us examine these in reverse order.

The word Constitution in the phrase "the Constitution or Laws of any State" refers to a State Constitution, and not to the Constitution for the United States of America. This is shown by a quotation from the first draft of the U. S. Constitution, August 6, 1787. In that draft, Article VIII read as follows:

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the Constitutions or laws of the several States to the contrary notwithstanding.

This is quite evidently the draft of what is now Article VI of the U. S. Constitution. In the last clause, the word "Constitutions" is in the plural, and clearly refers to the Constitutions of the several States, and not to the draft document itself.

Next, what is meant by the Authority of the United States? The term "United States" obviously refers to the United States Government, since the States themselves are prohibited from entering into treaties under Article I, Section 10 of the U. S. Constitution. The Authority of the United States referred to here is the authority of the Federal Government. What defines or limits the authority of the Federal Government? Is it not the Constitution itself that does this? Does the Federal Government have unlimited authority to do anything that the President and Congress want to do? The answer is clearly no, and a few examples should suffice to prove the point.

The President is granted power, by and with the advice and consent of the Senate, to make treaties, according to Article II, Section 2, paragraph 2 of the U. S. Constitution. The House of Representatives and the Supreme Court have nothing to do with treaties. Now, suppose that the President and the Senate have disagreements with the House of Representatives. Can the President and the Senate make a treaty with some foreign nation to abolish the House of Representatives by revising Article I? Or could they make a treaty to abolish the Supreme Court by eliminating Article III? Or, for that matter, could they make a treaty to abolish the entire U. S. Constitution? I cannot imagine that anyone would answer in the affirmative to any of these questions. Nevertheless, there are many people who think that other parts of the Constitution can be overridden by treaties, and this is the same in principle.

The framers of the U. S. Constitution did not delegate limited and specific powers to the three branches of government outlined in Articles I to III of the Constitution, and then give unlimited power to the President and the Senate to change or overthrow the same Constitution by treaty in Article VI. The Anti-Federalists did not trust big government, warned that attempts might be made someday to do this, and tried to insert specific language to prevent any devious interpretation of this Article. For example, in the Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents (Dec. 18, 1787), we find the following proposition to the Convention:

> That no treaty which shall be directly opposed to the existing laws of the United States in Congress assembled, shall be valid until such laws shall be repealed, or made conformable to such treaty; neither shall any treaties be valid which are in contradiction to the constitution of the United States, or the constitutions of the several states.

Perhaps the greatest need is to define what is meant by a treaty. It matters little what we consider to be a treaty today, because the word used in the Constitution means exactly what it meant in 1787, and not what it may be defined as now. Laws and Constitutions do not change by a process of redefining words. In order to understand what a treaty is, we should go to the framers of the Constitution and see what they said. In particular, it is instructive to see what James Madison and Alexander Hamilton, two of the three authors of the Federalist Papers, wrote concerning treaties, since they were promoters of the new Constitution in their day.

In Federalist Paper No. 33, Alexander Hamilton presented an argument concerning the concept of the "supreme law of the land," exactly as it appears in Article VI of the present U. S. Constitution. Notice what he says in it concerning treaties:

> But it is said that the laws of the Union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the

> individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.

It is evident from this quotation that Alexander Hamilton did not consider a treaty to be on a par with the Constitution. He even used the expression "mere treaty," indicating that a treaty is not equivalent to a law, which must be supreme and inflexible if it is actually to be a law at all.

Next, we turn to James Madison, and examine how he used the word treaty. In a discussion on the method of ratification of the Constitution, as to whether the State Legislatures or the people themselves would have to approve the new Constitution for it to be ratified, it was reported in the Anti-Federalist literature that he said the following (July 23, 1787):

> Mr. Madison thought it clear that the Legislatures were incompetent to the proposed changes. These changes would make essential inroads on the State Constitutions, and it would be a novel and dangerous doctrine that a Legislature could change the constitution under which it held its existence. There might indeed be some Constitutions within the Union, which had given a power to the Legislature to concur in alterations of the federal Compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league or treaty*, and a *Constitution*. The former in point of *moral obligation* might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. 1. A law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null and void. 2. The doctrine laid down by the law of Nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation.

In other words, James Madison believed that, according to the law of Nations, a treaty was nullified if one of the parties to the treaty violated the treaty, while a Constitution would remain in effect with the force of law even if it had been violated. A treaty could have moral

obligations, but it could not have the same political operation as a Constitution, because a treaty is always subordinate to law.

Two other references to illustrate use of the word treaty at the time of the writing of the Constitution should suffice to indicate its meaning. In the Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents (Dec. 18, 1787), the explanation of the history prior to the Constitutional Convention of 1787 included the following comment:

> It was [after the Peace Treaty of 1783] that the want of an efficient federal government was first complained of, and that the powers vested in Congress were found to be inadequate to the procuring of the benefits that should result from the union. … The Congress could make treaties of commerce, but could not enforce the observance of them.

In a list of proposed Amendments to the Constitution (June 27, 1788), the following amendment was included:

> That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; and no treaty ceding, contracting, restraining, or suspending, the territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.

From these quotations it is clear that the subjects of treaties included commercial and trade matters between nations, and certainly agreements between nations not to make war with one another. However, it is abundantly clear that treaties cannot be used to destroy the U. S. Constitution. It is Article VI of the Constitution that gives treaties authority, and it is the Constitution that defines and restricts the operations of the Federal Government. If there is no Constitution, then there is also no basis in law for the Federal Government, and no authority for any treaty, either.

In addition, as Madison pointed out, it is a dangerous idea for a government to be able to modify the Constitution which created the government. The President and the Senate of the United States of America cannot change the Constitution. No treaty they make can change the Constitution, no law enacted by Congress can change the Constitution, and no decision by the Supreme Court can change the Constitution. Only the States and the people can change the Constitution. Any attempt to put the United States under the United Nations Charter is an act of usurpation, and should be treated as such, as stated by Alexander Hamilton.