Bricker-Dirksen Amendment

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The Senate Committee on the Judiciary has recommended the adoption of a resolution to amend the Constitution of the United States. It concerns treaties and other international agreements; but it differs from other versions of what is called the Bricker Amendment. Senator Dirksen of Illinois appears to have been the person who secured an agreement of a majority of the committee in submitting the present text as follows:

"Section 1. A provision of a treaty or other international agreement which conflicts with any provision of this Constitution shall not be of any force or effect."

While there are two additional sections, as noted, Section 1 is the only section that is worthy of any appreciable debate. Before it is made a part of the Constitution of the United States there should be an announcement, as clear as it is humanly possible to state it, of the purposes that its advocates seek to accomplish. Since there have been decisions of the United States Supreme Court as to the validity of treaties and of legislation to enforce them, the voters should be informed which of these decisions will be rendered ineffective as precedents upon the adoption of section 1, supra.

The sponsors should be entirely frank and intellectually honest. There are two additional sections of the Bricker-Dirksen proposal. Section 2 provides:

"On the question of advising and consenting to the ratification of a treaty, the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate." This was not a part of the resolution submitted by the majority of the Senate Committee on the Judiciary on June 15, 1953 but a similar provision was a part of the Knowland and subsequent proposals. It is a provision that is not very important because there has been no observed denial that the requirement could be made a part of the rules of procedure in the Senate without amending the Constitution. Frank E. Holman, ex-President of the American Bar Association, who appears to have been the real father of the "Bricker Amendment," stated that this provision "could be accomplished by a mere change in Senate rules." Holman, STORY OF THE 'BRICKER' AMENDMENT at 47 (1954).

However, the Dirksen report, states: "While it has been suggested that a rule such as here proposed be made a part of the Senate rules, such action could not prevent the waiving of such rules by a unanimous consent agreement." S. Rep. No. 1716, 84th Cong., 2d Sess. 19 (1956). Query: Suppose that the rule for yeas and nays prohibited a waiver by unanimous consent. Would that be sufficient to prevent a waiver? Consider, also, that a treaty ratification by a voice vote with not a single voice objecting to the waiver of the roll call could hardly be anything other than a non-controversial treaty.

Section 3 of the Bricker-Dirksen proposal is the customary limitation: "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."
should be no place in this effort to secure an amendment for face-saving purposes or for personal prestige, or as balm for wounded feelings.

The experience in this country with the Fourteenth Amendment should make its citizens wary of broadly-phrased constitutional amendments which are not as clearly understood as possible. The interpretation of a constitutional amendment will be uncertain at best. Hence, the proponents should strive for precision. The Eleventh, Thirteenth, Fifteenth, Sixteenth, and Nineteenth Amendments have presented problems that had to be settled by the courts but all of them presented reforms that were relatively clear, as compared with the Fourteenth, which is still the basis for a strange mixture of clashing views of vast significance. Judicial legislation to a limited extent appears to be inevitable as long as there are courts which interpret the Constitution. But such legislation can be largely controlled by care in the drafting of constitutional amendments.

It is not believed by the writer that the Bricker-Dirksen proposed amendment is as clear as it should be. The report of the majority of the Committee on the Judiciary is not convincing as a frank statement of what it is expected that the proposal will accomplish. Whether this is a fair criticism can be determined only by considering the previously decided cases and the previous exhortations to adopt the “Bricker Amendment” in 1953 and 1954.

**Previously Decided Cases**

In the treaty of peace with Great Britain in 1783 there was a provision that permitted British subjects to sue American citizens for debts. In *Ware v. Hylton*\(^2\) such a suit was brought. The American citizens, who were also citizens of Virginia, defended by invoking a Virginia statute which provided in such a case that a debtor could discharge his debt by paying into a state loan office the amount claimed. It appears that the defendants followed the statute by making payment in state paper currency. It also appears that this paper money was not the equivalent of good British money, commonly called “sterling money.” The Supreme Court held that the treaty provision nullified the Virginia statute and destroyed the payment made under it.

In *Hopkirk v. Bell*\(^3\) the Supreme Court of the United States likewise held that a Virginia statute of limitations had been rendered ineffective in the particular instance by the same treaty of peace.

There are at least three decisions that have sustained as effective,
treaty provisions which granted aliens the right to succession of property contrary to statutes of states.\(^4\)

In 1911 the United States and Japan proclaimed a treaty, which provided that Japanese citizens in this country could engage in trade on the same terms as our own citizens. But the city of Seattle in 1921 passed an ordinance that prohibited an alien from engaging in business as a pawnbroker. The Seattle ordinance was sustained by the Supreme Court of Washington\(^5\) which may have been the victim of local feeling against Orientals prevalent at the time on the West Coast. However, to the credit of the United States Supreme Court, this decision was overruled.\(^6\) It is desirable to have a national court supreme on questions arising under treaties. It is believed that such a court is more likely than an elected state court to express the national interest.

In 1923, Anderson, a citizen of Denmark, but a resident of Iowa, died leaving his mother his sole heir. She was a citizen and resident of Denmark. The Iowa Code provided for an assessment of an inheritance tax of ten per cent on Anderson's property. There would have been no such tax if the mother had not been a non-resident alien. The Supreme Court of Iowa

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\(^5\) Asakura v. Seattle, 122 Wash. 81, 86, 210 Pac. 30 (1922). The Supreme Court of Washington observed but did not decide "Whether a treaty making power can impair or destroy the police power of a sovereign state."

\(^6\) Asakura v. Seattle, 265 U.S. 322 (1924). One argument made by Seattle was this: "If Congress and the President cannot enact a statute which violates the Tenth Amendment, how can the President and the Senate, together with some alien minister or other diplomatic representative, enter into a treaty which has that effect?" Missouri v. Holland was referred to skeptically and distinguished.

The June 1, 1956 NATIONAL VOTER, published by the League of Women Voters of the U.S., comments upon statutes of South Carolina and Alabama requiring "those who deal in Japanese goods to display signs to that effect. Japan has formally protested that these statutes discriminate against its textile goods and thus violate the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan." Assuming that the United States could enjoin the enforcement of these statutes, would the Bricker-Dirksen proposal, if adopted, prevent such action?

On September 7, 1956, thirty-one nations signed a new anti-slavery convention, but the United States abstained. Why? There was speculation that the State Department was afraid of reviving congressional support for the Bricker Amendment. See St. Louis Post-Dispatch, August 16, 1956, p. 17A and September 7, 1956, p. 5C.
held that the Iowa Code did not conflict with a treaty with Denmark made in 1826 and renewed in 1857. The Supreme Court of the United States reversed this decision, holding that the treaty should be "interpreted with that liberality demanded for treaty provisions," and that the "treaty-making power is independent of and superior to the legislative power of the states" and "must prevail over inconsistent state enactments."7

So far there have been presented five classes of state statutes which were held to be unenforceable because they conflicted with orthodox treaties. Thus, the all important question is presented: do the proponents of the Bricker-Dirksen resolution desire to have these decisions overruled, in effect, by their proposal, viz., S.J. Res. 1 of the 84th Congress? If they think that some but not all of these decisions are contrary to "any provision" of the United States Constitution, they should inform the voters which are disapproved by them and which are not.

**Report of Judiciary Committee**

There appears to the author no "provision" that could be involved except as Mr. Justice Holmes stated in *Missouri v. Holland*8 "some invisible radiation from the general terms of the Tenth Amendment." Thus, it becomes important to examine the report of the judiciary committee which purports to explain the Bricker-Dirksen resolution. This report — S. Rep. No. 1716, 84th Cong., 2d Sess. (1956) — quoted brief statements from four opinions of the Supreme Court. In these statements appear these expressions: (1) federal jurisdiction cannot be enlarged under the treaty making power; (2) a treaty may not violate the Constitution of the United States; and (3) the treaty power cannot change the character of the government in one of the states. Then the report proceeds thus:

"However, confidence in this dicta from decisions of the Supreme Court has been undermined by dicta to the opposite effect in some of the more recent Court cases, and by the advent of an effort by some in positions of authority to use the treaty power as an instrument for the alteration of purely domestic policy rather than as an instrument of contract between sovereign nations."9

A discussion of *Missouri v. Holland* follows and on page 3 of the Report is this conclusion:

"The Supreme Court decided in that case, that the treaty making power was not limited by the 10th amendment which reserves all rights not

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8 252 U.S. 416 (1920).
expressly\textsuperscript{10} delegated to the United States by the Constitution to the states respectively or to the people. Insofar as that decision relates to the first section\textsuperscript{11} of this amendment, however, the concern is not with the conclusion reached but rather with the expressions used in the course of the opinion.” (Footnotes added.)

On page 6 of the Report appears additional discussion of the expected effect of Section 1:

“Section 1 of this amendment removes any possible doubt whether a treaty must be consistent with the Constitution. It gives unequivocal constitutional effect to early judicial dicta not yet incorporated in binding decisions that no provision of an international agreement which violates the Constitution or which is inconsistent with the nature of the Government of the United States or of the relation between the States and the United States shall be valid (\textit{New Orleans v. United States}, 10 Pet. 662, 736; \textit{The Cherokee Tobacco}, 11 Wall. 616, 620–1; \textit{Holden v. Joy}, 17 Wall. 211, 243; \textit{Geofroy v. Riggs}, 133 U.S. 258, 267; and see \textit{Asakura v. Seattle}, 265 U.S. 332, 341). The inferences drawn by some persons from \textit{Missouri v. Holland}, cited supra, and \textit{U.S. v. Curtiss-Wright Corporation}, also cited supra, that the treaty power is unlimited in any field of alleged international concern, regardless of the Constitution, will be unqualifiedly negatived, and any doubt on this score forever put to rest.

“While some argument has been made that such dicta as contained in the \textit{Cherokee Tobacco} case, cited above, and the case of \textit{Geofroy v. Riggs}, also cited above, that the treaty power does not authorize what the Constitution forbids, should abate all fears on the subject, the fact remains that statements in the opinions of the court in the cases of \textit{Missouri v. Holland}, supra, and \textit{U. S. v. Curtiss-Wright Corporation}, supra, go in the opposite direction of an unlimited treaty power.”

\textbf{Comment on Senate Report No. 1716}

It is submitted that these utterances do not inform a reader whether Section 1, if adopted as an amendment of the Constitution, would render \textit{Missouri v. Holland} impotent as a ruling decision, or whether it would then be possible for a successful attack to be made upon the enforcement of the statute concerning migratory birds. Those interested in the protection of such birds, it is believed, would regret such a result. The impression that the author has obtained from the quoted passages is that those who drafted, and perhaps those who merely signed, S. \textsc{Rep.} No. 1716 recognized the widespread belief that the treaty and legislation involved in \textit{Missouri v. Holland} are desirable and generally approved by Americans; and that it would be a political error to condemn the decision in that case. However,

\textsuperscript{10}The word “expressly” was italicized by the author because it does \textit{not} appear in the Tenth Amendment.

\textsuperscript{11}It is well to remember that the “first section” is the only one that is of any appreciable importance.
they seem to be anxious to prevent another effective treaty that by logical reasoning would belong in the same category. Such seems to be the difficulty that “States-Righters” have with their vague political creed.

A very noticeable omission from the majority portion of S. REP. No. 1716 is that none of the cases placed in the five examples, supra, of powers exercised by the national government by virtue of the treaty section of the Constitution, is discussed, except for a quotation of one sentence from *Hauenstein v. Lynham.* This quotation affords no justification for a proposal that may be interpreted, if adopted, to overrule valuable decisions. That is to say, they are valuable if one will concede that the United States of America should have the power to make treaties that in the national interest will override statutes of states to the contrary, as provided in the second paragraph of Article VI of the Constitution. In any event, the voters are entitled to know whether it is intended by the supporters of Section 1, *supra,* to thereby render ineffective as precedents the decisions commencing in 1796, as cited in notes 2 to 8, supra, inc.

The only perceived difference between the precedents cited in notes 2 to 7 inclusive and *Missouri v. Holland,* cited in note 8, is this: *Missouri v. Holland* was a case that came to the Supreme Court in a dramatic way, viz., after Congressional legislation, enacted before the treaty had been made, was held unconstitutional in some courts as beyond the granted powers of the national government, and therefore contrary to the 10th Amendment. Then after the treaty was ratified, essentially the same legislation, as far as constitutional principles were concerned, was sustained. This result, however, was a manifestation of the following reasoning which seems to the author to be proper. The treaty power is specifically granted to the national government and specifically forbidden to the states. The agreement with Great Britain was a treaty. As such the Congress had the power to enforce it under the necessary and proper clause. All of which is not to say that some of the provisions of the Constitution are not limitations upon the exercise of the treaty power just as there are limitations upon the formidable war power. But the Supreme Court has not yet decided that the exercise of the treaty power with or without enforcing legislation has exceeded this specifically granted power. Advocates of the Bricker Amendment are unwilling to take a chance with the solutions that may be worked out by the Supreme Court of the United States over the years ahead. The rest of us,

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12 Later there is a quotation from, but no specific discussion of, *Asakura v. Seattle,* 265 U.S. 332 (1924).
13 U.S. Const. art. I, § 10; art. II, § 2.
14 Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte Endo,* 323 U.S. 283 (1944); *Hamilton v. Kentucky Distilleries Co.,* 251 U.S. 146 (1920); *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).
however, should insist that their proposal must not sweep away decisions that even they do not expressly challenge.

**Hayden's Question**

In the 1954 debate in the Senate, Senator Hayden asked Senator Bricker this question:

"If the words in his amendment: 'A provision of a treaty which conflicts with this Constitution shall not be of any force or effect' remove any possible doubt as to whether a treaty must be consistent with the Constitution, then I would like very much to have the senior Senator from Ohio say whether, in his opinion, if those words had been in the Constitution in 1920, would sound logic then have required the Supreme Court to decide that the Migratory Bird Treaty made with Great Britain on behalf of Canada in 1916 was in conflict with the Constitution, and, consequently, that the Migratory Bird Treaty Act of 1918 was unconstitutional."

Senator Bricker replied thus:

"In my judgment the words would not, standing alone, because the Supreme Court said very definitely in Missouri against Holland that the treaty was in accordance with the Constitution because of the supremacy clause of the Constitution. It said it conformed with the Constitution, and therefore it became the supreme law of the land. However, coupled with the other sections of the committee text, there is no question that the doctrine of Missouri against Holland would not have become law. Missouri against Holland would have been decided in another way very likely under the commerce clause of the Constitution.

"The reason the decision created no more concern at that time was that the results were salutary, and there was then no organized effort to change the laws of this country by treaty, as there is today. That is the reason, on the basis of that section alone—many people think it is important—it does not reverse the decision of Missouri against Holland to the effect that a treaty is the supreme law of the land. The decision held that a treaty does not have to comply with the terms of the Constitution."

It is not pertinent here to consider all aspects of Senator Bricker's complicated answer but the author of this article is unable to reconcile satisfactorily the first and last sentences just quoted from Senator Bricker. Nor can one be certain that the Supreme Court then or later would have held the Migratory Bird Treaty of 1916 and the Migratory Bird Treaty Act of 1918 valid by virtue of the commerce clause. The important utter-
ance by Senator Bricker, for the purpose of this article, is that he stated that the section quoted by Senator Hayden would not, in his judgment, have caused a different decision in Missouri v. Holland. If the reader will observe the language, the text of the section about which Senator Bricker spoke is the same as the Bricker-Dirksen proposal except that the latter has added the words “any provision of” after the words “conflicts with.”

Accordingly, American citizens are entitled to be informed whether the Bricker-Dirksen proposal would overrule Missouri v. Holland when in the opinion of Senator Bricker Section 1 of the committee substitute for S.J. Res. 1 of the 83d Congress would not have done so.

Holman’s Views

The preceding examination of Senator Bricker’s views suggests that an examination should be made of the ideas expressed by Mr. Frank E. Holman who has had so much to say in favor of the proposal that it should, perhaps, be called the Holman rather than the Bricker Amendment. In 1954, he wrote his “Story of the ‘Bricker’ Amendment,” a paper bound book distributed by the Committee For Constitutional Government, Inc.

ard refers to his studies, at Chief Justice White’s request, to find authority for federal regulation of migratory birds under the 1913 law, before the Canadian treaty. He concludes: “the study, which occupied several months, reached the conclusion that the states alone were the repositories of the power to regulate migratory birds, since by no possibility could this migratory resource be called interstate commerce, which depends on the acts of man.”

This view was stated again a little later more definitely as follows: “Mr. Hayden. I made inquiry of the senior Senator from Ohio (Mr. Bricker), and he has assured me that his interpretation of his amendment is that it would in no manner affect and would not have affected the decision of the Supreme Court in the case of Missouri against Holland if the amendment had been a part of the Constitution in 1920.

“Mr. Bricker. I said that first section of the committee report, standing alone, would not.

“Mr. Hayden. What is there in the pending joint resolution that would affect the Missouri against Holland decision?

“Mr. Bricker. The ‘which’ clause would reverse Missouri against Holland. That was the intention of the ‘which’ clause. The intention was that treaties would not destroy the structure of the relationship between the Federal Government and the States. This amendment would not affect the result in Missouri against Holland as of that time. As I stated, in my judgment the Supreme Court would sustain it today under an entirely different section of the Constitution, as it should have done at the time it rendered its decision.

“Mr. Hayden. The ‘which’ clause would reverse the decision in Missouri against Holland; is that the Senator’s statement?

“Mr. Bricker. Yes; the ‘which’ clause would have reversed the very theory or principle enunciated by the Supreme Court in Missouri against Holland, and would have prevented taking away powers from the States and giving them to the Federal Government. It would likewise have prevented those powers from being taken away and their being given to an international body.” 100 Cong. Rec. 1794 (daily ed. Feb. 17, 1954).

It is also true that the Bricker-Dirksen resolution has added the words, “or other international agreement” to Section 1 of S.J. Res., 83d Cong., 1st Sess. (the Bricker-Judiciary Committee text). These words will be discussed later.
On page 23 he referred to Section 2 of the "Bricker-Judiciary Committee text" which was:

"A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty."

On page 26 Mr. Holman stated that the

"language of Section 2 of the Amendment—the famous 'which clause'—merely protected the American people from an enlargement of the doctrine of Missouri v. Holland (252 U. S. 416, 432) to the effect that the treaty power may be conveniently used as a vehicle for the expansion of the powers of the Federal Government—by first making a treaty on a subject and then legislating without any constitutional restraint or limitation whatsoever."20

Mr. Holman also stated on p. 26: "Missouri v. Holland is the first case in which the Tenth Amendment was squarely raised and held ineffective as against the treaty power."

While Mr. Holman did not write, as far as is known, that Section 2 would overrule, in effect, Missouri v. Holland, it seems to the author of this article that his statement that Section 2 would "prevent an enlargement of the doctrine" means that the decision would no longer be effective as a precedent; it would merely remain as authority to support the particular treaty and the particular statute challenged in that case. That is a comfortable position for reformer Holman to assume. It could be thought to partly satisfy conservatives who otherwise might be against the adoption of the amendment he favored. But it seems to this writer as uncertain whether that assurance can be made by Mr. Holman or anybody else. Who

20 As far as the author of this article knows, there is nothing in any opinion of the Supreme Court of the United States that remotely justifies the last seven words used by Mr. Holman; and there is language in Missouri v. Holland to the contrary.

Mr. Holman also wrote: "The doctrine that the treaty power is unlimited and omnipotent and may be used to override the Constitution and the Bill of Rights (as Mr. Dulles himself has said) is a doctrine of recent origin and largely derived from Missouri v. Holland." [Emphasis added.] Holman, Story of the "Bricker" Amendment at 28 (1954).

In 1955 Mr. Holman published a pamphlet in which he expressed this view: "Any text of an amendment to be adequate must protect the internal rights of American Citizens and protect the American form of government against the threat of treaties and other international agreements. To do this the text of any amendment should provide as already indicated;

"(1) that no treaty or other international agreement which conflicts with any provision of the Constitution shall be valid.

"(2) that no treaty or other international agreement shall be effective as internal law in the United States unless implemented by legislation otherwise Constitutional." Holman, The Increasing Need for a Constitutional Amendment on Treaties and Executive Agreements, 5; reprinted, Hearings Before the Subcommittee on S.J. Res. 1, The Senate Committee on the Judiciary, 84th Cong., 1st Sess. 653, 657 (1955).

It is important to know whether Mr. Holman now thinks that the Bricker-Dirksen version is adequate. His criticism of Missouri v. Holland on p. 13 of this pamphlet is very sharp.
can be sure of the view of the Supreme Court on that question, raised per-
haps many years after the adoption of the Bricker-Dirksen Amendment?

Later Mr. Holman on p. 41 entered upon a discussion of the Knowland
substitute, Section 1 of which was:

“A provision of a treaty or other international agreement which con-
flicts with the Constitution shall not be of any force or effect. The judicial
power of the United States shall extend to all cases, in law or equity, in
which it is claimed that the conflict described in this amendment is
present.”

Please observe that the first sentence of Section 1 of the Knowland
substitute is the same as section 1 of the Bricker-Dirksen proposal except
that the latter changes the words, “the Constitution” to “any provision of
this Constitution.”

Concerning the Knowland substitute, Mr. Holman wrote on p. 49 that:

“... Section 1 of the Knowland substitute, standing alone, would only
protect the American people with respect to those matters that are
specifically safeguarded in the Constitution, such as freedom of speech
and of the press, etc. It would not protect the American people with respect
to the rights reserved generally to the States and to the people by the
Constitution. That is precisely why it was necessary to have Section 2 of
the Senate Judiciary Committee text, including [sic] something like the
‘which clause,’ so that, in addition to preventing a treaty from overriding
the specific provisions of the Constitution, a treaty should not have the
power of overriding the reserved rights under the Constitution or expand-
ing the power of the Federal Government over domestic affairs.”

In an address in Milwaukee, Wisconsin, August 6, 1953, Mr. Holman
stated: “Unfortunately, it so happens that the Knowland language fails
to protect the Constitution and the rights of the people as to their domestic
affairs.”21

The citizens of this country are entitled to hear from Senators Bricker,
Dirksen and their allies whether they now agree with the preceding view of
Mr. Holman; whether Section 1 of the Bricker-Dirksen proposal would do
no more than Mr. Holman stated; and whether the “etc.” in the last quo-
tation from Mr. Holman’s book includes all that is in the first eight amend-
ments to the Constitution, or all that is in the first ten amendments. If
anything in addition to the first eight amendments is included in the
“etc.” the additional parts should be specified. In this connection it
should be remembered that, as far as this writer knows, Mr. Holman has
never stated specifically whether he desires to have the precedents cited
in notes 2 to 7 inclusive of this article overruled as ruling decisions. Neither
has he specified how it would be possible, in his language, to “protect the

21 Address — 54th National Encampment, Veterans of Foreign Wars, Milwaukee, Wis.,
Aug. 6, 1953.
American people with respect to the rights reserved *generally* to the states and to the people by the Constitution without overruling these cited cases.

**Dirksen's Views**

It is likewise important to know the views that Senator Dirksen has had concerning the various versions of proposed amendments concerning treaties.

The Chicago Tribune has supported Senator Dirksen in his campaigns for national offices. Also it has vehemently advocated the "Bricker Amendment" in its most extreme form. Its March 4, 1956 issue announced the "new Dirksen-Bricker version" and stated concerning it the following:

"The amendment still would be effective in curbing encroachment on states rights thru treaties and executive agreements, according to Dirksen. One effect, he said, would be to nullify a 1916 treaty with Canada governing protection on migratory birds."

The Tribune also stated:

"The latest draft was put forward by Sen. Dirksen (R., Ill.) in a tactical maneuver that may provide another senate test on the proposal to limit the President's power to make treaties and other international agreements."

The expression "tactical maneuver" is not reassuring to this writer. He fears that it is the equivalent to a "very slick trick", *viz.*, to retain the effect of the "which clause" without using it.

**Kefauver's Dissent**

A part of S. REP. No. 1716, submitted by Senator Dirksen, is the dissenting view of Senator Kefauver. He set forth the 1955 version of the Bricker amendment as follows:

"Section 1. A provision of a treaty or other international agreement which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or effect.

"Section 2. A treaty or other international agreement shall become effective as internal law in the United States only through legislation valid in the absence of international agreement.

"Section 3. On the question of advising and consenting to the ratification of a treaty, the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate."

Then Senator Kefauver commented as follows:

"During the 1st session of the 84th Congress extensive hearings were held before a subcommittee of the Committee on the Judiciary on a ver-
sion of the Bricker amendment which had been introduced by Senator Bricker on January 6, 1955. Despite the objections of a number of constitutional experts, including the Attorney General and the Secretary of State, this Bricker version was favorably reported to the full Committee on the Judiciary by a vote of 3 to 2.

"However, this is not the version which is now being reported to the Senate by the full committee. It was shelved in favor of the new version introduced by Senator Dirksen. We believe that one cogent reason for this sudden switch is that the Bricker version was so explicit that its dangerous consequences were obvious on its face, whereas the new Dirksen version is so worded that its dangers are camouflaged.

"One thing that should be made clear at the outset is that only the most meager consideration was given to the new version before it was reported out by the committee. It first saw the light of day in a confidential memorandum distributed to members of the Judiciary Committee 2 weeks prior to their hasty consideration of it on March 5, 1956. The matter was discussed only at an executive session of the committee. No hearings were held either by the committee or a sub-committee. There was no attempt to elicit the views of any constitutional experts. In fact, the committee did not deem it advisable to withhold its decision regarding this new version even long enough to ascertain the views of the Secretary of State and the Attorney General."22

The main reason for Senator Kefauver's dissenting view was stated to be that the Dirksen version had added to Section 1 of the 1955 Bricker version three little words, *viz.*, "any provision of" before the words "this Constitution." As thus phrased he wrote: "This proposed constitutional amendment either does nothing or it does much too much;"23 and, "What is important is that the meaning of the words of the provision is far from clear, their legislative history is fuzzy, and there is the danger that the Supreme Court might give them an interpretation which, in practice, would prove to be calamitous."24

**Hennings' Dissent**

Likewise, Senator Hennings in his separate dissent wrote:

"The proponents of the Dirksen amendment have not made plain, either in the majority report or in their public statements, what the Dirksen amendment will or will not do. They have even failed to assure the country in explicit terms that under the Dirksen amendment the Supreme Court's vital decision in the case of *Missouri v. Holland* will not be trampled under foot. . . .

"Sound public policy is surely at war with amending the Constitution unless the purpose and effect of the amendment are clear. The Dirksen amendment is not clear. This is sufficient reason for not adopting it."25

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23 Id. at 22.
24 Id. at 27.
25 Id. at 1 of part 2.
Three Little Words

The only statement found in the majority report S. Rep. No. 1716—that appears to explain why the "three little words" were added was this:

"During the debate in the 83d Congress fears were expressed that the language quoted above, standing alone, might not afford any protection at all against abuse of the treaty power. The fear was that it might be legally impossible for the courts to find any conflict between a treaty and the Constitution by reason of the suggestion of Mr. Justice Holmes in Missouri v. Holland that a treaty to be valid need only comply with the formal requirements for treaty-making. The addition of the three words, making treaties conform to every constitutional provision, makes clear that a treaty is to be tested by more than mere procedural requirements."\(^{26}\)

The reference, in this passage from the majority report, was to what was named as the Ferguson proposal of the 83d Congress, viz: "A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect."\(^{27}\)

If we accept this assertion concerning the purpose of the "three little words", it would appear in the first place that that purpose, as far as treaties are concerned, could be accomplished in clearer language by providing thus: A provision of a treaty which conflicts with this Constitution shall not be of any force or effect even though the treaty has had the benefit of all formal and procedural requirements, such as submission to the Senate by the President, ratification by the Senate, and the exchange of ratifications by the sovereigns who are parties to the treaty.

In the second place, the Bricker-Dirksen and the Ferguson proposals apply to "other international agreement(s)" as well as to a treaty. Mr. Justice Holmes in Missouri v. Holland wrote about treaties and nothing about other international agreements. Thus the current proposal goes beyond the correction of a suggestion by him. It would seem that a proposal fashioned on the supposition of the "formal requirements for treaty-making" is inappropriate if the purpose is to subject all international agreements to restrictive regulation.

In the third place, the Senate seems to be engaging in a very small business if it is merely attempting to correct an observation or a doubt expressed in a single opinion, viz., Missouri v. Holland.

United States v. Pink

Section II. A. 2, the majority portion of S. Rep. No. 1716 discusses "International agreements" and there can hardly be a doubt that the major-

\(^{26}\) Id. at 7.
\(^{27}\) Id. at 7.
ity of the Senate Committee on the Judiciary intend that their proposal, if adopted, will demolish *United States v. Pink*28 as a ruling decision. Observe this passage from the Report:

“As pointed out by the opponents of Senate Joint Resolution 1 so often, the States of the Union are protected, in some measure, against abuse of the treatymaking power by the respect for the rights of those States among the Members of the Senate. However, the Pink case is a precedent by which any President, merely by making an executive agreement with the head of any other government, could invade vital State functions and prerogatives. It is extremely doubtful if anything would have shocked the Founding Fathers more than the suggestion that the Federal-State relationship was alterable at the will of a single individual.”

Section II. A3. of the majority portion of Report No. 1716 is entitled “Interpretation” and it is therein stated that “the committee deems it advisable to set forth its conclusions with respect to the terminology of the resolution as now phrased.”29 In this third part the discussion sometimes makes no decisive discrimination between treaties and other international agreements. Thus please observe and ponder upon these two paragraphs:

“It may readily be observed from the foregoing citations that there are those who believe that there are matters of domestic concern which, if dealt with by treaty, would constitute an improper exercise of the treatymaking power. The proponents of this amendment believe that it is desirable to incorporate such a concept in the Constitution itself so that there can be no question that such a limitation exists. The language here proposed, that a provision of an international agreement which conflicts with any provision of the Constitution shall not be of any force or effect, would accomplish such a result, for, as far as the committee is concerned, a treaty or other international agreement “conflicts” with the Constitution if it does not deal with a matter of genuine international concern, or, to put it another way, if it attempts to accomplish an internal reform by means of an international agreement.

“In addition to the foregoing effect, the first section of the amendment would also apply constitutional standards to executive agreements. The decisions of the courts as to the effect of such agreements on Federal and State laws are disturbing in their implications. The exact dimensions of this effect are as yet unknown.”30

These two paragraphs seem to disclose that the proponents of the Bricker-Dirksen proposal somehow entertain a hope that section 1 of

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30 Id. at 14.
that proposal will accomplish what Senator Bricker in 1954 said that section 1 of the Bricker-Judiciary Committee text (S. J. Res. 1, 83 Cong., 1st Sess.) would not accomplish but that section 2 of the latter (the which clause) would effect.

Moreover, in the process of condemning United States v. Pink S. Rep. No. 1716 leaves this author uncertain whether the author of the Report (presumably Senator Dirksen) also desires to make it impossible for the result that was obtained in the Pink case to be hereafter effected even by an orthodox treaty ratified by the Senate.

If U. S. v. Pink should be crushed by the proposed constitutional amendment, the same is true of the majority opinion in United States v. Belmont. Both cases tested the validity of an international agreement between Soviet Russia and the United States, as represented by President Roosevelt. Despite the vigorous assault on the Pink case and the dissent of two justices in that case, this writer agrees with the decision of the majority in that case and with the majority opinion in the Belmont case.

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31 301 U.S. 324 (1937). The decision was by a unanimous court even though three judges were "unable to follow the path" by which the majority proceeded to its decision.

32 The statement that there is "no express constitutional sanction for the conclusion of executive agreements by the President" plus the discussion concerning the Pink case and executive agreements in S. Rep. No. 1716, 84th Cong., 2d Sess. 17-19 (1956), presents this sort of a jumble to the author of this article:

(1) As for the Pink case, the "need for corrective action is apparent."

(2) But under the Bricker-Dirksen proposal, the President can use either a treaty or an executive agreement in making international agreements.

(3) The "President will be able to continue to use executive agreements to conduct the day-by-day routine international business of the nation."

(4) "The amendment, however, will not permit an executive agreement to modify or override Federal and State Laws." But, "Presidential agreements may have effects on State and Federal laws" . . . . (Illustrations are given.)

(5) "In addition, executive agreements may continue to be made pursuant to direct congressional authorization" . . .

(6) "With respect to agreements conducted by the President alone, if such agreements involved a matter within the delegated process of Congress, and the agreement had not been authorized by the Congress, it would be ineffective unless and until such time as Congress had ratified." . . .

(7) Finally there is this amazing last sentence concerning Section 1 of the proposal: "If State laws were to be modified or overridden, the agreement would have to take the form of a treaty."

An excellent and useful article is Levitan, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States, 35 ILL. L. REV. 365 (1940)—written, however, before the decision in U.S. v. Pink, note 28, supra.

There are many other books and articles worthy of careful thought. Only a few of them will be cited: McClure, International Executive Agreements (1941), reviewed critically by Borchard, 42 COL. L. REV. 887 (1942); 53 YALE L.J. 664 (1944). Sutherland, Restricting the Treaty Power, 65 HARV. L. REV. 1305 (1952); Chafee, Amending the Constitution to Cripple Treaties, 12 LA. L. REV. 345 (1952).

Of those favoring the "Bricker Amendment" the best article read by this author is the
It is certain that the treaty power may be abused. That is true of any power vested in a government. The idea that we can have a constitutional restriction on the treaty power that will automatically secure good international agreements but prevent abuses or ill-advised treaties or international agreements is a myth. Government is not that simple. As far as this author has read, no reformer has advocated that the constitutional treaty procedure must be used for all international agreements. It is recognized that such a requirement would be thoroughly impractical. Congress has frequently authorized the making of international agreements by the President or by others under his control. Thus, the Congress has had its part in the growth of a practice in this country that is contrary to a literal reading of the treaty provision in the Constitution. That provision has been expanded by this long accepted practice and thus it has come to pass that we have four methods of making international agreements:

1. orthodox treaties that follow the text of the Constitution literally.
2. joint resolutions of the House of Representatives and the Senate, approved by the President.
3. Congressional-executive agreements where the Congress first authorizes by legislation and then the executive executes the authority by making an international agreement.
4. Presidential-executive agreements made by the President without prior authorization by the Congress.

If there is need of a reform it should be carefully drafted because there is a danger in using general expressions which may be interpreted in various ways. Careful draftsmen likely will find it very difficult, if not impossible, to draft a reform of our constitutional practice i.e., the customary part of the treaty power specified in the Constitution, without endangering that which is useful and even essential in the conduct of foreign affairs.

At any rate, the voting citizens are entitled to know whether the plan to demolish the Pink case will endanger the fourth method of making international agreements. If that is the purpose, it can be stated in clearer language than that contained in the proposed Bricker-Dirksen Amendment. Here is one way that such a purpose, it is believed, could be effected:

"No agreement that purports to bind the United States and another sovereign can be effected except by (1) a treaty submitted by the President to the Senate and ratified by it as specified in Article II of this Constitution, or (2) a joint resolution of the House of Representatives and the Senate, approved by the President, or (3) a Congressional-executive agreement where the Congress first authorizes by legislation and then the executive executes the authority by making an international agreement, or (4) a Presidential-executive agreement made by the President without prior authorization by the Congress."

one written by Vermont Hatch in 39 A.B.A.J. 808; but he failed to discuss the decisions cited in notes 3 to 7 incl., supra; and his discussion of Ware v. Hylton, note 2, supra, seems unsatisfactory. See Ober, The Treaty Making and Amending Powers: Do They Protect Our Fundamental Rights?, 36 A.B.A.J. 715 (1950). His proposed amendments p. 796, among other things, would save the guarantees of individual liberties in the first Ten Amendments "from substantial alteration by any treaty or executive agreement."
tion, or by (2) a joint resolution of the Congress, approved by the President, with the power in the Congress to adopt the joint resolution despite the President's disapproval as specified in Article I of this Constitution, or by (3) the action of the President pursuant to a statute or joint resolution that authorizes the President to make the agreement and only to the extent that the President is so authorized."

A frank and specific avowal of what is wanted is needed!