EDITORIAL COMMENT

TREATIES AS DOMESTIC LAW

A number of articles have recently been published both in this JOURNAL and elsewhere discussing the possibilities of domestic legislation in the United States through the treaty-making power. Among these possibilities is that of extending the legislative power of Congress over subjects not otherwise within its jurisdiction by means of legislation to carry out treaty stipulations.

Most of these articles have assumed that this possibility was a new discovery, and the authors have presented themselves as discoverers of a means of constitutional legislation hitherto unexplored and of vast extent. Many of them have gone so far as to say that the Department of State of the United States has only lately realized that there existed in our Constitution this latent power to legislate through treaties.

For the sake of historical accuracy and a just appreciation of the wisdom of the statesmen in charge of our international relations in earlier years, it seems desirable to record that not only was this power known and exercised many years ago, but also that its limitations were better understood then than they seem to be now.

At the outset of the administration of Mr. Elihu Root as Secretary of State in 1907, he was confronted as a part of the unfinished business awaiting his attention in the Department with a group of unsettled questions with Canada. The Joint High Commission between the United States and Canada had been established in 1898 to adjust all pending questions in dispute between the two Governments. That Commission had met and considered and discussed these questions, which embraced some twelve or thirteen subjects, but unfortunately the Commission had failed to come to an agreement upon any of them. The obstacle to an agreement was the Alaskan boundary dispute upon which they could not agree, and, failing that, they were unwilling to agree upon any of the others.

The Alaskan boundary question fortunately had been disposed of before Mr. Root became Secretary of State, and, as it so happened, he had participated in the settlement of that question as one of the arbitrators on the part of the United States on the Alaskan Boundary Arbitration Tribunal in 1903. With that question out of the way, Mr. Root was satisfied that all of the other pending questions could be successfully dealt with through diplomatic negotiations. Accordingly, soon after he became Secretary of State he called upon the present writer, who had been the American Joint Secretary of the Joint High Commission, to act for him as special counsel and assistant in dealing with these questions.

It was decided at the outset that the first thing to be done was to settle

the policy of the Department as to the extent and limitations of the treaty-making power of the United States. Accordingly, the present writer, in his capacity as Counsel and Adviser to the State Department on these subjects, made a study and report as to the scope of the treaty-making power as affecting the questions to be dealt with. In making this report it was realized that it was necessary to deal with the subject primarily from the point of view of treaties as domestic law because the settlement of practically all of the questions under consideration involved the rights of American nationals within the United States.

The report, accordingly, was prepared on that basis. Secretary of State Root approved it without qualification, and ordered that it be printed and adopted by the Department as controlling its policy and action in negotiating treaties. This report was soon afterwards published in the first number of this JOURNAL with the title, "The Extent and Limitations of the Treaty-Making Power."

This reference to this report is of importance only as showing the official indorsement of the views expressed therein, which dealt with practically all of the questions which have since been raised, nearly all of which have now been settled by decisions of the Supreme Court sustaining the views expressed in the report.

The report opened with the two following propositions:

> Where the treaty-making power is exercised by the sovereign power of a nation, the right to treat with other nations rests wholly in sovereignty and extends to every question pertaining to international relations.
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> Where, however, the treaty-making power is not exercised by the sovereign power of the nation as a whole, but has been delegated to a branch of the government by which it is exercised in a representative capacity, the treaty-making power there, although it arises from sovereignty, rests in grant, and can be exercised only to the extent of and in accordance with the terms fixed by the grant.

The second of the above-quoted propositions, as applied to treaties of the United States, is based on decisions of the United States Supreme Court, and has been indorsed by Secretary Root, who is generally recognized as having the ablest legal mind of our time, and yet it has been completely ignored by many of the modern commentators on the subject.[1]

The report then reviewed all the leading court decisions and Congressional reports down to that date involving the questions under consideration.

It was found that—

> As will appear from the cases cited below, the treaty-making power has repeatedly exercised jurisdiction over matters beyond the reach of Congress and such exercise of jurisdiction has invariably been sustained by the Supreme Court. It will furthermore be shown that Congress is empowered, under the Constitution, to legislate with respect to matters

[1] See Professor Pitman B. Potter's article entitled "Inhibitions upon the Treaty-Making Power of the United States," published in this JOURNAL, Vol. 28 (1934), p. 456.

> not otherwise within its jurisdiction, when such legislation is necessary to carry out treaty stipulations affecting such matters, provided always that they are matters directly touching the foreign relations of the nation and genuinely involving its international interest.

Relying upon these findings, Secretary Root early in his administration caused to be negotiated the Treaty Concerning Fisheries in the United States and Canadian Waters, concluded on April 11, 1908. This treaty provided for the adoption and enforcement of fisheries regulations by Congress in waters within the limits of the several boundary states along the Great Lakes over which Congress, in the absence of such treaty, would not have had jurisdiction. The proposed regulations were promptly adopted by Congress and have remained in force ever since.

So, also, in the administration of Secretary Knox, following the lead of Secretary Root, negotiations were initiated for a treaty with Canada protecting migratory birds. This treaty came into force in December, 1916, and was followed by Congressional legislation enforcing its provisions within the jurisdiction of the several states.

A similar Act of Congress had been adopted before this treaty came into effect, and had been declared unconstitutional by the Federal courts. Nevertheless, the Act passed after the treaty came into force, which clearly extended the jurisdiction of Congress over matters not within its delegated powers, was sustained by the Supreme Court as constitutional, and thus conclusively demonstrated that a distinction should be drawn between the jurisdiction of the treaty-making power and the jurisdiction of Congress in relation to the so-called reserved powers under the Constitution. It also definitely settled the authority of the treaty-making power to extend by treaty the jurisdiction of Congress for the purpose of enforcing the treaty stipulations.

This report also examined the subject of self-executing treaties. After reviewing the court decisions, it was found that the Supreme Court had determined that in order to operate as "the supreme law of the land" under Article VI of the Constitution a treaty must be self-executing. Self-executing treaties were defined as those requiring no legislative or Executive action to carry them into effect. It was held by the court that treaties which in themselves are incomplete as laws, or otherwise require legislation to make them operative, address themselves to the executive and legislative rather than to the judicial branch of the Government, and are not self-executing as the term is here used.

Whether or not this provision of Article VI making treaties the supreme law has any coercive force to compel legislative action to carry into effect treaties which are not self-executing is not directly dealt with in the decisions above referred to. Citations on that point are not necessary, however, for it is clear that if this provision making treaties the supreme law of the land does not prevent Congress from repealing by later legislation treaties which

are self-executing, there is no coercive effect beyond the moral obligation arising from national good faith and honor, and the obligation to make operative a treaty requiring legislative action to carry it into effect is no greater than the obligation to leave undisturbed a treaty already in force.

A treaty, therefore, under this provision of Article VI, as construed by the Supreme Court, has the value of a law of the land, so far as the judicial branch of the Government is concerned, only with the consent of the legislative branch of the Government.

It may be noted here that very few treaties are strictly self-executing.

So far as penalties are concerned, treaties do not carry provisions for the punishment of treaty violations. It would be quite inappropriate for governments to stipulate what penalties should be imposed upon their respective nationals within their own jurisdiction for treaty violations. As above noted, the migratory birds treaty required Congressional legislation to give it effect, and the Treaty Concerning United States and Canadian Fisheries expressly provided that Congressional legislation should be adopted establishing rules and regulations governing the use of those fisheries.

It must also be noted that a number of limitations are imposed by the Constitution upon the making of treaties which operate to prevent their becoming self-executing without the concurrence of Congress. For example, the treaty-making power can not override the powers delegated elsewhere, nor deprive the other branches of the Government of the right to exercise the powers entrusted to them by the Constitution. As an illustration of these limitations, attention is called to two subjects which are confided to Congress exclusively by the Constitution. The views expressed in Congress and by the courts and by authoritative writers on the subject show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties, treaty stipulations can not be regarded as self-executing, and require legislative action to carry them into effect.

The report also raised the question, which at that time had not as yet been passed upon by the Supreme Court, whether the treaty-making power could effectively adopt international regulations dealing with economic questions, such, for example, as the universal improvement of labor conditions, or regulations in conflict with the police powers of the state. On this question the report finds that it would be necessary, in dealing with such questions, that the contemplated action should fall within the general scope and purpose of the Constitution with respect both to the Nation and to the States, and also that it should be in accord with the underlying conditions inherent in the treaty-making power—namely, that it must be exercised to promote the general welfare of the American people and that the matters dealt with must directly concern the international interests or relations of the Nation. Accordingly—

> If it appears that these requirements are fulfilled actually as a matter

> of fact, and not as a mere subterfuge for exercising the power, then in the light of the decisions of the Supreme Court above cited, sustaining the jurisdiction of the treaty-making power over some of the so-called reserved powers, it is difficult to assign any reasonable ground for denying it jurisdiction over the other so-called reserved powers in the cases suggested. It has already been argued that inasmuch as the reserved powers all stand on the same footing in their relation to the treaty-making power, and in view of the terms of the provision making such reservation of powers, the right to exercise jurisdiction over any of them implies the right to exercise jurisdiction over them all. The question of the police powers was left open as a possible exception, but no well-defined distinction can be drawn between the police powers and the other so-called reserved powers in relation to the treaty-making power, and no conclusive reason appears for making an exception of them in this connection.

In conclusion, the report found that—

> In the light of these opinions it cannot well be denied that the treaty-making power is a *national* rather than a *federal* power, and this distinction measures the whole difference between its jurisdiction and the jurisdiction of Congress in relation of the so-called reserved powers.

In view of the foregoing considerations, it is evident that in order to make use of the treaty-making power as an agency for domestic legislation, a number of conditions and limitations will be encountered which materially limit the scope of that method of legislation. A useful field is thus offered for further examination and discussion of the subject of to what extent and within what limits domestic legislation can be accomplished through the exercise of the treaty-making power.

In connection with this subject there are two other questions which require consideration.

One question of interest is, What is the status of domestic legislation enacted by Congress on the authority of a treaty extending its jurisdiction when the treaty justifying such legislation is terminated?

The other question is, What can be accomplished in the way of domestic legislation by inter-state agreements sanctioned by Congress in accordance with the provisions of Article I, Section 10, of the Constitution?

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THE CONSTITUTION OF THE PHILIPPINES

On May 14, the qualified electors in the Philippines accepted by an overwhelming vote the constitution submitted to them as drafted by the Philippine Constitutional Convention and approved by President Roosevelt as being within the terms of the Tydings-MacDuffie Act.[1] The total vote cast was strangely small (barely fifty per cent. of the qualified electors voting), considering the importance of the matter and the large percentages of par-

[1] Statutes of Congress, 73rd Cong., 2nd Sess., Chap. 84 (Session Laws, 1934, I, 456).