THE EXTENSION OF CONGRESSIONAL JURISDICTION BY THE TREATY-MAKING POWER

By the recent decision of the Supreme Court of the United States in the case of Missouri *v.* Holland, that court, in an opinion delivered by Mr. Justice Holmes, definitely and conclusively decided in the affirmative the much debated question of whether or not 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.

This question was discussed in an article published in an early number of this JOURNAL [1] wherein it was pointed out that the treaty-making power itself was one of the powers delegated to the Federal Government and therefore was not affected by the Tenth Amendment to the Constitution reserving to the States or to the people the powers not delegated to the United States by the Constitution. Furthermore, it was contended that it was well settled not only by the sanction of custom, but also by the authority of decisions of the Supreme Court, that in the international relations of the nation, the treaty-making power had jurisdiction over matters beyond the ordinary jurisdiction of Congress, and therefore that it must embrace some at least of the powers which, if measured by the jurisdiction of Congress, would be reserved to the states or to the people.

After examining these authorities, the conclusion was reached that the treaty-making power is a *national* rather than a *federal* power, and that this distinction measures the whole difference between its jurisdiction and the jurisdiction of Congress in relation to the so-called reserved powers.

It was also pointed out in that article that in cases in which the treaty-making power dealt with matters beyond the ordinary jurisdiction of Congress, that jurisdiction was thereby enlarged to meet the requirements of the situation, pursuant to the authority conferred upon Congress by the provisions of Article 1, Section 8, of the Constitution, which empowered Congress to "make all laws which might be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any Department or officer thereof."

[1] "Extent and Limitations of the Treaty-Making Power," by Chandler P. Anderson, this JOURNAL, July, 1907. Vol. I, page 636.

The views and conclusions expressed in that article were challenged by several writers of authority, who dealt with the subject from the States' rights point of view, but the question can hardly be regarded any longer as open for discussion in view of this recent decision [2] of the Supreme Court, from which the following extracts are taken:

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. . . .

On December 8, 1916, a treaty[3] between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above-mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

The opinion points out that to answer this question it is not enough to refer to the Tenth Amendment reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. The opinion continues as follows:

If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government. . . .

It is said that a treaty cannot be valid if it infringes the Constitution, that

[2] Printed *infra*, p. 459.

[3] Printed in Supplement to this JOURNAL. Vol. 11,'1917, page 62.

there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. United States *v.* Shauver, 214 Fed. Rep. 154. United States *v.* McCullagh, 221 Fed. Rep. 285. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer *v.* Connecticut, 161 U. S. 19, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force. . . .

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. Andrews *v.* Andrews, 188 U. S. 14, 33. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Cary *v.* South Dakota, 250 U. S. 118.

The objection which suggests itself that a roundabout way is thus furnished by which Congress may be empowered to take jurisdiction generally over all the otherwise reserved powers seems to be met by the underlying condition, which applies to all such cases, that only those matters which directly concern the international interests of the nation and promote its general welfare can be brought within the jurisdiction of Congress in this way by treaties.

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