

# Treaties: WHEN are they part of “the supreme Law of the Land”?

By Publius Huldah.

If the U.S. Senate ratifies the **U.N. Convention on the Rights of the Child**, will it become part of the supreme Law of the Land? If the Senate ratifies the “cap and trade” climate change treaty, will *that* become part of the supreme Law of the Land?

We hear it said that *whenever* the Senate ratifies a treaty, it becomes part of “the supreme Law of the Land”. But is that True? Not necessarily! Walk with me, and I will show you how to think through this question, and how to analyze other constitutional questions which come your way.

You must always ask: **Is this authorized in the Constitution? Where exactly** in the Constitution? And **precisely what** is authorized by the Constitution?

1. Does the federal government have authority to make treaties? Can treaties be about any object? Or, are the proper objects of treaties limited by The Constitution?

Article II, §2, cl. 2, U.S. Constitution, says the President:

... shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur...

Article VI, cl. 2 says:

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. [emphasis added]

Thus, we see that the federal government *is* authorized to make treaties. Now, we must find out whether there are limitations on this treaty making power.

2. It is a classic **rule of construction** (rules for understanding **the objective meaning** of texts)<sup>1</sup> that one must give effect to every word and phrase. The clause does *not* say, “Treaties made by the United States are part of the supreme Law of the Land”. Instead, it says Treaties **made under the Authority of the United States**, are part of the supreme Law of the Land.

So we see right away that a Treaty is part of the supreme Law of the Land *only if* it is made "**under the Authority of the United States**".

3. From where do the President and the Senate get Authority to act? From The Constitution. The objects of their *lawful* powers are enumerated in the Constitution. Thus, the President and Senate must be authorized in the Constitution to act on an object before any Treaty made by them on that object qualifies as part of "the supreme Law of the Land". If the Constitution does not authorize the President and Congress to act on an object, the Treaty is not "Law" – it is a mere usurpation, and deserves to be treated as such. (**Federalist Paper No. 33**, last para).

**Because the Constitution is "fundamental" law (**Federalist No. 78**, 11<sup>th</sup> & 12<sup>th</sup> paras), it is The Standard by which the legitimacy of all Presidential Acts, all Acts of Congress, all Treaties, and all Judicial Decisions is measured** (**Federalist No. 78**, 10<sup>th</sup> para).

4. In **Federalist No. 44** (7<sup>th</sup> para from end), James Madison explains why it is necessary that Art. VI, cl. 2, provide that federal treaties have supremacy over State Constitutions. Otherwise, a treaty which violates a State Constitution would have no effect in that State:

...as the constitutions of the States differ much from each other, it might happen **that a treaty** or national law of great and equal importance to the States **would interfere with some** and not with other **constitutions** and would consequently be valid in some of the States at the same time that it **would have no effect** in others. [emphasis added]

**Madison thus illustrates the Principle that a treaty which interferes with the Constitution has no effect.** I found no other discussion in The Federalist Papers on this point.

So, let us turn to Thomas Jefferson, who wrote:<sup>2</sup>

**In giving to the President and Senate a power to make treaties, the Constitution meant only to authorize them to carry into effect, by way of treaty, any powers they might constitutionally exercise.** –Thomas Jefferson: The Anas, 1793. ME 1:408 [emphasis added]

**Surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.** –Thomas Jefferson: Parliamentary Manual, 1800. ME 2:442 [emphasis added]

According to the rule established by usage and common sense, of construing one part of the instrument by another, **the objects on which the President and Senate may exclusively act by treaty are much reduced**, but the field on which they may act with the sanction of the Legislature is large enough; and I see no harm in rendering their sanction necessary, and not much harm in annihilating the whole treaty-making power, except as to making peace. –Thomas Jefferson to James Madison, 1796. ME 9:330 [emphasis added]

5. So! The treaty making power of the United States is very limited. What, then, are the proper objects of treaties? To find the answer, we must go to The Constitution to see what it authorizes the President and the Congress to do. The Constitution delegates to Congress powers “To regulate **Commerce** with foreign Nations ... and with the Indian Tribes” (Art I, § 8, cl. 3); and “To declare **War**...and make Rules concerning Captures on Land and Water” (Art I, § 8, cl. 11). The Constitution authorizes the President to “...appoint **Ambassadors, other public Ministers and Consuls...**” (Art II, §2, cl. 2).

The authors of The Federalist Papers address the treaty making power of the United States. John Jay says treaties relate to “war, peace, and to commerce” and to the promotion of “trade and navigation” (**Federalist No. 64**, 3<sup>rd</sup> & 6<sup>th</sup> paras). Madison says treaties also relate to sending and receiving ambassadors & consuls and to commerce (**Federalist No. 42**, 1<sup>st</sup> four paras).

There may be additional objects of the treaty making power authorized in The Constitution. For example, Art I, § 8, cl. 8, authorizes Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the **exclusive Right to their respective Writings and Discoveries**”. Thus, The United States could properly enter into treaties respecting patents & copyrights.

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6. Let’s look now at the proposed U.N. Convention on the Rights of the Child. If ratified by the Senate, would it become part of “the supreme Law of the Land”?

To answer that Question, we must ask: Does the Constitution grant to Congress the power to make laws respecting “children”? Does the Constitution grant to the Executive Branch jurisdiction over “children”?

The answer to both questions is “**NO!**” In addition, the 10th Amendment says if a power is not delegated to the United States by the Constitution, or prohibited to the States by Art. I, §10, it is reserved to the States or the people. Thus, jurisdiction over “children” is reserved to the States or the People! Accordingly, if the Senate were to ratify the U.N. Convention on the Rights of the Child, the treaty would **NOT** become part of “the supreme Law of the Land”, because it would not have been made **under the**

**Authority of the United States.** It would be a mere usurpation and would deserve to be treated as such.

If the Senate were to ratify the cap-and-trade “climate” treaty, which, among other things, would force energy companies to buy allowances or permits for their “carbon emissions”, would it become part of “the supreme law of the Land”? You are now equipped to find the answer, and you can confidently defend it!

Do not forget: **The federal government may not lawfully circumvent the U.S. Constitution by international treaties. It may NOT do by Treaty what it is not permitted to do by the U.S. Constitution.**

7. Finally, Thomas Jefferson points to *a legislative remedy* if the President and the Senate ignore the constitutional limits on the treaty making power of the United States. Thomas Jefferson says:<sup>2</sup>

We conceive the constitutional doctrine to be, that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three [did he mean, "two"] branches of Legislature, an act of legislation will be requisite to confirm these articles, and that **the House of Representatives, as one branch of the Legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not.** –Thomas Jefferson to James Monroe, 1796. ME 9:329  
[emphasis added]

I was glad... to hear it admitted on all hands, that laws of the United States, subsequent to a treaty, control its operation, and that the Legislature is the only power which can control a treaty. Both points are sound beyond doubt.–Thomas Jefferson to James Madison, 1798. ME 10:41

What a man! And our system of checks & balances is an elegant one, indeed!

8. Folks! For too long, we have blindly accepted whatever we hear others say. Someone on TV says, “If the Senate ratifies this treaty, it will become part of the supreme Law of the Land!” And not only do we believe it, we repeat it to others. And thus, we became part of the misinformation dissemination network. In order to restore our Constitutional Republic with its federal form of government, we must rediscover how to think and analyze. And then, we must boldly say, “They don’t have authority under The Constitution to do that!” PH

### **Endnotes:**

<sup>1</sup> Educators no longer teach “rules of construction”, because it has become the dogma of our time that texts have no “objective meaning” to be discovered. Instead, each person is to come up with his own “understanding” – and one person’s “understanding” is as good as another’s. A friend recalls the following incident which occurred in his high school English class during 1960: The class read a short story, and then the teacher asked each student to say what the story meant to him. *Whatever* a student said was praised by the teacher. But when it was my friend’s turn, he said: “It doesn’t matter what it means to me – what matters is what the author meant.” The teacher was not pleased with this ‘out of place’ comment. Is it any wonder many judges feel free to “understand” the Constitution any way they please? They were *conditioned in school* to “think” this way; and they did not resist the conditioning.

<sup>2</sup> I originally obtained these Jefferson quotes from the University of Virginia webpage on Thomas Jefferson. However, they have since reorganized their Jefferson pages, and I can no longer find the quotes there. I will have to find these quotes somewhere else.

<sup>3</sup> It has been said that Charles Dickens’ works were pirated, printed and sold in these United States without paying any royalties to Dickens! A copyright treaty with Great Britain would have discouraged this theft of Dickens’ intellectual property. PH

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