Environmental

TREATIES: A SOURCE FOR FEDERAL MUNICIPAL POWER

Within the last several years, many people have been utterly astonished at the phenomenal growth and influence of the so-called environmental movement. From its "salad days" of the early seventies, this movement has blossomed so quickly that it now has the visible support of giant corporations and powerful political figures, including the former alleged environmental President, George Bush, as well as that shining star in the Democratic Party, Vice-President Al Gore. Two years ago, the controlled media deluged us with coverage of the importance of the Rio Summit and when it happened, it became the third most discussed media event of that year just behind the elections and the Olympics. There appears to be a hidden agenda behind the environmental movement with its promotion of an environmental treaty.

Quite obviously, environmental legislation is inherently the proper subject of legislation by the state, and many states currently have such acts in effect within their jurisdictions. At the federal level, the jurisdiction of the United States is constrained by the operation of Art. 1, § 8, cl. 17 of the U. S. Constitution, and the multitude of decided cases regarding this part of the Constitution declares that the United States has territorial jurisdiction solely within Washington, D.C., the federal enclaves inside the States, and the territories and insular possessions of the United States. The possession of territorial jurisdiction is essential under this constitutional provision for federal municipal law such as environmental legislation to apply. Within the territories and possessions of the United States, the federal government possesses power similar to that of a state legislature; see Berman v. Parker, 348 U.S. 26, 31, 75 S.Ct. 98, 102 (1954); and Cincinnati Soap Co. v. United States, 301 U.S. 308, 317, 57 S.Ct. 764, 768 (1937). Therefore, municipal environmental legislation enacted by Congress could readily apply in these areas within the jurisdiction of the United States. And logically, a consideration of solely this part of the Constitution would dictate a conclusion that federal municipal law could apply only within those areas subject to the jurisdiction of the United States.

A ready example of a case so holding is United States v. Shauver, 214 F. 154, 160 (E.D.Ark. 1914), which concerned the issue of where the Migratory Bird Act of March 1913 could apply. Via this act, Congress sought to extend protection to migratory birds by limiting the hunting season and otherwise placing restrictions upon hunting of these birds. As is only natural, upon adoption of this act federal law enforcement officials started strenuously enforcing it and here they had arrested Shauver in Arkansas for shooting and killing migratory birds. Shauver moved to dismiss the indictment filed against him on the grounds that the act contravened the 10th Amendment by invading the jurisdiction of the states upon a matter historically reserved for legislation by the states. In deciding that this act was unconstitutional, Judge Trieber noted that the common law provided that the states essentially owned the birds within their borders and state legislation was the sole source by which control of hunting could be accomplished. In so concluding, he held:

> "It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses

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> the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game in a state, and is therefore forced to the conclusion that the act is unconstitutional."

Notwithstanding Judge Trieber's decision, enforcement of the act did not stop and it was thereafter enforced within Kansas, where a fellow named McCullagh was arrested for killing migratory birds. In United States v. McCullagh, 221 F. 288, 293 (D.Kan. 1915), the issue of the constitutionality of the Migratory Bird Act of 1913 was again before a different court and it, relying upon its own research of the law as well as the decision in Shauver, likewise concluded that this act was unconstitutional:

> "[T]he exclusive title and power to control the taking and ultimate disposition of the wild game of this country resides in the state, to be parted with and exercised by the state for the common good of all the people of the state, as in its wisdom may seem best."

Consideration of the above cases, which appear to be the only ones of that period, leads to the conclusion that some powerful federal officials desired to seek the enactment of this law to expand the scope of federal authority; the laboratory experiment selected for determining whether the judiciary would declare that Congress possessed power to control hunting was started within the heartland of America, Arkansas and Kansas. But here, those seeking greater federal power met their defeat, at least temporarily. To secure such power, these parties went back to the drawing board and what they developed did give them the power they sought.

In 1916, the United States and Great Britain, on behalf of Canada, adopted the Migratory Bird Treaty and thereafter Congress in 1918 passed another Migratory Bird Act to implement the provisions of the treaty, this act being slightly improved over the previous version as experience would thus dictate. As this occurred, federal law enforcement officials again started to enforce the new act in another experiment to determine whether this time, because of the treaty, they had achieved the municipal power they so dearly loved. Again, they started enforcement activities within Arkansas and the case they developed was again assigned to Judge Trieber.

Within Arkansas in 1919, a man named Thompson was arrested for shooting these protected migratory birds and this case was assigned to the very same judge who had rendered the decision in Shauver, supra; see United States v. Thompson, 258 F.257 (E.D.Ark. 1919). Here, thinking he had a very favorable judge, Thompson raised the very same argument as Shauver which had previously proved successful in front of Judge Trieber. But this time around, things were different and the federales were acting upon the authority of a treaty and this one change within the law dictated an entirely different result. In upholding the act and thus its application within the jurisdiction of Arkansas, Judge Trieber carefully analyzed the prior decisions rendered by the Supreme Court which

illustrated the operation of treaties and how the same could abrogate state laws:

> "Law can only prescribe the conduct for the people within the jurisdiction of the lawmaker, while treaties are to affect rights and privileges of subjects of foreign countries and of our citizens in such countries. Treaties are reciprocal, and in all instances the same rights and privileges are granted to the citizens and subjects of each of the contracting parties in the respective countries," Id., at 258.
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> "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of this nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries. The states of the Union may enact all laws necessary for their local affairs, not prohibited by the national or their own Constitution; but they are expressly prohibited from entering into treaties, alliances, or confederations with other nations. If, therefore, the national government is also prohibited from exercising the treaty power, affecting matters which for internal purposes belong exclusively to the states, how can a citizen be protected in matters of that nature when they arise in foreign countries," Id., at 263.
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> "Even in matters of a purely local nature, Congress, if the Constitution grants it plenary powers over the subject, may exercise what is akin to the police power, a power ordinarily reserved to the states," Id., at 264.

Judge Trieber concluded that this treaty thus provided Congress with a power of municipal legislation and that treaty and its implementing act plainly operated within the state of Arkansas. A different case originating within Missouri, United States v. Samples, 258 F. 479 (W.D.Mo. 1919), ultimately found its way to the U.S. Supreme Court where an identical conclusion was reached; see Missouri v. Holland, 252 U.S. 416, 434, 40 S.Ct. 382, 384 (1920), which stated, "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power." See also United States v. Selkirk, 258 F. 775 (S.D. Tex. 1919); United States v. Rockefeller, 260 F. 346 (D. Mon. 1919); and United States v. Lumpkin, 276 F. 580 (N.D. Cal. 1921).

After it was determined that the Migratory Bird Treaty thus provided a municipal power to the United States to control hunting even within the jurisdiction of a state, the next issues which arose were whether regulations under both the act and treaty were valid, the arguments made against the regulations being that the treaty was limited in scope and thus could not support very detailed regulations concerning hunting activities, which simply had to be unconstitutional as a consequence.

In 1936, another similar treaty was made with Mexico and apparently regulations were adopted which more strenuously controlled hunting of migratory birds, these regulations covering such details as whether birds could be baited with grain. In Cochrane v. United States, 92 F.2d 623 (7th Cir. 1937), the defendants were members of a duck club

and employees of the club placed duck decoys upon and sprinkled corn within the waters around the club located on an inland lake in Illinois. Unfortunately, the defendants sprang up and shot ducks from a blind on the edge of the lake at a time when the federales were looking, and they were arrested for killing ducks. In defense, these parties contended that the regulations invaded the reserved rights of the states protected via the 10th Amendment and that the regulations were beyond the scope of the treaties. But, the Seventh Circuit summarily rejected these arguments finding that the regulations were valid both under the treaties as well as the interstate commerce powers of Congress.

In Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938), the operators of a hunting club were informed that if they performed activities regularly conducted within the past of baiting birds with grain before the start of the federally approved hunting season, they would be prosecuted for violating new regulations. The club sued to enjoin enforcement, but the Ninth Circuit concluded similarly as in Cochrane. In United States v. Reese, 27 F.Supp. 833 (W.D.Tenn. 1939), the federal act and regulations which protected "these feathered friends of mankind" were held valid and enforceable within that state.

In Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942), the United States had established a bird refuge off the coast of Virginia, that refuge consisting of waters within a bay as well as a small plot of land that the U.S. had purchased. But, a regulation was promulgated which closed adjoining lands to hunting and a duck club adversely affected sued to enjoin implementation of that regulation. In rejecting the club's argument, it was concluded that the bird treaties empowered the feds to enact these regulations even though they had operation upon private lands within state jurisdiction.

In 1912, the Senate adopted the International Opium Convention and Congress might have enacted about the same time legislation to implement it. If it did, the implementing act failed to mention that its authority was derived from the treaty. In any event, an act controlling distribution of opium became the basis for the indictment of a man who was merely possessing opium and a dismissal of his indictment went before the Supreme Court. In United States v. Jin Fuey Moy, 241 U.S. 394, 36 S.Ct. 658 (1916), the Court had before it the validity of this act which operated within the jurisdiction of the state and it held that dismissal of the indictment was mandated because the act invaded the jurisdiction of the state. In an attempt to save the act and the indictment against this defendant, the government surprisingly argued that the act, although silent on the point, was really one which implemented the Opium Convention. Nonetheless, the Court concluded that the failure of the act to state its premise within the Convention precluded its application on the grounds asserted by the government.[1] See also United States v. Ah Hung, 243 F. 762, 764 (E.D.N.Y. 1917)("Mere possession of an article injurious to health would not render a

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[1] This case would appear to hold that any act implementing a treaty must of necessity statutorily identify the treaty as the basis for the act. As an example, the Genocide Treaty was adopted in the spring of 1987; it was implemented by the Genocide Convention Implementation Act of 1987, P.L. 100-606, 102 Stat. 3045, which created 18 U.S.C., § 1091. However, the fact that in this case the Government asserted a treaty basis for the act notwithstanding the lack of statutory language at least indicates that other acts which really implement a treaty may likewise be silent as to the source for such legislation.

person liable to a United States statute unless some constitutional basis for the statute gives the United States the right to regulate upon the subject").

Some years later, the 1912 International Opium Convention was supplemented by a similar convention of 1931, which was thereafter implemented by appropriate legislation designed to control the production of poppy within this country. In Stutz v. Bureau of Narcotics, 56 F.Supp. 810, 813 (N.D.Cal. 1944), some poppy growers sought an injunction to the enforcement against them of the provisions of the act implementing the convention, the argument which they made being that the act invaded the reserved powers of the states in contravention of the 10th Amendment. In rejecting such argument and holding that the act applied within the jurisdiction of California, the court declared:

> "The competency of the United States to enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit forming drugs is not questioned. The obligations of the United States incurred as a party to the two Conventions heretofore mentioned were lawfully undertaken in the proper exercise of its treaty making power. And Congress is constitutionally empowered to enact whatever legislation is necessary and proper for carrying into execution the treaty making power of the United States."

The above discussion is not an attempt to fully explain the treaty powers of Congress and all that is offered is a ready example of their operation. Here, municipal legislation designed for application within the states concerning migratory birds as well as drugs has been shown to be typically beyond the power of Congress. But, give Congress a treaty and allow it to enact laws for its enforcement and it does acquire the municipal power to control intrastate activities.

The United States has a tremendous external power; see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216 (1936); and United States v. Peace Information Center, 97 F.Supp. 255 (D.D.C. 1951). Even the United Nations Charter is a treaty; see Balfour, Guthrie & Co. v. United States, 90 F.Supp. 831 (N.D.Cal. 1950); and Sei Fujii v. State, 242 P.2d 617 (Cal. 1952). There are decisions holding that this power does not permit what the constitution forbids; see Amaya v. Stanolind Oil & Gas Co., 158 F.2d 554 (5th Cir. 1946); Farmer v. Rountree, 149 F.Supp. 327 (M.D.Tenn. 1956); and Pierre v. Eastern Air Lines, Inc., 152 F.Supp. 486 (D.N.J. 1957). Yet, it is likewise clear that no definitive limits have been decided regarding this extensive power.

The former U.S. Attorney General William Barr acquired his position by realizing the extent of this external power of the United States. It was his advice which authorized the invasion of Panama to secure the capture of General Noriega and this precisely catapulted him into that high office. His office secured that decision of the Supreme Court holding that the Fourth Amendment does not apply to searches of homes by federal officials within Mexico; see United States v. Verdugo-Urquidez, ___ U.S. ___, 110 S.Ct. 770 (1990). Within the last few years, this external power of the United States was declared to be the basis for lawfully kidnapping parties in other countries; see United States v.

Alvarez-Machian, __ U.S. __, 112 S.Ct. 2188 (1992).

All of this is a harbinger of things to come. Is it not easy to contemplate what must be currently in the minds of people such as Bill Barr and the heads of a multitude of federal agencies? As always, these agencies seek aggrandizement with power and authority, yet based upon the delegated powers of the U.S. Constitution, they cannot directly achieve total power. But what is shown above demonstrates that the federales could potentially feign a treaty with Guam and thus secure municipal power. But why should they stoop so low with such a trick? What they inherently desire awaits them at their footsteps with the more facially legitimate environmental treaties which surely will flow from the Rio Summit.

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