

June 2021

Sabotage of American Freedoms

O. Otto Moore

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

O. Otto Moore, Sabotage of American Freedoms, 29 Dicta 197 (1952).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

THE TREATY MAKING POWER

At the Mid-winter Meeting of the American Bar Association in Chicago last February, the House of Delegates approved a resolution favoring an amendment to the Federal Constitution relative to the operation of Treaties, reading as follows:

“A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty.”

The Association is deeply concerned as to the possible effect of the Genocide Convention and the Covenant on Human Rights, as well as other similar Treaties, upon the domestic affairs of the States and the Nation.

The Louisiana State Bar Association, On May 10, 1952, unanimously adopted a resolution favoring an amendment to the Federal Constitution providing that Executive Agreements or Treaties with foreign nations shall not become the internal law of the land unless implemented by appropriate legislation, and that no such legislation shall be valid if contrary to or in excess of the powers delegated to the Congress by the Constitution.

The action taken by the House of Delegates of the American Bar Association was by no means unanimous and the Standing Committee on Peace and Law through United Nations, and other United Nations supporters, opposed such a constitutional amendment. The following articles by Mr. Justice Moore and other members of the Colorado Bar present some aspects of this controversy. The Colorado Bar Association has taken no action on the matter to date.—*Editor.*

SABOTAGE OF AMERICAN FREEDOMS

JUSTICE O. OTTO MOORE
of the Colorado Supreme Court

Since the subject which we will consider deals generally with the United Nations organization and the charter thereof, it seems advisable that we take a brief look at the condition which existed in the world at the time of the creation of that organization.

Within the generation which preceded the creation of the United Nations, millions of lives had been sacrificed and inconceivable value in material world wealth had been consumed by the gluttonous appetite of the giant war machines of the earth. Two-thirds of the population of the globe were sick, hungry, ill-clothed, ill-housed and oppressed. At long last we began to realize that time and space had been annihilated by the intervention of the airplane, radio, and numerous other evidences of scientific endeavor. We became conscious of the fact that our world had

shrunk in size so that Moscow and Washington, D. C., were now closer together than New York and Philadelphia were at the time our nation was founded. We became fully persuaded of the truth that our world after all is relatively small and that every nation and civilization was vulnerable to annihilation and total disaster resulting from atomic warfare.

The blood bath of World War II, having been concluded in victory for the allied armies, we looked back upon the ruin and began to count the cost. The inevitable conclusion was reached that in modern warfare neither victor nor vanquished can emerge a winner. Immediately following the cessation of hostilities, the specter of the cold war between the Soviet Union and the so-called free democracies appeared on the horizon. An exhausted world sought to find a way to ensure against a recurrence of the heartache and suffering and the wanton waste of the resources of earth that are inseparably involved in a titanic world war. The average citizen in every land sought a means of ensuring peace with justice. Certain lessons had been definitely learned from experience of the not too distant past.

Most intelligent minds had agreed that we could not build peace either for ourselves or for the world by attempting to isolate ourselves. Isolation did not, and will not work. Most intelligent minds had learned that we could not build peace either for ourselves or for the world by appeasement of aggression. It did not work with Hitler and Mussolini and it will not work with the Communists or Stalin. Most intelligent minds had agreed that we could not bring permanent peace for ourselves or for the world simply by fighting and winning a war, because we have done this twice in the last thirty-five years and there is no assured peace. Most intelligent minds had concluded that we could not build permanent peace by eliminating a devil on the loose in the world, whether he be called a Czar, a Kaiser, a Hitler or a Mussolini. The result of fighting and winning World War I to "make the world safe for democracy" by getting rid of the Kaiser, was to make the world ripe for Hitler and Mussolini, who were worse. Getting rid of Fascism and Hitler through World War II brought us no peace but an ever more powerful Stalin and Mao Tse-Tung.

THE PURPOSES OF THE UNITED NATIONS

In this atmosphere and with this background, to which much more should be added to round out the full picture, men and women everywhere sought a means of assuring peace with justice, and thus it was that the United Nations came into being and a charter was adopted in the altruistic hope that peace with justice might be achieved through the co-operative effort of participating nations. Nothing that I say on this occasion is intended as a criticism of the lofty ideals and high purposes and ambitions which inspired the creation of the United Nations. These purposes were: First (and foremost) to maintain international peace

and security; second, to develop friendly relations among nations; third, to promote international economic and social co-operation; and fourth, to be a center for harmonizing the actions of nations in the attainment of these common ends.

On June 26, 1945, the charter of the United Nations was signed by the representatives of fifty nations. It became effective on October 24, 1945, when it was ratified by more than two-thirds of the countries whose representatives had signed it. This charter provided that there should be six principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. I shall be speaking to you in a moment concerning some of the activities of the Economic and Social Council.

The United Nations was sold to us, and we accepted it, upon the basis that it was an association of sovereign states, *that it was not constituted as a parliament of man, nor as a federated government of the world, but as an organization open to all peace-loving nations of the world on the basis of the principle of sovereign equality.* The object to be accomplished—TO OUTLAW WAR!

THREAT OF WAR HAS NOT BEEN ELIMINATED

After almost seven years of activity on the part of the United Nations, grave problems cry out for solution in all parts of the world.

The icy tentacles of the cold war have not melted but have frozen over additional vast areas of the earth; in Korea planes, and tanks, and bombs, and guns, and bayonets—and men—clash in the bloody business of war; and for the year just ahead we plan to spend an enormous amount for armaments, for defense, an amount which when broken down to understandable terms means one million dollars for each ten-minute period throughout the whole year.

The world is sullen and angry and distrustful as the struggle for the minds of men begins to gather force and momentum. We contemplate the heavy cost in lives, and suffering, and treasure, which have been laid upon the altar of liberty in these United States as the price of freedom; we know that even at this very moment our sons and brothers fight and die on Heartbreak Ridge, or some other stony, cold Korean hillside—rightfully or wrongfully, as you would have it in your own appraisal of the events that put them there—they are there in the name of freedom. Well might we all pause in the mad rush of these days—pause at the shrine of Mr. Lincoln and with renewed purpose, “highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom.”

America needs a rekindling of the fires of freedom and a better understanding of the fact that freedoms already have been

lost, and more are in danger of being lost, right here at home. It is unfortunate, but nevertheless true, that we seldom become aroused about the gradual loss of an intangible. Let someone attempt to invade our home and walk off with the furniture, or pitch his tent and take possession of five acres of our farm and we'll respond with a resistance that is in proportion to the visible emergency. But when some priceless unseen intangible thing like constitutional freedom is being slowly drugged into a state where it is more and more powerless and impotent to stand as a first line of defense against invasion upon the liberties and freedoms of the people, all too few of us make any note of it and all too few of us do or say anything about it. We come to our homes in the evening after what we call a hard day at the office or the shop; we pass quickly over the challenging headlines and the editorial pages of our daily press which bring to our attention each day the current developments in the creeping death process; we say "ho hum" and turn to the comic section or the sport page.

We have this generation all concerned about fighting communism, which is nothing more or less than super-statism where the government decides what the individual deserves and gives it to him with a vengeance. A man by the name of Paul Harvey on the radio a short time ago said, "I'm not so sure that I could explain to the young man lying half in and half out of the gutted tank on a Korean hillside why he had to die, why his dreams had to get shot full of holes. Why he had to spill his insides across some crummy, worthless Korean hillside when the freedoms back home for which he thought he fought were stolen while he was away." Our sons are spilling their blood under the flag of the United Nations. While our boys fight in Korea, fundamental concepts of American freedom are having a desperate fight for survival within the high councils of the United Nations and, as an American, I am certain that one of the greatest threats to freedom is to be found in the current trend of events within the councils of that body.

FREEDOM THREATENED AT HOME

Following World War II, the United States ascended to the leadership of the western free world. We adopted an almost unlimited policy of participating in world affairs. There was an unprecedented resort to the treaty making power, *and this power has been used to accomplish purposes that could not possibly have been foreseen a generation ago.* We helped produce the United Nations Charter. We have adopted it as a treaty. Under this charter and the proposed developments thereof, the American people are today confronted with the question as to whether or not in an attempt to give greater liberty to other peoples in the world they will destroy their own freedoms.

Within the last generation there has been an incessant bombardment upon our long established concepts of constitutional

guarantees. By strained judicial interpretations, and, in many ways which for lack of time we cannot discuss, constitutional guarantees are becoming of uncertain value. If we can stem the tide at this point there yet is time to avoid irreparable loss. However, through the use of the treaty-making power we face new and grave threats to constitutional liberties. By a recent decision of the Court of Appeals in California this new threat is brought to light. It now becomes clear that by the adoption of a treaty even the Constitution of the United States and its Bill of Rights may be amended. The Charter of the United Nations may be the supreme law of the land and take precedent over and above the Constitution of the United States. Without doubt a treaty supercedes the Constitutions and laws of the several states. I quote from the opinion of the California court as follows: ¹

“The Charter has become ‘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.’ U. S. Const., Art. VI, sec. 2. The position of this country in the family of Nations forbids trafficking in innocuous generalities but demands that every State in the Union accept and act upon the Charter according to its language and its unmistakable purpose and intent.

“Since the Charter is now the supreme law of the land it becomes necessary to examine its provisions and guarantees and to interpret it in the light in which it was adopted by the participating nations.” ²

Keeping in mind the thought that whatever is adopted as a treaty, if self executing, may well become the supreme law of the land and take precedence over all else, let me point out to you a few specific instances among many, many more which could be mentioned, in which American freedoms are being sabotaged within the councils of the United Nations. The Economic and Social Council of the United Nations, one of the six principal units already mentioned, was given power by the charter “to make recommendations for the purpose of promoting respect for,

¹ Sei Fujii v. State, 217 P. 2nd 481.

² Since this article was prepared, the Supreme Court of California has affirmed the above mentioned judgment of the California Court of Appeals (242 P. [2d] 617). The court in a lengthy opinion, by a four to three vote, held the California Alien Land Law unconstitutional in that it violated the Fourteenth Amendment, although the court had previously held the act constitutional and the Supreme Court of the United States had affirmed that decision (263 U. S. 225). The California Supreme Court said that the provision of the charter of the United Nations, which was relied on by the Court of Appeals, was not self-executing for the reason that only broad general purposes and objectives of the United Nations organization were contained therein, and that in the absence of subsequent “implementing legislation” the United Nations charter did not automatically supersede the local California law.

and observance of, human rights, and fundamental freedoms of all." In carrying out this objective a commission consisting of representatives of fifteen nations was appointed, known as the Human Rights Commission. They have prepared a covenant on Human Rights. The American representative on the commission approved the document. It has the approval of the state department. It will ere long, unless public sentiment is roused in righteous protest against it, pass the hurdle of United Nations approval and be submitted for adoption by the United States as a treaty; and if this covenant on Human Rights is ever adopted by this nation as a treaty, or in any other manner, we would be binding ourselves to other nations to uphold and enforce foreign, totalitarian, communistic concepts of fundamental freedoms, diametrically opposed to our own, and the Bill of Rights of our national and state Constitutions would lie in ashes at our feet. As was stated by William Fleming in an article published in the American Bar Association Journal in November, 1951:

"The United States delegation has, unfortunately, not realized that the struggle against communism is a global one, indeed. It is waged not only on the battlefields of Korea, but everywhere, including the Council chambers of the United Nations and the Human Rights Commission. American boys in Korea bearing the brunt of the Communist onslaught are fighting for the same ideas and ideals that ought to be upheld at the conference table. Our troops gave a magnificent account of themselves, but our delegates or those who instruct them lacked both courage and faith to refuse to sign a document so utterly alien to the American tradition."

The very first Article of our American Bill of Rights reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances." Under the American concept these guarantees are absolute and ever present, and no circumstances or emergency can cause them to be set aside or rendered inoperative. Congress cannot place any limitations or restrictions on the free enjoyment thereof. But Congress does not make treaties and it now becomes clear that the exercise of the treaty-making power through the pressures behind the United Nations gives us cause for great concern. We are already in the United Nations. The Charter has been adopted. We are now considering in the United Nations the Covenant on Human Rights, adoption of which, as a treaty, has been recommended by appropriate United Nations committees.

Article 13 of this proposed covenant on Human Rights provides that, "Everyone shall have the right to freedom of thought,

conscience and religion," *but* it goes on to say that this freedom to manifest one's religion "shall be subject only to such *limitations as are pursuant to law* and are reasonable and necessary to protect public safety, order, health, etc."

Article 14 of this document, which if adopted might take precedence over the Constitution of the United States and knock out our state Bill of Rights, provides: "Everyone shall have the right to freedom of expression—to seek, receive and impart information—," *BUT* it goes on to say that this right carries special duties and responsibilities and "may therefore be subject to certain penalties, liabilities and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, safety, etc."

Under Article 2 of the covenant, free speech, free press, right to assemble and petition, can be suspended in case of "a state of emergency officially proclaimed by the authorities."

To all of these vague assurances—with their "ifs", "ands" and "buts" the United States already has bound itself to take "action in co-operation with the organization for the achievement of the purposes set forth in Article 55." (Charter.)

In 1786 Thomas Jefferson said: "Our liberty depends upon the freedom of the press and that cannot be limited without being lost."

Five days before the promulgation of the Declaration of Independence, the Virginia Assembly adopted a constitution which said:

"Freedom of the press is the great bulwark of liberty. None but a despotic government would attempt to restrain it. If it be restrained all liberty falls."

It is an historical fact that every advance in individual liberty that has been recorded since the art of printing was invented has been won through the efforts of the courageous press. It also is an historical fact that every loss of liberty that has been recorded during the same period has been preceded by a subjugation of the press to the dictates of government. Goebbels was appointed Minister of Public Enlightenment in Germany in 1933—Russia brought the Press under State Control in 1921—Peron in Argentina disposed of *La Prensa*.

If eternal vigilance is the price of freedom, now is the time to be vigilant. And I take the liberty here to suggest that there comes a time in the nature of things when patience is no longer a virtue. What I mean is illustrated by the way a congressman recently paraphrased a familiar quotation. He said, "If you keep your head when all about you are losing theirs—maybe you just don't understand the situation."

It is contended by those who see no danger in the vast expansion of the subject matter now being handled by treaty, that civil liberties in this nation cannot be adversely affected thereby.

It is stated that the essence of our freedoms is found in the First Amendment to the Bill of Rights (hereinabove quoted) and in the Fourteenth Amendment, and that these bulwarks of strength will stand against "any attack by any treaty at any time." This is wishful thinking and completely overlooks the fact that never in the history of the United States Supreme Court has a treaty provision been invalidated because inconsistent with a constitutional provision of either the state or nation. It entirely overlooks the plain truth that there is absolutely nothing in the First Amendment which operates as a prohibition against the making of treaties containing provisions limiting or denying the rights guaranteed by said amendment. The prohibition is that *Congress* shall not place limitations on the rights guaranteed. Congress does not make treaties. Every authority now available points in the direction of a determination that there are no limitations whatever upon the treaty-making power. In *United States v. Reid*, 73 Fed. (2d) 153, Mr. Justice Wilbur, speaking for the Ninth Circuit Court of Appeals, said, "It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a *casus belli* to the other contracting power."

HUMAN RIGHTS ARE AN INTERNATIONAL CONCERN

If our fundamental concept of American freedoms is cast aside and we adopt, in treaty form, the watered-down concept of fundamental freedoms contained in the Covenant on Human Rights, no man can say with certainty what the Supreme Court of the United States might do in the event that the restrictions on freedoms provided for in that covenant were invoked by those in authority. The United Nations charter determined without question that human rights are matters of international concern warranting action in concert with other powers. It thus has been declared a proper subject for consideration under the classification of Foreign Affairs. Mr. Justice Sutherland, in *United States v. Curtiss Wright Corp.*, 299 U. S. 302, pointed out with great emphasis that the broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, *is true only in respect of our internal affairs*, and has no application whatever to the treaty-making power which deals with matters having an international scope.

As a nation, the United States of America has been generous with material gifts to the world. But the greatest gift we have given to the people of other lands has not been the abundance of our farms, the productivity of our factories or the wealth of our storehouses. The greatest gift we have given the world is the gift of hope for, and a belief in, freedom. America has shown the world that freedom works better than any other way of life. We have by our example inspired hope in the hearts of all men that someday they, too, may be free from the heavy hand of tyranny and the grinding misery of poverty.

America has shown the world that when men are free they can achieve the impossible. By giving free rein to the creative genius of every individual American we have released the energies of our people to build the huge mass production industries that pour out billions of dollars' worth of telephones, automobiles, radios, electrical appliances, refrigerators, stoves, airplanes, and a tremendous variety of other goods and services, all of which are within the reach of the ordinary worker. These goods have been distributed far beyond the boundaries of our nation into others, and thus have lightened the burden of people in all parts of the world. The products of American industry are sought after from Britain to Iran, from Norway to Japan.

America has given hope to the downtrodden, the hungry and the enslaved peoples of the world that the Golden Rule can be successfully embodied; not perfectly, but more perfectly than any other instrument to advance human welfare. We have created a government founded upon the principle that all men are equal before God and before the law, and that the dignity of the individual is the highest aim of government. Because we have done these things, because we have put freedom before all else, we have astounded the world by our progress and our abundance.

First, above all else we must preserve liberty at home, and possess it in truth and fact as well as in theory before we undertake to give it to the world.

We must generate and distribute freely light with which to illuminate the minds of men to the end that they may understand and effectively combat all forces seeking to undermine our system. We must generate and dispense freely the kind of heat which will warm the hearts of men everywhere and draw them together in better understanding of our common heritage and the necessity for its preservation. Above all, we must generate and dispense freely power; power to control the wills of men in the accomplishment of good; power to defend successfully, protect and preserve the freedoms for which America stands; power to compel accomplishment of the great objective which Pascal in the year 1650 said was the great need of his day. He then stated, "Justice and power must be brought together so that whatever is just may be powerful, and whatever is powerful may be just."

BAR ASSOCIATION MOVE TO NEW OFFICES

June first was moving day for the Denver and Colorado Bar Associations. We are now located in newer and somewhat larger offices in Suite 702, Midland Savings Building in Denver. Our phone number, ALpine 1355, remains unchanged. All members are invited to visit the Association offices, as always, when in Denver.