DOES THE CONSTITUTION MAKE THE PRESIDENT SOLE NEGOTIATOR OF TREATIES?

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When the Armistice was proclaimed, the President assumed that he had the sole power to negotiate the treaties with Germany and Austria-Hungary, with the governments of which powers Congress had declared a state of war existed. The President also assumed the power to aid in establishing new nationalities and in determining the territorial boundaries of the Central Powers and of other nations, among them several against which Congress had not declared war. The Senate, without protest, conceded to the President this power with respect to the necessary treaties. Throughout all the proceedings there was no recorded opposition by the Foreign Relations Committee of the Senate, or by any Senator, to the President's claim that the negotiation of the treaties was vested exclusively in him, nor was there even any criticism of his position in this regard.

As late as the 26th of August, 1919, the President, in his letter to the Chairman of the Senate Foreign Relations Committee, gives as a reason why he withheld the treaties with Austria-Hungary, Bulgaria, and Turkey, the undesirability of creating the precedent which would be created by submitting to the Senate, or its Committee on Foreign Relations, treaties in their draft form. He states that such a course "would tend to take the function of negotiating treaties out of the hands of the Executive, where it is expressly vested by the Constitution."

The reply by the Chairman of the Foreign Relations Committee to the President's letter admits, "as of course," that the Committee "was aware that negotiations are wholly in the hands of the Executive." This assertion that the sole power to negotiate treaties has been lodged in the President by the Constitution, akin to the prerogative in a monarch, made by the President and expressly assented to by the Chairman of the Foreign Relations Committee of the Senate, has been accepted by the press of the country as admitted constitutional law. Numerous editorials have characterized the Committee's request for information as to the contents of these pending drafts of treaties as an evidence of a want of respect for the Constitution, and have declared that for the President to yield to such a "preposterous" demand would be to abandon a great presidential prerogative.[1]

[1] Discussing the Knox Resolution, the New York Times in its issue of May 7th, 1920, says: "It [the resolution] must be vetoed, for the state of war cannot

This was the contention of Secretary Seward with respect to recognition of the Maximilian government in Mexico. In April, 1864, he wrote our Minister to France that recognition of Maximilian was a purely executive question. On June 27th the Committee on Foreign Affairs reported to the House a resolution asserting that it belonged to Congress to declare the foreign policy of the United States, and it was the constitutional duty of the President to give effect to that policy in diplomatic negotiations. It may be that the power exercised by President Wilson in making himself sole negotiator, and virtually sole representative of the United States of America to negotiate the several treaties with the Central Powers, conforms to the accepted interpretation of his powers under the Constitution now. Certain it is that the debates in the Constitutional Convention disclose a different view, held by the framers of the Constitution, namely, that the Senate should participate equally with the President in such negotiation. The Journal of the Federal Convention[2] contains a number of illuminating entries with regard to the sense of Article 2, section 2 of the Constitution.[3]

The first meeting, at which delegates from seven states were convened, was on May 25, 1787. John Dickinson of Delaware and Elbridge Gerry of Massachusetts did not take their seats until May 29th. On that day Charles Pinckney from South Carolina laid before the Convention the draft of a federal government which he had prepared, to be agreed upon between the free and independent states of America. Article 7 of this draft reads, "The Senate shall have the "sole and exclusive power to declare war, to make treaties, and to appoint ambassadors and other ministers to foreign nations," etc.

On June 26th the convention considered the duration and powers of the Senate. James Wilson of Pennsylvania in debate stated,

"Every nation may be regarded in two relations, first to its own citizens, secondly to foreign nations. The Senate will probably be the repository of the powers concerning the latter objects. It ought, therefore, to be made respectable in the eyes of foreign nations."

On August 6th the report of the Committee of Detail was made. The Preamble recited, "We, the people of the states, [enumerating

be ended, the condition of peace cannot be restored, by resolution. . . . Mr. Knox does not need to be reminded that the negotiation of treaties is exclusively the business of the President."

[2] Published in 1840 under direction of the United States Government from the original manuscripts kept by President Madison, and reprinted in 1893.

[3] Article 2, section 2, clause 2 reads as follows: 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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law. . ."

them] do ordain, declare and establish a Constitution for the government of ourselves and our posterity."

Article 9, section 1, of the report submitted by the Committee of Detail (for the Constitution to be ordained) reads, "The Senate of the United States shall have power to make treaties, and appoint ambassadors, and Judges of the Supreme Court."

Prior to the reference of the draft of the proposed Constitution to the Committee of Detail on June 18th, Mr. Hamilton, who had hitherto been silent on the business before the Convention, submitted amendments to the draft offered by Mr. Randolph. Article 4 of Mr. Hamilton's draft reads,

"The Supreme Executive authority of the United States to be vested in a Governor to be elected to serve during good behavior. The authorities and functions of the executive to be as follows: To have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the Senate, the power of making all treaties," etc.

On August 23rd, Article 9, section 1, was reported by the Committee of Detail, reading, "The Senate of the United States shall have power to make treaties," etc. Gouverneur Morris moved an amendment to the section after the word "treaties": "but no treaty shall be binding on the United States which is not ratified by law."

Mr. Wilson stated that the King of Great Britain, being obliged to resort to Parliament for the execution of treaties, was under fetters similar to those imposed on the Senate by the amendments proposed by Mr. Morris. Mr. Dickinson supported the amendment, although it was unfavorable to the small states, which would otherwise have an equal share in making treaties.

Dr. Johnson pointed out that full and complete power was vested in the King of Great Britain. If Parliament should fail to provide the necessary means of execution, a treaty would be violated.

Mr. Gorham stated that negotiations on the spot were not to be desired, that treaties would generally be influenced by two or three men who would be corrupted by the ambassadors sent here. He added, "In such a government as ours it is necessary to guard against the government itself being seduced."

Mr. Randolph moved that the motion of Gouverneur Morris be postponed, but the question was lost, the states being equally divided. Mr. Madison suggested for consideration whether a distinction might not be made between different sorts of treaties, allowing the President and Senate to make treaties eventual and of alliance for limited terms, and requiring the concurrence of the whole legislature in other treaties.

The first section of Article 9 was finally referred again to the Committee of Detail.

On September 4th the Committee of Eleven[4] reported an alteration in the report before the convention, to be amended to read, "The Presi-

[4] On unfinished parts of the Constitution.

dent, by and with the advice and consent of the Senate, shall have power to make treaties;" substantially the language of clause 2, section 2, Article 2 of the Constitution as it now reads.

On the 7th of September the above clause, on second reading, being under debate, Mr. Wilson moved to add after the word "Senate" the words, "and House of Representatives." He thought the need of secrecy in the business of treaties, being inconsistent with obtaining the complete legislative sanction, was outweighed by the importance of the latter. Mr. Sherman thought the power could be safely trusted to the Senate, and that the necessity for secrecy in the case of treaties forbade a reference of them to the whole legislature. Mr. Wilson thought the plan dangerous as throwing power into the hands of the Senate and said, "They are to make treaties and they are to try all impeachments." "In allowing them thus . . . to make treaties which are to be laws of the land the legislative, executive and judiciary powers are all blended in one branch of the government." Mr. Wilson's motion was rejected and the convention agreed to the form of the first sentence. It is evident that the framers of the Constitution understood that the words, "by and with the advice and consent of the Senate to make treaties," made the Senate a joint participant from the beginning.

The provision of Article 6, that all treaties shall be among the supreme laws, and hence requiring them to be publicly known, shows that in the debate the words, "He [the President] shall have power by and with the advice and consent of the Senate to *make* treaties," was understood to require that the Senate be joined as negotiator of treaties. Doubtless it was then contemplated that all treaties would be negotiated by an agent or agents selected by the Senate and President jointly, and no member realized that the President might take into his own hands, "acting in his own proper person," the negotiating of a treaty, especially a treaty which undertook to parcel out the Eastern Hemisphere and the islands of the seven seas.

That the Senate was to be joined in all negotiations for a treaty further appears by the later debates on the subject. The proposed clause, "but no treaty shall be made without the consent of two-thirds of the members present," being under consideration, Mr. King stated that as the executive was here *joined* in the business, there was a check which did not exist in Congress, where the concurrence of two-thirds was required. Mr. Madison moved to insert after the word "treaty" the words, "except treaties of peace," allowing these to be made with less difficulty than other treaties. It was agreed to *nem. con.* Mr. Madison then moved to authorize the Senate, two-thirds assenting, to make treaties of peace without the concurrence of the President. The President, he said, would necessarily derive so much power and importance from a state of war that *he might be tempted to impede a treaty of peace.* Mr. Butler seconded the motion. Gouverneur Morris thought the power of the President in this case harmless; that no peace ought to be made without the *concurrence* of the President. Mr.

Butler was strenuous for the motion as a necessary security against ambitious and corrupt Presidents. Mr. Madison's motion failed of adoption. The clause concerning treaties, amended by the exception as to treaties of peace, was then adopted by a vote of eight states in favor and three against.

On September 8th Mr. King moved to strike out the exception of treaties of peace from the general clause requiring two-thirds of the Senate to make treaties. A re-consideration of the whole clause was agreed to. Gouverneur Morris was against striking out the exception of treaties of peace. He stated that if two-thirds of the Senate should be required for peace, the legislature would be unwilling to make war for that reason, and that besides if a majority of the Senate should be for peace, and be not allowed to make it, they would be apt to effect their purpose in the more disagreeable mode of negativing the supplies for war.

Mr. Williamson remarked that treaties were to be made in the branch of the government where there might be a majority of the states without a majority of the people: that the small number of Senators constituting a quorum of the Senate should not have the power to decide the conditions of peace. Mr. Wilson said, "If two-thirds are necessary to make peace, the minority may perpetuate war against the sense of the majority;" a prediction which has been realized. Mr. Gerry enlarged on the danger of putting the essential rights of the Union in the hands of so small a number as the majority of the Senate, representing perhaps not one-fifth of the people. Mr. Sherman was against leaving the rights established by a treaty of peace to the Senate and moved to annex a proviso that no such rights should be ceded without the sanction of the legislature. On the question of striking out "except treaties of peace," eight states voted in the affirmative and three in the negative. On motion to strike out the clause requiring two-thirds of the Senate for making treaties, Delaware voted aye, and nine states voted no.

Mr. Rutledge and Mr. Gerry moved that no treaty should be made without the consent of two-thirds of all the members of the Senate. Mr. Gorham stated that here was a difference between proceedings under the Continental Congress and under the proposed new Constitution: as the President's consent would also be necessary in the new government. On motion to strike out, three states voted aye, and eight voted no.

On September 12th Dr. Johnson, from the Committee on Style, reported the Constitution in substantially its final form: the first two paragraphs of Article 2, section 2, being as they now read. On September 17th the engrossed Constitution being read, and a speech written by Dr. Franklin delivered, urging consent thereto, the members signed the Constitution.

The language used by the participants in the debates on the frame of the treaty-making article in the Constitution furnishes no foundation

for President Wilson's claim, and the Senate's concession, that the function of negotiating treaties is vested wholly in the Executive. It was never suggested in the Convention that the President might make treaties, provided two-thirds of the Senate should afterwards approve his action. Such may now be the law by custom established, but it is manifest that the framers of the Constitution contemplated and provided that the Senate should participate in the negotiations.

Neither was the present accepted construction of the power conferred on the Executive that which was held by our first President, who was a member of the Convention. President Washington denied the right of the House of Representatives to be joined in the making of treaties, but he repeatedly asked the Senate's advice in negotiating treaties.[5]

It is significant that President Washington asks whether the Senate will advise and consent to his "ratification of a treaty," and in proclaiming treaties states that "by and with the advice and consent of the Senate" he has "in due form ratified" such treaties.

An article by James C. Welling printed in the National Intelligencer of October 30th, 1858,[6] states that on the 22nd of August, 1789, the President of the United States came into the Senate Chamber, attended by General Knox, and laid before the Senate a statement of facts in reference to the negotiation of certain treaties with various Indian tribes. Desiring to fix certain principles on which the negotiations should be conducted, he submitted to the Senate a series of questions, to each of which he requested a categorical answer, to guide him in giving instructions to the Commissioners appointed to treat with the Indians. The questions were seven in number, and were considered throughout two daily sessions in the presence of the President, and, as appears from the Senate Journal, of General Knox.

On March 30th, 1796, in answer to the House resolution requesting a copy of the instructions to the Minister of the United States who negotiated the treaty with the King of Great Britain, and other documents relating to that treaty, President Washington replied at length. He stated, that having been a member of the Convention and knowing the principles on which the Constitution was formed he never had a doubt that the power of *making* treaties was exclusively vested in the President *by and with the advice and consent of the Senate,* provided two-thirds of the Senators present concurred; that the necessity of caution and secrecy was a cogent reason for vesting the power of *making* treaties in the President, *with the advice and consent of the Senate.* Throughout the reply he coupled the Senate with the President as the makers of a treaty.

In 1846 President Polk asked the advice and consent of the Senate in advance upon the ratification of the treaty with Great Britain relative to Oregon, and sent the Senate a message in which he wrote:

[5] See his communications to the Senate dated respectively Feb. 9th, Aug. 4th, 6th, 7th, and 11th, 1790, and May 8th, 1792.

[6] Lieber, *Civil Liberty* (3d ed. 1874) 135, note.

"I lay before the Senate a proposal, in the form of a convention, presented to the Secretary of State on the 6th instant by the envoy extraordinary and minister plenipotentiary of Her Britannic Majesty, for the adjustment of the Oregon Question, together with a protocol of this proceeding. I submit this proposal to the consideration of the Senate, and request their advice as to the action which in their judgment it may be proper to take in reference to it.

"In the early periods of the Government the opinion and advice of the Senate were often sought in advance upon important questions of our foreign policy. General Washington repeatedly consulted the Senate and asked their previous advice upon pending negotiations with foreign powers, and the Senate in every instance responded to his call by giving their advice, to which he always conformed his action. This practice, though rarely resorted to in later times, was, in my judgment, eminently wise, and may on occasions of great importance be revived. The Senate are a branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration, the President secures harmony of action between that body and himself. The Senate are, moreover, a branch of the war-making power, and it may be eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace or war. On the present occasion the magnitude of the subject would induce me under any circumstances to desire the previous advice of the Senate, and that desire is increased by the recent debates and proceedings in Congress, which render it, in my judgment, not only respectful to the Senate, but necessary and proper, if not indispensable to insure harmonious action between that body and the Executive. . . . For these reasons I invite the consideration of the Senate to the proposal of the British Government for the settlement of the Oregon question, and ask their advice on the subject. . . . Should the Senate, by the constitutional majority required for the ratification of treaties, advise the acceptance of this proposition, or advise it with such modifications as they may upon full deliberation deem proper, I shall conform my action to their advice. Should the Senate, however, decline by such constitutional majority to give such advice, or to express an opinion on the subject, I shall consider it my duty to reject the offer."

Both John Jay and Alexander Hamilton prepared and published articles in the Federalist, with respect to the treaty-making power. Jay states,[7]

"The President and Senators will always be of the number of those who best understand our national interests. With such men the power of making treaties may be safely lodged. . . . The Convention have done well in so disposing of the power of making treaties. Although the President must, informing them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest."

Under the Confederation, Congress alone was intrusted with the power of making treaties, and it required the assent of the thirteen states to make a treaty.

[7] That by John Jay is No. 64 of THE FEDERALIST.

Considering the inconvenience of the negotiation of treaties by a legislative body, Mr. Jay pointed out that for want of secrecy and dispatch in this method, the Constitution vested the power to make treaties in the Senate and the Executive, and thus provided that *negotiations* for treaties should have every advantage which could be derived from talents, information, integrity, and deliberate investigation on the one hand, and from secrecy and dispatch on the other; that as all constitutional acts of power, whether in the executive or the judicial department, had as much legal validity as if they proceeded from the legislature, the people might commit the power to make treaties to a distinct body of the legislature. Hamilton observed[8] that the power of making treaties partook more of the legislative than of the executive character, and belonged properly neither to the legislative nor to the executive; that a man raised from the station of a private citizen to the rank of Chief Magistrate, possessed of but a slender fortune, and looking forward to a period not very remote when he might be obliged to return to the station from which he was taken, might sometimes be under temptation to sacrifice duty to interest; that an ambitious man might make his own aggrandisement by the aid of a foreign power, the price of his treachery to his constituents. He adds,

"The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in the nation to commit its interests of so delicate and momentous a kind as concerns its intercourse with the rest of the world, to the sole disposal of a magistrate, created and circumstanced as would be a President of the United States."

He noted that if the *making* of treaties were intrusted to the Senate alone, the nation would lose a considerable advantage in the management of its external concerns, and the people would lose the additional security which would result from the co-operation of the executive, and he adds,

"Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially aid the safety of the society; that the presidential office will always bid fair to be filled by men of such character as to render their *concurrence in the formation of treaties* peculiarly desirable; that under the Constitution, because of the co-operation of the President, the people will have greater security against the improper use of the power of making treaties than they enjoyed under the Confederation."

There can be little doubt that the states, in ratifying the proposed Constitution, voted with the general understanding that the Senate was to participate in the negotiation of treaties with foreign nations, and that all acts of the President in the negotiation of such treaties were to be taken with the knowledge and approbation of that body.

It was Judge Tucker's opinion[9] that under the Constitution the

[8] In No. 75 of THE FEDERALIST, from which Judge Story quotes largely in his *Commentaries on the Constitution.*

[9] 1 Tucker's Blackstone, *Commentaries* (1803) Appendix, 335-339..

Senate is to participate in the conclusion of a treaty as well as its ratification appears from his discussion of how, under the Constitution, the plenitude of authority granted to the President and the Senate as the treaty-making power, if abused to the detriment of the public, should be punished.

This eminent Judge held the view: first, that treaties should be concluded by an ambassador appointed by the President with the advice and consent of the Senate; second, that the instructions given such ambassador should be submitted to and approved by the Senate; third, that such ambassador, and even the President himself, were subject to impeachment for the abuse to the detriment of the public of the authority which was vested in them by the Constitution.

Upon the question of the effect of a treaty, some of the articles of which may contain stipulations on legislative objects, or such as are especially vested in Congress by the Constitution, Judge Tucker asks,

"Is Congress bound to carry such stipulations into effect, whether they approve or disapprove of them? Have they no negative, no discretion upon the subject? The answer seems to be that it is in some respects an inchoate act. It is the law of the land, and binding upon the nation and all its parts, except so far as relates to those stipulations. Its final fate in case of refusal on the part of Congress to carry those stipulations into effect would depend on the will of the other nation."[10]

Mr. Justice Miller in his lectures on the Constitution noticed the question which has arisen by the presentation to the Senate for ratification of the treaty with France which President Wilson negotiated and signed.

The learned Justice pointed out that there existed a doubt as to the power of the President by and with the advice and consent of the Senate to make a treaty with a foreign nation, which according to the Constitution is to be the supreme law of the land, in those matters with respect to which, by other provisions of the Constitution, the concurrence of the House of Representatives is essential to the making of a valid law.

Under the Constitution war can be declared only with the concurrence of both houses of Congress. It is reasonable that both houses of Congress with the approval of the President should make declaration of the termination of war.

A bill making appropriations for the purchase of Alaska was passed by the House only after that body accepted a report from a conference committee containing a resolution stating that the stipulations of the treaty could not be carried into full force and effect by legislation, to which the consent of both houses was necessary.

The proposed treaty with France, signed by the President, requires this country to proceed immediately to the help of France should

[10] Mr. Justice Iredell in the case of *Ware v. Hylton* (1796) 3 Dall. 199, 272, indicates his agreement on this point with Judge Tucker.

Germany make an unprovoked attack on that nation. If the Senate shall ratify this proposed treaty, the difficulty may be overcome by the House passing an act re-enacting *seriatim* the provisions of the treaty. This was the course pursued in 1816 with respect to the Commercial Convention of 1815 with Great Britain. With reference to that convention the Conference Committee of the House of Representatives reported,

"Your Committee understood the Committee of the Senate to admit the principle contended for by the House, that while some treaties might not require, others may require, legislative provision to carry them into effect, that the decision of the question how far such provision was necessary, must be founded upon the peculiar character of the treaty itself."

President Wilson refused to join in the ratification of the treaty of Versailles with such reservations as two-thirds of the Senate desired.

President Adams yielded to the judgment of the Senate under like circumstances, as appears by his message of March 2nd, 1801, wherein, addressing the Senate, he said:

"Gentlemen of the Senate:

"I have considered the advice and consent of the Senate to the ratification of the convention with France under certain conditions.

"Although it would have been more conformable to my own judgment and inclination to have agreed to that instrument unconditionally, yet as in this point I found I had the misfortune to differ in opinion from so high a constitutional authority as the Senate, I judged it more consistent with the honor and interest of the United States to ratify it under the conditions prescribed than not at all. . .

JOHN ADAMS."

That it would have been better if the President had been required by the Senate to negotiate the treaties with Germany and Austro-Hungary through a duly appointed ambassador or ambassadors upon instructions submitted to and approved by that body must be apparent to all. Had the Senate soon after the Armistice exercised its constitutional power of advice, by the adoption of a resolution declaring it to be the sense of that body that the United States declined to join in setting up nations, fixing their boundaries, or assuming any direction or control of the territorial boundaries of the nations of Europe, or their colonial possessions, it is probable that satisfactory treaties could have been submitted and ratified early in the year 1919.

The past is now history. The peace of the world would have been sooner and better assured had the authority vested in the Senate by the Constitution been recognized by the President, or independently exercised.

The history of executive action in the annexation of Texas, and the setting up of the Republic of Panama, as well as the late signing of the treaties with Germany, Austria-Hungary, and France, cause thoughtful men to approve of the announced purpose of President-elect Harding, that before attempting to negotiate a new covenant, he will advise with the Senate.