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THE TREATY MAKING POWER OF THE CONSTITUTION

Hon. Robert M. La Follette

EDITOR'S NOTE. This article is edited from a speech of Senator La Follette delivered recently in the United States Senate. The speech has been considered a legal masterpiece by men of all shades of political opinion. In editing it, all matters of political significance have been eliminated so that the speech as thus edited is addressed directly to the constitutional question and the legal interpretation of the powers expressed in the constitution. W. D. C.

The Constitution provides that the President of the United States shall have "power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur."

This contemplates an interchange of views between the President and the Senate while a treaty is in the process of making, so that differences of opinion, if any, may be discovered and reconciled in the legal, orderly course of procedure, commanded by the Constitution. In such interchange of views neither party would have an advantage over the other. Uuder such procedure the President and the Senate would be equally free to consider a proposed treaty on its merits, and neither could be coerced into surrendering honest convictions as an alternative to abandoning a treaty. This is the rational procedure ordained by the fathers in their wisdom when they framed our Constitution.

The precedents established by the great Presidents Washington, Adams, Jefferson, Jackson, Lincoln, Grant, and others show that they each sought and received the advice of the Senate in all stages of treaty making.

It was a guard against such an event as we have before us now that the framers of the Constitution provided that the President should advise with the Senate in making all treaties. If this be not the plain meaning of the Constitution, then the words "by and with the advice" of the Senate have no meaning at all. After a treaty has been signed and sealed in secret without the advice of the Senate and is then presented for concurrence, there is no longer anything to advise with the Senate about. The Senate has the power to concur only.

But that is only one-half of the constitutional duty of the Senate in making treaties. The provision of the Constitution

that the treaty shall be made with the Senate's advice is just as mandatory as that it shall be concurred in by two-thirds of the Senators present before it can become effective.

Let us look more closely at this construction of the provision of the Constitution.

What has the Senate really to do with making a treaty of peace?

Does the Constitution lodge in this body the express right to participate in the making of a treaty?

Has the Senate any duty to perform other than to "consent," or refuse to consent, to a treaty after it shall have been completed, signed, and submitted to this body by the President?

Article II, section 2, of the Constitution provides:

> He—
>
> 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.

Note well the language of the Constitution.

The words "by and with the advice and consent of the Senate" immediately follow the words "he shall have power."

They limit, modify, and restrict the power of the President in the act of making a treaty the moment he begins to exercise that power.

The framers of the Constitution used words with accuracy and exactness.

The only meaning of the word "by" given in any standard authority which could aptly apply to the text is "through" or "according to." The use of "with," upon all authority, signifies association, conjunction, alliance, assistance, harmony. As Webster states it, "association in respect to accompaniment, conjunction, interaction"; "association by way of alliance"; "association by way of simultaneousness"; "association in respect of sphere of jurisdiction."

And what is the obvious meaning of the word "advice"?

It means "to counsel; to give an opinion recommended as worthy to be followed."

But when should "advice" and "counsel" be sought? When as to the making of a treaty should it be given?

Manifestly it should be given, if at all, when it would be most effective; while the scope and terms and covenants of the treaty are being formulated, while the minds of those directly engaged in making the instrument are most open to receive "advice" and "counsel" worthy to be followed.

It is idle to say that the Constitution means that the President should advise with the Senate after the treaty has been put in final form, and has been duly signed by the accredited delegates to the peace conference.

That is not the meaning of the language of the Constitution. Its plain terms deny any such construction. If that were the meaning of the Constitution, then the words "by and with the advice and consent of the Senate" would have been left out altogether, and the section would have simply provided that the President shall have the power to make treaties, provided two-thirds of the Senators present concur. If that were the language of the Constitution, if there had been eliminated the provision which, with much thought and consideration, as I shall show, was put in by the constitutional convention—"with the advice of the Senate"—if those words had been eliminated and it was simply provided that "the President shall have the power to make treaties with the concurrence of the Senate," even that language would have been sufficient to require conference with the Senate during the making of a treaty, lest the Senate, at the last moment, might withhold its consent from so momentous a treaty in the making of which it had no part.

But the framers of the Constitution wisely did not leave the matter there. It makes the "advice" of the Senate just as much a necessary part of the framing of the treaty as it makes the "consent" of the Senate necessary to its final execution.

But go a step further. What is it the President shall have power to do "by and with the advice and consent of the Senate"? Why, "he shall have the power, by and with the advice and consent of the Senate to make treaties."

"To make," according to all authority, is "to create," "to frame," "to construct."

What better word could have been chosen to express the purpose and intent of the framers of the Constitution?

It puts the "advice," the "counsel," of the Senate into every act of the President, after he shall have opened the negotiations, in making, framing, and constructing the treaty, from the beginning to the end, from its inception until its completion.

Any President violates the strict and literal mandate of the Constitution, as well as its spirit, when he makes, frames, and constructs the treaty without advice and consultation with the Senate.

It is too late for the advice to be effective after the treaty is made and signed and passes out of his hands and into the possession of the Senate.

It is no answer to say that the Senate can then amend the treaty and refuse to concur in it unless the amendments are accepted.

True, they have that power, but the conditions then operate to deprive them of that freedom of judgment which the Constitution intended to confer upon them as an unconstrained aid in perfecting that instrument.

The possibility of this outcome may well have the effect to coerce the Senate into accepting a treaty containing provisions of doubtful meaning, or omissions of great importance to our Government, or into yielding and reluctantly concurring in a treaty some of the covenants of which may even contain the germs of national disaster.

It is an accepted canon of construction that the meaning of any law is to be found in its own language. As an aid to the determination of an ambiguous statute, resort may be had to the discussion of the legislative debates and to legislative journals. The treaty-making power of the Constitution is not involved in any ambiguity. However, it may be of interest in this connection to notice briefly the historic setting of this provision. It will aid to a clear understanding of the intention of the framers of the Constitution to start with the thought in mind that the making of a treaty is the exercise of a sovereign power.

When the Colonies achieved independence, the right of sovereignty, carrying with it the treaty-making power, became inherent in each of the thirteen states. In forming the Continental Congress, the State was made the voting unit, and the treaty-making power was exercised through the State acting in its sovereign right.

Under the Articles of Confederation each State retained its sovereignity and had one vote. Provision was made in the articles that no one State should enter into a treaty with any king, prince, or foreign State without the consent of Congress. The Congress was given the authority to enter into treaties. But so jealous were the States of their sovereign treaty-making power that it was provided in the articles that no treaty could be made excepting by and with the vote of nine States. I emphasize this because it bears upon the Senate's power in making treaties. This conception of the close association with the power of making treaties and sovereignty in each of the States becomes a material consideration in construing and in tracing the historical development of this matter in the Constitutional Convention. Hence when the Constitutional Convention met to form a more perfect Union on the 25th day of May, 1787, the delegates there assembled were imbued with the idea that the treaty-making power was inherent in the sovereignty of the States. It was so agreed that each State should be represented in the United States Senate.

Therefore it logically followed, when it came to dealing with the delegation of the treaty-making power to the new government that they were about to form, that they should lodge that great power exclusively in the United States Senate, and that is what they did. In the first construction of our Constitution you can see how their minds were working. You only need to trace the history of this provision to get the psychology of the men who were making our Constitution.

So we find in the first draft of the Constitution presented to the convention by Mr. Pinckney on the 29th of May, that it contains the provision with respect to treaties which is as follows:—

> Art. 7. The Senate shall have the sole and exclusive power to declare war and to make treaties.

That is the first draft of our Constitution. Thus it will be seen that in the first draft of the Constitution the President was not even mentioned in connection with the power of making treaties.

This draft of the Constitution, presented by Mr. Pinckney, was presented on the 29th of May. The convention assembled on the 14th of May. There was but a meager attendance at that time, and because of the meager attendance of delegates an ad-

journment was taken to the 25th of May; and on the 25th of May the delegates assembled in such numbers that they organized the Constitutional Convention, and Gen. George Washington was elected its president and William Jackson was elected its secretary.

It was organized for business about the 25th of May, and on the 28th or 29th of May Charles C. Pinckney presented to that Constitutional Convention a working draft of a constitution for this Government of ours.

Impressed by the fact that with the power of making treaties goes hand in hand sovereignty, that each of the thirteen Colonies had the power of making treaties because of their independent sovereignty, when they organized into the Confederation that provision was recognized, and the vote by States was carried over into the provisions of the Articles of Confederation and expressed there and perfected. So if each of the States was to be represented in the legislative body here and have equal voting powers, known as the United States Senate in the new government that they were about to form, it was perfectly logical and perfectly natural in the working of the mind of Charles C. Pinckney that in the first draft he submitted he should have incorporated the provision that treaties should be made by the States represented in the United States Senate on an equal voting basis.

On June 18, less than a month after the Constitutional Convention convened, Alexander Hamilton made an address before the convention, and in that address he submitted, in a tentative way, some suggestions—as he says, mere suggestions—for the consideration of the committee that was working upon the building up of the constitutional provisions. Among the suggestions that he made is this one, and it is the first time that in the Constitutional Convention the President appears to have been thought of by anybody in connection with the treaty-making power. That is rather interesting.

Quoting the following:

> The authorities and functions of the Executive to be as follows:

Omitting the enumeration of other functions and coming to the one in question:

> To have, with the advice and approbation of the Senate, the power of making all treaties.

They still adhered to the plan that treaties should be made by the United States Senate, because the United States Senate represented the States on an equal voting basis.

Then a committee on detail—that is, a committee to work out the details of the Constitution—was appointed. It presented its report on August 6. It reported as to treaties the following:

> Article IX. sectional. The Senate of the United States shall have power to make treaties.

The next reference is made on August 15. Mr. Mercer, a delegate who was a factor in that convention, made the suggestion that the treaty-making power ought to be lodged solely with the Executive. There was not any discussion upon his suggestion, as revealed by the notes.

On September 4, Mr. Brierly, of the committee of 11, the committee on detail, reported to the convention several propositions, among which was the one dealing with this question of making treaties. That was on the 4th day of September, 13 days and only 13 days before the Constitutional Convention adjourned. Then for the first time the President was brought into the report of the committee which was preparing the draft of the Constitution for the final action of the convention in substantially the same form in which we have it now.

It was clearly the purpose of the framers of the Constitution to withhold from the President the exclusive authority to make treaties. Indeed, it was at a late hour in the proceedings of the convention that they admitted the Executive to a participation in it. They regarded it as too vast a power, fraught with too serious consequences to be committed to the sole discretion of one man. A badly conceived and unwisely constructed treaty might prove a costly venture. It might involve the country in the gravest difficulties, the most embarrassing entanglements. It might even convert a covenant designed to secure peace into an instrument to force us into war. To safeguard against the dangers incident to the mistakes and errors of a one-man judgment and the menace of an overreaching ambition, the framers of the Constitution vested the treaty-making power in the President and the Senate.

After this somewhat too extended excursion into the historical aspects of this very interesting matter, let us come back to a consideration of this provision of the Constitution.

Chief Justice Marshall, in *Gibbons versus Ogden,* said:

> "As men whose intentions require no concealment generally employ words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they said."

When, therefore, the Constitution commands that the President and the Senate shall advise together in making a treaty, it was clearly intended that each side should be free to receive or to reject the advice of the other. The time for advice is when the treaty is being negotiated and debated at the conference table and still subject to change by the representatives of the Government parties to the agreement.

In *Gerald versus Mobly,* in Thirteenth Otto; page 580, Justice Field said:

> "A constitutional provision should not be so construed as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it is aimed."

Now, what was the mischief at which this constitutional provision was aimed which required the President and the Senate to advise together in making a treaty? It was aimed at the mischief of too great power in making treaties being exercised by one man.

Alexander Hamilton, fresh from active participation in the Constitutional Convention, addressing the people of New York pending their ratification of the Constitution, emphasized the importance of the Senate's "joint and concurrent participation in making treaties." Those are his words. What does that mean?

Speaking of the danger of lodging with one man, the President of the United States, the exclusive authority to make treaties and control foreign relations, he said:

> "However proper and safe it may be, in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years duration.

Again he says:

> "The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous

> a kind, as those which concern 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."

Granting that the Senate still has the power to reject a treaty, it still has the power to amend it; but it was never intended by the makers of the Constitution that the Senate should be under constraint.

Listen to Hamilton further. Fortunately we have the voice and the thinking of these men here, preserved in the printed page occasionally to make its appeal.

> It—
>
> The treaty-making power—
>
> will be found to partake more of the legislative than of the executive character.

And in the same address he said:

> "An ambitious man might make his own aggrandizement by the aid of a foreign power, the price of his treachery to his constituents."

The mischief at which the constitutional provision was aimed, which gave to the Senate co-ordinate power with the Executive in making treaties, was plain and well understood.

But going further, precedent upon this subject has been established by Presidents whose learning, devotion to duty, and loyalty to the institutions of our country can not be questioned.

President Washington's administration, following immediately upon the adoption of the Constitution, and numbering among its members many of those who had been prominent in framing the Constitution, furnishes the most persuasive proof as to what the men of that time understood the Constitution to require of the President in the exercise of his treaty-making power.

The first treaty ever negotiated by our Government was with the southern Indians early in President Washington's first administration. The method of procedure in that case, though involving nothing more than a treaty with an Indian tribe, was such as to carry out the letter and the spirit of the Constitution. President Washington first sent a message to the Senate in which he advised the Senate that he wished to meet with it the following day "to consider the terms of a treaty to be

negotiated with the southern Indians." This message was sent to the Senate August 21, 1789. President Washington accordingly the next day came to the Senate, accompanied by Gen. Knox, a soldier who was prepared to answer questions pertaining to the Indians, though he was not otherwise an officer of the Government, and the President briefly stated the purpose of the meeting. Seven specific questions were submitted to the Senate as to the "proposed negotiations." The President requested a vote by the Senate upon each of the seven propositions. The Senate took the questions under advisement and postponed action until the following Monday, at which time it voted in favor of only a part of the seven propositions stated.

Some two or three weeks before President Washington asked the advice of the Senate concerning the negotiations of the treaty just mentioned, the Senate had already appointed a committee to determine the manner in which communications respecting treaties should be conducted between the President and the Senate. President Washington communicated his views to this committee, stating, in substance, that "in case of treaties oral communications seem to be indispensably necessary, because of the variety of subjects embraced in them which would not only require consideration but might undergo much discussion. (See Crandall on Treaties, 2d ed., p. 67.)

That indicates how the Senate and President Washington viewed this question.

President Washington throughout his two terms of office never failed to ask the advice of the Senate respecting the negotiation of all treaties which were made while he was President.

On August 4, 7, and 11, 1790, and January 18, 1792, and March 23, 1792, the President asked the advice of the Senate as to negotiating various treaties with the Indian tribes.

In a message to the Senate on August 4, 1790, respecting the proposed treaty with the Creek Indians, the President said:

> "In consequence of the general principles agreed to by the Senate in August, 1789, the adjustment of the terms of a treaty is far advanced between the United States and the chiefs of the Creek Indians, now in this city, in behalf of themselves and the whole Creek Nation."

You will note here that a year prior to the date of this communication the President had advised with the Senate and secured

from it an opinion as to the general principles which should be embodied in the treaty. Following out those principles, it seems that a year's negotiations were in progress. It further appears from this communication from the President to the Senate, under date of August 4, that the President was embarrassed in his dealings with the Creek Indians, because British merchants importing their goods, through Spanish ports, had a monopoly of the trade with the Creeks, and brought about disorder and discontent among the Indians. The President, therefore, submitted to the Senate whether a secret treaty might be negotiated with the Indian chiefs to obviate this difficulty.

On August 11, 1790, the President, in a message to the Senate in reference to a proposed treaty with the Cherokee Indians, said:

> "On this point, therefore, I state the following precedents, and request the advice of the Senate thereon.
>
> First. Is it the judgment of the Senate that overtures shall be made to Cherokees to arrange a new boundary so as to embrace the settlements made by the white people since the treaty of Hopewell, in November, 1783?"

President Washington thought that in fixing this boundary, this little boundary, a mere short span upon the map, that the Senate ought to be consulted and advised with before he put it into the fixed terms of a treaty to be submitted for them to concur in.

> "Second. If so, shall compensation to the amount of —— dollars annually or of —— dollars in gross be made to the Cherokees for the land they shall relinquish, holding the occupiers of the land accountable to the United States for its value?
>
> Third. Shall the United States stipulate solemnly to guarantee the new boundary which may be arranged?"

Those were the questions that he submitted to the Senate to be advised upon by the Senate in pursuance of what he thought to be the requirements of the Constitution in treaty making.

On January 18, 1792, President Washington addressed the Senate as follows:

> "I lay before you the communications of a deputation from the Cherokee Nation of Indians now in this city, and I request your advice whether an additional article shall be made to the Cherokee treaty to the following effect, to-wit:

> That the sum to be paid annually by the United States to the Cherokee Nation of Indians in consideration of the relinquishment of lands as stated in the treaty made by them on the 2d day of July, 1791, shall be $1,500 instead of $1,000 mentioned in the said treaty."

You will note here how trivial was the amount involved, how simple the negotiations; and yet, because of the principle involved, and because he wished to obey the Constitution, President Washington did not proceed to negotiate even the simple treaty here proposed and the determination of the amount—between $1,500 and $1,000—without first requesting the advice of the Senate upon the subject.

Again in addressing the Senate of the United States, May 8, 1792, President Washington submitted the following propositions for the advice of the Senate.

> "If the President of the United States should conclude a convention or treaty with the Government of Algiers for the ransom of the 13 Americans in captivity there for a sum of not exceeding $40,000, all expenses included, will the Senate approve the same? Or is there any, and what, greater or lesser sum which they would fix on as the limit beyond which they would not approve the ransom?"

Continuing the quotation:

> "If the President of the United States should conclude a treaty with the Government of Algiers for the establishment of peace with them at any expense not exceeding $25,000 paid at the signature, and a like sum to be paid annually afterwards during the continuance of the treaty, would the Senate approve the same? Or are there any greater or lesser sums which they would fix on as the limits beyond which they would not approve of such treaty?"

Of course, in all the more important treaties President Washington was equally punctilious in seeking the advice of the Senate, or in associating the Senate with the President in framing the treaty through an agent agreed upon between the President and the Senate. Whenever that course seemed to be the most practical one the Senate was represented in the making of the treaty as much as the President, when they jointly agreed upon the selection of an agent or of agents who should make the treaty.

For example, February 9, 1790, he addressed the Senate as follows:

> "You will perceive from the papers herewith delivered and which are enumerated in the annexed list, that a difference subsists between Great Britain and the United States relative to the boundary line between our eastern and their territories. A plan for deciding this difference was laid before the late Congress, and whether that or some other plan of a like kind would not now be eligible is submitted to your consideration.
>
> "In my opinion it is desirable that all questions between this and other nations be speedily and amicably settled, and in this instance I think it advisable to postpone any negotiations on the subject until I shall be informed of the result of your deliberations and receive your advice as to the propositions most proper to be offered on the part of the United States.
>
> "As I am taking measures for learning the intentions of Great Britain respecting the further detention of our posts, etc., I am the more solicitious that the business now submitted to you may be prepared for negotiation as soon as the other important affairs which engage your attention will permit."

President Washington thought it advisable to postpone even opening negotiations until the Senate had deliberated upon the matter and advised him—to quote his own words—"as to the propositions most proper to be offered on the part of the United States"; and because of the great importance and urgency of the question, the President exhorted the Senate that it act as promptly as the other important affairs which engaged its attention would permit, to the end that he might be advised upon the questions submitted to the Senate and the matter—to quote his words—"be prepared for negotiation."

Not only did President Washington, in his solicitude to obey the Constitution, seek the advice of the Senate in advance upon the principles to be embodied in every treaty made during his administration, but when he found it necessary to appoint someone to conduct the negotiations for him he submitted the names of such persons to the Senate, with his reasons for their selection, and sought the approval of the Senate upon the appointment.

Accordingly, he addressed the Senate on January 11, 1792, respecting the proposed treaty with Spain. After setting out the fact that the representatives of the King of Spain had approached our Government with suggestions that a treaty be made respecting the navigation of the Mississippi River, President Washington said:

> "In consequence of the communication from the Court of Spain, as stated in the preceding report, I nominate Willian Carmichael, present chargé d'affaires of the United States at Madrid, and William Short, present chargé d'affaires of the United States at Paris, to be commissioners plenipotentiary for negotiating and concluding with any person or persons who shall be duly authorized by His Catholic Majesty a convention or treaty concerning the navigation of the River Mississippi by the citizens of the United States, saving to the President and Senate their respective rights as to the ratification of the same."

President Washington not only knew and recognized the constitutional right and duty of the Senate to advise with the President in making treaties, but he also realized the full extent and great responsibility and the limitations imposed upon the treaty-making power vested by the Constitution in the Executive, and he never hesitated to execute that power to the full limit of his constitutional right and duty. No man ever called President Washington a weakling or a man who was afraid to assume responsibility or disposed to surrender the rights and prerogatives of the presidentîal office. Accordingly when the House of Representatives, in March, 1796, adopted a resolution requesting the President to send to it a copy of the instructions to the minister to negotiate a treaty with the Government of Great Britain, claiming that the carrying out of the treaty would require legislation of the House, President Washington courteously but firmly declined to comply with the request, on the ground that no such duty was enjoined upon him by the Constitution.

In his message to the House of Representatives, Washington pointed out that the House of Representatives was a large body and that the danger of communications of a confidential nature becoming public was much greater than in the case of the Senate, and that this was one reason which moved the convention which framed the Constitution to vest the treaty-making power in the President and the Senate. On this point he said:

> "The necessity of such caution and secrecy was one

> cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle upon which that body was formed confining it to a small number of Senators. To admit then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent."

President Washington knew the danger of a bad precedent, and so he adhered firmly to the Constitution, every line of which had been written under his eye, and every sentence of which had been most ably debated in his presence, neither seeking, on the one hand, an undue extension of the President's treaty-making power nor, on the other hand, allowing that power to be in the slightest degree limited or impaired.

The practice of all the early Presidents, particularly those who had some part in the framing of the Constitution, was the same as that of President Washington. They sought the advice of the Senate concerning any proposed treaty at some point prior to the time the treaty was submitted for final action. While subsequently this practice was departed from, it is also true that it has been generally followed in exceptional cases when necessary to enable the Senate to advise the President in the constitutional sense.

President Adams' practice was exactly the same as Washington's. Let one instance suffice.

In negotiating a treaty with the French Republic, the President laid before the Senate a general statement of the ground covered, and submitted to the Senate for confirmation the names of the agents he desired to select to conduct the negotiations. Addressing the Senate under date of May 31, 1797, he said:

> "I nominate Gen. Charles Cotesworth Pinckney, of South Carolina; Francis Dana, chief justice of the State of Massachusetts; and Gen. John Marshall, of Virginia, to be jointly and severally envoys extraordinary and ministers plenipotentiary to the French Republic.
>
> "After mature deliberation on the critical situation of our relations with France, which have long engaged my most serious attention, I have determined on these nominations of persons to negotiate with the French Republic to dissipate umbrages, to remove prejudices, to rectify errors, and adjust all differences by a treaty between the two powers.

> "It is, in the present critical and singular circumstances, of great importance to engage the confidence of the great portions of the Union in the characters employed and the measures which may be adopted. I have, therefore, thought it expedient to nominate persons of talents and integrity, long known in the three great divisions of the Union, and at the same time to provide against the cases of death, absence, indisposition, or other impediments to invest any one or more of them with full powers."

President Jefferson, it is well known, maintained, and while Secretary of State advised the President, that the Senate should be consulted before the opening of negotiations respecting a treaty, since it was for that body to finally concur in the treaty. I cite the writings of Jefferson, Ford Edition, fifth volume, page 442.

If the requirements of secret diplomacy which were so much affected by statesmen throughout the world in the nineteenth century sometimes led our Presidents to conduct treaty negotiations with too little regard for the letter and spirit of the Constitution, that was merely the occasion for the really great Presidents to respect the principles of the Constitution, and return to the practice of Washington and his immediate successors.

Accordingly we find that President Jackson, under date of May 6, 1830, sought the advice of the Senate concerning a proposed treaty with the Choctaw Indians, by which they offered to cede to the United States all their country east of the Mississippi River. Among other things, he said:

> "It is certainly desirable, on various and very pressing accounts, as will appear from the accompanying documents, that some agreement should be concluded with the Indians by which an object so important as their removal beyond the territorial limits of the States may be effected.
>
> "In settling the terms of such an agreement, I am disposed to exercise the utmost liberality, and to concur in any which are consistent with the Constitution and not incompatible with the interests of the United States and their duties to the Indians. I can not, however, regard the terms proposed by the Choctaws to be in all respects of this character; but, desirous of concluding an agreement upon such as are, I have drawn up the accompanying amendments, which I propose to offer to the Choctaws if they meet the approbation of the Senate. The conditions which they offer are such as, in my judgment, the most likely to

> be acceptable to both parties, and are liable to the fewest objections. Not being tenacious, though, on the subject, I will most cheerfully adopt any modifications which on a frank interchange of opinions my constitutional advisers may suggest, and which I shall be satisfied are reconcilable with my official duties.
>
> "With these views I ask the opinion of the Senate upon the following questions:
>
> "Will the Senate advise the conclusion of a treaty with the Choctaw Nation according to the terms which they propose? Or will the Senate advise the conclusion of a treaty with that tribe as modified by the alterations suggested by me?
>
> "If not, what further alteration or modification will the Senate propose?"

Lincoln, too, in negotiating treaties, conformed strictly to the Constitution and followed the practice of early Presidents. One of Lincoln's first acts was to ask the advice of the Senate on a proposition submitted by the British Government to refer certain matters in controversy between the two countries to arbitration. In this communication, under date of March 16, 1861, President Lincoln said:

> "The Senate has transmitted to me a copy of the message sent by my predecessor to that body on the 21st day of February last, proposing to take its advice on the subject of a proposition made by the British Government through its minister here, to refer the matter in controversy between that Government and the Government of the United States to the arbitrament of the King of Sweden and Norway, the King of the Netherlands, or the Republic of the Swiss Confederation.
>
> "In the message my predecessor stated that he wished to submit to the Senate the precise questions following, namely:
>
> "Will the Senate approve a treaty referring to either of the foreign powers above named the dispute now existing between the Governments of the United States and Great Britain concerning the boundary line between Vancouver Island and the American Continent? In case the referee shall find himself unable to decide where the line is by the description of it in the treaty of the 15th of June, 1846, shall he be authorized to establish a line according to the treaty as nearly as possible? Which of the three powers named by Great Britain as an arbiter shall be chosen by the United States?

> "I find no reason to disapprove of the course of my predecessor in this important matter; but, on the contrary, I not only shall receive the advice of the Senate therein, cheerfully, but I respectfully ask the Senate for their advice on the three questions before recited."

The predecessor of Mr. Lincoln referred to in his message was, of course, Mr. Buchanan. His views on the subject had been stated while Secretary of State, in 1846, in instructions given to Mr. McLean, Minister to Great Britain. Quoting President Buchanan, he there said:

> "The Federal Constitution has made the Senate to a certain extent a co-ordinate branch of the treaty-making power. Without their advice and consent no treaty can be concluded. This power could not be intrusted to wiser or better hands. Besides, in their legislative character they constitute a portion of the war-making as in their executive capacity they compose a part of the treaty-making power. * * * A rejection of the British ultimatum might probably lead to war, and as a branch of the legislative power it would be incumbent upon them to authorize the necessary preparations to render this war successful. Under these considerations the President, in deference to the Senate and to the true theory of the constitutional responsibilities of the different branches of the Government, will forego his own opinion so far as to submit to that body any proposition which may be made by the British Government not, in his judgment, wholly inconsistent with the rights and honor of the country."

President Buchanan also during his administration followed this practice, and on February 21, 1861, sought the advice of the Senate in advance of negotiations for a treaty to refer to arbitration the northwest boundary dispute.

Resuming for a moment reference to Lincoln's administration and to the practices which he followed, on July 19 President Lincoln submitted to the Senate for its advice, with a view to formal ratification, the draft of a treaty formally agreed upon between the United States and the Delaware Tribe of Indians relative to certain lands of the tribe.

On December 17, 1861, President Lincoln transmitted to the Senate for advice a copy of a draft for a convention with the Republic of Mexico, by Mr. Corwin, then minister to that Government. He urged the immediate consideration by the Senate,

because of the momentous interests of the two Governments at this juncture.

On January 24, 1862, President Lincoln sent a message to the Senate laying before it a dispatch just then received from Minister Corwin. It contained important information concerning the war then being waged against Mexico by Spain, France, and Great Britain. The President asked that the Senate give early consideration to the request which he had previously submitted to the Senate, to the end that he might cause instructions to be sent to Mr. Corwin, such instructions as would enable him to act in a manner which, while it would most carefully guard the interests of our country, would at the same time be most beneficial to Mexico.

In this connection citing a communication from President Lincoln to the Senate:

"Washington, June 23, 1862.

To the Senate of the United States:

On the 7th day of December, 1861, I submitted to the Senate the project of a treaty between the United States and Mexico, which had been proposed to me by Mr. Corwin, our minister of Mexico, and respectfully requested the advice of the Senate thereupon.

On the 25th day of February last a resolution was adopted by the Senate to the effect "that it is not advisable to negotiate a treaty that will require the United States to assume any portion of the principal or interest of the debt of Mexico, or that will require the concurrence of European powers."

This resolution having been duly communicated to me, notice thereof was immediately given by the Secretary of State to Mr. Corwin, and he was informed that he was to consider his instructions upon the subject referred to modified by this resolution and would govern his course accordingly.

That dispatch failed to reach Mr. Corwin, by reason of the disturbed condition of Mexico, until a very recent date, Mr. Corwin being without instructions, or thus practically left without instructions, to negotiate further with Mexico.

In view of the very important events occurring there, he has thought that the interests of the United States would be promoted by the conclusion of two treaties, which should provide for a loan to that Republic. He has, therefore, signed such treaties, and they having been duly ratified by

the Government of Mexico, he has transmitted them to me for my consideration. The action of the Senate is, of course, conclusive against an acceptance of the treaties on my part. I have nevertheless thought it just to our excellent minister in Mexico and respectful to the Government of that Republic to lay the treaties before the Senate, together with the correspondence which has occurred in relation to them. In performing this duty I have only to add that the importance of the subject thus submitted to the Senate can not be overestimated, and I shall cheerfully receive and consider with the highest respect any further advice the Senate may think proper to give upon the subject."

On March 5, 1862, President Lincoln submitted to the Senate a copy of a message addressed to them by President Buchanan relating to the award made by a joint commission under the convention between the United States and Paraguay, together with the original journal of the proceedings of the commission, and requested the advice of the Senate as to the final acquiescence in or rejection of the award of the commission by the Government of the United States. He requested also that the Senate return the journal, as it was a document which should be returned to the custody of the Secretary of State.

President Johnson, following the footsteps of his immediate predecessors, on January 15, 1869, asked the advice of the Senate concerning the proposed naturalization treaty with Great Britain in conformity with the London protocol of October 9, 1868.

President Grant adopted the same course. In the communication to the Senate under date of May 18, 1872, he said:

"I transmit herewith the correspondence which has recently taken place respecting the differences of opinion which have arisen between this Government and that of Great Britain with regard to the powers of the tribunal of arbitration created under the treaty signed at Washington, May 8, 1871.

"I respectfully invite the attention of the Senate to the proposed article submitted by the British Government with the object of removing the differences which seem to threaten the prosecution of the arbitration and request an expression by the Senate of their disposition in regard to advising and consenting to the formal adoption of an article such as is proposed by the British Government.

"The Senate is aware that consultation with that body in advance of entering into agreements with foreign states has many precedents. In the early days of the Republic,

Gen. Washington repeatedly asked their advice upon pending questions with such powers. The most important recent precedent is that of the Oregon boundary treaty in 1846.

"The importance of the results hanging upon the present state of the treaty with Great Britain leads me to follow these former precedents and to desire the counsel of the Senate in advance of agreeing to the proposal of Great Britain."

President Arthur followed the same practice, and on June 9, 1884, submitted to the Senate in advance of any negotiations a proposal from the ruler of the Hawaiian Islands to extend the reciprocity agreement then in force for a period of seven years.

In very recent years the proposed treaties have often been dealt with by the Presidents in annual or general messages instead of special messages, and the whole matter opened in that way for general discussion between the President and the Senate for a complete understanding.

Treaty negotiations have often been begun by the Executive in response either to joint or Senate resolutions advising such negotiations.

Such was the resolution of March 4, 1909, requesting the President to renew negotiations with Russia concerning the treatment of American Citizens in Russia.

So also in some instances Presidents have designated as commissioners to negotiate treaties members of the Senate and of the Foreign Relations Committee, as in the case of the commissioners appointed by President McKinley, September 13, 1898, to negotiate the treaty of peace with Spain. It will be remembered that President McKinley at that time gave to the Senate a majority of the membership of the commission that negotiated the treaty with Spain. The membership of that commission was as follows: William R. Day, late Secretary of State, chairman of the commission; Cushman K. Davis, Senator, and at that time chairman of the Committee on Foreign Relations; William P. Frye, Senator, and also a member of the Committee on Foreign Relations; George Gray, Senator, and a member of the Committee on Foreign Relations at that time; Whitelaw Reid, late minister plenipotentiary of the United States to France. That was the commission that negotiated the treaty with Spain at the conclusion of the war with Spain in 1898.

That was in a marked degree a recognition of the Senate as

a concrete authority and power in the making of treaties. The practice has been uniform, or practically uniform, for the Presidents to transmit to the Senate information concerning any proposed treaty in response to a resolution of the Senate requesting it. Where the treaty has come before the Senate in a completed form for its action without having been previously advised with by the Executive, the Senate has never hesitated—to reject the treaty if it was deemed objectionable. For example, the Senate refused concurrence in proposed treaties with Great Britain in January, 1869; June, 1886; February, 1888; and January, 1897.

It will serve no good purpose to go over the long list of treaties which have been rejected by the Senate which came to it for consideration for the first time in completed form, because it is a fact of history that the Presidents after a time, particularly when our Government had passed beyond the influence of the period of the making of the Constitution, began to reach out for more and more executive power. It is sufficient to say that whenever an Executive has assumed that the situation was such that the advice of the Senate could be obtained by submitting the treaty in completed form for its consideration without previous conference, the Senate has in such cases invariably insisted upon the right to the same freedom of action as it would have possessed had it been consulted at an earlier stage of the negotiations.

It is not to be expected that through a period of almost a century and a half and the administration of twenty-seven different Presidents there would be perfect uniformity on all occasions; but, generally there has been clear recognition of the constitutional mandate to advise with the Senate in making a treaty.

The policy of our greatest Presidents has been to seek the advice of the Senate concerning a proposed treaty in advance of negotiations where that was feasible. In many instances, of course, that has not been feasible and has not been done. In many instances the will of the Senate and the wishes of the parties to the treaty were well known and the interests of the United States were perfectly clear. In such cases few, if any, doubtful questions were involved in the negotiation of the treaty, and the advice of the Senate could be freely given upon the completed draft of the document, which, however, if found faulty

could be amended or rejected without in any way jeopardizing the interests of the country. But the rule to be deduced from all the precedents, and which is expressed so clearly in the Constitution as hardly to require the citation of authorities, is that the President is bound to advise with the Senate at some stage in the process of making a treaty which will leave the Senate free to give its advice solely on the merits of the proposed treaty, and when the President is free to accept and act upon the advice which the Senate gives him.

Conceding that there is no power in the Senate to compel the President to do that; and many of the text writers upon this subject have treated it just from that standpoint alone in discussing the question of the power of the Senate to compel the President to advise with the Senate in the making of a treaty. Of course, the Senate has no other power over the Executive than the power of impeachment upon articles presented by the House of Representatives.

No other interpretation of the Constitution is possible if this language is to be understood in its plain, ordinary sense, and no other interpretation is possible, in view of the construction which, by their official acts, Washington and the other Presidents of the country, particularly those who caught the spirit of the Constitutional Convention from the time in which they lived, have placed upon it. What has been said is the very least that any President can do in advising with the Senate in making treaties and still claim to have obeyed the Constitution, and particularly when treaties relate to changes in the very substructure of this Government.

The Constitution, when it required the President to advise with the Senate, intended in the first place that that advice should represent the deliberate, free thought and judgment of the Senate, and in the second place it was intended that it should be received at a time when the President was free to act upon it.

It would be an insult to the memory of the wise and patriotic men who framed our Constitution to suppose that they ever intended that the great treaty-making power with which they endowed the Senate should be so prostituted as to become merely a means of registering the President's will. Nothing of the sort was intended by the framers of the Constitution, and the language of the Constitution permits no such construction.