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LEGAL LIMITATION OF ARBITRAL TRIBUNALS.

Until the year 1776, the doctrine prevailed universally among the civilized nations that there must be one part of the government of every independent state in which was vested legally unlimited power; the part of the government which exercised this legally unlimited power being regarded as the source of the law of the state. In some states, this legally unlimited power was regarded as vested in the Monarch; in others in Parliament.

In 1776, as the result of ten years' consideration by the American Colonies of the claim of Great Britain that its Parliament had the right to exercise legally unlimited power over them, the United States of America came into existence under a Declaration of Independence, which was at the same time an Agreement of Union, and the preamble of which was a Fundamental Constitution of the United States. By this Fundamental Constitution,—which today exists in full force, underlying the Constitution of 1787,—a new political doctrine was advanced and a new political system was founded. According to this Fundamental Constitution, all governmental power is held to be legally limited—primarily by the principles of supreme universal law, and secondarily by the supreme organic law of each particular society, made theoretically by all the people of the society assembled, and determining the structure of the society and the relations of the parts. The principles of supreme universal law are those which grow out of the nature of man and society. Each political society as a necessity to its own existence is re-

garded as securing to each individual his self-protection and self-preservation—the protection and preservation of the individual being necessary to the protection and preservation of society. These rights of the individual, growing out of his human nature and his relation to his Creator, and out of the nature of human society, are held to be "unalienable" and hence universal. The Declaration does not purport to state all the principles of the supreme universal law. It only declares that "among" these unalienable rights are the rights of "life, liberty and the pursuit of happiness." The rights thus named are clearly rights of self-protection and self-preservation. On the necessity of self-protection and self-preservation in order that society may exist, and on the necessity of there being an organization of every society, made theoretically by all the people assembled, before there can be a government, the preamble of the Declaration of Independence based the American doctrine that all governmental power is by the necessity of the case legally limited. The American doctrine of legally limited governmental power became thus opposed to the European doctrine of legally unlimited governmental power, and there was founded an American system which was opposed to the European system.

The success of the United States in the American Revolution established the American system. In 1787, the Constitution of the United States was adopted, giving to the world a proof that the American system could be worked out in a practical form. By the Constitution, the theory of the Declaration was translated into a political fact.

In 1823, the South American countries had become independent and free to choose whatever system they might prefer. The "Holy Alliance" of the powers of Continental Europe threatened to extend the European system to South America by force. In that year President Monroe, with the informal concurrence of both Houses of Congress and with the approval of the American people, in a Message to Congress, announced as the distinctive policy of the United States, that the European system should not be extended to the Western Hemisphere by European force, on the ground that such an extension would tend to destroy the

American system, which the people of the United States believed to be essential to peace and order. In that Message he said:

"The political system of the Allied Powers is essentially different . . . from that of America. This difference proceeds from that which exists in their respective governments; and to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. . . . It is impossible that the Allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness."

Th Civil War abolished slavery and thus removed the inconsistency between our doctrine and our practice, which had up to that time led to impossible compromises and to an attempt to regard the preamble of the Declaration as a statement of "glittering generalities." By the Fourteenth and Fifteenth Amendments to the Constitution the American system was completed.

The European system of legally unlimited governmental power results logically in what is called the "sovereignty" of independent states. "Sovereign" states live theoretically in a condition of omnipotence and unsociability. When they come into contact with other "sovereign" states, they fight or agree. "Sovereign" states are theoretically not subject to "law"; they are above law and make law for non-sovereign communities which they control by force. Hence on the European system judicial settlement of disputes between nations is theoretically inconceivable, and arbitration tends to be only a political compromise made by high diplomatic officials when the ordinary diplomatic officials are unable to agree.

According to the American system, there is no governmental omnipotence and hence no state omnipotence. States are merely large corporations created by the people of the states assembled for the purpose of collective and individual self-protection and self-preservation, and organized and vested with specific powers

for this purpose. Like other corporations, states are assumed to exist in society. They are hence amenable to law, and disputes between them are to be settled by courts. Hence the Supreme Court of the United States has jurisdiction of cases to which the United States is a party and of controversies between states. The American states willingly submit their differences to settlement by the Supreme Court, because that Court, like every other part of the American Government, acts under the Bill of Rights and the other provisions of the Constitution and is legally limited by all the applicable provisions of the Constitution in each case that arises before it. In the United States proper, the Supreme Court is legally limited by all the provisions of the Constitutional Bill of Rights, in their literal sense; and also by the organic provisions of the Constitution—the provisions which determine the relations of the states to each other and to the United States—in their literal sense. In the political society composed of the United States and the countries and places under its jurisdiction, the Supreme Court is legally limited, as it has recognized by its own decisions, by those provisions of the Constitutional Bill of Rights which are of universal import, and by the organic provisions of an unwritten or customary Constitution, based on the Constitution of the United States and formed by applying the provisions of that Constitution, not in their literal sense, but according to "the general spirit of the Constitution," as reasonable customs, in such manner as may be needful to suit the circumstances of this greater political society and its component parts.

In suits between states, or to which the United States is a party, the Supreme Court, acting under the Constitutional Bill of Rights, holds void and ignores any governmental action occurring in the United States or in any country or place under its jurisdiction, which deprives any person or personality of his or its life, liberty or property without due process of law; and upholds the organic provisions of whichever Constitution may be involved—the written Constitution in the case of the political society known as "the United States of America," and the unwritten one in the case of the greater political society composed

of this nation and the countries and places annexed to it and under its jurisdiction.

The United States, however, three years ago agreed by treaties with a number of foreign nations, to submit to arbitration certain kinds of disputes which it might have with them, and it is now proposed to extend some of these arbitration treaties so that they will cover a much wider field. The question arises whether these treaties, if they are constitutional, are consistent with the American system; or to state it differently, whether these treaties, if they are constitutional, do not commit the United States to the European system.

The arbitration treaty between the United States and Great Britain of 1908, and the other existing arbitration treaties of the same year and of later date, provide, among other things, as follows:

"Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899; provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

"In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure."

Nothing is said in these treaties concerning any legal limitations on the power of the tribunal. The parties are in each case to conclude a special agreement "defining . . . the scope of the powers of the arbitrators." The Convention for the Pacific Settlement of International Disputes, of the 29th of July, 1899, likewise makes no mention of legal limitations upon the powers of the arbitral tribunal. By that Convention it was agreed[1] that "international arbitration has for its object the set-

[1] Article 15.

tlement of differences between states by judges of their own choice, and on the basis of respect for law." The arbitrators[2] are to be persons "of known competency in questions of international law," and the powers who have recourse to arbitration are to sign a special act[3] in which "the extent of the arbitrators' powers" is to be "clearly defined." There is nowhere in the treaties or in the convention any suggestion of limitations upon the arbitral tribunal under a law which is binding upon the tribunal and the disputant nations. The expression "on the basis of respect for law" is indefinite and recommendatory, binding the tribunal to nothing. The powers of the arbitrators are legally unlimited. They may be restricted by the agreement of the parties, but they are not restricted by law.

It may therefore happen that a case between states, or involving a dispute between states, which has been tried by the Supreme Court of the United States acting under all the applicable provisions of the Constitution, and which has been decided by it with reference to these limitations, may be retried in an arbitration proceeding by a tribunal which is without any legal limitation whatever, and decided in an entirely different manner. So the arbitral tribunal may decide a case on the principle of political compromise or on the principle of regulating the balance of power, and without attempting to apply legal principles. Of course, these difficulties might to some extent be met by the special agreement made in each case; but any limitations upon the powers of the arbitrators arising out of the agreement would not resemble, either in form or in effect, those legal limitations which rest upon courts as parts of a system of government based on legally limited powers.

The existing treaties provide that they shall expire in five years from the date of their ratification. This fact, coupled with the fact that they apply only to a small class of cases and reserve to each disputant nation the right to withdraw cases from arbitration, makes these treaties of little consequences as providing an immediate substitute for war. Whenever there is any danger to

[2] Article 23.
[3] Article 31.

one of the contracting nations from a proposed arbitration, the case is withdrawn from arbitration by that party as one affecting its "vital interests, independence or honor."

New treaties have recently been signed with Great Britain and France for the purpose of extending the practice of arbitration to all "justiciable" cases and making withdrawal of "justiciable" cases practically impossible. The question whether these treaties shall be ratified is one of great importance. We have no longer to consider treaties which apply only to a small class of cases, which reserve to each of the disputant nations an almost discretionary right of withdrawing cases from arbitration, and which are to be in force for a short period. If the pending treaties are ratified, and if they are constitutional, arbitration of most of the disputes between the contracting nations will become a permanent institution, and tremendous interests will be involved.

The pending treaties[4] provide, among other things, as follows:

"All differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other tribunal, as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

"The provisions of Articles 37 to 90, inclusive, of the Convention for the Pacific Settlement of International Disputes concluded at the second Peace Conference at The Hague on the 18th October, 1907, so far as applicable, and unless they are inconsistent with or modified by the provisions of the special agreement to be concluded in each case, and excepting Articles 53 and 54 of such convention, shall govern the arbitration proceedings to be taken under this treaty."

[4] Article I.

These treaties, it will be noticed, are the same as the existing treaties, in the fact that they do not recognize any legal limitations as binding on the arbitral tribunal. A special agreement is to be made defining the scope of the powers of the arbitrators, but neither in this provision, nor in the Convention of 18th October, 1907, is there any legal limitation recognized. Article 37 of this Convention is the same as Article 15 of the Convention of 1899, and declares that international arbitration is to proceed "on the basis of respect for law." "Justiciable" cases are to be submitted to arbitration and justiciable cases are defined as those "susceptible of decision by the application of the principles of law or equity"; but there is no requirement that the arbitrators shall decide these justiciable cases according to the principles of law or equity, and no legal limitation of any kind is recognized as binding upon them.

The provision limiting the withdrawal of cases from arbitration on the ground that they are not "justiciable"[5] is as follows:

> "The high contracting parties further agree to institute as occasion arises, and as hereinafter provided, a Joint High Commission of Inquiry, to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them, even if they are not agreed that it falls within the scope of Article I. . . .
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> "It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty."

This last paragraph has been held by the majority of the Senate Committee on Foreign Relations to have the legal effect to obligate (or attempt to obligate) this nation to arbitrate any dispute with Great Britain or France which the Joint High

[5] Articles II and III.

Commission shall hold to be arbitrable (justiciable) either by a unanimous vote or by the vote of a majority which includes all but one member. The majority of the Senate Committee, in their report of August 15, 1911, therefore recommended the omission of this paragraph as attempting to impair the constitutional power of the Senate to ratify treaties, by delegating to a tribunal the right to decide the question of arbitrability of international disputes. After quoting the last paragraph above quoted, it was said:

"It will be seen by examination of the clause just quoted that if the Joint Commission, which may consist of one or more persons, which may be composed wholly of foreigners or wholly of nationals, decides that the question before them is justiciable under Article I, it must then go to arbitration whether the treaty-making power of either country believes it to be justiciable or not. A special agreement, coming to the Senate after the Joint Commission had decided the question involved to be justiciable, could not be amended or rejected by the Senate on the ground that in their opinion the question was not justiciable, and did not come within the scope of Article I. . . .

"In approving Article I of the treaty the Committee assents to the arbitration of all questions coming within the rule there prescribed. The terms in which the rule is stated are, however, quite vague and indefinite, and they are altogether new in international proceedings. It is possible that others may take an entirely different view from that entertained by the Committee or by the negotiators of the treaty as to what was meant by justiciable or as to what was meant by the principles of law or equity when applied to international affairs, and in the absence of any established rules of international law for the construction of such provisions and of any precedents, others might put upon these provisions a construction entirely different from that which the treaty-making power now intends. Under these circumstances to vest in an outside Commission the power to say finally what the treaty means by its very general and indefinite language is to vest in that Commission the power to make for us an entirely different treaty from that which we supposed ourselves to be making."

The effect of the treaties, is, therefore, in the opinion of the majority of the Senate Committee, to attempt to establish a system of joint judiciary for the three nations, and to delegate to the joint judiciary the power to determine the limits of its own jurisdiction.

On November 8, 1911, Secretary of State Knox delivered an address on "The Pending Arbitration Treaties" at Cincinnati, before the American Society for Judicial Settlement of International Disputes, in which he placed a different meaning on the paragraph in question. In that address, the Secretary of State quoted the following provisions from the pending treaties:

(From the Treaty with Great Britain.) "The special agreement in each case shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion."

(From the Treaty with France.) "The special agreement in each case shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, and on the part of France subject to the procedure required by the constitutional laws of France."

The Secretary of State in his address said:

"Although in the pending treaties the Executive branches of the Governments concerned agree to be bound by the decision of the Commission as to the arbitrability of a question upon which the Executive branches do not agree, this decision is subject to the approval of the self-governing Colonies of Great Britain, if the question affects them, and to the approval of the Senate of the United States, and in certain cases the Senate and Chamber of Deputies of France, to whom the right of approval is expressly reserved in each case.

"Every agreement to arbitrate must go to the Senate for its approval. There can be no arbitration without its approval. An agreement to arbitrate goes to the Senate for its approval either because the Executive branches of the two countries concerned in the difference agree that the difference is one for arbitration or because, failing so to agree, the Commission of Inquiry report that it is such a difference.

"How can the Senate's power over the agreement be less if it goes to the Senate after the Commission's report that it presents an arbitrable question than if it had gone there because of the opinion of the Executive branches of both Governments to the same effect?

"If the two Governments agree that the difference is arbitrable, they make an agreement to arbitrate it and it is sent to the Senate for its approval. If the two Governments cannot agree that the difference is arbitrable that ends the matter until the Commission reports, and if its report is that the difference is arbitrable, an agreement is made to arbitrate it and the agreement is sent to the Senate for approval just as if no such question had been raised, and the Senate deals with it with unimpaired powers."

The Secretary of State thus asserts that the true construction of the pending Treaties is, that "the Executive branches of the Governments concerned agree to be bound by the decision of the Commission as to the arbitrability of a question upon which the Executive branches do not agree," and that at the same time, after a decision has been made by the Joint High Commission that a certain question is arbitrable (justiciable), the Senate of the United States, by reason of the reservation of its powers respecting the special agreement in each case, deals with the question of arbitrability "with unimpaired powers." The last paragraph of Article III, as construed by the Secretary of State, should, therefore, in order to conform to his construction, read as follows:

"It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this Treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, the Executive branches of the Governments concerned shall be bound by the decision of the Commission as to the arbitrability of the question, but the Senate of the United States in all cases (and also a self-governing Dominion of the British Empire in cases involving its interests under a treaty signed by Great Britain; and also the Senate and Chamber of Deputies of France in cases where they have the constitutional right of ratification of treaties signed by the President of the French Republic) may, by virtue of their reserved rights regarding special agreements hereunder, deal with the question of arbitrability with unimpaired powers."

The power of the Senate of the United States under the Constitution is to advise with the President concerning treaties

and to accept, amend or reject them. There is no power given by the Constitution to the Senate to veto the conclusions of a political tribunal or to overrule the decisions of a judicial tribunal.

The meaning given to the pending Treaties by the Secretary of State would make it possible for one part of the Government of the United State—the President—to be bound by the decision of a tribunal regarding a foreign matter, while another branch—the Senate—was not bound. Such a situation would seem likely to result in a war which would be at once civil and international.

The action of the Senate of the United States in overruling a decision of the Joint High Commission would not resemble that of a self-governing Dominion of the British Empire in overruling such a decision. The Dominion would in this case act as a third party whose interests were affected and who refused to be bound by the act of Great Britain. Nor would the action of the Senate of the United States resemble that of the Senate and Chamber of Deputies of France in overruling such a decision; for there can be no doubt but that if both these Chambers united in overruling such a decision, the matter would be settled so far as France was concerned, since the two Chambers together would certainly represent the united will and purpose of the people of France. To place the responsibility on one Chamber in such a case is far different from placing it on the two Chambers.

The interpretation placed on the pending treaties by the Secretary of State is, of course, not binding unless acquiesced in by the Senate and by the nations which are parties to the pending treaties. Therefore, as there exists a difference at present between the majority of the Senate Committee and the Secretary of State as to the meaning of the treaties, the opinion of the majority of the Senate Committee will, for the purposes of this article, be assumed to be correct. If the pending treaties have the meaning given to them by the Secretary of State, it would seem that, though they may perhaps be constitutional, it is improbable that they will be supported by the public sentiment of the nation. If they have the meaning attributed to them by the majority of the Senate Committee, the point made in their report that the treaties are unconstitutional as impairing the con-

stitutional right of the Senate to ratify treaties seems unanswerable. There are, however, some other considerations regarding the pending treaties, on this construction of them, with which it is the purpose of this article to deal.

These treaties are, it would seem, objectionable because they attempt to subject a great and indeterminate part of the foreign interests of the United States to a tribunal which exercises powers without legal limitation—that is, to a tribunal which exercises arbitrary power—without reserving to the President, or to the President and Senate, or to the Congress, an unimpaired discretionary power to withdraw cases from arbitration sufficiently broad to enable us to protect our system and our vital interests.

We submit all our domestic questions to legally limited tribunals. Consequently, it seems clear that if we adopt the system attempted to be established by these treaties, we shall to that extent abandon the American system and adopt the European. That which we fought the Revolution to gain, that which we defended by the Monroe Doctrine, that which we waged the Civil War to perfect, we shall voluntarily yield. The European and American systems will have met, and the European system will have prevailed. It is highly improbable that the decisions of a legally unlimited tribunal would lead to peace. We obey the Supreme Court because it is legally limited, and because it acts within these established limits and for certain definite purposes, as a part of the carefully wrought out mechanism of our government. We shall not be likely to obey a tribunal which has no legal limits, which is bound by no law, which is disconnected from the government of any nation, and which exists above the nations which create it, theoretically omnipotent except as the disputant nations make subtractions from its omnipotence by a special agreement in each case. Such a tribunal might ignore the international *status quo,* or it might uphold national action which deprived persons, corporations or communities of life, liberty or property without due process of law, or which impaired the obligation of contracts, or which imposed compulsion in religious matters, or it might force the parties to make a political compromise. If an unsatisfactory decision should be made by

such a tribunal and if the American people should be met by the claim that they had consented by these treaties to the exercise of arbitrary power, they would doubtless answer, as their Revolutionary ancestors did when British philosophers asserted that they had consented to the exercise of legally unlimited power over them by the British Parliament by reason of their having accepted royal charters, that consent to the exercise of legally unlimited power is a nullity, and acquiescence in the exercise of such power impossible.

It may be said that the power exercised by the arbitral tribunal is judicial, and that judicial power is not arbitrary power. That, however, is not American doctrine. We bind our courts by legal limitations, equally with our legislatures and our executives; for we know by experience that arbitrary power may be exercised under the judicial guise and that this is the most insidious of all forms of arbitrary power.

But it may be said that it is impossible to impose on arbitral tribunals legal limitations like those which the people of the United States impose on their courts; and particularly like those which they impose on the Supreme Court of the United States when it sits as a tribunal to settle disputes between States. In view of this supposed impossibility, it may be urged that it is necessary that we trust our lives and properties in disputes with other nations to tribunals with arbitrary power, as a course of action more conducive to peace and order than fighting. The experience of mankind, however, proves that the only decisions that keep the peace are those made by courts, that is, by tribunals which act as a part of the machinery of a political society; which are legally limited by the fundamental principles of supreme universal law duly formulated, and by the organic constitution of the society; and which apply and interpret the law of the society in cases duly brought before them. Decisions of persons or tribunals having arbitrary power lead quite as often to disorder as to order.

It therefore becomes important that we examine the proposition that it is impossible that tribunals for settling disputes between nations should have legally limited powers. This re-

quires an investigation of some of the fundamental ideas which yet prevail in some quarters concerning the relations between independent states.

These relations, as explained by many publicists, are based upon two contradictory principles. Independent states are for some purposes considered as persons not living in society, who fight or agree. When so considered, their relations are "international." They are also for some purposes considered as social units and as component parts of the society of nations. When so considered, their relations are under a "law," which is imposed on them by the society of nations. In political thinking, these two ideas are continually attempted to be blended. Jeremy Bentham in 1780 invented the expression "international law," and this expression has come into quite general though not universal use. We have become so habituated to it that we do not stop to consider that it is meaningless. Law comes from a political society which is above the persons who are subject to the law; it never comes from "between" or "among" the persons who are subject to the law. There may be a law of the society of nations, which binds the nations as members of the society; and there may be a law of a group of nations united so as to form a particular society of nations; but there can be no other kind of "law" which is of any effect upon the nations. The expression "international law" is as unthinkable as a black white.

The Constitution uses the expression "the law of nations" instead of "international law." The former expression occurs in the 10th clause of Article I, Section 8, by which Congress is given power to "define and punish . . . offences against the law of nations."

The vogue which the expression "international law" has had is doubtless due to the confusion of the idea of agreement and the idea of law—the fallacy lying in the assumption that law is essentially nothing but agreement. Recent investigations and study in jurisprudence have shown the true connection between the two ideas. Law, in the sense of jurisprudence, is a body of rules of action or relationship formulated by a political society, which the society enforces upon its members. The society exists

by agreement and its action is determined by the agreement of those who have the majority of power. But the political society always intervenes between the agreement and the law,—the agreement makes the political society, and the political society recognizes or makes the law. The moment we should attempt to speak of interpersonal law, the absurdity of the expression "international law" would become apparent; for our common sense and experience would immediately show us that we do not obey our agreements, and that we do obey the law which the political society of which we are members imposes on us—the political society being established, maintained and operated by our agreements.

If we dismiss the idea of "international law," and take as the basis of our political thinking the proposition that the only law which can bind a nation is that which is imposed upon it by a political society of nations, of which it is a member, the difficulty about there being legal limitations upon tribunals which decide disputes between nations begins to disappear. A logical basis for legal limitations upon such tribunals is established and the difficulty which remains is, to define the legal limitations.

A particular society or union of nations may be organized for legislative purposes, or for executive purposes, or for judicial purposes, or for all of them. If two or more nations should agree to establish a court for the settlement of disputes between them, they would be united in a judicial union. A judicial union would imply the establishment by the political society composed of the uniting nations of a common federal law emanating from the union.

It would be possible, therefore, for the United States, Great Britain and France, and other nations which they might associate with them, to enter into a judicial union for the purpose of having disputes between them settled by a common tribunal appointed by them. Indeed, there may be a question whether or not the legal effect of the pending treaties, if they are ratified and are held constitutional, will not be to establish a judicial union between these three nations, in which case the arbitral tribunal would, according to American doctrine, be legally lim-

ited by the principles of the supreme universal law and by the constitution and laws of the union. As bearing on this question, the provision making the arbitration arrangement permanent, with a reservation of the right of secession, may be important. This provision, as it appears in the proposed treaty with Great Britain,[6] reads:

"This treaty shall supersede the arbitration treaty concluded between the high contracting parties on April 4, 1908. . . . The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible, and the treaty shall take effect on the date of the exchange of its ratifications. It shall thereafter remain in force continuously unless and until terminated by twenty-four months' written notice given by either high contracting party to the other."

If the effect of the pending treaties is to establish a judicial union of three nations of which the United States is to be a member, the question arises whether such a union can constitutionally be formed by treaty. It is an act of great importance and solemnity for the United States to enter into a union with foreign nations for judicial purposes. Moreover, the Constitution[7] provides:

"New States may be admitted by the Congress into this Union; but no State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress."

When any change is to be made in the component parts of the Union which exists under the Constitution, or in the composition of the Union, therefore, Congress must act. Can it be possible that when it is a question of the United States making itself a component part of a Union, of which two great European states are to be the other members, any less authority than the Congress of the United States can decide?

[6] Articles VI and VII.

[7] Article IV, sec. 3.

The Constitution also provides: [8]

"The Congress shall have power . . . to declare war . . . to raise and support armies . . . to provide and maintain a navy . . . to make all laws which shall be necessary for carrying into execution the foregoing powers."

It also provides: [9]

"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."

A treaty is an agreement with a foreign power regarding a particular dispute. The power to delegate to a tribunal the settlement of a dispute presupposes the inability of the President and Senate to make a treaty which shall itself settle the dispute, and a choice by the nation between a settlement of the dispute by war and a settlement by judicial means. It seems as reasonable to hold that the Constitution places the responsibility for making such a choice on the Congress as an incident to the war power, as on the President and Senate as an incident to the treaty-making power. The efficiency of judicial settlement of international disputes depends upon the existence of a public sentiment in favor of such settlement; it can never be made certain that the public sentiment is in favor of judicial settlement either in a particular case involving questions of great public interest or as a general policy, until the House of Representatives, which speaks for the whole people of the United States, and the President and Senate, have declared in favor of this method of settlement. The doubt, if there be one, whether the right to make this choice belongs to the whole Government or to a part of it, should, it would seem, be resolved in favor of the whole Government; for only by the action of the whole Government can it be certain that in cases where treaty is impossible the public sentiment of the nation is in favor of judicial settlement rather than war. It would be consistent not only with the Constitution, but with the

[8] Article I, sec. 8.
[9] Article II, sec. 2.

advanced thought of the civilized world, if treaties providing for general arbitration of international disputes, or for the arbitration of particular disputes which are of public interest, should, after having been formulated and ratified by the President and Senate, be finally ratified and sanctioned by an Act of Congress passed after the existence of a public sentiment in favor of the treaty had been ascertained.

It seems to have been the original understanding on the part of the British Government that any arrangement for general arbitration made by Great Britain with the United States would be in the nature of a judicial union or an exercise of the war-and-peace powers, requiring the sanction of Parliament, acting on a special mandate from the people of Great Britain. On March 13, 1911, Sir Edward Grey, Secretary of State for Foreign Affairs, speaking in the House of Commons on a motion to reduce the Army and Navy estimates, referred to the suggestion made by President Taft that the United States should enter into agreements "with some other nations to abide by the adjudication of International Arbitration Courts in every issue which cannot be settled by this nation, no matter what it involves, whether honor, territory, or money" for the purpose of "demonstrating that it is possible for two nations at least to establish between them the same system which through the process of law have existed between two individuals under government."[10] In that speech, Sir Edward Grey said:

"These are bold and courageous words. We have no proposal before us, and unless public opinion will rise to the level

[10] These quotations and that immediately following are from the official Parlamentary Debates. (The Parliamentary Debates, Official Report, 5th Series, vol. 22, pp. 1989-1991.) The words of President Taft quoted by Sir Edward Grey were delivered before the American Society for Judicial Settlement of International Disputes on December 17, 1910. In the official report of the Proceedings of that Society (p. 353), President Taft's words are thus given:

"If now we can negotiate and put through a positive agreement with some great nation to abide the adjudication of an international arbitral court in every issue which cannot be settled by negotiation, no matter what it involves, whether honor, territory, or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish as between them the same system of due process of law that exists between individuals under a government."

of discussing a proposal of that kind, not with reference to charges of inconsistency, not with reference to what one nation or the other is going to do by some agreement, but unless they rise to the height of discussing as a great movement in the opinion of the world, it cannot be carried out. But supposing it took place, and two of the greatest nations in the world were to make it clear to the world by agreement such as that, that in no circumstances were they going to war again, I venture to say that the effect on the world at large of the example would be one which would be bound to have beneficial consequences. . . . Entering into an agreement of that kind there would be great risks entailed. If you agree to refer everything to arbitration as the President of the United States has said, you must be prepared to take certain risks. You must be prepared for some sacrifices of national pride. An agreement of that kind so sweeping as that, if proposed to us, we should be delighted to have such a proposal, but I should feel it was something so momentous and so far-reaching in its possible consequences that it would require not only the signature of both Governments, but the deliberate and deciding sanction of Parliament. That, I believe, would be obtained. I know that to bring about changes of this kind public opinion has to rise to a high plane, higher than it can rise in ordinary times, and higher than some hon. Members opposite, I imagine, think it can ever rise. In ordinary times that may be true, but the times are not ordinary with this expenditure, and they will become still less ordinary as this expenditure increases. . . . I think it is not impossible, though I admit that in a case of such an enormous change progress may be slow, that the public opinion of the world at large may insist, if it is fortunate enough to find leaders who have the courage—the sort of courage which has been shown in the utterances I have quoted in this House—upon finding relief in this direction. Some armies and navies would remain, no doubt, but they would remain then not in rivalry with each other, but as the police of the world. Some hon. Members say we should not live to see the day. I dare say we should not, . . . but I think we shall live to see some progress made."

Any arrangement with Great Britain which requires "the deliberate and deciding sanction of Parliament" registering an ascertained state of British public opinion, must also require the deliberate and deciding sanction of the Congress of the United States, registering an ascertained state of public opinion in this country.

Under the Constitutional Law of France, also, it seems that it may be reasonably held that a treaty establishing a system of arbitration between France and other nations requires the sanction of the French Parliament. The Constitutional Law of France on the Relations of the Public Powers, enacted July 16, 1875,[11] provides:

"The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the Chambers as soon as the interests and safety of the State permit.

"Treaties of peace and of commerce, treaties which involve the finances of the State, those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two Chambers.

"No cession, exchange or annexation of territory shall take place except by virtue of a law."

A treaty purporting to establish a permanent system of general arbitration with another nation would, it would seem, involve all the subjects mentioned in this law, and would hence require the concurrent action of the President of the French Republic and the two Chambers—that is, in effect, of the French Parliament.

Nor does it seem that there is any less need of deliberate and solemn action by the Legislatures of the contracting parties because the proposed treaties, instead of covering all disputes, cover all "justiciable" disputes, especially when the contracting nations substantially renounce their individual right to place their own construction on the word "justiciable." The principle laid down by Sir Edward Grey seems clearly to apply to the pending treaties, and to require "the deliberate and deciding sanction" of the Legislatures of the nations which enter into the judicial union, acting upon a special mandate from the people of each of the nations, after the meaning and effect of the treaties have been fully ascertained and made clear to them.

It is the practice of civilized nations that the question whether a nation shall form a union with other nations shall be settled either by the Legislature or by a Constitutional Conven-

[11] Article 8.

tion. It seems clear that no part of our Government, except the Congress, can possibly have this power, as the organ of the nation for this purpose, under the Constitution. If Congress has not this power, such a union could be effected only by amendment of the Constitution.

But assuming the constitutional power of Congress to bind the nation in a judicial union with other nations, such a course seems to be contrary to American policy, inexpedient and unnecessary.

President Washington's Farewell Address applies to-day with the same force as in 1796. The danger of losing our national heritage of political principle and our national honor and independence by political union or permanent alliance with foreign nations—especially with those whose fundamental ideas are different from our own,—is the same now as it was then. It is true now, as it was then, that "Europe has a set of primary interests which to us have none or a very remote relation." The European states still live unsocially, and their relations are governed by the principle of military strategy known as "the balance of power." Our Fundamental Constitution—the preamble of the Declaration of Independence—is regarded by European statesmen as meaningless. The state is still assumed by European publicists to be the source of all law and hence not subject to law. The individual has no rights against the Parliament, but only such privileges and immunities as the Parliament may grant to him. We can neither prove or disprove our doctrine; nor can the Europeans prove or disprove theirs. It is a matter of accepting or declining to accept as "self-evident" certain propositions which can neither be proved nor disproved. There must be a conversion of the Europeans to the American doctrine, or a conversion of the Americans to the European doctrine. Between the doctrine of legally limited power and that of legally unlimited power there is no half-way house. A political union for judicial purposes between a nation which regards all governmental power as legally limited and a nation which holds that a part of the government is legally unlimited, is clearly contrary to American policy and has a tendency to imperil and ultimately to overthrow

American institutions. It is still clearly our true policy, as it was in Washington's day, "to steer clear of permanent alliances with any portion of the foreign world," and to regard as our friends and permanent allies all the nations of the world; dealing with them, however, on such terms that we shall not sacrifice or imperil the fundamental doctrine of legally limited governmental power for which this nation stands, and which we believe to be essential to peace and justice.

The formation of a judicial union with particular nations is thus seen to be contrary to American policy. It seems clearly also to be inexpedient. Judicial unions of particular nations are likely to convert themselves into "Holy Alliances." They tend to establish a law for the particular union which is inconsistent with the general juridical sentiment of mankind; to become self-righteous; and to attempt to force their ideas of law and political doctrine upon the rest of the world. If the United States, Great Britain and France were to enter into a judicial union, could we reasonably blame any outsider nation which should declare its own "Monroe Doctrine" in order to protect its legal and political ideas from invasion by the union? We think that the American system deserves to be protected, and we are determined to protect it, not only in our own interests but in the interests of the world at large. But the strength of our position lies in the doctrine which we are protecting and in our wholly defensive attitude. If we form a judicial union with nations which do not hold the political principles which the Monroe Doctrine protects, we may well be charged, by outsider nations, with having abandoned our fundamental principles, our defensive attitude, and the Monroe Doctrine itself. Moreover, we may well be considered as having formed a "Holy Alliance" with these nations to propagate such a faith in legal and political matters as the whole Alliance may decide to be suitable for itself and the rest of the world to hold. Thus a particular union for judicial purposes might lead to jealousy and war, instead of to peace.

A particular union is thus seen to be inexpedient, as well as contrary to American policy. It appears also that it is un-

necessary, since there may be a more simple and practicable road to the arbitration or judicial settlement of disputes between nations by legally limited tribunals,—which, it appears, ought to be the goal of our efforts. There is one union or society of which any nation may be a member, without creating any jealousy or imperilling its fundamental legal and political doctrines. This is the union or society of all the nations and peoples of the world, which has already received the name of "the society of nations." Scholars already recognize the existence of this society and are beginning to regard that which has been called "international law" as the law of the society of nations. To make this society a political fact and a part of practical, every-day politics, nothing is required except that the nations should recognize the existence of this political society and their membership in it. They will then be bound by the customary law of the society, as it is now formulated and as it may hereafter be formulated. For the government of political societies under customary law, courts are the only necessary organs. They ascertain custom, determine its reasonableness, and by their adoption and application of reasonable custom authenticate it as a part of the customary law of the society. Such courts are legally limited by the principles of the supreme universal law, by the existing unwritten constitution and customary law of the society, and by all customary law which, under these limitations, they assist in formulating. The customary law, in the case of the society of nations, is to all intents and purposes a federal law of the society of nations, since it relates only to those matters which are common to all the nations or are beyond the competency of any one. That which we call "international law" is in fact the federal customary law of the society of nations, formulated without a definite legislature and enforced without a definite executive. For the proper development of customary law, courts and tribunals with advisory powers seem likely to be more effective than those whose decisions purport to be enforced by physical or moral compulsion; for customary law must ever rest largely in opinion, and the strength of customary law lies in its power to induce a voluntary obedience. Moreover, nations which hold

to the doctrine of legally unlimited governmental power could reasonably accept advisory arbitration by tribunals recognizing themselves as legally limited, since it would not be inconsistent with their doctrine to take advice concerning the settlement of their disputes with other nations.

For the purpose of bringing about the judicial settlement of disputes between nations by legally limited tribunals, any one nation may act alone in its recognition of the society of nations and its membership therein; or several may act simultaneously. Considering the fact that this nation stands for legal limitations upon all governmental power, it seems that it might properly take the lead, leaving the nations which do not accept this doctrine to take such action as they deem proper. This might require that this nation should offer to submit to advisory arbitration all disputes of every kind with any nation, on the understanding that the arbitrators were to regard themselves as legally limited by the principle of universal law that no person is to be deprived of his life, liberty or property by any political society or government without due process of law, and, subject to this law, by all the customary organic and regulative law of the society of nations, as the same is now formulated under the name of "international law" and as it may be formulated by the authentication of reasonable customs—the existence of customs and their reasonableness being determined by having regard to and respect for all existing accepted customs, the principles of all civilized systems of laws, and the precedents under these systems. Such an offer might be made by a joint resolution of both Houses of Congress and a Presidential announcement contained in a Presidential Message, in substantially the same way as the Monroe Doctrine was promulgated. The present Hague Tribunal and the Convention for the Pacific Settlement of International Disputes could be utilized, and thus the necessity of entering into treaties could be avoided, unless it should be considered necessary under the Constitution that the Senate should supervise the "special agreement" in each case.

Such an offer by the United States might well constitute a basis for the consideration by the next Hague Conference of

the question of legal limitation of arbitral tribunals; for it seems clear that the success or failure of arbitration of the disputes of nations depends on whether or not the arbitral tribunals act under legal limitations. Only by making the society of nations a fact of practical politics, it would seem, can such legal limitations exist. Leadership by the United States in the movement to recognize and establish the society of nations and to institute a general practice of advisory arbitration under the reasonable customary law of that society, would be consistent with the policy of self-regarding altruism which Washington advised when in his Farewell Address he said:

"Harmony, and a liberal intercourse with all nations, are recommended by policy, humanity, and interest."

If, however, this course should seem presumptuous on the part of this nation, or likely to be interpreted as an attempt to force the American system on the rest of the world, two other courses are open—either to adopt the pending treaties with the clause omitted which attempts to delegate the power of decision regarding justiciability to a Joint High Commission, as the majority of the Senate Committee on Foreign relations propose, —adding, out of caution, the reservation proposed by the minority of the Committee, withdrawing from arbitration "any question which depends upon or involves the traditional attitude of the United States concerning American questions, or other purely governmental policy"; or to renew the existing treaties until a date some time after the close of the next Hague Conference. The latter course seems the safer one. The pending treaties, even if amended so as to reserve to the President and Senate power to withdraw cases from arbitration as non-justiciable, leave it uncertain what cases may be withdrawn. Moreover, they may involve this nation indirectly in what will be in fact a judicial union with particular nations. They may also commit us to the European system of legally unlimited governmental power, for they imply that the arbitrators may decide cases on their views of "law or equity" without first applying the fundamental principles securing the rights of the individual and without regard to those great organic national and international

policies and dispositions by which the international world is held together, and which form its unwritten Constitution. The existing treaties, on the other hand, leave it open to this nation to withdraw from arbitration any disputes which involve these fundamental principles, or which, if decided in a particular manner, might endanger these organic policies and dispositions. They thus enable us to protect our system, our national policies and the organic policies and dispositions of the whole world.

It seems probable that the question of limitation of arbitral tribunals will be open for discussion at the next Hague Conference, even if this nation should hold to the existing treaties. There seems to be a general desire among the nations that what is called the "codification of international law" shall be considered by the Conference. This will, it would seem, necessarily involve the question of legal limitation of states, governments, and arbitral tribunals. As a result of these discussions, it will be made clearer to us what ought to be our permanent policy in the matter of judicial settlement of international disputes. The great danger to the cause of judicial settlement appears to lie in the adoption by the leading nations of an insufficiently considered policy which will subject them to legally unlimited power and will result in war rather than in peace, thus bringing judicial settlement into disrepute. The existing treaties have been successful. The only reason urged for changing them is, that they do not go far enough to have an apparent effect in reducing war expenditure, and in preventing the loss of productive energy caused by war and the preparation for war. They are supported by the general public sentiment. Though they have not been ratified by the whole Government of each of the contracting nations, they can, if necessary, be so ratified without delay. The question of their constitutionality, so far as this nation is concerned, is not likely to be raised, and the reservation of broad discretionary power to withdraw cases from arbitration goes far to remove both constitutional objections and objections based on general principles. They afford us a safe ground on which to rest while we are considering what should be the next step. It seems

that it will be wiser, before moving from our present secure position, to take time to consider our next step, waiting until we can have the benefit of the discussion and action of the next Hague Conference, so that when next we move, we may do so with confidence and unanimity, in the conviction that we are moving in the right direction.

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Washington, D. C.