TREATY-MAKING AND THE PRESIDENT'S OBLIGATION TO SEEK THE ADVICE AND CONSENT OF THE SENATE WITH SPECIAL REFERENCE TO THE VIETNAM PEACE NEGOTIATIONS

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ABSTRACT

The relationship between the President and the Senate of the United States with respect to the treaty-making power is examined in the light of the formulation and ratification of the Constitution and subsequent historical events and expert opinion. It is concluded that the President must seek the advice of the Senate both before entering into substantive treaty negotiations and also during their course, and the consent of the Senate when specific agreements are to be pursued. If the Senate should agree that the major treaty provisions to be offered for negotiation cannot be determined before negotiations are to begin, then the President should appoint, by and with the advice and consent of the Senate, a special envoy whose specific task is to form a treaty for later submission. The implications of this conclusion for improving the chances of success of the present Vietnam peace treaty negotiations are discussed.

> 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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . whose Appointments are not herein otherwise provided for, . . .[1]
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> The Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.[2]
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> This Constitution . . . shall be the Supreme Law of the Land . . .[3]

INTRODUCTION

Does the President have the constitutional power to negotiate a peace treaty with North and South Vietnam without the formal advice and consent of the Senate as a body? The Author's contention is that the President does not. Were the President to seek this advice and consent, it would help him greatly in quickly negotiating a workable treaty, which is so desperately needed. Without this advice and consent, the President

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[1] U.S. CONST. article II, § 7.

[2] U.S. CONST. amend. X.

[3] U.S .CONST. article VI.

is representing only himself and his administration, and hence is operating in a political vacuum. In 1788 in the *Federalist Papers*, which were written to promote the adoption of our Constitution, John Jay stated that the "president and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several states or to foreign nations. With such men the power of making treaties may be safely lodged."[4] With the advice and consent of the Senate, the President would represent more accurately the position and interests of the United States at the Paris negotiations. North Vietnam and the NLF would then be aware that the President's negotiating polices represent more than just the interests and attitudes of a particular administration and therefore would be less inclined to expect that a contrary public opinion in the United States could produce a change in policy in time. In forming the "advice" each Senator would be required to review this matter in its entirety and to act on a considered personal opinion. Such an undertaking would help crystallize exactly what is the national interest. Indeed, the Senate could take the initiative and begin to form the advice, starting from known presidential opinions.

The considerations that militate against this view are twofold: (1) a tradition of allowing the President to form treaties on his own authority without the formal advice and consent of the Senate; and (2) the explanation of the treaty-making power given in Senate Document No. 39, *Constitution of the United States—Analysis and Interpretation*, dated 1964, which attempts to justify the current practice. The latter tends to perpetuate the current practice since it purports to define the Constitution's treaty power provision. Since the Senators and the President swore to support the Constitution, none would challenge current practice if it were thought to be constitutional. The editors of Senate Doc. No. 39 are E. S. Corwin and others; they prepared the document for the Library of Congress Legislative Reference Service. Corwin also wrote the influential book, *The President—Office and Powers*. Although Mr. Corwin has made an important contribution to some aspects of constitutional law, his opinion in this connection cannot be taken as the final word.

After reviewing Corwin's opinion and his justification (given in Sen. Doc. No. 39 and in his book), along with other documents and writings and Supreme Court cases, the Author has concluded that the President must not only have the formal advice and consent of the Senate before negotiating matters of substance (the President may, however, initiate talks on his own authority), but that it would be in the best interest of the nation for the President to obtain that advice and consent. The remainder of this article, then, contains a review of the principal circum-

[4] THE FEDERALIST NO. 64 (J. Jay).

stances surrounding the "advice and consent" phrase in the treaty power. The statements and references given by Corwin which are pertinent to the subject are used as a guide and each of these is treated herein.

We begin with an analysis of Senate Doc. No. 39. Here Corwin as justification for the current practice uses only four facts: (1) part of an essay by John Jay in the Federalist Papers; (2) part of a Senate speech by Rufus King in 1818; (3) the experience of President Washington in seeking Senate advice in making treaties; and (4) the opinion of Justice Sutherland in *U.S. v. Curtiss-Wright Corp.*[5] This article will attempt to show that Corwin did not use the first three of these items in context, and that the inferences which can properly be drawn from these sources do not support the position adopted either in Senate Doc. No. 39 or in Corwin's book.

The President-Senate relationships during the formation of the Jay Treaty and the Versailles Treaty are discussed. A separate and detailed analysis of Justice Sutherland's opinion on the treaty-making power in the *Curtiss-Wright* decision is also included. More evidence is also provided regarding (1) the question of whether Senate advice requires Senate action as a body, (2) the origin of the treaty clause phraseology, and (3) the President's role as Commander in Chief in making peace treaties. Finally, the Vietnam peace treaty negotiations are discussed.

E. S. CORWIN AND SENATE DOCUMENT NO. 39

1. *John Jay and the Federalist Papers*

In order to better understand the analysis of Senate Doc. No. 39, the reader is invited to read the entire paragraph entitled "President and Senate" in that document.[6] It would seem that this paragraph lends support to the Author's contention by stating that "The constitutional clause evidently assumes that the President and the Senate will be associated with the entire process of making a treaty."[7] The paragraph, however,

[5] 299 U.S. 304 (1936).

[6] S. DOC. NO. 39, 88th CONG., 2d SESS. (1964), p. 462:

"The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers. The constitution's clause evidently assumes that the President and the Senate will be associated throughout the entire process of making a treaty, although Jay, writing in the Federalist, foresaw that the initiative must often be seized by the President without benefit of Senatorial counsel. Yet so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient."

[7] *Id.*

then states that "John Jay, writing in the Federalist, foresaw that the initiative must often be seized by the President without benefit of Senatorial counsel." This brief report of Jay's essay could be readily misconstrued. One might suppose that Jay did not adopt in his essay the above view about "the entire process of making a treaty," and one might understand the "initiative" remark as attributing more power to the President than Jay in context actually did. The full Jay essay[8] said of treaties that "The President must, in forming them, act by the advice and consent of the Senate"[9] and that the initiative relates to "those preparatory and auxiliary measures which are not otherwise important in a national view . . . and which usually require the most secrecy and the most dispatch."[10] The Jay essay does not add confusion to the treaty clause in the Constitution, as Corwin implies; but rather this essay explains the clause. It must be remembered that the *Federalist Papers* were written by Alexander Hamilton, James Madison, and John Jay in order to explain the Constitution to the people and secure its adoption by the separate States.

2. *Rufus King's 1818 Speech*

Senate Doc. No. 39 points out that the Senate *may* advise the President, without his asking, basing this conclusion on a Senate speech given by Rufus King in 1818. No one would deny this power to the Senate. However, the significance of this speech lies not in whether the Senate may volunteer advice; it lies in the last two paragraphs of that speech (not discussed in Senate Doc. No. 39) where the phrase "make a treaty" is defined and explained. Rufus King stated: "The Constitution does not say that treaties shall be concluded but that they shall be made by and with the advice and consent of the Senate." He asserted that "to make a treaty includes all the proceedings by which it is made."[11] King said that any other interpretation would require that the Constitution be changed to read: "The President shall make treaties, and by and with the advice and consent of the Senate ratify the same."[12] King's speech is consistent with the above mentioned Jay essay: Jay did not say that the President must, in concluding treaties, act by the advice and consent of the Senate, but that he "must, in *forming* them, act by and with . . ." (emphasis added).

Rufus King was a delegate from Massachusetts to the Federal Convention, which drafted the Constitution, and played a prominent role

[8] THE FEDERALIST NO. 64 (J. Jay).

[9] *Id.*

[10] *Id.*

[11] ANNALS OF CONG. 15 CONG. 1st SESS., I, at 106-07. *See also* 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 424 (Yale Univ. Press).

[12] *Id.*

there.[13] He was on the Committee of Style along with Hamilton and Madison and was on the Committee of Eleven which drafted the treaty clause. He actively promoted the new Constitution and was elected as a delegate to the Massachusetts Convention which ratified it. Later as a U.S. Senator, he was a member of the Committees on Finance and Foreign Relations, and served as chairman of the latter.[14] The speech cited is the only explicit definition of the treaty power offered in *The Records of the Federal Convention of 1787* which were collected and edited by M. Farrand (Farrand included the King speech in the appendix as "supplementary material that could be found" to throw "light upon the work of the constitutional convention.").

The background of Rufus King's speech is most helpful in perceiving its full meaning.[15] The Society of Friends of Baltimore in late 1817 brought a petition to the Senate on the subject of abolishing slave trade. Senator Burrill, in support of this petition, proposed a Senate resolution to direct the Committee on Foreign Relations to inquire into the "expediency of taking measures in concert with other nations for the entire abolition of the said trade." In the ensuing Senate debate on the resolution Senator King, in support of the resolution, noted that our "long depending negotiations [on the subject of slave trade] with Spain still exists." He urged that our foreign ministers be reminded that the United States is greatly interested in abolishing slave trade universally and should therefore press for an agreement with the foreign powers.[16] After King's remarks an objection was raised to advising the President in the forming of a treaty with Spain. This objection was based on the supposition that the business of making this treaty belonged exclusively to the Executive. King replies with his explanation of the treaty power. The Burrill resolution was passed without modification, which indicates that the Senate concurred in King's explanation of the treaty power.

The only clue as to why Senate Doc. No. 39 does not discuss the last part of King's speech, which defines the phrase "make a treaty," is provided in a footnote in Corwin's book, *President—Office and Powers*.[17] In this footnote Corwin implies that the King speech is nullified by a Senate Foreign Relations Committee Report issued two years earlier (February 15, 1816).[18] The committee report had to do with a Senate resolution proposed by Rufus King which would advise the President concerning his negotiations with Great Britain on certain matters of com-

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13 M. FARRAND, THE FRAMING OF THE CONSTITUTION (Yale University Press).

14 R. ERNST, RUFUS KING—AMERICAN FEDERALIST (University of North Carolina Press).

15 6 C. R. KING, THE LIFE AND CORRESPONDENCE OF RUFUS KING 90-95.

16 *Id.*

17 E. S. CORWIN, THE PRESIDENT—OFFICE AND POWERS 478 (N.Y.U. Press, 1948).

18 8 S. DOC. NO. 231, 56th CONG. 2d SESS. *Compilation of Reports of Committee on Foreign Relations, 1789-1901*, p. 22-24.

merce. The committee rejected the proposal on the ground that such advice was unnecessary, because the committee felt that the President had already pursued the ideas contained in King's resolution, and further that it was not in the national interest for the Senate to interfere since a division of opinion between the Senate and the Executive would give the other side a decided advantage. However, the report of the committee contains no treatment of the question of constitutional power, except the observation that the Constitution permits only the President to *conduct* foreign negotiations, which is of course true. The report stands for no proposition except that the committee felt it would be unwise to interfere in *those particular negotiations*. To treat this report as a constitutional ruling on the making of treaties is unwarranted. The fact that two years later King won in his contention that the Senate could offer unsolicited advice to the President (*i.e.*, the Burrill resolution), after he argued on constitutional grounds, makes it clear that the earlier committee report could not in any case be taken to represent Senate opinion on the treaty power.

3. *George Washington's First Attempt at Treaty-Making*

Perhaps the main reasons for the current practice are the prevailing views, in the executive branch at least, that (1) seeking advice from the Senate prior to substantive negotiations is impractical and (2) the Constitution is not clear as to how advice and consent are to be rendered. In search of the true meaning of the treaty clause one would certainly want to learn how President Washington carried out this power since he was the first President under the Constitution. In his book on the presidency Corwin tells the reader that Washington tried to use the Senate as a council in forming treaties but that this simply did not work: "The somber truth is that the conception of the Senate as a presidential council in the diplomatic field broke down the first time it was put to the test."[19] In a footnote in Sen. Doc. No. 39 Corwin states that Washington's efforts to obtain advice and consent "proved futile, principally because the Senate balked."[20] In another book *The President's Control of Foreign Relations* (1917), Corwin says: "at the outset, Washington sought to associate the Senate with himself in the negotiation of treaties but this method of proceeding went badly and was presently abandoned."[21]

These statements are simply not true. The incident to which Corwin refers is the formation of the first treaty under the Constitution.[22] Presi-

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[19] E. S. CORWIN, *supra* note 17, at 254-58.

[20] S. Doc. No. 39, 88th Cong., 2d Sess. (1964), P-463.

[21] E. S. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS (1917), p. 85.

[22] Annals of Congress, August 22-26, 1789.

dent Washington (who was also president of the Federal Convention and among those who best understood the Constitution) appeared before the Senate and asked for its "advice and consent to some propositions respecting the treaty *to be held* with the Southern Indians." (emphasis added) The Senate, in deliberating the matter, was concerned about Washington's insistence on being present while the Senate debated. They felt that Washington's personal authority prevented freedom of discussion and refused to give advice and consent on that day and wanted to postpone a decision until the next week. Washington became angry over the delay but then agreed to comply. Three days later the Senate gave its advice and consent to Washington's proposals without difficulty. The fact is that Washington consulted the Senate in advance of the making of every treaty in his administration[23] and obtained the advice and consent of the Senate. After the first experience, which Corwin has misrepresented, he did so through messages and not in person. The only "method of proceeding" that was "abandoned" was *personal* consultation as distinguished from written communication.

The remaining piece of evidence which Corwin used in *The President's Control of Foreign Relations* was taken from John Q. Adams' "Memoirs":

> Mr. Crawford told twice over the story of President Washington's having at an early period of his administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations so that when Washington left the Senate Chamber he said he would be d----d if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate.[24]

Corwin has made this story quite popular and it is generally accepted without question.[25] Because of this and because by itself it seems to run counter to the above findings, this passage must be reviewed in detail. From this minuscule item of evidence Corwin draws the conclusion that after his first attempt Washington did not seek Senate advice before treaty negotiations. (On the contrary, he did as is later shown.) After citing this quotation, Corwin says that Adams was stating a rule of procedure which did not require the President to seek advice of the Senate before "negotiating a particular treaty." But Corwin's conclusion was simply a case of reading something into Adams which is not stated there. The background of the Adams' writing is as follows.[26]

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[23] R. HAYDEN, THE SENATE AND TREATIES—1789-1817 (MacMillan).

[24] E. S. CORWIN, *supra* note 22, at 87-88.

[25] H. F. GRAFF, "Thinking Aloud: Participatory Foreign Policy," The New Leader Magazine, March 2, 1970. *See also*, CONG. REC. S4132, March 20, 1970, and E. F. GOLDMAN, "The President, The People, and The Power to Make War," American Heritage Magazine, April, 1970.

[26] J. Q. ADAMS, MEMOIRS, Vol. 6, 310-430 [hereinafter cited as MEMOIRS].

The Ghent Treaty of 1815 between the United States and Great Britain stipulated "that both parties should use their best endeavors to accomplish the abolition of the African slave trade."[27] Recall that in 1818 the Senate passed a resolution advising the President to press harder for an international agreement to abolish the African slave trade. Two years later, while our negotiations with Great Britain were going on, the United States enacted a law on May 15, 1820, making it unlawful for a U. S. citizen to engage in the African slave trade. On February 28, 1823, the House of Representatives passed a resolution "that the President of the United States be requested to enter upon and prosecute, from time to time, such negotiations with the several maritime powers of Europe and America, as he may deem expedient, for the effected abolition of the African slave trade, and its ultimate denunciation as piracy under the law of nations, by the consent of the civilized world."[28] It can therefore be said that the President pursued the negotiations *by and with the advice of the Senate*, and indeed of both houses of the Congress. The episode in no way supports the "rule" that Corwin inferred from the account by Adams. We should inquire into the context of the Crawford comment to determine the problem toward which it was directed.

On April 30, 1824 as a result of these negotiations President Monroe submitted to the Senate a Slave Trade Convention with Britain that recognized slave trading as an act of piracy. However, some of the Senators from the Southern States were becoming uneasy over the growing sentiment in Great Britain in favor of abolishing slavery altogether and thought that to ratify the Convention would produce the same effect in the United States. For this and other reasons there was new opposition to the treaty in the Senate. When President Monroe learned from Adams of this opposition, which brought about some delay in the ratification of the treaty, he was "astonished." Then, upon learning that the treaty might be defeated, Monroe quickly sent a message (drafted by Adams) to the Senate pleading for ratification. The message was detailed and presented persuasive arguments.[29] On the next day the Senate ratified the convention with amendments. Rufus King, who was instrumental in bringing the Senate to advise the President to make a slave trade treaty in 1818, reported the Senate action personally to Secretary of State Adams. King apologized for the amendments but Adams replied that the amendments, although significant, were not serious: "The essential basis of the Convention was untouched," *i.e.*, the principals "slave trade shall be piracy" and "the mutual right of search and capture" were preserved. But Britain did not ratify the amended treaty. Five months

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[27] SEN. EXEC. JOURNAL Vol. 3, at 381.

[28] *Id.*

[29] *Id.* at 380-85.

later an envoy from Britain proposed to conclude a new convention to provide for right of search on the coast of America, a provision which had been rejected previously by the Senate. The new convention was to be otherwise the same as the draft previously ratified by the Senate. President Monroe held a cabinet meeting on November 10, 1824 to discuss the British proposal. In the meeting it was agreed not to conclude a new convention since the mood in the Senate against it was even stronger than before. It was in this meeting that Crawford made the comment that was used by Corwin.

President Monroe may have wanted to consult *personally* with the Senate to try to persuade them to accept the new convention. After all, Monroe had before rescued the treaty from defeat by consulting the Senate by means of a detailed message. This would explain why Crawford, in the cabinet meeting, told the story of George Washington's experience with personal consultation with the Senate. But Corwin's inference from Crawford's statement that the President need not consult the Senate prior to entering into substantive negotiations is unfounded. Furthermore, Adams had this to say about any further negotiations on the subject of the slave trade:

> I had observed to Mercer that after what had taken place in the Senate upon this Convention, and the subsequent effort, obviously intended to follow it up, to make it unpopular, the power of the President to negotiate further under the resolution of the House would be much checked until there should be some further manifestation of opinion by Congress in its favor.[30]

Finally, on January 20, 1825 Monroe in a message to the Senate indicated that negotiations would be resumed only by "common consent."[31]

CORWIN AND THE JAY TREATY

In his book *President—Office and Powers* Corwin implies that the Jay Treaty (the first foreign treaty under the Constitution) was negotiated without the advice and consent of the Senate. Corwin states:

> From that time forth [meaning: from the time Washington personally appeared in the Senate chamber] in fact, the relations of President and Senate in the realm of diplomacy came rapidly to assume a close approach to their present form. The history of the famous Jay Treaty five years later is a prime illustration. The treaty was negotiated in London under instructions in the framing of which the Senate had no hand.[32]

The implication given is that Washington did not seek the advice and consent to negotiate. On the contrary, he *did.*

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[30] MEMOIRS at 361.

[31] SEN. EXEC. JOURNAL Vol. 3, at 410.

[32] E. S. CORWIN, *supra* note 17 at 254-58.

The events surrounding the Jay Treaty are as follows.[33] During the first years under the Constitution there still remained some differences between Great Britain and the United States. On February 9, 1790, Washington asked the Senate's advice as to the best method of settling a number of these old disputes:

> 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.
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> In my opinion, it is desirable that all questions between this and other nation 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.
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> As I am taking measures for learning the intentions of Great Britain respecting the further detention of our posts, &c. I am the more solicitous 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.[34]

On March 24, 1790 the Senate advised the President and suggested a plan. Washington then sent a representative to England who informally sampled opinions of some British leaders and concluded that the plan was not acceptable. Thereupon, Washington reported back to the Senate on February 14, 1791. As time went by, the disputes grew more serious as England seized some American ships and incited Indians against our settlers. Resolutions were before the House of Representatives "for cutting off commercial intercourse and sequestering British Debts." Knowing that the resolutions before the House were moving the country back into war, a group of Senators, which included Rufus King, held a conference and quickly developed the Jay envoyship plan and gave it to Washington.[35] That plan was to have the United States send to England a person who would have the highest confidence of the British leaders to find out their concerns and the reasons for their hostile acts and to negotiate a settlement. Our ambassador in Great Britain at the time would not do. Our negotiator had to be of high standing and enjoy the highest confidence of the American people. He would make the voyage across the Atlantic to impress the British of our sincere desire to make a friendly settlement of differences. The person chosen by Washington, with the help of the small group of Senators, was John Jay, the Chief Justice of the Supreme Court. Then, in accordance with the requirement

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[33] R. HAYDEN, *supra* note 23. *See also* SEN. EXEC. JOURNAL Vol. 1.

[34] SEN. EXEC. JOURNAL Vol. 1, at 37.

[35] 1 C. R. KING, THE LIFE AND CORRESPONDENCE OF RUFUS KING 517.

of the Constitution, Washington sought the Senate's advice and consent to appoint Jay as "Envoy Extraordinary of the United States, to his Britannic Majesty" for the purpose of negotiating a treaty whose propositions, because of the nature of things, could not be known beforehand. The message from George Washington to the Senate was as follows:

> Gentlemen of the Senate: The communications which I have made to you during your present session, from the dispatches of our Minister in London, contain a serious aspect of our affairs with Great Britain. But as peace ought to be pursued with unremitted zeal, before the last resource, which has so often been the scourge of nations, and cannot fail to check the advanced prosperity of the United States, is contemplated; I have thought proper to nominate, and do hereby nominate, John Jay, as Envoy Extraordinary of the United States, to his Britannic Majesty.
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> My confidence in our Minister Plenipotentiary at London, continues undiminished. But a mission like this, while it corresponds with the solemnity of the occasion, will announce to the world the solicitude for a friendly adjustment of our complaints, and a reluctance to hostility. Going immediately from the United States, such an Envoy will carry with him a full knowledge of the existing temper and sensibilities of our country, and will thus be taught to vindicate our rights with firmness, and to cultivate peace with sincerity.[36]

The Senate approved the nomination three days later, after some debate, with the full knowledge and understanding that for these particular negotiations, the treaty propositions could not be known *a priori.* Thus the Senate in consenting to the mission shared the confidence Washington had in John Jay that whatever Jay would agree to would be in the interest of the United States.[37] (In contrast, the Senate had not been asked its advice and consent in appointing the envoys to Paris to negotiate a treaty with North Vietnam.) It is the Author's contention that President Washington had fully met the requirements of the Constitution in this instance since the Senate's advice and consent was sought and obtained before negotiations. The Senate simply chose not to require that Jay be given instructions and was willing to wait until Jay brought back a treaty which would serve as a basis for consultation with the Senate. Eleven months later Jay returned with a settlement. It was laid before the Senate for its advice and consent. The Senate in turn approved it, subject to an amendment. The amendment was easily negotiated with Britain and the treaty went into effect. A war had thus been avoided. And so it was that the Senate did perform a large role in making the treaty, not only by advising and consenting to the Jay appointment *but by participating in the earlier events of 1790-91 mentioned above.* The earlier attempts at settling the disputes, which were based on

[36] SEN. EXEC. JOURNAL Vol. 1, at 150; incidentally, the phrasing of Washington's message had its origin in the minutes of the above mentioned conference of Senators. *See id.*

[37] R. HAYDEN, *supra* note 23.

Senate advice, made both the President and the Senate that much wiser when the disputes erupted. For they then knew that a much stronger diplomatic move was necessary to avert the fast-approaching war.

The conclusion drawn from the history of the Jay Treaty by Corwin, and probably by others as well, is that since the Senate consented to let the executive branch alone frame a treaty during foreign negotiation, *any* President in the future could enter into negotiations and continue on through to a finished treaty without the Senate's consent to do so for each occasion.[38] Corwin states, "In a word, the Senate's character as an executive council was from the beginning put, and largely by its own election, on the way to absorption into its more usual character as a legislative chamber." This conclusion again shows up in Sen. Doc. No. 39 under the paragraph entitled "Negotiations, A Presidential Monopoly."[39] But this conclusion is without foundation. No evidence exists that in consenting to the Jay nomination the Senate intended to authorize all future Presidents to enter into substantive negotiations without the advice and consent of the Senate. Moreover, the Senate does not have the authority to transfer this power to the President and the President does not have the authority to assume it. Therefore, if anyone were to claim that a precedent was established by the Jay Treaty events, that precedent, which is in accordance with the Constitution, would be as follows: If the terms on which a settlement is possible cannot be estimated beforehand, then the President should nominate a person for the specific task of meeting with the other side and framing a basis for a settlement. But before the envoy can be appointed, the Senate's advice and consent is needed. The treaty provisions arranged by the envoy would then be used by the President as a basis on which to approach the Senate for its advice and consent on concluding the treaty.

Fleming sums it up as follows. After his first treaty,

> Washington confined his communication with the Senate on the subject of treaties to written messages, though he still adhered to the practice of asking the advice of the Senate before negotiations were opened and during their course. Negotiations with England over the northeastern boundary were suspended until the President could consult the Senate, and the Senate agreed in advance to approve the proposed terms of a treaty with Algiers. Even this method of consulting the Senate during negotiations lapsed with Washington, however, and seems not to have been resumed until 1838, when President Van Buren asked the Senate to disapprove a proposed commercial treaty with Ecuador before negotia-

[38] E. S. CORWIN, *supra* note 17 at 254-58.

[39] S. DOC. NO. 39, 88th CONG., 2d SESS. (1964), p. 463:

> "Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character. 'He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it,' declared Justice Sutherland for the Court in 1936."

> tions rather than after. Polk, in 1846, asked the Senate's approval of suggested terms of peace with Mexico, and similar requests were forwarded by Buchanan and Lincoln in 1861, Johnson in 1868, Grant in 1872, and 1874, and Arthur in 1884. An indirect method of securing advance approval of the Senate was to nominate an envoy to negotiate a treaty and attach an outline of proposed terms. Confirmation of the appointment then automatically approved the treaty project. This device was used by Washington and Adams repeatedly and by Jefferson at least once.[40]

THE VERSAILLES TREATY

It simply makes common sense that if the Senate has to consent to treaties, then the President ought to consult with them in forming treaties to avoid embarassments or a breakdown in foreign relations or in the relationship between the executive and the legislature. The latter could seriously weaken the nation. The Versailles Treaty of 1919 is a case in point.[41] President Wilson went to Europe at the end of World War I to negotiate the peace treaty with Germany and the Allies. He had entered into substantive negotiations and personally carried them through to the end without ever seeking the advice and consent of the Senate to do so. He was severely criticized for not abiding by the Constitution's treaty power provision. For example, Senator Lodge, the chairman of the Foreign Relations Committee, requested the President to submit a draft of the current treaty outline while the negotiations were still in progress and said:

> I am only asking something that has been done by almost all our Presidents who have consulted the Senate about entering into negotiations, about the character of negotiations, about awards, about pending negotiations . . . The Senate was consulted prior to negotiations by George Washington; it was consulted prior to negotiations by Abraham Lincoln. And in the path George Washington and Abraham Lincoln walked there is no man too great to tread.[42]

Senator Spencer said, "The President alone pursued his course, without any conference with the country he represented and with special disregard of the Senate, which, by the Constitution of the United States is made his legal adviser, particularly in connection with treaties."[43] But Wilson had his strong belief in the League of Nations plan which he had built into the treaty and felt that the Senate had little choice but to approve it. In his book *Constitutional Government in the United States* he had written:

> The initiative in foreign affairs, which the President possesses with-

[40] D. F. FLEMING, THE TREATY VETO OF THE AMERICAN SENATE 21-22 (Putnam).

[41] W. S. HOLT, TREATIES DEFEATED BY THE SENATE 249-307 (Johns Hopkins Press).

[42] *Id.*

[43] *Id.*

> out any restriction whatever is virtually the power to control them absolutely. . . . He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.[44]

Indeed, when Wilson returned he toured the country to whip up support against the growing Senate opposition. But in the end his disregard for the Senate's advice and consent role during negotiations led to the Senate's rejection of the treaty.[45] It is highly probable that this event, which drove a wedge between the Senate and the Executive, was a prime factor in the more serious erosions of the treaty power that followed that period of time, such as the broader use of executive agreements, which the Senate is now attempting to correct.[46]

SUTHERLAND AND THE U. S. V. CURTISS-WRIGHT CASE

This section discusses the circumstances and considerations involved in the Supreme Court decision in *U. S. v. Curtiss-Wright*[47] in which the Court adopted Wilson's view of the treaty power. It can be shown herein that Justice Sutherland's statement regarding the treaty power was dictum and, furthermore, was without foundation.

Curtiss-Wright dealt with the legality of an embargo which was imposed by President Franklin D. Roosevelt pursuant to a joint resolution of Congress in 1934, on arms shipments to the belligerents in the Chaco War between Bolivia and Paraguay. The President was authorized to proclaim the embargo if he determined that it would contribute to restoring peace. In delivering the majority opinion, Justice Sutherland chose to discuss the treaty-making power even though this clause of the Constitution was not at issue. He contended that:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.[48]

In support of this contention, Justice Sutherland quotes John Mar-

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[44] W. S. HOLT, *supra* note 41.

[45] Anyone who thinks that the Senate acted irresponsibly should study the Senate Foreign Relations Committee majority Report against the treaty. CONG. RECORD, Sept. 10, 1919.

[46] *See* National Commitments Resolution, CONG. RECORD, S. 7122-54 (June 25, 1969). *See also* S. REP. NO. 91-129, *supra* note 18.

[47] 299 U.S. 304 (1936).

[48] *Id.* at 319.

shall: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[49] It is true that only the President can represent our nation in conducting foreign negotiations. Hamilton in the *Federalist Papers* (No. 75), made it clear that it is most efficient to have the President conduct foreign negotiations and that the "Senate could not be expected to enjoy the same confidence and respect of foreign powers in the same degree . . . with that of the President." In No. 72 Hamilton stated that the "actual conduct of foreign negotiations" is "most understood by the administration."[50] Sutherland infers from John Marshall that the President can enter into substantive negotiations and even complete them through the agreement stage without the Senate's advice and consent. However, this is unfounded. Marshall made the statement in connection with an extradition treaty with England, *already in force.* An Englishman who committed a crime against English law on the high seas sought sanctuary in the U.S. Upon Britain's request President Adams was seeking to return the criminal to England. A resolution which alleged that the President was usurping judicial powers in returning the criminal was proposed in the House. Representative Marshall argued that the President was only executing the law of the land, that is, the extradition treaty. Marshall was not discussing the relation of the President to the Senate but his relation to the courts.[51]

The only other evidence offered by Sutherland was an 1816 Senate Foreign Relations Committee report [hereinafter called the 1816 Committee Report]. As we have seen, Corwin attempted to use this report to nullify Rufus King's explanation of the treaty power. It was shown above that the opinion expressed in the committee report, which did not purport to rest on constitutional grounds, was in effect repudiated by the Senate two years later when it adopted Rufus King's argument on the Constitution's treaty clause. However, since the 1816 Committee Report is the only reference cited by Sutherland which discusses the role of the Senate in relation to treaty negotiations, it is important to review in more detail the facts surrounding this report. The Senate Executive Journals for 1805 through 1828 (Vol. 2 and 3) are the sources for the facts used in the following discussion.

On May 31, 1813, President Madison asked for advice and consent to appoint John Q. Adams, and others, as ministers to negotiate a treaty of peace to end the war of 1812 and a treaty of commerce with Great Britain. The Senate approved most of the nominations but held up that of Albert Gallatin until Madison removed him as Secretary of the Treasury. (On

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[49] U.S. v. Curtiss-Wright, 299 U.S. 304 at 319 (1936).

[50] THE FEDERALIST No. 72 (A. Hamilton).

[51] ANNALS OF CONG. 6th CONG. 613.

January 14, 1814 Madison nominated Henry Clay and others to join the negotiating team and the Senate approved them also.) Thus, the Senate had the opportunity to offer advice but simply chose not to do so, presumably because they had confidence in the appointed negotiators and were not sure what advice to give. The Senate may also have felt that debating the matter would have delayed the end of the war. For example, on June 2, 1813 Rufus King moved to request from the President papers relating to the arrangement of the peace conference, and the Senate rejected the motion. On February 15, 1815 Madison submitted the treaty of peace for advice and consent. The treaty, known as the Treaty of Ghent, was quickly approved. The treaty of commerce, which was to come later, was still being negotiated.

On December 6, 1815 Madison submitted to the Senate "for their consideration, and advice as to ratification," the treaty of commerce with Britain. The treaty was ratified by the Senate, Rufus King voting yea. But immediately after the vote King proposed that the Senate "recommend to, and advise, the President to pursue further and friendly negotiations" with Britain for the purpose of securing additional trade agreements. The King proposals were referred to the Committee on Foreign Relations which submitted its report on February 16, 1816. This report, which was the one cited by Justice Sutherland, took the view that the proposals of King had been pursued in the negotiations and that the need for any further negotiation ought to be left up to the President. The matter was debated off and on for several weeks and then was dropped on a motion by King, on April 26, 1816, to postpone consideration indefinitely. The section of the 1816 Committee Report which was quoted by Sutherland follows:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.[52]

The remainder of the 1816 Committee Report, not quoted by Sutherland, reads as follows:

> A division of opinion between the members of the Senate in debate on propositions to advise the Executive, or between the Senate and Ex-

[52] S. Doc. No. 231, *supra* note 18.

> exutive, could not fail to give the nation with whom we might be disposed to treat the most decided advantage. It may also be added that if any benefits be derived from the division of the legislature into two bodies, the more separate and distinct in practice the negotiating and treaty ratifying power are kept, the more safe the national interest.[53]

Thus, Sutherland's claim rests on this 1816 Committee Report. But, a review of the facts will prove that this report will not bear the weight he puts on it.

It is apparent from the above that the Senate, with the exception of Rufus King, was content in rendering advice after the negotiations were completed, although the Senators advised and consented to the envoyships. After all, the above mentioned peace treaty and commerce treaty were successfully made in this manner and the successful Jay Treaty was also made in this manner. This method is constitutional provided that both the Senate and the President agree to employ it for each separate occasion. But the 1816 Committee Report attempts to establish this procedure as a matter of routine, which in effect is delegating to the President the Senate's share of that portion of the treaty-making power involving negotiation, although still retaining for the Senate the power to approve the appointment of those who negotiate. But the Senate does not have the constitutional power to delegate its powers, nor can the President assume delegated powers. It should also be noted that the Senate did not formally endorse the 1816 Committee Report. But more important, two years later during the debate on the Burrill resolution in 1818, Rufus King convinced the Senate that it cannot under the Constitution delegate any portion of the treaty-making power. (Recall that King was a prominent member of the Constitution Convention. Senator Bibb, who submitted the 1816 Committee Report, was not a delegate to that convention.)[54] The 1818 King speech, which was discussed earlier in connection with Senate Doc. No. 39, is presented here in its complete text:

> Without adverting to the several branches of the executive power, for the purpose of distinguishing the cases in which it is exclusively vested in the President, from those in which it is vested in him jointly with the Senate, it will suffice on this occasion to observe that, in respect to foreign affairs, the President has no exclusive binding power, except that of receiving Ambassadors and other foreign Ministers, which, as it involves the decision of the competence of the power which sends them, may be an act of this character; to the validity of all other definitive proceedings in the management of foreign affairs, the Constitutional advice and consent of the Senate are indispensable.
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> In these concerns the Senate are the Constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the

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[53] *Id.*

[54] M. FARRAND, *supra* note 13.

> foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient.
>
> There is a peculiar jealousy manifested in the Constitution concerning the power which shall manage the foreign affairs, and make treaties with foreign nations. Hence, the provision which requires the consent of two-thirds of the Senators to confirm any compact with a foreign nation that shall bind the United States; thus putting it in the power of a minority of the Senators, or States to control the President and a majority of the Senate: a check on the Executive power to be found in no other case.
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> To make a treaty includes all the proceedings by which it is made and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so, touching the measures employed in making the same. The Constitution does not say that treaties shall be concluded, but that they shall be made, by and with the advice and consent of the Senate: none therefore can be made without such advice and consent; and the objections against the agency of the Senate in making treaties, or in advising the President to make the same, cannot be sustained, but by giving to the Constitution an interpretation different from its obvious and most salutary meaning.
>
> To support the objection, this gloss must be given to the Constitution, 'that the President shall make treaties, and by and with the advice and consent of the Senate ratify the same.' That this is, or could have been intended to be the interpretation of the Constitution, one observation will disprove. If the President alone has power to make a treaty, and the same be made pursuant to the powers and instructions given to his Minister, its ratification follows as a matter of course, and to refuse the same would be a violation of good faith; to call in the Senate to deliberate, to advise, and to consent to an act which it would be binding on them to approve and ratify, will it is presumed, be deemed too trivial to satisfy the extraordinary provision of the Constitution, that has been cited.[55]

After hearing King's speech the Senate voted to interfere in the direction of foreign negotiations—that is, it passed the Burrill resolution—and thereby rejected the opinion of the 1816 Committee Report relative to the treaty-making power. As for the commerce treaty with Britain that precipitated the 1816 Committee Report, the Senate voted to involve itself in the course of further negotiations on commerce with Britain on January 26, 1819 and again on January 3, 1820. These facts, and a correct understanding of John Marshall's "sole organ" speech, leave the opinion of Sutherland regarding treaty negotiations completely without foundation. Furthermore, Sutherland simply ignores the records of the Constitution Convention, the *Federalist Papers*, the record of the first years in the Senate Executive Journal, which records the executive

[55] ANNALS OF CONG. 15th CONG., 1st SESS. 106-07.

proceedings apart from the legislative proceedings, and particularly the Rufus King speech and its associated Senate endorsement.

In the face of all this evidence the question is raised: What caused Sutherland to offer his dictum on the treaty-making power? An article by Forrest R. Black in 1931, *The United States Senate and the Treaty Power*,[56] is most revealing in this respect. Black reported that at that time there were "two widely divergent schools of thought as to the respective [constitutional] roles of the President and of the Senate" in making treaties:

> The Washingtonian [interpretation] views the role of the Senate as an integral part of the treaty making function, which may be exercised at any stage of a negotiation; the other [interpretation], the Wilsonian, considers the function of the Senate merely to give sanction to a treaty that is already drafted . . . [and] would make the word 'advice' mere surplusage.[57]

The Wilsonian view found its literary expression in Corwin's book, *The President's Control of Foreign Relations*, 1917, which was written to answer "the numerous interesting questions which have arisen since Mr. Wilson went to Washington as to the powers of the President in the diplomatic field."[58] Black presented a very informative and thorough analysis of this issue and concluded that the "Washingtonian" interpretation was correct but he indicated that the "Wilsonian" view was more likely to prevail. In summing up the case for the Wilsonian advocates, Black states: "The gist of their case seems to be that *the nature of transactions with foreign nations requires caution and unity of design, and their success frequently depends on secrecy and dispatch . . . that a division of opinion between the Senate and the President could not fail to give the nation with whom we might be disposed to treat, the most decided advantage.*"[59] Now observe that the case for the Wilsonian advocates as reported by Black (italicized) was taken verbatim from the previously mentioned 1816 Foreign Relations Committee report and reappeared in the *Curtiss-Wright* opinion five years after Black's article when Sutherland adopted the Wilsonian interpretation.[60]

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[56] F. R. BLACK, THE UNITED STATES SENATE AND TREATY POWER, 4 ROCKY MT. L. REV. 1-19 (1931). Black's article discusses many other considerations and important historical events affecting the treaty power and refers to other articles on the subject. His article should be studied by all those pursuing this matter.

[57] *Id.*

[58] E. S. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS, preface.

[59] F. R. BLACK, *supra* note 56 at 12 and 14.

[60] The Curtiss-Wright case had to do with the President executing a law of Congress and not the negotiating of any treaty. So why did the Court settle one of the questions Corwin tried to answer? The Constitution does not grant the Judiciary the power to settle questions, *only cases*. It is ironic that in the very speech by John Marshall cited by Sutherland in the Curtiss-Wright decision, Marshall said this about the Court settling questions:

"By the Constitution, the Judicial Power of the United States is extended to all cases in

It is thus apparent that there was in the period of 1917-1936 an aggrandizement of the Executive in foreign affairs and that Sutherland in *Curtiss-Wright* played a part.

However, if Sutherland wanted to contend that the President has the power to negotiate without Senate advice, a power not explicitly delegated by the Constitution, then the burden was on him to come up with facts to justify that position. But the two minute fragments of historical data relied on by Sutherland do not support him. The meager basis for his treaty power opinion, however, can be explained. For there was a larger issue that concerned Sutherland and this was his theory of implied foreign affairs powers which was central to the trend toward more executive powers in foreign affairs. This theory occupies most of Sutherland's attention in his *Curtiss-Wright* opinion with the treaty power mentioned only briefly. (Moreover, if the negotiation of treaties was Sutherland's main concern, he surely would not have omitted the last paragraph of the 1816 Committee Report which said: ". . . the more separate and distinct in practice the negotiating and treaty ratifying power are kept, the more safe the national interest.") His theory is based on the assumption that the federal government's "powers of external sovereignty did not depend upon affirmative grants of the Constitution."[61] This theory is presented in more detail in his book, *Constitutional Power and World Affairs*.[62] A review of this book in connection with the treaty-making power is therefore essential because *therein* is Sutherland's *real* basis for his *Curtiss-Wright* opinion on the treaty power.

It would seem easy to disprove the view that "powers of external sovereignty did not depend upon affirmative grants of the Constitution," since the tenth amendment of the Constitution evidently precludes them. After all, the Court, in 1957, in *Reid vs. Covert* stated:

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution . . . the United States Government . . . has no power except that granted by the Constitution . . .[63]

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law and equity, arising under the Constitution, laws, and treaties of the United States but the resolutions [under debate] declare that Judicial power to extend to all questions arising under the Constitution, treaties and laws of the United States. The difference between the Constitution and resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed by the Judiciary." Annals of Cong., 6th Cong., at 606.

[61] U.S. v. Curtiss-Wright, 299 U.S. 304 at 319 (1936).

[62] Columbia University Press, 1919.

[63] 354 U.S. 1 at 12 (1956).

However, Sutherland, in his book, argued that if an external sovereignty power was not expressly granted in the Constitution, *but neither denied*, then this power (whatever it might be) was still granted to the national government by the Constitution since neither the people nor the states could have it in practicality. That is, he argues, the tenth amendment does not apply to external sovereignty powers because the framers (supposedly) intended that these powers were complete under the Constitution, whether or not they all are expressly stated in the Constitution's phraseology:

> "We must cease to measure the authority of the general government only by what the Constitution affirmatively grants, and consider it also in the light of what the Constitution permits from failure to deny."[64]

Since Sutherland deprives us the use of the tenth amendment in order to reject his theory, we must review his basis.

Sutherland's book was written at the end of World War I. Because of the new magnitude of horror which the war had wrought, he expressed his strong conviction that the United States must build a military preparedness, including compulsory service, and actively participate in international politics and adopt:

> Every possible safeguard which can be devised to prevent a repetition of the conditions under which Germany came perilously near realizing her dream of European dictatorship . . . the master of Europe [will be] . . . the master of the world.[65]

Although Sutherland opposed the League of Nation's plan, he urged "extension of the principles and plans" of the Permanent (International) Court of Arbitration established by the Hague Conference of 1899. He stated,

> It must be apparent to everyone that the field of national responsibility will be immensely broadened as a result of the war, and there will be presented questions not only relating to this phase of the matter but questions no less important related to the power of the national government under the Constitution to deal with them.[66]
>
> The powers of the national government over external affairs, all at once, therefore have assumed new and increased importance, in the light of which, a re-examination of their nature and extent is not only pertinent but may, sooner or later, become highly necessary; for it is certain that hereafter, whether desired or desirable, we shall be obliged to occupy a larger place in the affairs of the world, to participate to a far greater degree in world policies and lend substantial and increased assistance toward the solution of world problems.[67]

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[64] G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 172 (Columbia University Press, 1919).

[65] *Id.* at 21.

[66] *Id.* at 18.

[67] *Id.* at 26.

> For this condition of affairs, there must result, as will be shown hereafter at length [in his book], a rule of constitutional construction radically more liberal than that which obtains in the case of domestic powers . . . any rule of construction which would result in curtailing or preventing action on the part of the national government in the enlarged field of world responsibility which we are entering, might prove highly injurious or embarrassing.[68]
>
> [Therefore], in this new and extended relationship, we shall probably be obliged to extend the scope and application of the familiar meanings of the Constitution, and it may be to *find*—though not to *make*—new meanings.[69]

In his search for "new meanings" he states, after quoting the "precise language of the Constitution" regarding the treaty-making power:

> It will be observed that the advice and consent of the Senate qualifies the power of the President to make, not to negotiate, treaties. When a treaty is contemplated, therefore, the President may, and more often does, enter upon negotiations with foreign governments, through diplomatic channels, and carries them to the point of reaching an understanding as to the terms and phraseology of the treaty, before the advice and consent of the Senate is sought at all—subject of course, finally, to Senatorial action.[70]

This "new meaning" is of course incorrect as the wealth of evidence presented in this article demonstrates. Furthermore, Sutherland attempts no proof in his book of this assertion, except to say that the Constitution does not explicitly deny it. (Presumably, he relied on Corwin to attempt a proof since he undoubtedly had a high regard for him—*e.g.*, he called Professor Corwin's book, *National Supremacy*, "brilliantly convincing.") He "found" this separate "negotiation power" so that the President could move freely in international affairs by avoiding any possible Senate interference. For he states:

> The time is fast approaching, if it be not already here, when we must be able to assert and maintain for that [national]government the unimpaired powers of complete external sovereignty. We must not—we cannot—enter upon this field of amplified [international] activity with half-developed limbs. The complete powers of the governments of other nations must be matched by the complete power of our own government. Upon this enlarged stage of international negotiation and co-operation we cannot afford to play the part of a political cripple. Our government must come to its new tasks not only with full, but with unquestioned powers. To be obliged to confess, when called upon to deal with some novel but vital matter, that the government lacked sufficient authority, because of the absence of affirmative language in the Constitution, would be most humiliating and regrettable . . . any theory of constitutional construction which leads to such a result will not bear analysis and must be rejected.[71]

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[68] *Id.* at 21.

[69] *Id.* at 27.

[70] *Id.* at 122.

[71] *Id.* at 171.

Sutherland argued that the President has this implied power to negotiate without Senate advice because the Constitution does not deny it. He argues that nowhere in the record of the Federal Constitutional Convention is it stated that our external sovereignty powers are incomplete. Hence, he states, because they are complete and because there is the power "to negotiate," separate (supposedly) from the power "to make" treaties, it resides with the Branch most suited—the Executive. Therefore, he argues that the separate power "to negotiate" is granted implicitly in the Constitution and, consequently, the tenth amendment, "the powers not delegated to the United States by the Constitution . . . are reserved . . . to the people," does not apply in this case. He states that we are

> "dealing with a class of powers, sufficiently numerous to be difficult of exhaustive enumeration, but which, whether enumerated or not, might at any time, require exercise, and perhaps very prompt exercise."[72]

However, the above theory and arguments by Sutherland, which were used to circumvent the tenth amendment, come crashing down to utter uselessness when confronted with the authority of the *Federalist Papers*:

> No. 14 (Madison), In the first place it is to be remembered that the general government is *not* to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects [*i.e.*, listed one by one in the Constitution].
>
> No. 45 (Madison), The Powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.

And so we are *not* dealing with a class of external sovereignty powers that are too numerous to completely enumerate but rather these powers are "few and defined" and include only those "certain enumerated ob-

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[72] *Id.* at 36. During the struggle for ratification of the Constitution, there was great concern that the federal powers may not have been limited to those enumerated. James Wilson, who was a delegate to the Constitutional Convention from Pennsylvania, said to a "Meeting of the Citizens of Philadelphia" that "in delegating federal powers, . . . the congressional authority is to be collected, not from tacit implication, but from the positive grant, expressed in the instrument of union. . . . Hence, . . . everything which is not given, is reserved." (*Pamphlets on the Constitution*, Paul L. Ford, p. 156.) The people insisted, however, that Wilson's assurance be written into the Constitution. Madison led the effort to amend the Constitution accordingly and the 10th amendment was included in with the Bill of Rights. (*The Birth of the Bill of Rights*, Robert A. Rutland, pp. 126-218). However, there persists the view that the 10th amendment is not meaningful with respect to implied particular powers. *See The Federalist Era* by John C. Miller, p. 24. This view can be rejected with the authority of the *Federalist Papers*, No. 44. Here Madison makes it very clear that the term *enumerated powers* applies to those *general* powers *expressly* written into the Constitution and not to the innumerable *particular* powers that would be needed to exercise the former. The latter were to be provided for only by passing laws under the *necessary and proper* clause. This explains why the phrase "expressly delegated" does not appear in the 10th amendment whereas it appeared in the Articles of Confederation, Article II.

jects." Thus, the whole of Sutherland's opinion regarding the treaty-making power is not based on fact. It is dictum, without a factual basis, and, hence, is without authority.

Evidently, Sutherland was willing to chance his theory rather than attempt to confirm it, for he stated:

> I do not remember to have seen it stated, but obviously it must be this: that the exigencies of government administration, because of their great variety and constant augmentation cannot be foreseen and consequently cannot be enumerated; and it is better to risk an occasional abuse of power than it is to incur the inconvenience and dangers arising from lack of effective power.[73]

As to risking occasional abuse of power, George Washington had this to say:

> If, in the opinion of the people, distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[74]

Although Sutherland's call for military preparedness and an international Court of Arbitration may have been good, his flaw was that he was willing to violate our Constitution so that the President could move more freely in international politics, thereby jeopardizing representative government here at home. We have already accumulated much experience under his theory of a separate, implied negotiating power and the results indicate little success in achieving "solutions to world problems." For example, Wilson sought to negotiate without Senate advice and he failed to make a practical League of Nations treaty as a consequence. We have had two large wars since then (World War II and Korea) and no satisfactory resolution of either of them was achieved through negotiations conducted without Senate consultation. We are presently involved in a longer, third war and, again, negotiation without Senate consultation has gotten nowhere. We have had and are having a frightening nuclear arms race and negotiation without Senate consultation has achieved only small success in nuclear arms limitation. As an indication of the extent which the Wilsonian view pervades the Executive Branch today, the President is reported to have said that the recently passed Senate Resolution 211 on the Strategic Arms Limitations negotiations was "irrelevant."[75]

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[73] *Id.* at 47.

[74] 35 J. FITZPATRICK, WRITINGS OF GEORGE WASHINGTON 229.

[75] CONG. RECORD, S.6100 (April 23, 1970).

SENATE ADVICE AS A BODY

The "advice of the Senate" required for treaty-making must take the form of a Senate resolution. The opinions of selected members invited to the White House cannot constitute Senate advice and neither can a collection of public statements made by individual Senators. The Constitution requires that "each Senator shall have one vote"[76] which was the equality of states compromise reached in the Federal Convention.[77] Madison, in the Federalist (No. 62) said that the states "ought to have an equal share in the common councils." Also, Jay in the *Federalist* (No. 64) said that "should any circumstance occur which requires the advice and consent of the Senate, he may, at any time, convene *them*." (emphasis added) Jay does not say and neither does the Constitution, that the President may seek out certain members and solicit only their advice, or that a committee of the Senate may provide the advice and consent.

To prove the last point one need only cite, again, the record of the Senate Executive Journal, Vols. I and II, and specifically the message to the Senate from President Madison in which he declined to confer with a Senate appointed committee on constitutional grounds:

> The appointment of a committee of the Senate to confer immediately with the Executive himself, appears to lose sight of the co-ordinate relation between the Executive and the Senate, which the Constitution has established, and which ought, therefore, to be maintained.[78]

Indeed, on another occasion the Senate attempted to confer with Madison through a committee and the President again declined. According to the report:

> "He regretted that the measure had been taken under circumstances which deprived him of the aid or advice of the Senate."[79]

Having shown that advice of the Senate requires resolution of the Senate as a body, it should be said that only a simple majority vote is required rather than the two-thirds vote required for final ratification of a treaty. The clause, "provided two-thirds of the Senators present concur," evidently applies only to consenting to the treaty. It makes no sense to identify "concur" with the advice; the framers would not have thought it necessary to state in the Constitution that the Senate must concur in its own advice. Rather, if the Senate concurs, it is with the plan of another branch of the government. Inspection of the Senate Executive Journal, Vol. 1, will bear this out.

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[76] U.S. CONST. article I, § 3.

[77] M. FARRAND, *supra* note 13.

[78] SENATE EXEC. JOURNAL Vol. 2 at 382.

[79] *Id.* at 389.

ORIGIN OF THE TREATY MAKING CLAUSE

Early drafts of the Constitution during the Federal Convention of 1787 gave the Senate sole treaty-making power. However, the framers were unable to agree that the Senate should have the sole power. Near the end of the convention, on August 31, a committee of eleven was appointed to which was referred this and other unfinished parts of the Constitution.[80] On September 4, the committee proposed to the convention the clause: "the President by and with the advice and consent of the Senate shall have power to make treaties." It is again noted that Rufus King was a member of this Committee of Eleven. This gives more weight to his 1818 Senate speech previously cited where he explicitly defined the treaty power. Madison was a member of this committee, also. Perhaps he drew upon his state's constitution for the phraseology of the treaty-making clause. The Virginia State Constitution, in effect at the time, stated, "he, [the Governor] shall, with the advice of a Council of State, exercise the executive powers of government." (The term "Privy Council" and "Council of State" were used interchangeably in the Virginia Constitution.) On September 7, Mr. Mason moved to install a "privy council" or "council of state" to advise the President in forming treaties, and leave to the Senate only the function of concurring in treaties and appointments, since otherwise the Senate would be required to be in constant session. Rufus King then argued that the inconveniences of having the Senate act as a "Council of Advice" did not warrant creation of a "New corps which must increase the expense as well as influence of the [federal] Government."[81] Mr. Gouverneur Morris argued that with a privy council the "President by persuading his council to concur in wrong measures, would acquire their protection for them."[82]

As for the concern over the Executive having to share secrets with the Senate, associating the term "privy council" with the Senate in the drafting of the Constitution explains why the Senate adopted a secrecy rule whenever receiving messages and documents related to treaty-making.[83] Further illustration of the point that the Senate was expected to share secrets is given by the fact that on September 7 the House of Representatives were excluded from treaty-making after Mr. Sherman argued that the power of making treaties "could be safely trusted to the Senate. He [Sherman] thought it could; and that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."[84] According to F. R. Black the Wilsonian advocates ad-

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[80] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787.

[81] *Id.* at 539.

[82] *Id.* at 542.

[83] *See generally*, SENATE EXEC. JOURNAL Vols. 1, 2, and 3. *See also*, Senate Rules Manual.

[84] M. FARRAND *supra* note 81 at 538.

vanced the argument that "real secrecy is impossible if the Senate is kept advised of the facts during the negotiation of the treaty." To this Black said:

"But even if the Senate as a body should receive its [secret] information, it would be in executive session behind closed doors, and the argument that secrecy would be jeopardized is but a polite way of questioning the patriotism and the motives of the members of the United States Senate."[85]

PRESIDENT AS COMMANDER IN CHIEF

Corwin has argued that due in part to the Commander in Chief role (the President can arrange an armistice on his own authority), the President is "the sole organ of diplomatic relations to negotiate the final peace."[86] Here it seems that Corwin singles out the negotiation of peace treaties as the exclusive province of the Executive. To refute this view one need only consult the records of the Federal Convention.[87] After the treaty clause in its present form was adopted, Madison moved to insert "except treaties of peace" after the clause. After that motion passed, Madison "moved to authorize a concurrence of two-thirds of the Senate to make treaties of peace, without the concurrence of the President. The President he said would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace. Mr. Butler seconded the motion. Mr. Gorham thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature. Mr. Govr Morris thought the power of the President in this case harmless; and that no peace ought to be made without the concurrence of the President, who was the general Guardian of the National interests. Mr. Butler was strenuous for the motion, as a necessary security against ambitious and corrupt Presidents. He mentioned the late perfidious policy of the Statholder in Holland; and the artifices of the Duke of Marlbro' to prolong the war of which he had the management. . . . Mr. Williamson thought that Treaties of peace should be guarded at least by requiring the same concurrence as in other Treaties." The motion failed. The "except treaties of peace" clause was then stricken.[88] And so to negotiate the peace is *not* the sole power of the President as Commander in Chief. Rather, the situation is the same for peace treaties as for other kinds of treaties.

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[85] F. R. BLACK, *supra* note 59 at 13-14.

[86] E. S. CORWIN, *supra* note 17 at 315.

[87] M. FARRAND, *supra* note 80 at 540.

[88] *Id.* at 540-41.

THE VIETNAM PEACE TREATY NEGOTIATIONS

If the Vietnam peace treaty negotiations are of the nature as to require the "indirect method," then the President should nominate an envoy to the Paris Conference and obtain the Senate's advice and consent to appoint the nominee for the purpose of framing a treaty with North Vietnam. The Senate may want to require that the envoy carry with him an outline of proposed terms. On the other hand, it may be preferable that a draft of a treaty be worked out between the Senate and the President which could serve as the basis for talks with North Vietnam and the NLF. This draft would also require the consent of the Senate. The President would then be free to negotiate a final draft with the other side unless the emerging treaty took a form substantially outside that which was consented to by the Senate. In the latter event, the President would be obligated to consult again with the Senate. Either way, a sound constitutional procedure is available to the President since the Senate would have in each case the opportunity to give advice and, upon agreement, its consent to whatever plan of action might be worked out. It can hardly be justifiably argued that this procedure would be impracticably slow in view of the singular lack of substantive progress after more than 26 months of negotiations in Paris with no official Senate participation. On the contrary, bringing the active participation of the Senate into these negotiations, as suggested in the above procedure, may result in greater and more rapid progress because there would be a closer correspondence between our negotiating policies and our national interests and welfare. To further support this contention, there is the rather obvious view expressed throughout the *Federalist Papers* (No. 62, 63, and 64 in particular) that the Senate is to be composed of the "most distinguished men of abilities, . . . who [along with the President] best understand our national interests . . . considered in relation to foreign nations," and who, because of their six-year terms, will provide "accurate and comprehensive knowledge of foreign politics, a steady and systematic adherence to the same views, and a nice uniform sensibility to national character." Jay stated that the six-year Senate term provided "sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them." All of these statements point to the notion that the advice of the Senate is, if not indispensable, at least of great value in keeping our foreign policy consistent with our true interests and in keeping it from unduly fluctuating in order to avoid causing ill relations, or, in the words of the *Federalist Papers*, "forfeiting the respect and confidence of other nations."

Because the President and the Senators have all sworn to support the Constitution it seems only right to expect that both the President and the Senate undertake a thorough review of the treaty clause in order

to ensure that each is indeed supporting the Constitution. It must be recalled that twelve of the sixty-six senators during Washington's administration were delegates to the Constitutional Convention (of approximately fifty delegates) and ten were delegates to the States' ratifying assemblies. (Recall that Washington was President of the Constitutional Convention, Hamilton was Washington's Secretary of Treasury, and Jay, the first Chief Justice, wrote the essays in the *Federalist Papers* relating to foreign affairs). These men worked together closely to make the government function as it was intended by the Federal Convention and the state assemblies which approved the Constitution. In view of this, the way in which the government operated during the first years under the Constitution should weigh very heavily in interpreting the Constitution. And during these first years the treaty power was exercised in a spirit of co-operation and consultation between the Executive and the Senate. This co-operation was an important factor in getting the Nation off on a successful and solid start.[89]

It has been said that the Paris Peace Negotiations are preliminary, a kind of sparring to see whether serious negotiations are possible, and thus do not require the President to seek Senate counsel.[90] However, there is only *one* phase of any negotiation which the President can conduct without Senate counsel and that phase was defined by Jay: "Those matters which in negotiation usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures *which are not otherwise important in a national view* . . . For these the President will find no difficulty to provide . . ."[91] (emphasis added) Now as soon as the opposing parties in Paris agreed to the shape of the table and the place and times to meet, the "preparatory measures" were accomplished. From that time on, the discussions have surely been of "importance in the national view." Senator Bacon in his article, *The Treaty-Making Power*, said:

> It is proper for the Senate to advise at all stages. We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating and before they have determined and before they have acted.[92]

In closing, it should be said that the advice and consent of the Senate are intended to help the President in a common enterprise; they are not hostile limitations. Since in the final event, the President makes the peace

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[89] R. HAYDEN, *supra* note 23 at 3.

[90] *See* Senate Report 91-834; 91st CONG., 2nd SESS., May 1, 1970, "Termination of Middle East and Southeast Asia Resolution," p. 21, 29. On these pages the Department of State in commenting on various proposed Senate resolutions stated that the current Vietnam peace negotiations (as of December 4, 1969) were not "serious," "real," nor "meaningful."

[91] THE FEDERALIST No. 64 (J. Jay).

[92] F. R. BLACK, *supra* note 57 at 2.

treaty, he must try to realize that the Senate is his constitutional and only responsible counsellor, that the Senate is jointly responsible for the treaty and its early conclusion, and that the Senate exists to provide wise counsel. The treaty power makes demands upon the good faith of the President, since he must decide when it is appropriate to consult with the Senate, but consult he must. Our Constitution is both the *means* and the *end* of our foreign policy. Not to follow the Constitution would defeat its purpose.