YALE
LAW JOURNAL

VOL. XI DECEMBER, 1901 No. 2

THE TREATY-MAKING POWER UNDER THE CONSTITUTION.

The framers of the Constitution of the United States followed the systems of government of the day in making the Federal Executive the medium of communication with foreign powers, but in one important particular they made a radical departure from the existing practice of nations. In joining the Senate with the Executive in the negotiation and confirmation of treaties, they introduced a popular factor into the relations of the new nation with the powers of the world, destined to work an important change in international affairs. And in requiring that all treaties should secure the vote of two-thirds of the Senate, the framers of the Constitution emphasized their conviction that the executive should enter into no stipulations with a foreign power which did not command the support of a large majority of the people of the United States.

It is a curious fact that when the occasion arose for the first time to put in operation the clause of the Constitution that the President "shall have power, by and with the advice and consent of the Senate, to make treaties," Washington, who had been the President of the Constitutional Convention, sent a message to the Senate informing that body that on the next day at an hour named he would go in person to the Senate Chamber "to advise with them (the Senate) on the terms of the treaty to be negotiated."*

*1. Annals of Congress, 67.

Previous to this notification the Senate had appointed a committee "to confer with him on the mode of communication between the President and the Senate respecting treaties and nominations."*

It seemed to be taken for granted that the Constitution contemplated oral communication or personal conference between them as to treaties when their ratification was under consideration; and it was also regarded as proper that the President should personally appear in the Senate and consult that body on the initiation of treaty negotiations.

It was also considered proper that the President might call the Senate to meet him at his residence for the consideration of treaties, but that, until the Government should provide a public building for the President, it would be more convenient for him to go to the Senate." †

In accordance with the notification above cited President Washington went to the Senate to consider the treaty which was to be negotiated, accompanied by the Secretary having it in charge, and the subject was considered jointly for two days; but this method was found to be subject to serious objections and quite unsatisfactory, and it was abandoned after this one experience.‡

The first treaty that was ratified under the Constitution was one which had been negotiated during the Confederation while John Jay was Secretary of Foreign Affairs, and who continued in that capacity for some months after the new government was organized. When the treaty came to be considered by the Senate it was ordered "that the Secretary of Foreign Affairs attend the Senate to-morrow, and bring with him such papers as are requisite to give full information relative to the consular convention between France and the United

*11. Writings of Washington (Ford), 417. 1. Annals of Congress, 66.

†11. Writings of Washington. 417-19.

‡President Washington's visit to the Senate on this occasion was recalled at a cabinet meeting during the administration of Monroe as narrated in his diary by John Quincy Adams, then Secretary of State, as follows:

"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.

"The President said he had come into the Senate about 18 months after the first organization of the present government, and then heard that something like this had occurred." 6 Memoirs of J. Q. Adams. 427.

States." On the next day the following entry was made in the journal:

"The Senate was to-day mostly engaged in Executive business. The Secretary of Foreign Affairs attended, agreeable to order, and made the necessary explanations."* In this action the Secretary was following a practice observed in the Continental Congress, but the new Secretary of State, profiting by the President's experience, discontinued it.

A question raised soon after the adoption of the Constitution was whether the agency of the Senate was admissable previous to treaty negotiations, so as to advise on the instructions to be given to the ministers; or whether the President possessed an option to adopt one mode, or the other, as his judgment might direct. Justice Story says that President Washington seems to have assumed that the option belonged to the Executive, and adds that the Senate has been rarely, if ever, consulted.† But there are many instances in the later history of the country where the Executive has consulted the Senate, or its Committee on Foreign Relations, not only as to the initiation of treaties, but as to the progress made, and the final decision as to their signature. There are also instances where the Senate or Congress has taken the first step, by resolution or legislation, in the negotiation of treaties.

Secretary Webster, in the important negotiations which he conducted for the adjustment of the Northeastern boundary, constantly kept the Senate advised of the progress of the negotiations, and it was mainly for that reason he was able to carry the treaty by an overwhelming vote in a Senate which was politically hostile to the administration. Secretary Buchanan before signing the treaty adjusting the Oregon boundary, submitted the full text to the Senate, and secured an informal vote approving it. President Jackson even consulted the Senate as to the propriety of refusing to accept the award (under a treaty) of the King of the Netherlands, and procured a vote of that body advising him as to the course to be pursued. So that while the President and Secretary of State abstain from appearing before the Senate in person, the executive has always given a broad signification to the Constitutional phrase "advice of the Senate," both in the initiation and negotiation of treaties.

The negotiation of treaties is conducted by or under the direction of the Secretary of State, but such negotiation cannot properly be

*1. Annals of Congress, 52.

†2. Story on the Constitution (Cooley, 1873) p. 336.

said to be concluded until the "advice of the Senate" is obtained, which, as noted, is sometimes secured in advance, but usually not until the treaty is submitted to the Senate for ratification. That body being made by the Constitution a part of the treaty making power, the amendments which it may see proper to submit for the consideration of the foreign government which is a party to the proposed treaty, is as much a stage of the negotiations as the preceeding action of the Secretary of State. Although the Senate has for more than a century been exercising this Constitutional prerogative, its proper relation to treaty-making does not seem to be understood abroad. We find the British Secretary for Foreign Affairs, in his reply to Secretary Hay's despatch communicating the amendments of the Senate recently made to the Nicaragua Canal treaty, expressing surprise that the Senate should not have "ratified * * * the convention as signed." And contemporaneously with the British Secretary's despatch, the London *Spectator,* one of the most respectable of foreign periodicals and usually friendly to the United States, refers to "the ill manners of the Senate" in proposing its amendments of this treaty and asserts that that body is ignorant of diplomatic usage and certain to act "in the most indiscreet and objectionable way possible." And recently the London *Times* in an editorial discussing the same subject, in referring to the practice of the Senate in amending treaties, terms it a "modern development of the Constitution," which has grown up "since the close of the Civil War." And adds: "It has become, there can be no doubt, a part of Senatorial tradition that every treaty submitted to the Senate must be tinkered up, if only to warn the Executive branch of the Federal Government that it is 'the servant and not the master.' "*

Such language sounds strangely from a high official and intelligent writers of a nation whose first treaty (1794) with the United States after the adoption of the Constitution was amended in important particulars by the Senate and those amendments promptly accepted by Great Britain. They should also know that in the century and more since the Constitutional provision as to treaties has been in operation, the Senate has not only repeatedly amended conventions made with their government, but has in some instances rejected absolutely treaties negotiated with it, and new ones have

*London Times, Sept. 26, 1901.

been framed and accepted by their government in the terms desired by the Senate.*

How unfounded are such criticisms may be seen in the fact that of the four important treaties submitted by the McKinley administration to the Senate—the Spanish treaty of peace, the Hague arbitration, the Samoan, and the Isthmus Canal treaties—the first three were promptly ratified without amendment, and, if the apparently authentic press reports are to be believed, the British Government has accepted the Senate amendments of the latter and incorporated them in a new treaty. And the official records show that since the organization of the Government the treaties negotiated by the Executive and ratified by the Senate are far in excess of those amended or rejected. Justice Story, after a half a century of experience of the Constitution, wrote: "It is difficult to perceive how the treaty-making power could have been better deposited, with a view to its safety and efficiency."†

A question which has been much discussed in recent years is how far the Senate can delegate to the Executive its functions as a part of the treaty-making power, and to what extent Congress can confer upon the President legislative duties. Repeated instances can be cited where legislative action has conferred large powers upon the President in matters connected with our foreign relations, but in none of these instances can it be said that the Senate has parted with or delegated to the Executive its functions as a branch of the treaty-making power.

In the early days of the Republic, when many of the makers of the Constitution were participating in legislation, Congress passed laws giving to the President large powers respecting foreign commerce and tariff regulations. In 1794 he was empowered to levy an embargo whenever, in his opinion, the public safety shall so require * * * on all ships of the United States or of foreign nations in the ports of the United States;"‡ and in 1799 he was empowered to break off and renew commercial intercourse with France, "whenever, in

*A noted instance is the almost unanimous rejection by the Senate in 1869 of the Johnson-Clarendon convention for the settlement of the Civil War claims, and the ratification of the treaty of Washington of 1871 for the same purpose.

†2. Story on the Constitution, 335.

‡1. Statutes at Large, 373.

his opinion, the interests of the United States shall require."* Many acts of a like nature have been passed by Congress, the Canadian retaliatory act of 1887† beng still in force which confers power upon the President, under contingencies specified, to suspend, in his discretion, all commercial intercourse with the Dominion.

Of this class of legislation Chief Justice Marshall has said: "The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the decision of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."‡ Of the same nature as the acts cited was the provision in the tariff act of October 1, 1890,§ known as the McKinley law, which gave the President power to impose certain specified duties upon articles named, admitted free under the law, whenever the President should be satisfied that any foreign nation was imposing duties on American products which he should deem reciprocally unequal and unreasonable. Under this law the President, through the Secretary of State, entered into negotiations with nearly a score of foreign governments, and made with several of them what were termed "reciprocity arrangements," which were duly proclaimed in the same manner as treaties,‖ and in other cases where the negotiations failed to bring about an agreement, proclamations were issued imposing duties on the articles named imported from the countries.¶ The act upon which these diplomatic agreements were based is probably the nearest approach to a delegation of legislative or treaty-making power, and its constitutionality has been passed upon by the Supreme Court of the United States. The act was attacked on the ground that it "delegated to the President both legislative and treaty-making powers." In its decision the Court said: "That Congress cannot delegate legislative powers to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that

*1b. 615.

†24. St. at L. 475.

‡Wayman v. Southard, 10 Wheaton, 46.

§26 Stat. at L. 612.

‖For agreement with Spain for Cuba and Portò Rico, see 27, St. at L. 982.

¶For Proclamation as to Venezuela, see 27 St. at L. 1013.

principle. It does not, in any real sense, invest the President with the power of legislation. * * * * What the President was required to do was simply in execution of the act of Congress."* A competent writer refers to this decision as "one in which the Supreme Court has come nearest to marking the boundary within which legislative power may be delegated."†

It has been suggested by a high authority on legal and international questions‡ that the Senate, in ratifying the Hague Convention as to International Arbitration, has parted with its power or duty to further intervene in respect to cases of arbitration which may be submitted by the United States, in accordance with that Convention, and that the President alone, without the further action of the Senate, is empowered to decide as to all questions or issues which may be submitted to arbitration, and to carry the arbitration into full effect. Under the terms of that Convention arbitration is not compulsory on any of the powers adhering to it, and a resort to the tribunal will be purely voluntary; so that it has been suggested that this solemn compact of the nations is not more likely to be efficacious in settling international controversies that the agreement of the powers at the Paris Conference of 1856, when they resolved thereafter to resort to mediation in place of war for the settlement of their disputes, which subsequent history shows to have been a dead letter in international affairs. But if this Convention is to be made available by the nations, and if the President is the sole judge of the questions to be submitted on the part of the United States, the learned jurist cited has well said: "This is a tremendous power for a republic to lodge in one man's hands."

In order that we may see what power is lodged in the hands of the President if the contention under consideration is correct, it may be well to epitomize some of the provisions of the Hague Convention. It has four professed objects in view to prevent war, (1) the exercise of good officers, (2) mediation, (3) commissions of inquiry, and (4) arbitration. It provides for the submission to arbitration of "every sort of dispute" (Art. 17). The international commissions of inquiry are to be "constituted by a special *convention* between the parties in litigation" (Art. 10) and the "powers which shall have recourse to arbitration shall sign a special act (*com-*

*Field v. Clarke, 143 U. S. Reports, 650.

†Hon. E. B. Whitney, in *Columbia Law Review,* January, 1901.

‡Prof. S. E. Baldwin, in *Yale Review,* February, 1901.

promis), in which is clearly set out the case to be decided, as well as the extent of the powers of the arbitrators." (Art. 31).

Can it be conceived that the Senate in ratifying this Convention intended to confer or could have conferred, upon the President the unrestrained power to submit to arbitration a question involving the national honor, the Monroe doctrine, or even the legitimacy of our claim to any portion of the national domain? And would it be competent for the President alone to enter into a convention or agreement with a foreign power in accordance with Articles 10 and 31?

In giving its advice and consent to the ratification of the Hague Convention, the Senate conferred upon the President power to do what was necessary on the part of our government to organize the tribunal (Art. 23), the administrative council (Art. 28), and the international bureau (Art. 26), so that at the Hague there would be provided the machinery to carry on an arbitration, whenever any two or more nations might by agreement submit their differences to the tribunal there constituted. But I apprehend that should it happen that our Government decide to refer any dispute with a foreign government to the Hague tribunal, President Roosevelt, or whoever should succeed him, would enter into a convention with the foreign government, very carefully setting forth the question to be arbitrated, and submit that convention to the Senate for its advice and consent. If I read the Constitution of the United States, and the Hague Convention, aright, such would be the only course permissible by those instruments.

What is the view entertained by the Senate on this subject may be seen from its action on the Olney-Pauncefote arbitration convention of 1897.* The parties to that instrument provided that "all questions in difference between them which they may fail to adjust by diplomatic negotiations" should be submitted to arbitration. The different classes of questions were precisely distinguished, and different tribunals provided for their adjustment. The convention was drawn with care, the interests of our country well guarded, and I think it would have been a wise act on the part of the Senate and a great step in international arbitration, if the convention had been ratified. But it contained no provisions for a future convention or agreement as to the questions to be arbitrated, as contemplated in the Hague convention, and the whole control of the proposed

*Foreign relations of U. S. 1896, p. 238.

process of arbitration was committed to the Executive. The convention was rejected by the Senate, and it was understood that this fact was the main cause of its defeat. That body was unwilling to surrender its control of the questions to be submitted.

There are a class of Executive acts of a diplomatic character which at first glance would seem to be an independent exercise of the treaty-making power, but which in a strict sense cannot be so regarded. Of this class are agreements for the adjustment of claims of American citizens against foreign governments, which are often made by the Secretary of State without any reference of the agreements to the Senate. The most noted of these was the agreement of 1871, made with Spain for the adjustment by arbitration of the claims of American citizens arising out of the Cuban insurrection. The agreement, made by a simple exchange of notes, is included in the official volume of treaties,* but it was never submitted to the Senate for approval. Under this agreement, claims to the amount of many millions of dollars were adjusted.

A number of other agreements of a similar character have been made by successive Secretaries of State, whereby specified claims of Americans have been submitted to arbitration. The practice has not been uniform respecting the Senate. Sometimes such adjustments have taken the form of conventions which were submitted to the Senate, and in other cases the same President has carried out the agreement without consulting that body. In the latter case he proceeds upon the accepted theory that all claims of private citizens against foreign governments are subject to political exigencies, and it is within the discretion of the Executive to urge them diplomatically upon the foreign government or not; but their submission is usually with the consent of the claimant.

No case has yet occurred where the Executive has entered into an agreement for the adjustment by arbitration of the private claim of a foreigner against the United States without securing the approval of the Senate in the form of a convention. The reason for this may be that the Executive cannot bind the Government to the payment of money.

Other Executive acts of a diplomatic character are transitory measures which take the name of a *modus vivendi.* These are usually made pending some treaty negotiations, they are a temporary expedient to avoid friction or trouble until a permanent set-

*Treaties of the United States. (1889) p. 1025.

tlement of the questions in controversy is reached, and are made by the Secretary of State with the foreign government concerned. They take the shape of an exchange of notes or of a formal protocol, and ordinarily are not submitted to the Senate for approval. Of this character was the *modus vivendi* arranged by the commissioners of the United States and Great Britain pending the ratification of the convention of 1888, for adjusting the northeast fisheries with Canada. Also a *modus vivendi* was arranged with Great Britain, pending the negotiation of the Bering Sea fur-seal arbitration treaty, providing for the protection of the seals during one season, and a second *modus* was agreed upon for the second season to extend over the period of the fur-seal arbitration at Paris in 1893. One of these latter was submitted to the Senate, but the other was not submitted and went into effect by the President's proclamation alone.

Among the most recent instances of this class of Executive acts is the *modus vivendi* of 1899 respecting part of the Alaskan boundary made by Secretary Hay. For this act he has been unjustly criticised by a portion of the press as usurping the functions of the Senate and surrendering American territorial and mining rights. The arrangement was affected by the Secretary with the British Charge d'Affairres in Washington, pending the settlement of the much debated boundary question by the Joint High Commission to which the subject had been referred by the two Governments. The constant travel and traffic with the Yukon region from the head of the Lynn Canal made some temporary arrangements absolutely necessary for customs and police purposes. The agreement fixed a line "provisionally * * without prejudice to the claims of either party in the permanent adjustment of the international boundary;" the Secretary was careful to have the line so drawn so as to leave on the American side all permanent occupants within the territory in dispute, and to keep the line more than twenty miles from tide-water. Soon after the line was fixed gold was discovered on the British side, and a great influx of American miners took place, but the Secretary had fortunately provided in the *modus* that American citizens "within the temporary jurisdiction" of Great Britain should "suffer no diminution of the rights and privileges they would enjoy" in the United States. No harm would come to any American interest from the *modus,* and it has been productive of much good. It can be terminated at any time upon notice by either party. A similar *modus vivendi* was made by Secretary Evarts and the British Minister in 1878, as to the same boundary line on the Stikine river,

which evoked no criticism, as it was generally recognized to be a necessary provision; and it has continued in force to the present day.

From the foregoing review of the practice of the Government under the Constitution, it may be seen, first, that the Senate retains and exercises with jealous care its functions as a part of the treaty-making power; second, that Congress can and does delegate duties to, and increase the power of, the President in matters respecting foreign affairs; and third, that there are certain acts of an international character, binding the Government, which the President may perform without the interposition of the Senate.

Severe criticism is passed upon the Senate, sometimes at home, but more often abroad, for its action respecting treaties. It is frequently charged that it is composed of members who are ignorant of international law and of diplomatic practice, and that its decisions are mainly influenced by partisan politics and by a desire to thwart the Executive. At no time in our history has the Committee on Foreign Relations of that body been without controlling members thoroughly conversant with international law and foreign affairs; and though not without blemish, the personnel of that body may be favorably compared in intelligence and decorum with any other legislative body of the European Governments. Its members are on most questions swayed by partisan considerations, but in international affairs they are generally actuated by a high spirit of patriotism, and the conduct of the Senate respecting treaties has, in the main, justified the wisdom of the framers of the Constitution in giving it participation in the treaty-making power.

John W. Foster.