The Treaty-Making Power

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THE TREATY-MAKING POWER.

BY

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The treaty-making power is the power which determines the relations of a nation with other nations and of the subjects of one State with the subjects of another, and is thus one of the most important of the powers of government. This power is usually vested in the executive department of government, under limitations which vary in different nations.

In Great Britain the power is lodged in the Crown, and a treaty made by the sovereign is valid without the authority or sanction of Parliament. But when a treaty involves either a charge on the people or a change in the law of the land, while it can be made by the Crown alone, it cannot be carried into effect without the sanction of Parliament. It is usual to make such treaties subject to the approval of Parliament, and to submit them for its approval before ratification, or to ratify them conditionally. The doctrine has been recently advanced that in England the sovereign has no power in time of peace to cede territory by treaty to a foreign power without the approval of Parliament. In 1890 when the Queen was about to conclude a treaty with the Emperor of Germany for the cession of Heligoland she was advised by her ministers to make the cession conditional upon the approval of Parliament, the theory being that the sovereign could not make such a treaty without the sanction of Parliament. This was much criticised in debate. Mr. Gladstone, at that time out of power, did not consider the authority of Parliament at all essential. "It is hardly possible," he said, "I believe, to conceive any kind of
TREATY-MAKING POWER,

territory—colonies acquired by conquest, colonies acquired by settlement, with representative institutions or without representative institutions—it is not possible to point out any class of territory where you cannot show cases of cession by the Crown without the authority of Parliament." Anson writing on the Law and Customs of the Constitution, in commenting on this, seems to be of the opinion that to make the ratification depend on the good will of Parliament is an abnegation on the part of the Executive of a responsibility which the ministers ought to be ready to assume on behalf of the Crown.\(^1\) The fact that the English sovereign in conducting negotiations with foreign powers is exempt from the direct control or supervision of Parliament, certainly gives the monarch an opportunity for exercising great influence on the conduct of affairs.\(^2\)

In Switzerland the Federal Constitution confers on the confederation the sole right of concluding treaties with foreign powers, "particularly treaties relating to tariffs and commerce," while at the same time reserving to the cantons the right to conclude treaties with foreign powers "respecting the administration of public property and border and police intercourse." The Federal Council, which constitutes the Executive of Switzerland and is composed of seven members, is entrusted generally with all that concerns foreign relations. The member of the Council who is at the head of the Department of Foreign Affairs is charged with the work preparatory to the negotiation of treaties, and treaties prepared by him must be submitted by him to the Council, and, if approved by a majority of its members, they are then submitted to the two houses, which together constitute the Federal Assembly. These two houses are known as the National Council and the Council of States, the former representing the people, and the latter the cantons, answering in this respect to our House and Senate. These two chambers are entrusted with the ratification of alliances and treaties with.

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\(^1\) Part II, p. 281.

\(^2\) Dicey's Law of the Constitution.
foreign powers. They have the power to request the Federal Council to adopt a particular foreign policy, but in every case the treaty must come from the Council to the Chambers, and receive the approval of these two bodies.

The treaty-making power, under the present Constitution of the French Republic, is lodged in the President, subject in certain cases to the approval of the two Chambers. The provision is as follows:

"The President of the Republic negotiates and ratifies treaties. As soon as the interest and safety of the State shall permit, he shall give information of their contents to the Chambers. Treaties of peace, of commerce, treaties which involve the finances of the State, those which refer to the condition of persons, and to the rights of property of Frenchmen in foreign countries, are not final until voted by the two Chambers. No cession, no exchange, no annexation of territory can take place except by virtue of law."

This is a more limited power than he possessed under the Constitution of 1852, in which it was simply declared that the President of the Republic "makes treaties of peace, of alliance, and commerce." Under the Constitution of 1848, it is provided that the President "negotiates and ratifies treaties. No treaty is definitive until it has been approved by the National Assembly." Another clause declares that he "cannot cede any portion of the territory." The Constitution of 1880 simply provides that the King "makes treaties of peace, alliance and commerce," being similar to the provision in the Constitution of 1814.

The Constitution of the German Empire gives the Emperor the power to make treaties, but it also provides that in so far as treaties relate to subjects which fall within the legislative power of the Empire the Bundesrath shall concur in forming them, and that in such cases they shall not take effect until ratified by the Reichstag.

The Articles of Confederation gave to the United States "in Congress assembled" the sole and exclusive right and power
of entering into treaties. The Articles also provided that the United States should never enter into any treaties or alliances "unless nine States assent to the same" (through their representatives in the Congress). The power thus conferred was exercised in a number of instances, the most notable being the negotiation of the Treaty of Peace of 1783. The difficulty under the Articles was that while Congress had the power to make treaties it was without power to enforce them. It was compelled to look on in silent submission and see its treaties violated by the States in whose interest they were made. It could do no more than advise, suggest and recommend to the States, and generally its advice, suggestions and recommendations were ignored. The Treaty of Peace, for example, provided that creditors on either side should meet with no lawful impediment to the recovery of their debts. Under the present Constitution, making a treaty the supreme law of the land, this provision of the Treaty would have annulled all State laws imposing impediments to the collection of the debts, and creditors could have proceeded for their recovery without reference to anything to the contrary which might have been contained in the constitutions or laws of the several States. But under the Articles it was not so. The Treaty did not operate as a repeal of State laws, and Congress could only remonstrate with the States and entreat them to conform their laws to the provisions of the Treaty. A nation making treaties which it is unable to compel even its own people to observe, cannot occupy a very dignified position among nations, and is not in a position where it can command much respect. There can be little inducement to negotiate a treaty under such circumstances.

The Constitution of the United States provides that 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." In the plan proposed to the Constitutional Convention by Mr. Charles Pinckney, of South Carolina, on May 29th, 1787, it was provided that "The Senate shall have the sole and exclusive power ** to make
treaties.”1 In the plan proposed by Alexander Hamilton on June 18th, he provided that the Executive should “have, with the advice and approbation of the Senate, the power of making all treaties.”2 In the report of the Committee of Detail, made by Mr. Rutledge on August 6th, it was stated: “The Senate of the United States shall have power to make treaties.”3 On August 15th, the matter was under discussion in the Convention, and Mr. Mercer contended that the Senate ought not to have the treaty-making power as it belonged to the Executive department. He was also of the opinion that treaties should not go into effect until ratified “by legislative authority.”4 Mr. Mason claimed that the power should not reside in the Senate as it might by treaty dismember the Union by alienating territory.5 Later, Mr. Madison announced himself as thinking “it proper that the President should be an agent in treaties.”6 On August 31st, a committee, consisting of a member from each State, was created to whom was referred such parts of the Constitution as had been postponed or not acted on. That committee reported, September 4th, the following: “The President, by and with the advice and consent of the Senate, shall have power to make treaties. * * * * But no treaty shall be made without the consent of two-thirds of the members present.”7 On September 7th, the question came up again, and it was proposed to insert after the word “Senate” the words “and House of Representatives.” It was thought that the necessity of secrecy forbade a reference to the House, and the proposal was rejected, Pennsylvania alone voting in its favor.8 The provision as reported above on September 4th, was then adopted, and on September 12th the Com-

mittee on Style reported the provision as we now find it in the Constitution. It was not thought wise to entrust the treaty-making power to the President alone, as is sometimes done in the case of an hereditary monarch, lest he might be corrupted by foreign powers. It was therefore necessary to associate some other body with him in the exercise of this power, and the Senate was preferred for this purpose to the House, because of the greater experience and more comprehensive knowledge of foreign affairs which was likely to characterize its members, as well as on account of its smaller membership. It was thought that a body more numerous than the Senate was likely to become would be very little fit for the proper discharge of the trust. Two-thirds of the Senators present were required to concur in the ratification of the treaty rather than two-thirds of the whole body, for the reason that if the latter principle had been adopted it would often, from the non-attendance of some, amount in practice to a necessity of unanimity.

But the Constitution contains another important provision on the subject. It declares that "all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Ordinarily a treaty is not a law, but simply a contract between sovereigns. The above provision of the Constitution, however, makes the treaties of the United States a part of the municipal law. This is a peculiarity of our Constitution for special and local reasons. The treaty-making power of the United States, under this provision, may negotiate a treaty which will, if constitutionally concluded and ratified, abrogate:

1. A provision in the Constitution of any one of the States which conflicts with the provisions of the treaty.

2. A provision in the statute law of any State contrary to the treaty.

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1See Federalist, Number 75.
3. A pre-existing federal statute inconsistent therewith, in accordance with the maxim, *leges posteriores priores contrarias abrogant*.

Because, in the absence of such a provision as that we are considering, a treaty is a mere contract and not a legislative act, it does not generally itself effect the object to be accomplished, but must be supplemented by action taken by the law-making body. But in this country a treaty is for many purposes equivalent to an act of Congress, and may alone effect the object it seeks to accomplish. In the United States the treaty-making power under the Constitution is more plenary than it was under the Articles of Confederation. The Articles, although conferring on Congress the sole and exclusive right of entering into treaties, limited the power by providing “that no treaty of commerce shall be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.”

But under the Constitution the power to make treaties is conferred in general terms. There are no limitations expressed in the instrument, and it is fair to assume that the power exists in the national government as fully and completely as it exists anywhere. As no part of it is reserved by the Constitution to the States the whole is in the federal government. But does it exist in the national government without any limitations, and what are the limitations if any there be? Limitations may be implied even when none are expressed, and that such exist in respect to the treaty-making power we cannot doubt. Madison declares that a treaty is the supreme law of the land provided it be within the prerogative of making treaties, “which, no doubt, has certain limits.” Hamilton writes Washington, July 9th, 1795, that “A treaty cannot be made which alters

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1. Articles of Confederation, Art. 9.
the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States. But it is difficult to assign any other bounds to the power."¹ The matter has been nowhere better put than by Judge Cooley, who recently has expressed it as follows:

"But though no limitations are laid upon the power in the National Constitution, some exist in the very nature of things which the treaty-making power must be expected under all circumstances to respect and observe. We say this, having in mind only what we suppose to be a general rule applicable whenever the extent of the treaty-making authority of any country comes in question; all the conditions under which it has come into existence are to be considered: the racial and other peculiarities of the people; what the country is and its situation; the nature of established institutions, and so on, for all these are in mind when the authority is created, and in some sense are of its substance, whatever may be the words under which it is expressed. * * * * Then the treaty-making power, whatever be the nature of the government, if to be exercised by any subordinate of the sovereign and not by the sovereign directly, must not set aside or disregard any authoritative expression of the sovereign will, and it must not do acts or enter into negotiations that tend to undermine or overturn any existing institution of the country, or to change in any particular the established government. * * * * When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, restrains the treaty-making power quite as much as any other. If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might

gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

We think it is fair to say that the treaty-making power is limited by all the provisions of the Constitution which prohibit certain acts from being done by the government. The treaty-making power cannot be used, for instance, to establish slavery or involuntary servitude, or to take from any class of persons, born in the United States and subject to the jurisdiction thereof, their right of citizenship, or to assume a debt incurred in aid of insurrection or rebellion against the United States, or to establish a national religion, or to abridge the freedom of speech or of the press, or to suspend the writ of habeas corpus there being no rebellion or invasion, or to take away the trial by jury, or to deprive a State of its equal representation with others in the Senate. It is also limited by provisions of the Constitution which direct certain acts to be done in a particular way. The treaty-making power, for example, cannot be used to provide that the President shall be elected in a way different from that mentioned in the Constitution, or that the Justices of the Supreme Court shall hold their offices for a term of years and be elected by the people. This power cannot be used to change in any way the character of the government, or to do that which is inconsistent with its nature and structure. A treaty which should invade in any way the reserved rights of the States would be unconstitutional. It must be evident that unless there are constitutional limitations on the treaty-making power, Congress might practically cease to be the law-making body as prescribed by the Constitution. The treaty-making power could lay and collect taxes, regulate commerce, establish rules of naturalization, of patents and copyrights, define and punish piracies, borrow money, regulate the value of coin, fix a standard of weights and measures, make rules

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1 The Forum, June, 1893, pp. 397, 398.
3 See Prevost vs. Greeneaux, 19 How. 7.
and regulations governing the army and navy, admit new States into the Union, and, in fact, exercise most of the powers of government now entrusted to Congress.

That the treaty-making power extends to the annexation of territory is now conceded, although, as we all know, Mr. Jefferson did not believe that he had constitutional authority to make the treaty of 1803 with France for the cession of Louisiana to the United States. That treaty was concluded April 30th, and in August Mr. Jefferson wrote as follows:

"But I suppose they (Congress) must then appeal to the nation for an additional article to the Constitution, approving or confirming an act which the nation had not previously authorized. * * * The Executive in seizing the fugitive occurrence, which so much advances the good of their country, have done an act beyond the Constitution." 1

Mr. Jefferson was not mistaken in thinking that the treaty-making power was subject to limitations, although, of course, mistaken in believing that it did not extend to the acquisition of foreign territory. No amendment of the Constitution was needed to support the treaty. In 1828, Chief Justice Marshall thus summarily disposed of the point:

"The Constitution confers absolutely on the government of the Union, the 'powers of making war, and of making treaties;' consequently that government possesses the power of acquiring territory either by conquest or by treaty." 2

But while the treaty-making power thus extends to the acquisition of foreign territory, the question arises whether there are not implied limitations respecting it? Can it be possible that the President and the Senate have the power to annex the countries of Asia, or of Africa, and make them a part of the American Union? At this very time the importance of annexing the Hawaiian Islands is being urged upon the attention of the people of the United States. Can the treaty-

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making power of the government be properly used to create a system of American colonies in distant quarters of the globe, such as England, Germany, and France have established? One of the most distinguished jurists which this country has produced has expressed the opinion that while it might not be possible to annul a treaty to that effect once made, it would nevertheless be usurpation to make it.\(^1\) The Union was established and the Constitution adopted for "the United States of America." What right has the treaty-making power to enlarge it to the United States of America, Europe, Asia, and Africa? We think it has none whatever. Mr. Webster declared in 1837 that he did not believe the framers of the Constitution contemplated the annexation of foreign territory.\(^2\) But, whatever view may be taken of the constitutional question involved, it would seem as a matter of policy to be unwise to annex territory not contiguous to our own. In 1809, Jefferson wrote to Madison: "Nothing should ever be accepted which would require a navy to defend it."

The annexation of territory may fall more appropriately within the province of the law-making than the treaty-making power. The Constitution of the United States provides that new States may be admitted by the Congress into the Union. To provide by treaty that a territory annexed shall be admitted as a State into the Union is to ignore the rights of the House and is a usurpation of power. The annexation of Texas to the United States was not accomplished under the treaty-making power, but by congressional action. Mr. Calhoun, as Secretary of State in Mr. Tyler's cabinet, had negotiated a treaty for its annexation, but the treaty failed of ratification by the Senate. As soon as the treaty was rejected, Mr. Tyler sent a message to Congress suggesting that that body provide for annexation by law or joint resolution. A joint resolution passed both houses in accordance with which annexation was

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\(^1\) See Judge Cooley's article on "Grave Obstacles to Hawaiian Annexation," *Forum*, June, 1893.

secured. A writer on the "Constitutional History of the United States," who is also a biographer of Mr. Calhoun, asserts in his life of the latter that the action of the President was in fact an appeal from the Senate, which had the unquestionable right to reject a treaty, to the House of Representatives, to which no power had been given by the Constitution in relation to treaties. Professor Von Holst asks: "What was the sense of rendering the consent of two-thirds of the Senate indispensable for the conclusion of every treaty if, after a treaty had been rejected by the Senate, a simple majority of both Houses of Congress had the right virtually to ratify it, by accomplishing in some other form what the treaty was to have accomplished?" The answer is that it was within the constitutional power of Congress to do exactly what was done, and that as the intention of the friends of annexation was, all along, the admission of Texas into the Union as a State, what was done was done not only constitutionally, but in the most appropriate way, as it allowed the House to be consulted in the first instance in the matter of the admission of a new State into the Union. Professor Von Holst's question may be followed by another: What reason is there for ignoring the House of Representatives in a matter of annexation, the purpose being to bring a new State into the Union, when the fundamental law provides that new States may be admitted into the Union by the Congress?

In the Treaty of 1819 with Spain, ceding Florida to the United States, the following provision was inserted:

"The inhabitants of the territories which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."

A foreign State cannot be made a member of the Union by the treaty-making power. An Act of Congress is essential. Assuming that the treaty-making power agrees that a foreign State shall be admitted as a State, the question arises whether
it becomes the constitutional duty of the House to enact the necessary legislation. This question is answered in another part of this paper.

The treaty-making power may also be subject to limitations as respects the cession of territory. In England, under the British Constitution, the extent of the power has been discussed recently and with much vehemence. Various limitations have been alleged respecting the right of the Crown to cede territory by treaty. It is said that the sovereign may cede territories acquired by conquest, and Crown colonies, but that the power does not extend to the cession of other territory, or any territory respecting which Parliament has legislated. It is claimed that the powers of cession at the end of a war are different from and larger than those existing in times of peace.1 There seems to be, however, no authority beyond the dicta expressed in Parliamentary debate, or otherwise, for any such limitations on the treaty-making power in Great Britain. The extent of the power in the United States has been a vexed question. Mr. Jefferson advised Washington that the power did not extend to the alienation of territory. His opinion was "that by the law of nations it was settled that the unity and indivisibility of the society was so fundamental that it could not be dismembered by the constituted authorities, except (1), when all power was delegated to them (as in the case of despotic governments), or (2), when it was expressly delegated; that neither of these delegations had been made to our general government, and, therefore, that it had no right to dismember or alienate any portion of territory once ultimately consolidated with us."2 Jefferson represents Hamilton as agreeing with him as to the law of nations, and as thinking that no cession of settled territory involving a loss of citizenship could be made without the consent of the inhabitants affected. Wheaton expresses a doubt as to how far a mere general treaty-making power vested in the head of a federal government such as ours

necessarily carries with it the power of alienating the territory of any member of the Union without its consent.\textsuperscript{1} In the settlement of the disputed north-eastern boundary between Great Britain and the United States, which involved the cession of territory in which the States of Maine and Massachusetts were intrusted, this country before ratifying the Ashburton Treaty of 1842 was careful to obtain the consent of the States named to the cession contemplated. This, of course, is not conclusive on the question of constitutional power, but it clearly shows that a strong doubt was entertained respecting it.

The Constitution gives to Congress the power to fix duties and regulate commerce. It also provides that all bills for raising revenue shall originate in the House of Representatives. If the treaty-making power includes the right to make commercial treaties, it may fix duties, regulate commerce, and raise revenue without any consultation with the House of Representatives. This question came before the Senate in 1844 in connection with the ratification of a commercial treaty with the German States, which had been negotiated by Mr. Wheaton. The treaty was not ratified in the Senate because of paramount constitutional objections. Mr. Choate, of Massachusetts, made an adverse report for the Committee on Foreign Relations. Among other things the report says:

"In the judgment of the committee, the Legislature is the department of government by which commerce should be regulated and laws of revenue passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of the system is, indisputably, that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

The matter again came before the Senate in 1848 at the request of the President for its further consideration. On this

\textsuperscript{1}Dana's Wheaton on International Law, § 543.
occasion the vote against ratification was unanimous, and the defeat was due to the constitutional objections previously referred to. In a discussion which occurred in the Senate in 1885 over the ratification of proposed reciprocity treaties with Spain, Nicaragua, and Mexico, Mr. Morrill, of Vermont, in urging these constitutional objections quoted Mr. Webster as having said, "I hope I know the Constitution of my country better than to think a reciprocity treaty is constitutional."

The Senator from Vermont went on to say:

"The powers separately and specially granted by the Constitution to one branch of our Government cannot be assumed or held in common by any other branch at its pleasure. The invasion of the jurisdiction of one by another cannot be accounted less than rank usurpation. * * * It appears to me, therefore, that any treaty which encroaches upon the power to regulate commerce or upon that to originate revenue bills involves a plain, open, and palpable violation of the Constitution."

It would seem that the objections thus urged against commercial treaties are valid reasons against such an exercise of the treaty-making power. But if this be so we must admit, as Mr. Calhoun said in 1844, that its exercise has been one continued series of habitual and interrupted infringements of the Constitution, as from the beginning it has been exercised constantly on commerce. The practice is, however, to include in all such treaties a stipulation that they shall not be operative until Congress shall have enacted the legislation necessary to carry them into effect. President Arthur, in his message to Congress of 1884, calls attention to the fact that such a provision was contained in the commercial treaties negotiated by him, and that it was "deemed to be requisite under the clause of the Constitution limiting to the House of Representatives the authority to originate bills for raising revenue."

While the Constitution confines the treaty-making power to the President and the Senate, there are those who have claimed that the House of Representatives is entitled to exercise a veto
power on the making of treaties by declining to pass laws which may be necessary to carry the treaty into effect. This question was first raised in 1796 in connection with the Jay treaty, and gave rise to decided differences of opinion, which continue to exist. The House declared by resolution at that time that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and that it is the constitutional right and duty of the House in all such cases to deliberate on the expediency or inexpediency of carrying the treaty into effect. This view was shared by Jefferson and Madison. President Washington took a different view of the matter. The question was raised again in 1803 in connection with an appropriation for the purchase of Louisiana, and in 1868, when a like appropriation was desired for the purchase of Alaska, and later in connection with an award to England by the Commission on the Fisheries. The House, while insisting on its constitutional right to pass the act or refuse it, according to its own judgment, whether a treaty should go into effect or not, has in no instance refused to enact whatever law was needed to give effect to a treaty entered into by the President and Senate. It is claimed, on the one hand, that a treaty made by the President and Senate is the supreme law of the land, and as obligatory on the House of Representatives as upon any of the departments of government: that if the treaty contains a promise of a money payment it creates a public debt in respect to which the House has no more discretion than it has over the payment of the bonds for the public debt: that the House has the power to decline to make the necessary appropriation, but in so doing it violates the public faith as much in the one case as in the other. But, on the other hand, it is argued that a treaty is only the supreme law of the land in cases where it can go into effect without legislative aid: that in cases where the concurrence of the House is necessary to give it effect, as when an appropriation of money is needed, the treaty is not perfect until that concurrence is obtained.
It would seem the better opinion that in all ordinary cases the House should not hesitate to enact the necessary legislation to give effect to a treaty solemnly entered into with a foreign power. That power has nothing to do with the auxiliary legislative measures necessary to be taken on our part to give effect to the treaty. The United States is responsible for the execution of its treaties, and is not less responsible because a breach of faith arises out of "the discordant action of the internal machinery of its Constitution." A treaty with France in 1831 provided for the payment by that country of indemnities for spoliations on American commerce, and the French Chambers refused to vote the money. Thereupon President Jackson sent a message to Congress recommending immediate reprisals unless provision should be made for the payment of the debt at the next session of the French Chambers. Under like circumstances we should probably receive like treatment. At the same time it seems the better opinion that the House has a constitutional right to exercise an independent judgment in cases where legislation is necessary because of constitutional limitations on the treaty-making power. That power, for instance, cannot appropriate money, and cannot admit new States into the Union. In such cases the House cannot be deprived of its constitutional rights by virtue of any treaty stipulations.

The Congress of the United States in enacting laws is subject to the limitations imposed by the Constitution, and the judiciary hold an act of Congress void if passed in violation of the fundamental law. The great case of Marbury vs. Madison, 1 Cranch 137, decided in 1803, settled that question for all time. But does any distinction in this respect exist between the law-making and the treaty-making power, or will the courts also hold that a treaty, made by the President and confirmed by the Senate, is void, if, in their judgment, it violates in some way the fundamental law? It has been claimed that a distinction exists between these two cases, and that the courts
TREATY-MAKING POWER,

have no right to hold a treaty void on constitutional grounds.1
The sixth article of the Constitution reads as follows:

"This Constitution and the laws of the United States which
shall be made in pursuance thereof, and all treaties made, or
which shall be made, under the authority of the United States,
shall be the supreme law of the land."

It is claimed that while a law is void if not made "in pursuance"
of the Constitution, yet a treaty is "the supreme
law of the land" if only it has been made under the authority
of the United States. And it is said to be a necessary principle in all
governments that treaties made by the treaty-making power in good faith
must be considered as of paramount obligation, and that they bind the contracting
parties according to the laws and usages of nations without reference
to the fundamental law or municipal regulations of either. If
in pronouncing a treaty void we say to the foreign power
that it is bound to take notice of our Constitution, and to
know that under its provisions no authority exists for the
treaty in question, the other power may very properly reply to
us that it should not be required to know a matter of our own
law about which we ourselves appeared to be ignorant. It is
curious that such a question as this should be raised in this
country. It is clear, as before stated, that the courts of the
United States can pronounce an act of Congress void. It is
also well known that the courts of Great Britain cannot pro-
nounce an act of Parliament void. The courts of Great
Britain do not hesitate, however, to hold that the Crown has
exceeded its jurisdiction in its treaty engagements, and they
hold such engagements unconstitutional and void. In a case
before Sir Robert Phillimore, in 1879, the question was con-
sidered whether the Crown could by treaty merely extend to
foreigners immunities from the law of the land so as to affect
the private rights of citizens. He held that this could not be
done, saying: "This is a use of the treaty-making preroga-
tive of the Crown which I believe to be without precedent,

1See the Jurist, Vol. XI, p. 305, (1834).
and in principle contrary to the laws of the Constitution." He, therefore, declined to give effect to the treaty. The case was overruled in the court above, but on another point. Can it be within the power of the English courts to pronounce a treaty agreement void as being repugnant to the British Constitution, but beyond the power of our courts to render a similar decision respecting a treaty repugnant to the Constitution of the United States? In a case before the Supreme Court of the United States in 1796, it was argued by counsel that, under the Articles of Confederation, Congress did not have the power to make certain stipulations contained in the Treaty of Peace with Great Britain. In announcing his opinion, Mr. Justice Chase referred to the matter in the following guarded language:

"The argument, that Congress had not power to make the 4th Article of the treaty of peace, if its intent and operation was to annul the laws of any of the States, and to destroy vested rights was unnecessary, but on the supposition that this Court possesses a power to decide whether this article of the treaty is within the authority delegated to that body, by the Articles of Confederation. Whether this Court constitutionally possess such a power is not necessary now to determine, because I am fully satisfied that Congress were invested with the authority to make the stipulation in the 4th Article. If the Court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

A doubt seems to be intimated in the language quoted as to the power of the Court to hold a treaty void. But it must be remembered that at the time this language was used doubt existed as to whether the Courts could hold an act of Congress void. From what has previously been said, it appears that the treaty-making power is subject to limitation, and to assume that it cannot be confined within its limitation is contrary to our theory of government. If our Courts have never

1 The Parlement Belge, L. K., 4 P. D., 154.
2 Ware vs. Hylton, 3 Dallas 199, 237.
decided that the right exists in the judiciary to hold a treaty void on constitutional grounds it is because the occasion for such a decision has not yet arisen. It is not possible that the Courts of the United States will enforce a treaty made in violation of the fundamental law. The judicial power of the Federal Courts extends to cases arising under treaties and as a treaty is the law of the land only when it is made "under the authority of the United States," the Courts must have the right to decide whether it has been so made, and it is certain that it has not been so made if it contravenes the fundamental law. Neither the treaty-making nor the law-making power has any "authority" to violate constitutional provisions.

Important differences exist between the treaty-making power in Great Britain and the United States. In the former, as before remarked, the power is lodged in the Executive alone, while in the latter it is lodged in the Executive and Senate jointly. In the former, a treaty is a contract merely; in the latter it is a law. A treaty everywhere binds the contracting parties according to the laws and usages of nations, but in the United States that which is elsewhere a contract is by the fundamental law raised to the dignity of a "supreme law of the land." In Great Britain a treaty made by the Crown which is contrary to an act of Parliament would not be enforced by the courts of that country. But in the United States a treaty made by the President and confirmed by the Senate will be enforced by our courts and construed as repealing any provision contrary thereto which may be found in the Constitution or laws of any of the States, or in any act of Congress previously passed. In Great Britain, treaties of commerce, for example, fixing the amount of duties to be charged on the exportation or importation of goods cannot become operative without the aid of an act of Parliament. While in the United States a similar treaty, if such a treaty can be constitutionally made, as claimed by many, would not require an act of Congress to give it effect, but would itself operate as a law repealing all prior laws repugnant thereto.
Statutes and treaties are alike laws, but the methods by which they become such are radically different. The law-making body takes the initiative in the enactment of statutes, while the Executive takes the initiative in the making of treaties. In the enactment of statutes it is necessary to have the assent of the House as well as the Senate, but in the making of treaties the House need not be consulted. Publicity attends the enactment of a statute through all its stages from its introduction as a bill to the final vote on its passage, but secrecy characterizes the making of a treaty from the beginning of negotiation to final confirmation by the Senate.

The secrecy with which the foreign affairs of the government are conducted is in striking contrast with the publicity which attends the administration of other affairs of government. Our laws are openly made in our legislative assemblies, and publicly administered in our courts. But when it comes to the making of treaties the people are not informed of the action contemplated until after it has been taken. The question, therefore, naturally arises as to the reason for the making of a treaty in secret while a statute is made with entire publicity. And the question acquires additional significance when we reflect that the law which is publicly made in our Congress can be easily unmade in the next if the people disapprove it, while the treaty which is secretly made, being a solemn contract with a foreign power, can only be set aside by mutual consent of the two governments concerned. In the United States we claim to have a government of the people, for the people, and by the people, and yet without the knowledge of the people the most solemn obligations are assumed which must be fulfilled as promised unless we are prepared to break the national faith and enter, perhaps, on war.

Recent events press on the public mind the question of the propriety of keeping a treaty under the seal of secrecy until it is ratified and published. I raise no question here as to the wisdom and justice displayed by this government in the treaty said to have been entered into with Russia for the extradition
of fugitives from justice. I think that a strong argument may be made in favor of the treaty, but the fact remains that since its reported ratification it has been received in this country with pronounced disapproval. The *American Law Review* declares that "the public opinion of the American people is unanimously against it," and it calls for the abrogation of the custom of considering in "executive session of the Senate the ratification of treaties, declaring that there is absolutely no excuse for this seal of official secrecy." It expresses the opinion that "if Senators spoke and voted in the public hearing and in the public view, such a treaty as this could never be ratified." There are strong reasons which favor considering in open session the proposed ratification of treaties. But it is not clear that the reasons for making such a departure from accustomed usage are sufficiently strong to warrant its adoption. One of the reasons for excluding the House of Representatives from any share in the treaty-making power was the supposed necessity of secrecy in such matters, and the impossibility of maintaining secrecy if a body so numerous as the House were to be permitted to participate in the exercise of the power. Washington, in his Message to the House, dated March 30th, 1796, declining to communicate to that body instructions given to the minister of the United States at the Court of St. James, and the correspondence and documents relating to the Jay treaty, all of which had been called for by a resolution of the House, emphasized the importance of observing secrecy in the making of treaties. "The nature of foreign negotiations," he says, "requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated, would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconvenience, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making
treaties in the President, with the advice and consent of the Senate; the principle on which that body was formed confining it to a small body of members." Jay, in the *Federalist*, also attaches importance to the element of secrecy. "It seldom happens," he says, "in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes necessary." 1

In this, Hamilton also concurred. 2 It may be said that secrecy may be important in the negotiation of the treaty, but that it ceases to be of importance by the time it reaches the Senate for confirmation. This, however, is not the case, as the Senate may desire the modification of the treaty, making further negotiations necessary. If secrecy is important at all, its importance continues until final ratification is accomplished.

There are certain principles which the treaty-making power may well observe in entering into treaty engagements.

1. The fewer treaties there are between nations the better for the interests of peace. The policy of the United States, as outlined by Mr. Jefferson, was to avoid as far as possible entering into treaty relation with foreign powers. In 1804, he wrote as follows regarding a proposal to enter into a treaty with Naples:

"On the subject of treaties, our system is to have none with any nation, as far as can be avoided. We believe that, with nations as with individuals, dealings may be carried on as advantageously, perhaps more so, while their continuance depends on a voluntary good treatment, as if fixed by a contract, which, when it becomes injurious to either, is made by forced constructions, to mean what suits them, and becomes a cause of war instead of a bond of peace. * * * It is against our system to embarrass ourselves with treaties."

There is a great deal of political wisdom in one of Cobden's maxims, "The greatest possible contact between peoples," he said, "and the least possible contact between governments;  

1The *Federalist*, Number 64.
2The *Federalist*, Number 75.
TREATY-MAKING POWER,

because the contact of peoples promotes peace, and the contact of governments endangers peace." The governments of the world are realizing this, and careful examination will show that, as compared with former times, fewer treaties are negotiated between States.

2. As a rule, treaties should be made for a limited period and with provisions for revisal at stated times. There are some treaties which from their nature must be permanent, as treaties of boundary, of cession or exchange of territory. But the practice sometimes indulged of entering into "perpetual and eternal" engagements between nations respecting matters where permanence is not made essential by the nature of the treaty, can hardly be too severely condemned. Such engagements have, with reason, been pronounced "preposterous." John Stuart Mill argues strongly against this practice.

I am not aware of "any good reason why engagements reciprocally entered into between nations for their joint advantage should not be subject to periodical renewal. There are few, if any, contracts between nations the terms of which might not be so framed as to protect either party from sustaining undue loss or injury in case of the non-renewal of the contract."1 In his opinion, nations cannot rightfully bind themselves or others beyond the period to which human foresight can be presumed to extend. To undertake more is to incur the danger that the fulfillment of the obligation may, by change of circumstances, become either wrong or unwise. In the "instructions" issued to our Ministers Plenipotentiary appointed to negotiate treaties of commerce with European nations, bearing date May 7th, 1784, our government directed that such treaties should be made for a term not exceeding ten years from the exchange of ratification, with liberty "to extend the same as far as fifteen years with any nation which may pertinaciously insist thereon." This has been the policy of the United States, in the main, from that time to this. To be sure, we have sometimes promised to maintain a perpetual

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peace, as in the treaty of 1833 with Muscat, in which it is agreed that "There shall be a perpetual peace between the United States of America and Seyed Syeed Bin, Sultan, and his dependencies." But there are few such foolish statements to be found in the treaties of the United States. Certainly, agreements for perpetual peace can do no harm. But ordinarily, instead of entering into a perpetual engagement, it is far more sensible to provide, as in the treaty with Great Britain of 1862, that "It (the treaty) shall continue and remain in full force for the term of ten years from the day of exchange of the ratifications, and further, until the end of one year after either of the contracting parties shall have given notice to the other of his intention to terminate the same, each of the contracting parties reserving to itself the right of giving such notice to the other at the end of said term of ten years."

Or, as it is expressed in the treaty of 1842 with the same country, where it is provided:

"The eighth article of this treaty shall be in force for five years from the date of the exchange of the ratifications, and afterwards until one or the other party shall signify a wish to terminate it."

Treaties are permanently obeyed only when they represent the continued wishes of the parties.

3. Nations should as seldom as possible put oppressive or humiliating conditions into treaties. That is excellent advice which Immanuel Kant gives in his Essay on Perpetual Peace, where he says that "at the end of a war we should not make treaties which contain the seeds of another war." It is not safe or prudent to proceed on the theory that the terms of a treaty are to be regulated solely by the interests and relative strength at the time of the victors and vanquished.

Conditions should not be imposed which cannot reasonably be expected to be kept. Restrictions, for example, on the power of a nation to manage its own affairs, or which deprive it of rights common to all nations, are not likely to be permanently submitted to. A coming generation cannot be justly
asked to submit to a penalty imposed for offenses committed by a generation which preceded it.

4. When it is necessary to have legislation supplementary to a treaty, as when an appropriation of money is needed, the treaty should expressly provide that it is not to go into effect until a law to carry it into operation shall have passed the legislative body. "But prudence will point out," so Jefferson wrote in 1792, "this difference to be attended to in making them (treaties), viz: when a treaty contains such articles as will go into execution of themselves, or be carried into execution by the judges, they may be safely made; but when there are articles which require a law to be passed afterwards by the legislature, great caution is requisite."

5. There should be introduced into treaties a clause making provision for the arbitration of disputed questions arising in regard to the matters to which the treaty relates. In the case of ordinary contracts between individuals when differences of opinion arise as to the meaning of the contract and the nature of the obligations assumed, a resort may be had to the judicial tribunals which have authority to determine whether a breach of the contract has been committed, and either compel a specific performance or award damages to the injured party. But in contracts between nations, in the absence of some such provision as that contended for, there is, unfortunately, no tribunal which has the right or power to decide such disputes and bitter controversies interrupting friendly relations, embittering the peoples of the two countries, and finally resulting in war are not infrequently the result. In the treaty of 1854 extending the right of fishing and regulating commerce and navigation between the United States and the British possessions in North America, provision was wisely made to prevent or settle disputes arising as to certain matters under the treaty. That treaty provides that "in order to prevent or settle" any dispute concerning certain questions that were liable to arise under the treaty, each of the high contracting parties, on the application of either to the other, shall within six months there-
after, appoint a Commission; that the Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will decide according to justice and equity, "without fear, favor, or affection to their own country." The Commissioners are to name some third person as arbitrator in cases on which they differ in opinion, and if they cannot agree on the name of such third person, they are each to name a person, and it is then to be determined by lot which of the two persons so named is to be the arbitrator; and both of the contracting parties solemnly engage to consider the decision of the Commissioners, or of the arbitrator as the case may be, final and conclusive of the matter in dispute. The wonder is that similar provisions are not more frequently incorporated into treaties. The want of such a tribunal has been often felt and keenly deplored. Lord Derby, in 1877, while Secretary for Foreign Affairs, attending to the absence of such a tribunal for the settlement of such questions when they arise between nations, said:

"Unhappily, there is no international tribunal to which cases of this kind can be referred, or there is no international law by which parties can be required to refer cases of this kind. If such a tribunal existed it would be a great benefit to the civilized world."

The Association for the Reform and Codification of the Law of Nations have advocated the making of provision in treaties for the settlement by arbitration of disputed questions thus arising.