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OXFORD UNIVERSITY
BRITISH-AMERICAN CLUB
Paper No. 1

The Treaty-making Power in the United States

AN ADDRESS

BY

THE HON. JOHN W. DAVIS
Ambassador of the United States

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THE TREATY-MAKING POWER IN THE UNITED STATES

It is not easy for a Diplomatic officer, in search of a subject upon which to address a serious-minded body like the Oxford University British-American Club, to select a topic at the same time sufficiently concrete to be of interest, and sufficiently abstract to be within his permitted limits. He must forgo, of course, any discussion of matters in train between his Government and the one to which he is accredited; he must be dumb upon all political questions agitating his own countrymen; while as to those which disturb the serenity of his hosts he must, for his life, be not only dumb but to outward appearance deaf as well. Such restrictions, you will realize, are rather a severe abridgement of the Constitutional right of free speech. They leave their unfortunate subject little secure footing outside the realm of palaeontology or the higher mathematics.

I believe, however, that I shall not transgress if I ask you to consider the history and scope of the treaty-making power of the United States, or rather, from the point of view I have in mind, their treaty-making machinery. It is not impossible that some of its manifestations have come to your attention within the last twelve months; and from time to time there has been reason to fear that not all who witnessed its revolutions, or heard the clanking of its parts, have understood the mechanical principles by which it was controlled. Doubtless none of this audience fall within this category; but since you exist not only to secure but to disseminate information between our countries, I offer no apology for inviting your attention to the particular function of government with which all nations are reciprocally concerned.

There is a peculiar reason for such studies on the part of Britons and Americans. As no two nations are so much alike, so none are exposed to greater danger from a failure to recognize their differences. It is an observation worth

some reflection that in all probability neither the War of the Revolution nor the War of 1812 would have occurred if the Americans and English of those days had been less rather than more alike. From the American point of view the Revolution was begun as Englishmen, and continued in defence of rights to which the Colonists in common with other Englishmen were entitled by right of English blood. The searches and seizures that brought on the War of 1812 could never have resulted in the taking of some 2,500 or 3,000 American seamen by British cruisers from the decks of American vessels had it been possible to distinguish them either by speech or by appearance or by habit from those of British allegiance. You said they were British, and if not they ought to be. We said they were Americans and that ought to settle it. So we went to war, spilt each other's blood, and wound up without deciding which was in the right, being careful in the Treaty of Peace to avoid all reference to so delicate a subject. The many similarities between the two peoples ought to make, and quite surely do make, for their continued friendship; but we must be careful not to put upon these ties a strain stronger than they will bear, and we shall know their strength better if we test them link by link.

It is with such thoughts in mind that I approach the subject I have chosen. As I proceed you will find the American system in many respects not unlike that of Great Britain, but you will also detect many divergencies which I shall not tarry to point out. For while the foundation as well as the superstructure of the American Government was taken in large part from that of England—some by direct inheritance and some by conscious imitation—yet the architects who used these materials gave rein to their individual fancies and convictions and produced a building different in many respects from the ancestral home. The changes time has made in the new structure and the old have not always made them more alike.

Both for instance are on the model of government through parliamentary assemblies. But the British Parliament, having enacted a law, proceeds in its own person through the Ministry to supervise its execution; our Congress, having given birth to a statute, has nothing to do with its subsequent career, unless indeed it chooses to play the part not of executive but of executioner. When Parliament has expressed its will, it lies with no court to say that its powers have been exceeded, for Parliament is itself the reservoir

of the full power of the State; with us any Act passed by Congress or by the Legislatures of the several States is open to challenge in any court, from the lowest to the highest, upon the ground that it oversteps the limit which the Federal or State Constitution has fixed for the exercise of legislative power. The Royal veto in England has long lapsed into desuetude by lack of use, but no single President of the United States has hesitated to avail himself of his constitutional authority to veto bills with whose form or substance he was not content. Parliament and Congress are each bicameral bodies, but it has been made possible for the House of Commons to have its own way, the Lords to the contrary notwithstanding. In America a firm deadlock between the Senate and the House of Representatives can be resolved only by a change of minds or a change of members. And finally, it is the theory of the British Constitution that the treaty-making power is vested in the King, acting through his responsible Ministers; while the framers of the American Constitution committed it to the joint custody of the President and the Senate.

The Constitutional Provision

The language of the Constitution, Art. III, sec. 2, is that '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'.

To understand the American Constitution it is necessary to bear in mind the circumstances and the atmosphere which surrounded the Convention by which it was devised. That body met hot on the close of the War of Independence, and its members had all borne in greater or less degree some part in the struggle. To them it had been one of resistance to arbitrary and tyrannical authority. They had suffered, as they believed, from a deliberate effort on the part of the Crown to enlarge its power and invade the domain of the elected representatives of the people; and they were determined that, having shaken off their allegiance to George III, they would set up no imitator in his stead. With few exceptions, of whom Alexander Hamilton was the most conspicuous, all were overshadowed by a wholesome fear of unrestrained and ill-defined authority. To speak of a government as 'strong' was to condemn it in advance. The political thought of the day, moreover,

was under the spell of Montesquieu and his monumental treatise on the Spirit of Laws, and accepted as axiomatic his tripartite classification of the powers of government as Legislative, Executive, and Judicial, and his dictum that liberty was safe only when no two of these were lodged in the same hand. The machine which the Convention invented, therefore, was one of checks and balances throughout, allotting to each grand division its appropriate powers, but making the exercise of these conditional upon the concurrence of one or both of the others. Thus, while Congress alone may legislate, the President may veto and the Courts may test the statute by the constitutional yardstick. The President has great power of appointment to office and great authority as Commander-in-Chief of the Army and Navy; but the Senate must confirm his appointments and Congress alone can raise and maintain, assemble or dismiss, the forces which he is to command. The Judges of the Federal Courts hold office during good behaviour, and are independent and untrammelled in the discharge of their judicial duties; but the Senate must confirm them upon appointment, and Congress must prescribe their numbers and the organization and jurisdiction of the Courts over which they are to preside. Indeed I think at the moment of but one power given without some corresponding check—the power of executive clemency—although even here the President would be answerable before the Senate by impeachment for its corrupt use and to the people at the ballot box for its unwise exercise.

Few governmental agencies are invented outright. Their roots are commonly in the past. It will help therefore to recall the three distinct stages through which the revolting colonies passed on their way from individual independence to Federal Union.

The first of these was the era of the Continental Congress, first assembled in 1774, composed of delegates from the several colonies, whose duty it was to concert measures for the common defence. It was this body which afterwards declared war, adopted the Declaration of Independence, and gave birth to the Articles of Confederation. It was a gathering of plenipotentiaries from independent units, bound together by no written compact. Nevertheless it found it expedient to contract with foreign powers. Commissioners were appointed to negotiate with various European nations, but the treaties which they reported were made for and on behalf of the thirteen States by name,

and the Congress shared with no other officer the power to direct the negotiations and ratify the result.

The second was the period of the Confederation, beginning with the adoption of the Articles of Confederation, framed in 1777, finally ratified by all the States in 1781, and lasting until the inauguration of the new Government under the Constitution in 1789. In entering the Confederation the States were careful to reserve their 'sovereignty, freedom and independence, and every power, jurisdiction and right which is not by the Confederation expressly delegated to the United States in Congress assembled'. The sole and exclusive right and power of entering into treaties and alliances was vested in the 'United States in Congress assembled', upon condition that nine, that is to say two-thirds, of the thirteen States voting as units in the Congress should assent to the same. So determined was the Congress to keep in its own hand the trust thus committed to it, that the appointment of a Secretary of the United States for the Department of Foreign Affairs in 1782 was accompanied by a resolution requiring all instructions to Ministers of the United States, all letters to Ministers of Foreign Powers, in relation to treaties, all letters of credence and the plans of the treaties themselves to be submitted in advance to Congress for its inspection and approbation. This was certainly clumsy machinery, yet it sufficed to bring about in 1783 the treaty with Great Britain which recognized American independence and established the new nation.

The third era is of course that of the 'more perfect Union' under the Constitution, which began with the inauguration of President Washington in 1789. When the Constitutional Convention met in 1787 the mind of the delegates was accustomed to Congressional control and State approval of treaties and treaty-making, and therefore it is not surprising that the first draft reported to the Convention by its Committee on Detail vested the power to make treaties and appoint ambassadors in the Senate alone, choosing that body because it was the representative of the States, as was the lower House of the people. After discussion of this proposal, which was criticized as lacking in those elements of secrecy, dispatch, and prompt decision so necessary in delicate negotiation, a later report recommended the transfer of the power to the President, acting by and with the advice and consent of the Senate, or of two-thirds of the members present. This provision, although finally

adopted, was not permitted to escape without challenge. Some thought the power should lie with the President alone, others that it should remain solely with the Senate. Some thought the requirement of a two-thirds majority objectionable, since a minority might be able to block a treaty of peace and thus prolong a war which a majority were anxious to conclude. Others fancied that the danger lay rather with the President, who, if the Senate were not left in sole control, might block the conclusion of such a treaty in order to prolong the great accession of power and influence coming to him in consequence of a state of war. Gouverneur Morris urged that the concurrence of the President and a bare majority of the Senate should settle the question of peace; while Elbridge Gerry contended that treaties of peace dispose ordinarily of such vital matters that they of all others should be guarded by the two-thirds requirement. Numerous amendments, presenting these and other points of view, were voted down, and the clause was permitted to stand as we have it to-day. As Charles Cotesworth Pinckney of South Carolina put it in the debates that followed when the work of the Convention was before the several States for their approval:

'At last it was agreed to give the President a power of proposing treaties as he was the ostensible head of the Union, and to vest the Senate (where each State had an equal voice) with the power of agreeing or disagreeing with the terms proposed.'

Or in the language of Thomas Jefferson in his *Manual of Parliamentary Practice*, adopted by the Senate as the basis of its rules of order:

'By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary Legislature; the President originating and the Senate having a negative.'

Perhaps this brief summary puts the case as well as would a longer exposition. It answers, at least, to the point where the work of the Senate is concluded; for I would have you understand that in the formation of a treaty, valid and binding upon the United States, there are three distinct and indispensable stages. These are, first, negotiation by the President; second, approval by the Senate; and third—and this is by no means a mere form—ratification by the President. Let us consider these in order.

Negotiation by the President

'The President', said John Marshall, 'is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'[1] As such his discretion in the matter of negotiation is absolute and uncontrolled. The time, the manner, the subject of the negotiation, are all for him and him alone. He may begin at his pleasure and leave off at his will. He may conduct the negotiation through the usual diplomatic channels or by means of special agents of his own choosing; and of course, what he might do through his agents he may do in his own proper person. He may bring forward any project which meets with his approval, and he may decline to enter upon any topic which his judgement rejects. In the former event his work must ultimately be passed upon by the Senate, but in the latter the Senate is powerless to stir him to action.

In the nature of things this must be so, for it needs no argument to show how impossible it would be for a body to negotiate in any real sense which was composed at its formation of twenty-six members and has grown with the passage of time to ninety-six. It would be mutually insupportable, moreover, if foreign powers were compelled to weigh the credentials of the head of the State. As early as 1793 Mr. Jefferson, writing to the French Minister by authority of President Washington, stated that as the President was the only channel of communication between the United States and foreign nations it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation'; that whatever he communicated as such, they had a right and were bound to consider 'as the expression of the nation'; and that no foreign agent could be 'allowed to question it or to interpose between him and any other branch of the government under the pretext of either's transgressing their functions'.[2]

Of course he has the right to ask the advice of the Senate at any stage of the proceeding, and the Senate in turn may express its views by an appropriate resolution whenever the spirit moves it. But no duty to make such an approach rests upon the President, and he may give to any expression from the Senate only the weight which pleases him. Long-

[1] *Annals*, 6th Cong. 613.
[2] IV Moore, *Dig.* sec. 670.

continued custom has practically dispensed with any consultation of a formal character between them in advance.

In the beginning President Washington thought it the better plan to meet with the Senate in person before negotiations were begun. He presented himself accordingly to take their advice touching a proposed treaty with the Southern Indians, propounding a series of questions for their consideration. Discussion broke out, the session was adjourned to the succeeding day, and finally the Father of his Country departed with what one chronicler describes as a 'discontented air', adding, 'Had it been any other than the man whom I wish to regard as the first character in the world, I would have said with sullen dignity'.[1] Another, with perhaps even closer approach to the facts, reports him as saying when he left the Chamber that he would be d——d if he ever went there again.[2] He kept his word, and although the rules of the Senate still make provision for the decorous procedure to be observed on such occasions, Senator Lodge remarked on the floor of the Senate on January 24, 1906: 'Yet I think we should be disposed to resent it if a request of that sort was to be made to us by the President.'[3] The precedent thus set remained unbroken for 128 years, or until President Wilson appeared before the Senate on January 23, 1917, to address them upon the essential terms of peace, chief among these being the formation of a league of free nations to guarantee peace and freedom throughout the world.

Notwithstanding this unpleasant experience, President Washington continued throughout his term to invoke the opinion of the Senate by written messages upon negotiations which he proposed to inaugurate; but with his disappearance from office the custom fell into disuse and has practically disappeared.[4] Instances have continued to occur, but they have been relatively few in number and unimportant in result.[5] As early as October 15, 1804, Mr. Madison, afterwards President, then Secretary of State,

[1] Maclay's *Sketches of Debates in the First Senate of the United States*, 122-6.

[2] 6 *Memoirs*, J. Q. Adams, 427.

[3] *Cong. Rec.*, 59th Cong. 1st sess., 1470.

[4] *Butler on Treaty-Making Power of U.S.*, sec. 462.

[5] The most conspicuous of these is perhaps the action of President Polk in reference to the Oregon Boundary settlement in 1846. He remarked in his message that 'This practice, though rarely resorted to in later times, was in my judgment eminently wise, and may, on occasions of great importance, be properly revived'.

wrote to Minister Yrujo of Spain contrasting the Spanish and American practice, in this language:

'Another distinction absolutely decisive is that the conditional ratification . . . proceeded from the Senate, who, sharing in treaties on the final ratification only, and not till then even knowing the instructions pursued in them, cannot be bound by the negotiation like a sovereign, who holds the entire authority in his own hands.'

And he goes on to add:

'When peculiarities of this sort in the structure of a government are sufficiently known to other governments, they have no right to take exception at the inevitable effect of them.'[1]

Henry Clay, when Secretary of State in 1825, expressed the same point of view, thus:

'According to the practice of this Government, the Senate is not ordinarily consulted in the initiatory state of a negotiation, but its consent and advice are only invoked after a treaty is concluded under the direction of the President and submitted to its consideration. Each of the two branches of the treaty-making power is independent of the other, whilst both are responsible to the states and to the people, the common sources of their respective powers.'[2]

President Jackson, in asking the Senate on May 6, 1830, for its advice upon a proposed treaty with the Choctaw Indians, takes occasion to declare himself

'fully aware that in thus resorting to the early practice of this Government by asking the previous advice of the Senate in the discharge of this portion of my duties, I am departing from a long and for many years unbroken usage in similar cases. But', he adds, 'being satisfied that this resort is consistent with the provisions of the Constitution, that it is strongly recommended in this instance by considerations of expediency, and that the reasons which have led to the observance of a different practice, though very cogent in negotiations with foreign nations, do not apply with equal force to those made with the Indian tribes, I flatter myself that it will not meet with the disapprobation of the Senate.'

It has been suggested, however, that the Senate might be related to the negotiations leading to a treaty by the appointment of one or more of its members as plenipotentiaries for that purpose. But here again both precedent and, as many

[1] II *Am. State Papers, For. Relations,* 625.
[2] V Moore's *Digest,* 200.

think, the better reason, bar the way. Among the Commissioners whom President Madison selected for the Conference at Ghent which closed our war of 1812, were James A. Bayard of Delaware, a distinguished member of the Senate, and Henry Clay of Kentucky, then Speaker of the House. They were impressed, however, with the fact that such a service would impose upon them a double duty; to their colleagues at the Conference to respect any confidences that might there be confided to them, and to their associates in Congress to disclose all matters within their knowledge. Accordingly both resigned from Congress before entering upon their duties as Commissioners. At the end of the Spanish-American war President McKinley sent to the peace conference at Paris a Commission of five members, three of whom, Messrs. Davis, Frye, and Gray, were eminent members of the Senate. But the practice was so little to the liking of the Senate that a resolution disapproving it was introduced and referred in regular course to the standing Committee of the Judiciary. The Committee declined to report lest its action might be taken as a personal reflection upon the gentlemen selected. Instead it sent its Chairman, Senator Hoar of Massachusetts, to remonstrate with the President and to say to him 'that the Committee hoped the practice would not be continued'. Senator Hoar in a description of the interview reports the President as saying 'that he was aware of the objections; that he had come to feel them very strongly; and while he did not say in terms that he would not make another appointment of the same kind, he conveyed to me, and I am sure meant to convey to me, an assurance that it would not occur again'.[1]

Among the objections urged at the time were that such appointments tended to give to the President an undue influence over the Senate, and violated in spirit if not in letter the clause of the Constitution forbidding any Senator or Representative during the time for which he was elected to be appointed to any civil office under the United States, which should have been created during such time.

It is worth noting also that when this particular Treaty of Peace was laid before the Senate it gave rise, notwithstanding the make-up of the Commission, to the most heated and acrimonious debate, and for a time its ratification was seriously in doubt.

[1] *Cong. Rec.*, vol. 30, part 3, p. 2695.

It narrowly escaped the fulfilment of a gloomy prediction made by John Hay in the month of May, 1898, when he wrote to a friend:

'I have told you many times that I did not believe another important treaty would ever pass the Senate. . . . The man who makes the treaty of peace with Spain will be lucky if he escapes lynching.'[1]

The Approval of the Senate

But free and unfettered as is the President at every stage of the negotiations, the Senate is no less so when the result of his efforts is laid before it. It then becomes not only the right but the duty of all Senators to give expression to their impartial and independent judgement; and save for moral suasion the President is as powerless to influence their conduct as were they to dictate his own. Moreover, party ties cannot be relied upon to produce favourable action, for occasions are rare when any political party commands two-thirds of the seats in the Senate or a like proportion of those present and voting.

Without entering upon the intricacies of parliamentary procedure, it must be admitted that the path of a treaty through the Senate is not always strewn with roses. The treatment meted out has taken many different forms. The Senate has at various times (1) approved unconditionally, (2) approved with amendments, (3) approved without express amendments but upon condition that certain changes should be made, (4) approved with an accompanying resolution of reservation or interpretation, (5) failed or refused to act and so permitted the treaty to die an *un*natural death, or (6) disapproved and rejected.

The right to amend, or to approve upon condition that amendments should be made, was exercised from the outset. When the Commercial Treaty with Great Britain, negotiated on behalf of America by John Jay, first Chief Justice of the United States, was laid before the Senate in 1725, the twelfth Article, by a rather inexcusable oversight on Jay's part, was so drawn that it prohibited the transportation of American cotton in American vessels; it failed, moreover, to open the trade with the British West Indies to the extent which had been hoped. The Senate accordingly advised and consented to the ratification of the treaty 'on condition' that an Article should be added suspending so

[1] II Thayer's *Life of Hay*, 170.

much of the objectionable Article as related to trade between the United States and Great Britain. This was assented to by the British Government and ratification ensued. Since that time the practice has been followed with no little freedom, one author having computed that seventy treaties so amended had come into operation between the birth of the Union and the year 1906,[1] and the number has been added to since that day. Indeed it is not at all uncommon for the President in transmitting the treaty to the Senate to suggest certain amendments which further consideration upon his part has led him to advise.[2]

Of course such amendments are of no effect until they have received the consent of the other party to the covenant, and in this sense the Senate may be said to negotiate. But they are not considered to require a reopening of the formal negotiations nor a re-signing of the treaty, since the final exchange of ratifications of the treaty so amended is sufficient evidence of mutual consent.

Reservations and interpretative resolutions are likewise by no means infrequent. Thus in advising and consenting to the ratification of the General Act of the Algeciras Conference, the Senate took occasion to assert that in so doing it had no intention to depart from the traditional policy of America to have nothing to do with 'the settlement of questions which are entirely European in their scope'. While in acceding to the Hague Convention of 1907, it felt called upon to declare that nothing contained in that Convention should be so construed 'as to require the United States of America to depart from its traditional policy of not intruding upon, or interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state; nor shall anything contained in said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude towards purely American questions'.

How often, however, is the logic of events wiser and more inexorable than all the reasoning of statesmen. The pages of history are full of time's revenges, and even Senatorial wisdom has not escaped them. For instance, to mention but a few of many examples, in the year 1844 the Senate, moved largely by political feeling growing out of the slavery question, defeated a treaty for the annexation of Texas, which had seceded from Mexico and declared itself an inde-

[1] Foster's *Practice of Diplomacy*, 276.
[2] *Crandall on Treaties*, sec. 52.

pendent republic; but before two years had rolled around Texas became a State of the Union. In 1854 it rejected a like treaty for the annexation of Hawaii, but this too came to pass after the lapse of forty-four years. In 1865 it took similar action upon an agreement to purchase from Denmark the Virgin Islands for seven million five hundred thousand dollars; but the only result was to delay their acquisition for more than half a century and treble the price to be paid. In 1888 a treaty to settle the century-old dispute with Canada over the Atlantic Fisheries failed of approval, but wise counsels prevailed twenty years later and the matter is now at rest.

Be the action of the Senate what it may, it must not be imagined that any discourtesy is implied toward the Government with which the treaty is negotiated. As Secretary Fish put it in communicating with Great Britain when the treaty of 1869 dealing with the Alabama claims had been rejected:

> 'The United States can enter into no treaty without the advice and consent of the Senate; and that advice and consent to be intelligent must be discriminating; their refusal can be subject to no complaint, and can give no occasion for dissatisfaction or criticism.'

Ratification by the President

If the treaty has survived its ordeal in the Senate there remain the final steps of ratification by the President, the exchange of ratifications with the contracting power, and the President's proclamation declaring it the law of the land. Here there returns to the President all the freedom which he originally enjoyed. He could have declined in the first instance to negotiate; he could have elected not to lay the negotiated treaty before the Senate; he could at any time before the final vote have withdrawn it from their further consideration; and now he may decide to proceed no further upon the advice and consent which the Senate has expressed. This is true as well when the action of the Senate is one of unanimous approval, as when it is one of grudging consent or mutilating amendment.[1] In either case he may lock the treaty in his desk or consign it to cold oblivion in the public archives.

The roster of such diplomatic casualties is by no means

[1] *Crandall on Treaties*, par. 53.

short. It displays the constant jealousy with which the Executive and the Senate have guarded their respective powers. There was tremendous mortality, for instance, when the Senate and President Roosevelt locked horns over the arbitration treaties negotiated by Secretary Hay with a number of nations. These provided for the reference to the Hague Court of all difficulties of a legal nature as well as those relating to the interpretation of treaties, which could not be settled by diplomacy, and which did not affect vital interests, independence or honour. The reference in each case was to be made by special protocol or agreement, presumably by the direction of the President. This the Senate amended so as to keep the matter in its own hands. President Roosevelt was so deeply incensed that he refused to go on with the treaties. We hear from Hay again after this experience with the remark that:

> 'A treaty entering the Senate is like a bull going into the arena: no one can say just how or when the final blow will fall—but one thing is certain, it will never leave the arena alive.'[1]

The Constitution Supreme

I have spoken of the untrammelled discretion of the President and the Senate, but the phrase is really a misnomer. In the words used by Herodotus to describe the freemen of Greece, 'though free they are not absolutely free, for they have a master over them, the law'. Like all other officers of the Government they dare not exceed the authority which has been granted to them, and a treaty no less than a statute must conform to the Constitution and yield to its superior force. No treaty, by way of illustration, would have binding force which violated the Constitutional prohibition against the establishment of religion or the restriction of its free exercise, which abridged the right of the people peaceably to assemble and to petition for a redress of grievances, which sought to re-establish chattel slavery, or which disturbed the Constitutional distribution of power.

In matters requiring the appropriation of money or affecting customs dues and tariffs, the consent of the House of Representatives must also be obtained before the treaty can be executed: for like the House of Commons it holds the purse, with the right to unite in all appropriations and to initiate all legislation for raising the revenues, and it is zealous in the defence of its prerogatives.

[1] II Thayer's *Life of Hay*, 393.

Whether the Federal Government can agree to the cession of territory without the consent of the State of which it forms a part, is a question that has caused no little academic discussion. When the north-eastern boundary between the State of Maine and Canada came to be settled, the precaution was taken to have the State represented in the negotiations by commissioners and to secure the consent of its Legislature. But if the time should come—which, in the pious language of the old treaties, 'is not to be expected and may God forbid'—when the territory of the United States is successfully invaded, there will be a pretty controversy as to the right of the Federal Government to ransom the rest of the Union by ceding all or any part of the invaded portion.

Of more practical consequence is the query whether by the use of the treaty-making power the Federal Government can deal with any of those matters left by the Constitution to the control of the States; matters of public morals, public health, the hours of labour, or, as in the case of our most recent treaty with Great Britain, the protection of the wildfowl that come and go across the Canadian border. Here there is fierce battle among the pundits. You will think it strange that after the Constitution of the United States has been in force for 140 years such questions should still be open. I can only reply that there are many more equally unsettled, and as to all of them we wait for a deliverance in the fullness of time from the Supreme Court as the final arbiter and interpreter.

Conclusion

Such in meagre outline is the treaty-making power of the United States, and the machinery by which it operates. An unfriendly critic might denounce it as complicated and cumbersome, ill adapted to the complex demands of international intercourse, slow in action and uncertain in outcome. The requirement of a two-thirds rather than a majority vote in the Senate he might criticize not unjustly as a dubious excess of caution. He might point his moral and adorn his tale with many instances of sharp and frequently bitter discord between Presidents and Senators. Of this audience, however, I ask only that if you think it like Rob Roy MacGregor 'ower bad for blessing', you pronounce it also 'ower good for banning'. For believe me, the American people are like for many years to accomplish

through this means their compacts with mankind. The checks and balances by which it is surrounded, the free and full debate which it allows, are in their eyes virtues rather than defects. They rejoice in the fact that all engagements which affect their destinies must be spread upon the public records, and that there is not, and there never can be, a secret treaty binding them either in law or in morals. Looking back upon a diplomatic history which is not without its chapters of success, they feel that on the whole the scheme the fathers builded has served the children well. With a conservatism in matters of government as great perhaps as that of any people in the world, they will suffer much inconvenience and run the risk of occasional misunderstanding before they make a change.

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