

THE ROLE OF THE PRESIDENT AND THE SENATE IN THE TREATY MAKING POWER

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“He (the President) may himself be less stiff and offish, may himself act in the *true spirit* of the Constitution and establish intimate relations of confidence with the Senate on his own initiative, not carrying his plans to completion and then laying them in final form before the Senate to be accepted or rejected, but keeping himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his information of the greatest service to them; in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest.”—Woodrow Wilson.

From a constitutional standpoint, what is the respective role of the President and of the Senate in the making of treaties? At the present time there are two schools of thought expounding widely different doctrines upon this subject. The American people vividly remember the respective claims of the President and of the Senate in the recent consideration of the Treaty of Versailles. The question at issue is, does the Senate have the constitutional right to know the facts and to actually participate in the treaty making function, as an advisory body to the President, while the treaty is being formulated, or does the Senate only have the constitutional right to say “yes” or “no” when the treaty in its final form is first presented to it? Or to put it in another way, is the action of the Senate upon a treaty an integral part of the treaty making function which may be exercised at any stage of a negotiation, or is it merely to give sanction to a treaty that is already drafted?

In the discussion of this problem we shall examine and attempt to answer four questions. (1) What was the intention of the framers of the Constitution in this matter as evidenced by the debates in the Constitutional convention? (2) What is the correct construction of the phraseology of the constitutional provision on the treaty power? (3) Has our treaty practice been in harmony with this construction? And finally, (4) from the standpoint of policy, is this construction preferable?

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The debates on the treaty power in the Constitutional convention throw some light on our problem. The first point of importance to be emphasized is the fact that in the whole history of the Convention, at no time did any member suggest that the President alone should have this power. Even Hamilton, who was an ardent advocate of a highly centralized government, was unwilling to place this important power exclusively in the hands of the President. He believed that the Senate should participate because of "the vast importance of the trust, and the operation of the treaties as law." His Sketch of Government presented to the Convention, June 18, 1787, gave to the executive authority, with the "advice and approbation of the Senate, the power of making all treaties."

Furthermore, the debates show that the majority of the members were not even favorable to the idea of giving the President any share in the treaty power until late in the convention. The Pinckney Draft (Art. VII) provided that "The Senate shall have the sole and exclusive power . . . to make treaties." After weeks of discussion, on August 6, 1787, the Committee on Detail, still adhering to the Pinckney plan, reported out Art. IX, Sec. 1, which read as follows: "The Senate of the United States shall have the power to make treaties."¹ Prof. Mathews has admirably summarized the influences that led the members of the Convention to favor the Senate rather than the President in treaty making. "(1) Fear of the autocratic power which might result from placing this important function in the hands of one man, (2) a desire to depart from English precedent, (3) the force of practice under the preceding regime, when for lack of a President, the Continental and Confederation Congresses had directed the foreign relations of the country, and (4) the feeling that since the states were prohibited from making treaties, some compensation should be granted them by giving this power to their representatives in the upper house, thereby protecting them against injury at the hands of the Federal government in its control over foreign relations."²

The President was finally given a share in the treaty power only after Madison made the suggestion "that the Senate represented the states alone, and that for this as well as other obvious reasons, it was proper that the President should be an agent in treaties." But with reference to treaties of peace, Madison made an exception and sug-

1. See Article by Senator Bacon, "The Treaty Making Power," N. A. Review, Vol. 182, pp. 510-11.

2. The Conduct of American Foreign Relations, 1922, p. 131.

gested the consent of two-thirds of the Senate *without* the concurrence of the President, since the President would derive so much power and influence from a state of war that he might be tempted to impede the conclusion of a treaty of peace.³ This exception was defeated presumably because the convention accepted the view of Nathaniel Gorham of Massachusetts that the precaution was unnecessary since the means of carrying on war were in the control of the legislature.⁴

From a review of the debates in the Constitutional convention it is impossible to generalize and to say that the convention gave a definite answer to our specific problem. They did not describe in detail the exact function or the method of procedure of the President and the Senate in the making of treaties. But we submit that it is fair to conclude that the delegates were inclined at least to view the Senate as possessing equal dignity, equal power and equal responsibility with the President in the making of treaties. And this general attitude becomes significant in discussing the true meaning of the phraseology of the treaty clause as finally drafted.

But before attempting this interpretation, it is well to dispose of one consideration. In many of the treatises on the treaty power it is deemed proper by way of introduction to indulge in a philosophical speculation as to the inherent nature of this power, whether it be executive or legislative. We consider this to be irrelevant in determining the respective roles of the two departments in our government in the treaty making function. Our Supreme Court has said, "Our own Constitution and form of government must be our only guide."⁵

The Constitutional provision bearing on this point reads as follows: "He (the President) shall have power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."⁶ The advocates of the Wilsonian⁷ interpretation of the powers of the executive in the making of treaties would argue that it is the function of the President to negotiate and that of the Senate to consent. But the term "negotiate" does not appear in the Constitution. Both the history of the convention and the phraseology of the Constitution give the lie to this interpretation. Senator Bacon in a debate in the United States Senate in 1906 presented an irrefutable argument on this point. He said, "The Constitution does not divide

3. Documentary History of the U. S., Vol. III, p. 700.

4. Ibid, III, 700.

5. Fleming vs. Page, 9 How. 603.

6. Art. 2, Sec. 2, Clause 2.

7. We use the term "Wilsonian interpretation" because Wilson is the most thorough-going exponent of this view.

the power conferred upon the President and the Senate respectively into two parts, so that the term to make should be construed to mean, in the first division 'to negotiate' and in another division 'to consent,' thus conferring the one upon the President and the other upon the Senate. It is one *indivisible* power 'to make' and in the entire power 'to make' the Senate is given full participation on advising and consenting. The contention that the power of the President includes everything up to the time of the submission of the proposed treaty to the Senate might be sustained if the language of the Constitution were that 'the President of the United States shall have power to negotiate, and by and with the advice and consent of the Senate to make treaties.'⁸

There can be no question but that the precise wording of the treaty clause was deliberate and for a purpose. The framers did not desire to break up the treaty making power into two parts. They did not contemplate that the Senate should function only to give sanction to a treaty already drafted. Their purpose was to make the President and the Senate coordinate with each other in the treaty making function, sharing equal power and equal responsibility. If there is still doubt on this point, the following consideration should be conclusive. Separated only by a semi-colon from the treaty provision, and in the same article, section and clause of the Constitution is the provision for the nomination and appointment of officials. But note the difference in phraseology. "And he (the President) shall *nominate* and by and with the advice and consent of the Senate, shall *appoint* ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law," etc. As far as this function is concerned, the framers clearly distinguished between two powers, that of nominating and that of appointing. The first is exclusively in the hands of the President; the second is jointly given to the President and the Senate. But extremists who care little for the provisions of the fundamental law, have ignored this difference in phraseology and have claimed that because the Senate cannot amend a nomination by striking out the name sent in by the President and inserting another, it therefore, by analogy, cannot amend a treaty.⁹

There is one further argument from the standpoint of phrase-

8. Senator Bacon, *The Treaty Making Power*, N. A. Review, Vol. 182-505.

9. See Senator Lodge's article, *The Treaty Making Power of the Senate*, Scribner's, Vol. 31, p. 33.

ology. What is the meaning of the word "advice" in the treaty clause. Senator Bacon has said, "It is proper for the Senate to advise at all stages. We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating and before they have determined and before they have acted."¹⁰ The Wilsonian interpretation would make the word "advice" mere surplusage. John Marshall, our greatest Chief Justice, has something to say concerning an interpretation which would have this effect. "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intended to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said."¹¹

What, then, is the correct interpretation of the constitutional provision relating to the treaty power? We hold that the President and the Senate are coordinate departments and should have equal power and equal responsibility. This does not mean that the President is obligated to seek advice in person. He may do so by message. It does not mean that the President must, in all cases, seek advice before he enters into the preliminary stage of a negotiation. The President, as the chief executive, may take the initiative in the field of foreign relations, but when a treaty is under negotiation the Senate has a constitutional right to know the facts and to give advice. It is implicit in the very idea of making the Senate an advisory body to the President, that the Senate shall have the privilege of being an informed advisor. If the Senate sees fit to delegate its advisory function to its own Committee of Foreign Relations, the President may constitutionally deal with that committee and may seek advice from it. This committee, being the creature of the Senate, can be required to report to its creator at any time. It is also not inconsistent with the treaty clause for the Senate to take the initiative and suggest, by resolution, that a certain treaty of a certain type be negotiated. Of course the President is not bound to accept the advice; neither is the Senate bound to give its consent. As David Jayne Hill has so well said, "If an impasse is created intentionally, the fault lies with him who has intentionally created it, for it is not legally in the power of either participant in the process to destroy the freedom of judgment of the other. Its safety lies in the fact that it is a joint procedure. Either can completely block the

10. Quoted in Corwin's "The Control of Foreign Relations," p. 181.

11. *Gibbons vs. Ogden*, 9 Wheaton 188.

interests of the other, but neither can force the other; and herein lies the wisdom of the arrangement."¹²

Has our treaty practice been in harmony with this construction? It is important to get the point of view of the first President of the United States, who was also the president of the Constitutional convention and as such presided over the debates of that body. The actual practice of treaty making under Washington's administration evolved through three distinct stages as far as details are concerned. His earliest view is illustrated by the treaty with the Creek Indians in 1789. On August 22nd of that year, he appeared in person before the Senate to get its advice by an affirmative or negative vote on seven specific questions relating to the proposed treaty.¹³ The Senate voted affirmatively on only part of the propositions submitted.¹⁴ He not only expressed himself in favor of oral communications with the Senate, but even anticipated the establishment of a *special chamber* where the joint business of the President and the Senate could be conducted. In a letter to Madison on August 9, 1789, he said, "In all matters respecting treaties, *oral* communications seem indispensably necessary; because in these a variety of matters are contained, all of which not only require consideration, but some of them may undergo much discussion to do which by written communications would be tedious without being satisfactory."¹⁵ As to the place of carrying on this joint function, Washington said, "In the appointment to offices, the agency of the Senate is purely executive and they may be summoned to the President. In treaties, the agency is perhaps as much of a legislative nature, and the business may properly be referred to their deliberations in their legislative chamber. The occasion for this distinction will be lessened if not destroyed, when a chamber shall be *appropriated* for the *joint* business of the President and the Senate."¹⁶

This first stage is not only marked by the practice of oral communications, but also by the fact that the advice was sought in advance of, and during the negotiation. On April 1, 1792, Jefferson, as Secretary of State, advised the President to consult the Senate *before* opening negotiations, since its subsequent approbation was necessary to validate a treaty.¹⁷

12. Present Problems in Foreign Policy, 1919, Appleton, pp. 161-3.

13. Ex. Journal, 1-19-20-23.

14. Maclay, Sketches of Debate in first Senate of United States, Harris, Ed. 122-6.

15. Washington's Writings, Ford Ed. XI, 415.

16. Ibid, 417-9.

17. Washington's paper, XXI, p. 21; Jefferson's papers, series 4, Vol. 2, No. 18.

After the Creek treaty Washington abandoned the practice of appearing in person and asking advice, but he did continue to seek advice by message, either prior to or during negotiations. In connection with the treaty with Algiers in 1795 for the ransom of American seamen, Washington, acting on the advice of Jefferson, kept both houses informed of every step in the negotiations during a period of three years, on the theory that inasmuch as subsequent legislation would be required to make it effective, it would be good policy for the executive to keep in close touch with both branches of the legislature.¹⁸

The Jay treaty is illustrative of the third step. Here instead of consulting the Senate as a body for purposes of advice during the negotiation, he conferred with prominent members of the Senate. This practice has led to the growth and increasing power of the Senate Committee on Foreign Relations.

No attempt shall be made to give a detailed history of treaty making in each administration since that of Washington. A few salient facts and certain broad tendencies, however, should be pointed out. From the beginning of the government until August 1, 1914, 595 treaties have been made.¹⁹ Many of these are relatively unimportant. No President since Washington has appeared in person before the Senate seeking advice. Crandall cites eighteen instances in which the advice of the Senate has been sought by the President, by message, prior to negotiations.²⁰ Many of the Presidents have kept the Senate as a body advised, by message during the period of negotiations. A few of the outstanding illustrations are recorded. President Madison, in his message of July 6, 1813, went so far as to hold that the Senate by delegating its power to its own committee on Foreign Relations was violating the spirit of the treaty clause. He said, "The Executive and the Senate, in the cases of appointments to office and of treaties, are to be considered as independent of and coordinate with each other. The appointment of a committee of the Senate to confer immediately with the Executive himself loses sight of the coordinate relation between the Executive and the Senate which the Constitution has established, and which ought therefore to be maintained."²¹ President Jackson in a message of May 6, 1839, sought the advice of the Senate as to the conclusion of a treaty with the Choctaw Indians.²²

18. Am. St. Papers For. Rels. 1-288-300; 413-4 2.

19. Checklist of U. S. Public Documents, 1911, p. 978; Wright, Am. J. of Int. Law, Vol. 13, footnote pp. 242-3.

20. Crandall: Treaties, Their Making and Enforcement, 2 ed., p. 68.

21. Lodge: Treaty Making Powers of the Senate, Scribner's, Vol. 31, p. 39.

22. Ex. Journal, IV, 97.

Mr. Buchanan, as Secretary of State in President Polk's cabinet, instructed Mr. Lane, Minister to Great Britain, on February 26, 1848, as follows:

"The Federal Constitution has made the Senate to a certain extent a coordinate branch of the treaty making power. Without their advice and consent, no treaty can be concluded. This power could not be entrusted to *wiser* or *better* hands. Besides in their legislative character, they constitute a portion of the war making, as in their executive capacity they compose a part of the treaty making power. A rejection of the British ultimatum might probably lead to war, and as a branch of the legislative power, it would be incumbent upon them to authorize the necessary preparations to render this war successful. Under these considerations, the President, in deference to the Senate, and to the *true theory of constitutional responsibilities* of the different branches of the government, will forego his own opinions so far as to submit to that body any proposition which may be made by the British government."²³ When the British proposal in regard to the Oregon Boundary dispute arrived, President Polk submitted it to the Senate and added that he would "conform" to their "advice." In his message to the Senate he said, "The Senate are a branch of the treaty making power, and by consulting them in advance of his own action upon important measures of foreign policy, which may ultimately come before them for their consideration, the President secures *harmony* of action between that body and himself. The Senate, moreover, are a branch of the war making power; and it may be eminently proper for the executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace or war."²⁴ On August 4, 1846, Polk advised the Senate of his intention to propose terms of peace with Mexico.²⁵

On March 16, 1861, Lincoln sought further advice from the Senate on the Oregon question.²⁶ On the 27th of December, 1861, Lincoln again sought advice from the Senate concerning the guarantee of payment of claims urged by certain European powers against Mexico.²⁷ In 1862, Lincoln referred to the Senate for its advice a proposed treaty with Mexico. The Senate advised against it. President Johnson on two occasions²⁸ and President Grant on three occasions sought the

23. Works of Buchanan, Moore. Edition VI, 379.

24. Richardson: Messages and Papers of the Presidents, IV, 449.

25. Ex. Journal, VII, 132.

26. Ex. Journal, XI, 308.

27. Ex. Journal, XII, 24.

28. Ex. Journal, XVI, 163-441; XVII, 174.

advice of the Senate.²⁹ President Arthur in 1884 asked for the advice of the Senate in regard to a reciprocity treaty with Hawaii. He said, "It is fitting to consult the Senate on the matter before directing negotiations to proceed."³⁰

In addition to the cases where the President, by message, sought the advice of the Senate as a body during the period of negotiation, there are many illustrations of the practice where the President took into his confidence leading members of the Senate and sought their advice. A typical illustration of this method is found in the negotiations of the Ashburton treaty. Daniel Webster, as Secretary of State, kept the principal Senators informed as to the various steps in the negotiation and was thus enabled to secure the Senate's advice and consent to ratification, even though the majority of that body was opposed to the President politically.³¹ There are other cases where this advice was sought by formal notes sent to the Senate Committee on Foreign Relations. There have also been numerous cases where the President has refused to seek advice during the negotiations and has not submitted the treaty to the Senate until it was drafted in its final form.

Crandall cites thirteen cases where the President refuses to ratify treaties in the form approved by the Senate.³² He cites ten cases where the President withdrew treaties while still under Senate consideration.³³ He cites nine cases where the President withheld treaties from the Senate altogether,³⁴ and eleven in which the President submitted them to the Senate with recommendations for amendment.³⁵

The Senate has the power to reject a treaty by refusing to "consent" to its ratification. Crandall cites seventeen cases of rejection of treaties by the Senate.³⁶ Senator Lodge lists sixty-eight treaties, down to 1900, that have been amended by the Senate and afterwards ratified.³⁷ Further, the Senate can make its consent to ratification conditional upon the acceptance by the signatory power of amendments, reservations or interpretations. Quincy Wright points out that of over 650 treaties signed by the United States, in about one-tenth the Senate has qualified its consent to ratification.³⁸ The Supreme Court has held

29. Ex. Journal, XVIII, 59-264; XIX, 355-512.

30. Ex. Journal, XXIV, 280.

31. See J. W. Foster, *The Treaty Making Power Under the Constitution*, Yale Law Journal, XI, 71.

32. Crandall, p. 97.

33. P. 95.

34. P. 99.

35. P. 97.

36. P. 82.

37. Scribner's, Vol. 31, p. 33.

38. Minn. Law Review, Vol. 4, p. 15.

that to make an amendment, reservation or interpretation effective, both the President and the Senate must consent. In the case of *Fourteen Diamond Rings v. United States*,³⁹ we read, "The meaning of the treaty cannot be controlled by subsequent explanations of *some* of those who may have voted to ratify it." Interpretations or reservations made by the President without the consent of the Senate have met the same fate.⁴⁰

Of all the treaties that have been negotiated by the Executive without the "advice" of the Senate, the treaty of Versailles is the most notorious example. This treaty was negotiated in secret, and the Senate was kept in the dark during the whole period of the negotiation. Not only did the President, by his interpretation of the treaty clause make the word "advice" mere surplusage, but he also attempted to interfere with the Senate in the exercise of its constitutional function of giving "consent." Although posing as the exponent of "open covenants, openly arrived at," when he finally decided to present the treaty in its completed form to the Senate, he actually refused to submit, with the treaty, the discussions and minutes of the Peace Conference. He said, "The reasons we constituted that very small conference was so that we could speak with the utmost absence of restraint, and I think it would be a mistake to make use of those discussions outside."⁴¹ He must have known that it was impossible for the Senate to act intelligently and to give a real consent from the bare text of the treaty. In the nominal interests of peace, we behold the spectacle of the executive, attempting to bring unfair political pressure upon an uninformed Senate. After depriving a coordinate department of its constitutional right to the facts, he proceeded to appeal to the country, claiming to have a monopoly on the plans for the peace of the world. And in order that the emasculation of the coordinate power of the Senate might be complete, he so drafted the treaty and the covenant, that they could not be separated and could not be voted on separately on their merits. On March 4, 1919, in New York, the President, certain of victory, made this boast: "When that treaty comes back, gentlemen on this side will find the covenant not only in it, but so many threads of the treaty tied to the covenant, that you cannot dissect the covenant from the treaty without destroying the whole vital structure."

Usurpation is a dangerous thing, even though the act be committed in good faith and with the honest belief in its constitutional sanc-

39. 183 U. S. 176.

40. 5 Moore: Digest 205-6; Crandall, 85-381.

41. Hearings Before Sen. Com. on For. Rels. on Treaty of Peace With Germany, p. 521.

tion. But here to aggravate the offense, the usurpation was deliberate. Woodrow Wilson was no novice in the field of constitutional law. He knew the "true spirit of the Constitution," and his own words written in 1908 constitute a more perfect indictment of his whole attitude with reference to the Treaty of Versailles than anything that has ever been or ever will be uttered by his most malicious opponent.

Woodrow Wilson said, "But there is another course which the President may follow and which one or two Presidents of unusual sagacity have followed with satisfactory results that were to have been *expected*. He may himself be less stiff and offish, may himself act in the *true spirit* of the Constitution and establish intimate relations of confidence with the Senate on his own initiative, not carrying his plans to completion and then *laying them in final form* before the Senate to be accepted or rejected, but keeping himself in confidential communication with the leaders of the Senate while his *plans are in course*, when their *advice will be of service to him* and his information of the greatest service to them; in order that there may be a veritable counsel and a real accommodation of views instead of a *final challenge and contest*. The policy which has made rivals of the President and Senate has shown itself *in the President as often as in the Senate*, and if the Constitution did indeed intend that the Senate should in such matters be an executive council, it is not only the privilege of the President to treat it as such, it is also his *best policy* and his *plain duty*. As it is now the President and the Senate are apt to deal with each other with the formality and punctilio of powers united by no common tie except the vague common tie of public interest; but it is within their choice to *change the whole temper of affairs* in such matters and to exhibit the *true spirit* of the Constitution by coming into intimate relations of mutual confidence by a change of attitude which can perhaps be effected more easily upon the *initiative of the President* than upon the initiative of the Senate."⁴²

It is an interesting commentary on the Treaty of Versailles to note that President Wilson abandoned the practice, which he conceived in 1908 to be in conformity with the "true spirit of the Constitution" and relied on a very different theory, which he had enunciated in 1885 in his book, "Congressional Government," as follows: "His (the President's) only way of compelling compliance on the part of the Senate lies in his initiative in negotiation, which affords him a chance to get the country into such scrapes, so pledged in the view of the world to

42. Woodrow Wilson, "Constitutional Government of the U. S., pp. 139-140, Columbia University Press, 1908.

certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."⁴³

Impressed by the tremendous import of the issues at stake, Wilson deliberately decided to take the gambler's chance and to act on the theory enunciated in 1885, and in so doing he abandoned his better judgment. In accord with that theory he made the supreme effort "to bring about the appearance of dishonor" on the part of the Senate by his appeal to the effect that to defeat the League would be to "break the heart of the world." Because of a miscalculation of the temper of the United States Senate, the master strategy of Woodrow Wilson went down in defeat and it is our contention that that defeat should be sufficient to discredit this policy for all time. If that defeat has any significance, it can only mean that the Wilson policy in its very nature makes for blind opposition and prevents intelligent control.

From this brief historical presentation, it appears that, broadly speaking, there have been two interpretations of the treaty clause. The one, which we will term the Washingtonian, views the role of the Senate as an integral part of the treaty making function, which may be exercised at any stage of the negotiation; the other, which we will term the Wilsonian, considers the function of the Senate merely to give sanction to a treaty that is already drafted. As a matter of *policy*, which interpretation is preferable? The advocates of the Wilsonian interpretation relied mainly on one general argument, and although there is some variation in the phrasing of it, the gist of their case seems to be that the nature of transactions with foreign nations requires caution and unity of design, and their success depends on secrecy and dispatch. The writers who take this view apparently believe that the very statement of the proposition is so conclusive on its face that no defense of it is required. As a matter of fact, in the literature of the subject, we have found no adequate analysis of this seemingly axiomatic proposition. With all deference to the authorities who have come under the spell of this idea, we believe it can be shown that this argument falls far short of justifying their position, either in its theoretical or its practical aspects.

These men, whether they realize it or not, are in reality stating the argument in behalf of the idea that the treaty power in its entirety should reside *exclusively in the executive*, and logically their position is antagonistic to the very idea of any form of *joint control*

43. Chapter IV, pp. 232-34.

over treaties by the President and the Senate. But actually they are not advocating such a radical departure. In their attempt to bolster up the Wilsonian interpretation, they are relying on an argument which does not fit the case. It is not only irrelevant from the theoretical aspect, but we believe that a careful analysis of the actual operation of the Wilsonian interpretation will show that in fact their position is untenable. We shall attack this proposition from two points of view, attempting to show *first*, that it is theoretically indefensible and *second* that from a practical point of view the outstanding product of this interpretation, namely the Treaty of Versailles, fails miserably to make a case for expediency or dispatch.

As to the first point, no one has claimed that the Senate has the constitutional right to open negotiations with the diplomatic representatives of a foreign power. The President, as the chief executive, is the constitutional representative of the United States with regard to foreign nations. He is the proper official to direct, through the Department of State, the correspondence with our ministers abroad and with foreign ministers. The Senate does not possess the means of acquiring such information directly. Thus far, both schools of thought are in substantial agreement, but we should note that the acceptance of the above statement does not preclude the constitutional right of the Senate to suggest to the President that he undertake a certain negotiation nor does it preclude the right of the Senate to suggest the content of that negotiation.

With this as a starting point in our analysis, we next introduce two considerations which are fundamental and which the advocates of the Wilsonian interpretation seem to ignore in the development of their case for dispatch. The first is the cardinal principle in our constitutional system that the Executive and the legislative departments are coordinate, and the second principle is that in so far as the treaty power is concerned, the Constitution has conferred upon one branch of the legislature, namely the Senate, a *joint* participation with the President in the making of treaties. No conceivable interpretation of the treaty clause could deny that treaty making is a joint function. We are confronted then by the hard fact that both the President and the Senate must agree before a treaty can come into existence.

These basic considerations should be obvious, and yet, strange to relate, the literature of the subject is honeycombed with confusion and especially with reference to the Treaty of Versailles, men of learning have attempted to settle this constitutional question by an appeal to personalities. We submit that no intelligent discussion of

the respective merits of the Washingtonian and the Wilsonian interpretation of the treaty clause is possible, unless it takes into account the basic principles.

Let us compare these two interpretations as regards *secrecy*, *dispatch* and *safety*. First as to *secrecy*, Woodrow Wilson gave lip service to the ideal of "open covenants, openly arrived at," but he justified his attitude toward the Senate during the negotiation of the Treaty of Versailles on the ground that secrecy was all important. The deliberations of the Council of Five were secret beyond all precedents. No secretaries were admitted and no official minutes were kept. The Council of Five has been described by Dr. Dillon as "a gang of benevolent conspirators, ignoring history and expertship, shutting themselves up in a room and talking disconnectedly." It is not proper at this place to enter into a discussion of the relative merits of open versus secret diplomacy. Let us assume for the sake of argument that secrecy is preferable. We then meet the claim insisted upon by advocates of the Wilsonian interpretation that real secrecy is impossible if the Senate is kept advised of the facts during the negotiation of the treaty.

In this connection, they stress the size of the Senate, arguing that even though at the outset of the government, the Senate might function as an executive council, when it consisted of but twenty-six members, that now it is impossible because we have almost one hundred members. But the Senate may, consistent with the treaty clause, delegate its right to receive the facts during the negotiation, to its own Committee on Foreign Relations, which may consist of much less than twenty-six members and this committee could function while the Senate as a body is not in session. But even if the Senate as a body should receive this information, it would be in executive session behind closed doors, and the argument that secrecy would be jeopardized is but a polite way of questioning the patriotism and the motives of the members of the United States Senate. We refuse to subscribe to that doctrine. If the members of the highest legislative body in the land are so base that they cannot safely be entrusted with information, then why should they be given any right to participate in the treaty making function, in any particular? If the advocates of the Wilsonian theory were logically consistent they would realize that they are stating the case for an exclusive presidential treaty power and they would frankly and openly attempt to create a public sentiment which would lead to a constitutional amendment.

One thing is certain, they can never reach that goal by any attempt at informal amendment by executive interpretation, and any effort to

undermine a coordinate department of the government will not only deprive the country of the services of an *informed* advisor but also must ultimately lead to hostility and misunderstanding.

What can be said for the Wilsonian interpretation as regards *dispatch*? It has been argued that a division of opinion between the Senate and the President could not fail to give the nation with whom we might be disposed to treat, the most decided advantages and would delay if not altogether prevent the realization of our desires. But this argument is based on a false assumption. We have no right to claim that the President and the Senate will always be hostile, especially if the President follows the Washingtonian interpretation, and when they are hostile, the relations can be kept *secret*. If on the other hand, they are in harmony, the publicity of that fact will have much weight with the other nation. But more important than this is the fact that under our constitution, the treaty clause requires agreement between the President and the Senate before a treaty can be ratified. Considering human nature as we find it generally, and especially as it is exemplified in the Senate of the United States, it is futile to hope that time will be gained by keeping the Senate in ignorance of the facts during the whole period of negotiation. Men who are politically ambitious and who have been elected to represent their respective states in the highest legislative body in the land, knowing that they are members of a coordinate department in the treaty making function are not going to submit to any form of dictation or political pressure exerted by the executive. It is inconceivable that the President will ever become so powerful and the Senate so weak that such a policy can be relied upon in order to speed up the treaty making process.

It is important to note that the argument presented by Lord Balfour against the establishment of a Parliamentary Committee of Control of Foreign Relations in the English government is not applicable to our situation. He said in a speech of March 19, 1918, "Do not suppose that we can do the work better by having to explain to a lot of *people who are not responsible*. That is not the way to get business properly done."⁴⁴ This argument is not applicable to our Senate. Here we have a *joint responsibility*. Everyone admits that the President and the Senate must agree before a treaty can be made. The only question at issue is whether the two parties shall have the right to be equally informed.

Can the Wilsonian interpretation be defended from the standpoint of *safety*? The Senate, as a continuing body and as the highest legis-

44. Quoted in Reinsch Secret Diplomacy, pp. 168-9.

lative assembly, contains a considerable number of members of great capacity and large experience. We believe that the history of the Senate will reveal that even at its lowest ebb there were in that body a few great characters from whom any President might well have sought advice. We know that the Senate has often performed a patriotic and highly valuable service by its merciless examination of a treaty. An excellent example is the Hay-Pauncefote treaty, which, but the Senate, would have failed to reserve the right of the United States to fortify the Panama Canal.⁴⁵ Why not adopt the cooperative policy and take advantage of the experience of the Senate while the treaty is being negotiated? We cannot believe that the mere election of a man to the Presidency ipso facto endows him with knowledge or experience. Why not reveal to this coordinate body the facts, so that it may be an informed advisor? The American people have had enough of personal government. They are beginning to realize that leadership to be democratic must make use of democratic methods of procedure.

There is no hope for the political theorists who have failed to grasp the significance of the lesson taught by the Treaty of Versailles, and who continue to be dominated by the spell of an outworn idea. Wilson, up to the time of his tragic disillusionment, enjoyed greater power than any other President in the history of the republic. But he pursued a policy which was in violent conflict with his better judgment, expressed ten years before while president of Princeton. At that time he voiced the true policy that makes possible a real advice and consent. That is the policy based on cooperation that leads to understanding and makes for dispatch. The Harding-Hughes disarmament treaties were ratified without difficulty and without change. The explanation lies largely in the fact that President Harding appointed as members of the American delegation the leaders of the two great parties in the United States Senate, Mr. Lodge and Mr. Underwood.

Do we need a greater popular control over treaties? The most undemocratic feature of the great democracies of the world today is the method of carrying on foreign affairs. The machinery of diplomacy is a survival from the age of absolutism. The "barren game of intrigue" has been played and found wanting. Secret diplomacy has led to suspicion. Prof. Reinsch has said, "No nation is so bad as imagination, confused and poisoned by secrecy and by the suggestion of dire plottings, would point out."⁴⁶ Suspicion has in turn incited nations to enter a competitive race for armament, and the existence

45. Cong. Record, Jan. 28, 1920, Vol. 50, p. 2269.

46. Secret Diplomacy, 1822, Harcourt Brace Co., p. 141.

of great military machines has constituted a standing menace and an incentive to war. Such has been the diplomacy of Europe. Woodrow Wilson said, "European diplomacy works always in the dense thicket of ancient feuds, rooted, entangled and entwined. I did not realize it all until the Peace Conference; I did not realize how deep the roots were." The world has witnessed, the common peoples of Europe make the supreme sacrifice. It is a tragic commentary that at the outbreak of the World War there was in no European country a popular control over the conduct of foreign affairs.

Conditions in America have been much better. The men who framed the Constitution of the United States placed in that document two provisions with respect to the treaty making power, which are the very antithesis of secret diplomacy. They provided that no international agreement, to which the United States is a party, shall be binding unless agreed to by a representative body, the United States Senate and they further provided that treaties, when duly ratified, shall be the law of the land. It is implicit in these provisions that the treaties of this government shall be published to all the world. Further, we have Prof. John Bassett Moore, as authority for the statement that our State Department before the World War had no secrets whatever, with the exception of personnel reports.⁴⁷

Prof. Quincy Wright has said, "Critics of American government have often urged reform, usually in the direction of the British cabinet system, but their attention has been centered upon domestic affairs. It is an extraordinary fact that with respect to the control of foreign affairs the reverse is true. British writers have looked hopefully to the United States as a model for reform. Features of the American system have been endorsed by the British Union for Democratic Control of Foreign Relations founded in 1914."⁴⁸

The late Lord Bryce voiced this sentiment when he said, "The day may come when in England the question of limiting the present all but unlimited discretion of the Executive in foreign affairs will have to be dealt with, and the example of the American Senate will then deserve and receive careful study."⁴⁹

Should we be satisfied merely because we have a better system than Europe? We have shown not only that the Wilsonian interpretation of the treaty clause, which may become the prevailing interpretation, violates the spirit of the Constitution by making the word "ad-

47. See Reinsch, p. 198.

48. Wright, p. 362.

49. Am. Commonwealth, 2 Ed., p. 104.

vice" mere surplusage, but also we have pointed out that in the case of the Treaty of Versailles, the executive was attempting to prevent a coordinate department in the treaty making function from exercising a real "consent."

The history of our treaty practice has established the fact, beyond controversy, that there are two widely divergent schools of thought as to the respective roles of the President and of the Senate. Those who favor the Wilsonian interpretation do not relish the charge of usurpation. But even they do not have the audacity to make the counter charge that the Washingtonian interpretation constitutes usurpation. In order therefore to defend their position at all, representing as it does a later interpretation, they will be forced to employ the only alternative and contend that there is an ambiguity in the Constitution with reference to a *method of procedure*. From their own analysis of the situation we insist that clarification, one way or the other, is imperative. We say "imperative" advisedly, for if a written Constitution cannot be accurately drawn so as to define and describe a mere method of governmental procedure, what hope is there that it can effectively guarantee the protection of a substantive right? We do not believe that any one can be found who will be bold enough to assert that in this case clarification could not be accomplished by amendment, and further we do not believe that any one, after conceding that clarification is possible, would argue that it should not be consummated. To admit the ambiguity and at the same time to deny the possibility of clarification would be to assert the futility of all written instruments, whether they be contracts, by-laws, deeds, wills or Constitutions.

Granting then that clarification is needed, the question remains, which policy is preferable? We have analyzed the arguments presented by the adherents of the Wilsonian school and have shown that they have utterly failed to make their case for dispatch, for secrecy or for safety. We have placed our faith in the doctrine that "democratic leadership requires democratic methods of procedure." Whether the future, for us, shall be war or peace, is to be determined largely by those who control our foreign relations. We do not hold that our international policies should be determined in the market place. Detailed treaties cannot be intelligently made by plebiscite. But we do maintain that the ends of democracy will best be served by assuring the representatives of the people in the United States Senate a real participation in the treaty making power. The President alone under our system has direct access to the sources of information; and this is as it should be. But if we are to have a more direct popular control over

the making of treaties, cooperation and counsel and advice are necessary. To make these effective, the Senate *during the period of the negotiation*, must possess the facts, so that it can be an informed advisor.

John Hay, one of our greatest Secretaries of State, has said that "the irreparable mistake of our Constitution puts it into the power of one-third plus one of the Senate to meet with a categorical veto any treaty negotiated by the President even though it may have the approval of nine-tenths of the nation."⁵⁰

In the constitutional convention the proposal that a majority of the total number of Senators should suffice was defeated by one vote.⁵¹ James Wilson objected to the two-thirds requirement on the ground that "if two-thirds are necessary to make the peace, the minority may perpetuate the war, against the sense of the majority."⁵²

Alexander Hamilton said, "all provisions which require more than a majority of any body to its resolutions have a *direct* tendency to embarrass the operations of the government and an *indirect* one to subject the sense of the majority to that of the minority."⁵³

If it can be assured that the Senate in the future will be consulted and considered as a real advisor, we do not believe that a higher percentage than a bare majority of the Senators present should be required for consent. Whether we like it or not, the fact remains that many treaties have been and will be considered as party issues. To make it obligatory for an administration to command a two-thirds vote upon a treaty is to impose a condition that cannot often be met. If we assume (1) that all the Senators participate in the vote, and (2) that the treaty is looked upon as a party measure, the two-thirds requirement means a party majority of thirty-two members to insure acceptance. In the last forty years, no administration has enjoyed such a majority in the United States Senate.

We propose that the Constitution be formally clarified by adopting the Owen amendment. "The President shall have the power, by and with the advice of the Senate, to frame treaties, and with the consent of the Senate, a majority of the Senators present concurring therein, to conclude the same."⁵⁴

The adoption of this amendment would constitute a reaffirmation of what we conceive to be the original intention of the framers of the

50. Thayer: *Life of John Hay*, II, 219.

51. *Doc. History of the Constitution*, III, p. 705.

52. *Ibid.*, pp. 700-704.

53. *Federalist*.

54. *Sen. Joint Res.*, 176-66, Cong. 2 Sess., Mar. 22, 1920, Vol. 159, p. 5009.

Constitution. More than that, it would clarify the present treaty provision, which to the advocates of the Wilsonian school, is now vague and properly subject to two antithetical interpretations. Although not judicially enforceable, it would have a sobering effect upon the Executive and would tend to assure the people in the future a more direct control over the conduct of their government's foreign affairs. It would restore to the Senate, a broadly representative body, composed of men from every state and every class, the true role of a coordinate department in the important field of treaty making.

In proposing this amendment to democratize the treaty making function of our government, we have no desire to make the President a figurehead. If this amendment were adopted he would still retain four of his present privileges: (1) the initiative in negotiation; (2) the right to submit the treaty to the Senate with recommendation for amendment;⁵⁵ (3) the right to withdraw a treaty from the Senate either with a view to effect changes therein or to terminate proceedings;⁵⁶ (4) the right to refuse to ratify and proclaim the treaty after it has been approved by the Senate.⁵⁷

55. Ex. Journal, Vol. 1, 135, 259.

56. Richardson: Message and Papers of the President, Vol. VIII, 276-7.

57. Ex. Journal, Vol. VII, p. 7, 433, p. 462.