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The Treaty Power

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By Connor Hall *

Among the numerous amendments currently proposed for the Constitution of the United States is one sponsored by so respectable an authority as an ex-President of the American Bar Association, that in the making of treaties the concurrence of a majority, instead of two-thirds of the senators present, should be sufficient.

To those who still have some respect for the statesmen who framed the Constitution of the United States and established our government, it may be said that the requirement of two-thirds of the senators present was adopted for reasons which were then regarded as good and which, with the lapse of time, have increased, rather than diminished in force. Those reasons were, mainly; first, jealousy of the executive power; and, second, the lack of concurrence of the House of Representatives in the making of treaties and the desire to offset such lack of participation by the lower house by an increased majority of the upper. The colonists had, through experience, come to dread and to hate an overgrown executive. Even the firm dealing of Cromwell with Virginia, the later arbitrary action of George III, were not the most vivid memories which the founders of the government had in mind. They remembered the tyrannical rule of the royal governors, such as Andros and Berkeley. The formation of treaties naturally falls to the executive. The dispatch and secrecy necessary to negotiation cannot well be had with a numerous body. But the people were unwilling to entrust to the President, unrestrained, a power even then important. While the outward incidents of an overbearing executive have usually been absent, the reasons for popular jealousy of the national Executive are of equal, if not greater validity than in 1789. In the early days there was little patronage, and even that little was not so exercised as to build up the personal power of the President. But President Jackson exercised

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to the full the influence which the appointing power gave him and built up a great political machine. With the increase in population, wealth of the country and the apparently inevitable increase in bureaus and offices of various kinds the power of the President, through patronage, has grown to an enormous extent. And this influence is felt most by the legislature. At the present time the senator or representative who expects to be re-elected, feels that he must provide for as many of the people back home as possible. If the word goes out that he is impotent to help his friends who aspire to office, all this numerous and insistent crowd turn their faces to another. It may be safe to say that almost every senator feels the constant pressure of this power. It may not gall; he may be naturally fitted or may by force of will have adjusted himself to the circumstances; in short, he may have become suited to his environment. Nevertheless, this is a power from which he would find it difficult, if he desired, to escape. The influence of the President over the legislative bodies has also grown from another cause which could hardly have been foreseen in 1789—that is, the rise and complete dominance of party government. He is not only the chief executive of the nation; he is the head of a political party, which is constantly intriguing and manipulating, by laudable or non-laudable means, to gain and retain public favor. Of one of these great organizations, widespread and ever active, the President is the head. To his power as an officer is thus added the influence of the head of the clan. In so indefinite a matter it is of course not safe to give definite figures, but everyone conversant with public life in our times is aware that the President either as a party leader or as the distributor of patronage, is able on occasion to control completely the votes of a large number of senators. As to how many, will depend upon the individual strength of will and popularity of the President and the lack of it in the senators, but that his influence over large numbers of the upper chamber is great, no one will deny. An amendment which would permit the making of treaties upon the concurrence of a majority of the quorum present would come well nigh to placing the entire treaty-making power in the hands of the President. Upon ordinary treaties and with the ordinary party majority in the Senate, executive domination could not be seriously questioned.

The formation of treaties without participation by the House has frequently led to more or less friction. Whenever a treaty is

not self-executing, but requires the appropriation of money or other act involving the co-operation of the House of Representatives, the question consistently arises, is there any discretion left in the members of the lower house or is it their duty to take such steps as may be necessary to put the treaty into effect? Usually the House has taken the view that whether it was bound or not, it would not block the purposes of the government and put the country in the attitude of repudiating a treaty regularly entered into by its constituted authorities. Nevertheless, there has been some friction. Under a policy which regards the concurrence of two houses as wise, if not essential, it is most natural that if there is any certain action to be taken by one alone, that a somewhat larger majority of the one should be required.

The present is a particularly inapt time to propose removal of any restrictions of the treaty-making power. For, in our own day the treaty-making power has, by judicial determination, at last become definitely broadened, and a territory long debated has now been won by the advocates of liberal construction. For over a hundred years statesmen and lawyers argued whether the treaty clause was in itself a source of power, or whether it was merely a means of executing powers otherwise conferred upon the national government. It may now be regarded as finally settled, that the treaty-making power is an independent source of authority in the national government and that by means of a treaty the President and two-thirds of the Senate quorum can do what the President and a majority of both houses could not do by means of a statute. The limits of the treaty-making power are now bounded only by the specific powers granted by the Constitution to the national government and the vague penumbra of 'national' and 'international' interest. Thus, the President and two-thirds of the senators present may by treaty regulate the killing of migratory birds[1]; or bestow upon an alien the right to hold land, without regard to the law of the state wherein situate.[2] At a time when it is thus clearly brought home to the people of the United States that such intimate local concerns as the inheriting, holding and transmitting of real estate may be taken completely out of local control and regulated by the treaty-making power, it behooves them to be slow in making the formation of treaties more facile. With the enormous increase in communication and contact between the peoples of different

[1] Missouri *v.* Holland, 252 U. S. 416 (1922); United States *v.* Thompson, 258 Fed. 257 (1919).
[2] Sullivan *v.* Kidd, 254 U. S. 433 (1920).

nations, which we have witnessed and which is likely to go on with increased momentum in the future, the people may find an ever-increasing number of concerns, which they had regarded as local and which they still regard as sacred to their happiness and comfort caught up in the nebulous mass of national and international interests and regulated, not by their own legislatures or local bodies, not even by the entire national government, but by the President and a portion of the senators alone. New York City might find itself unable to control its own transportation system, because the influx there of great numbers of foreigners claiming treaty rights had converted transportation into a matter for a treaty; or Massachusetts, its fisheries; California and the Pacific coast states could no longer exclude the Mongolian from land ownership; Mississippi and Louisiana would find that their statutes providing for separation of white and colored passengers had been superseded by a treaty with Liberia. These examples might be multiplied indefinitely.

This increased communication of peoples in modern time has been given as a reason for rendering the formation of treaties more easy. This is an argument we are unable to follow. That treaties have become more numerous and more important, and therefore are to be entered upon more hastily and less considerately, is a pronounced non-sequitur.

A prosperous people are likely to regard dangers they do not immediately feel, as no longer existent, and be neglectful and even contemptuously impatient of the safeguards which the men of former generations slowly learned and devised through hard experience. Autocrats, in an enfeebled perspective, belong to far off evil times, along with giants, ghosts and dragons. But, while the outward aspect of human life changes from age to age, its inner motives remain much the same. The World War furnished striking proof of what may be done. Taking advantage of the powerful passion of the people, which united them in unquestioned support of the government, a horde of petty officials and bureaucrats sprang forth, each with a thick volume of regulations, threatening with heavy fines and long imprisonment everyone daring to disobey. The desire for power over others is always gnawing at the heart of some restless and ambitious man: Caesar, Robespierre, Wilhelm, Lenin; and the same old tricks are used over and over again. Arbitrary government establishes itself under cover of clamour and outcry about people's rights; despotism is

set up in the name of the *pro bono publico*. Cheap corn, gladiatorial games, equality and fraternity, dictatorship of the proletariat, and such like sops and false phrases are the means whereby autocrats cement an alliance with the multitude. With these dangers the members of the Constitutional Convention were thoroughly acquainted and they erected safeguards by balances of power. The legislative power is divided between two houses. The concurrence of the President in legislation is necessary, but against an arbitrary veto there is still a remedy by an increased majority of the two houses. The President appoints officers, but the Senate confirms. The House impeaches, but the Senate tries. The irreducible rights of the individual and the balance between the states and the national government are protected by the Supreme Court. The President negotiates treaties, but the Senate must concur. Treaties become law without the concurrence of the House of Representatives, but an increased majority of the Senate is requisite. Against some one of these checks, more often against the Supreme Court, attacks are made from time to time by aspiring politicians. Such attacks show that the checks are proving effective and vindicate the wisdom of the framers of the Constitution, who judged rightly that among the governors of the people there would be some restless and aggressive spirits, impatient of restraint in their government of others and to whom the positive limitations of a written fundamental law were necessary. The government of a wide, extended territory by an Asiatic despot, with his subordinate despots, is comparatively simple, but, according to republican principles, difficult. The latter requires a nice compromise between national unity and local autonomy. In the United States the natural development of the Constitution has favored the nation at the expense of the states; and further disturbances of equilibrium through new and definite augmentations of the centripetal force, certainly within the national government itself, are to be discouraged rather than favored.

It cannot but be regretted that so many amendments are proposed to the Constitution. That instrument was not the work of a moment. It was framed by men who were familiar with the long struggle by which a government, at once stable and free, had been established in England. They had had varied experience in colonial affairs and, to many of us it is hard to escape the conclusion that the original instrument, together with the first ten amendments, constituted a frame-work of government as nearly perfect

as men could devise. Of the amendments made since that time, some were unnecessary, some have proved futile and others positively harmful. To continue tacking miscellaneous amendments—many of them nothing more than statutes—to the frame-work of the Constitution, is like building lean-to cow sheds against the noble walls of a Greek temple.