

## Chapter XLVIII.

### PREROGATIVES OF THE HOUSE AS TO TREATIES.

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1. Suggestions of the House as to treaties. Sections 1502–1505.<sup>1</sup>
  2. Conflicts with Senate and Executive. Sections 1506–1519.
  3. Functions of the House as to revenue treaties. Sections 1520–1533.
  4. House exacts a share in making Indian treaties. Sections 1534–1536.
  5. Opinion of the Supreme Court as to explanations of treaties. Section 1537.
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**1502. Instances of the action of the House in carrying into effect, terminating, enforcing, and suggesting treaties.**—On March 2, 1835,<sup>2</sup> the House, by a unanimous vote, and after debate, agreed to the following resolutions:

*Resolved*, That in the opinion of this House the treaty with France of the 4th of July, 1831, should be maintained, and its execution insisted on.

*Resolved*, That contingent preparations ought to be made to meet any emergency growing out of our relations with France.

**1503. On February 19, 1833,<sup>3</sup> a bill (H. R. 741) “to carry into effect the convention between the United States and His Majesty the King of the Two Sicilies” was reported from the Committee on Foreign Affairs. This bill became a law.**

**1504. On June 3, 1874,<sup>4</sup> the Committee on Foreign Affairs reported to the House a joint resolution (H. J. Res. 107) providing for the termination of the treaty between the United States and His Majesty the King of the Belgians. This resolution passed the House, and became a law.**

**1505. In 1879,<sup>5</sup> the House passed a joint resolution (H. J. Res. 117) providing for a treaty with the Republic of Mexico.**

**1506. In 1816 the House, after discussion with the Senate, maintained its position that a treaty must depend on a law of Congress for its execution as to such stipulations as relate to subjects constitutionally intrusted to Congress.**

**An instance wherein the enacting words of a bill were declaratory as well as legislative in form.**

**Under the early practice the conference reports made to the two Houses were not identical.**

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<sup>1</sup> Notice of abrogation of a treaty made by joint resolution, section 6270 of Volume V.

<sup>2</sup> Second session Twenty-third Congress, Journal, pp. 499–581; Debates, p. 1634.

<sup>3</sup> Second session Twenty-second Congress, Journal, pp. 361, 491.

<sup>4</sup> First session Forty-third Congress, Journal, pp. 1097, 1251; Record, p. 4507.

<sup>5</sup> First session Forty-sixth Congress, Journal, p. 584.

On January 4, 1816,<sup>1</sup> the House, in Committee of the Whole House, proceeded to the consideration of the bill of the House “to regulate the commerce between the Territories of the United States and His Britannic Majesty according to the convention concluded on the 3d day of July, 1815.” Mr. John Forsyth, of Georgia, chairman of the Committee on Foreign Relations, stated that the bill was intended to carry into effect those parts of the treaty which required legislative interposition. The present discriminating duties on tonnage and importations were abrogated by the provisions of the treaty, and the present bill was for the purpose of conforming American law to the provisions of the treaty.

Mr. William Gaston, of North Carolina, made the point that the treaty since its ratification had become the law of the land, and therefore the pending bill seemed to him to be nugatory and unmeaning. On the succeeding day, January 5, in order to try the principles of the bill, Mr. Gaston moved that it be indefinitely postponed.

On January 8,<sup>2</sup> Mr. Forsyth replied, stating that the constitutional principle had been settled in 1795, when the House had enunciated the principle that “when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress.” This doctrine evidently applied not only to appropriations but to all cases over which power was specially given by the Constitution to the legislative department. Mr. Forsyth reviewed then instances where Congress had legislated in obedience to this broad principle. It was further urged<sup>3</sup> by Mr. Philip P. Barbour, of Virginia, that a treaty was the supreme law of the land so far as the States were concerned, but that this superiority did not extend over the Constitution and laws of the United States. Were there not such a check upon the treaty-making power the harmony between the departments of the Government would be broken down, and the treaty-making power would swallow up all the rest.

On the other hand, Mr. Thomas R. Gold, of New York, urged<sup>4</sup> that a treaty required the aid of an act of Congress for its validity no more than an act of Congress required the aid of a treaty. If the treaty’s reduction of the impost on British tonnage were not valid until an act of Congress should be passed what became of the most important act the Government ever passed—the declaration of war with Great Britain? The law declaring that war had not been repealed by Congress, and unless the treaty of peace abrogated it—i. e., was supreme to it—we were still at war. On a succeeding day Mr. John C. Calhoun elaborated<sup>5</sup> this argument also.

The motion to postpone the bill was decided in the negative,<sup>6</sup> yeas 60, nays 81.

But the discussion still continued on the constitutional question up to the taking of the question on the third reading of the bill on January 9, when it passed to a third reading, yeas 86, nays 69.<sup>7</sup>

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<sup>1</sup>First session Fourteenth Congress, Journal, p. 124 (Gales & Seaton ed.); Annals, pp. 454–457.

<sup>2</sup>Annals, pp. 473–477.

<sup>3</sup>Annals, pp. 478–481.

<sup>4</sup>Annals, pp. 482–485.

<sup>5</sup>Annals, pp. 526–532.

<sup>6</sup>Annals, p. 489.

<sup>7</sup>Journal, p. 142; Annals, p. 545.

And on the question of the passage the constitutional debate was again renewed, and on January 13<sup>1</sup> the bill passed, yeas 86, nays 71.

In the Senate the bill was, on January 18,<sup>2</sup> opposed for two reasons. Mr. James Barbour, of Virginia, stated that the Senate had already sent to the House a bill, the result of unanimous action by the Senate, declaring that all laws in opposition to the treaty should be held as null and void. The principle on which the Senate had acted was that, while the treaty operated to repeal any commercial regulations incompatible with its regulations, yet a declaratory act would remove all doubts and difficulties. It seemed to him that it would have been more decorous for the House to have acted on the Senate bill. But by the present proceedings an issue had been made up. Mr. Barbour then went on to argue that the treaty-making power was supreme over commerce, and that no legislative sanction was necessary in this case.

The debate was extended, various Senators speaking, among them Mr. Nathaniel Macon, of North Carolina, who upheld the principle contended for in the proposition of the House.

On January 19<sup>3</sup> the Senate rejected the bill of the House, yeas 10, nays 21.

On January 20 and February 4<sup>4</sup> the House considered the Senate bill "concerning the convention to regulate commerce between the territories of the United States and His Britannic Majesty." On the same day amendments were agreed to which in effect substituted for the text of the Senate bill the provisions of the bill passed by the House, and which the Senate had rejected. The bill was then passed by the House. The yeas and nays on the amendments were, yeas 81, nays 70.

The Senate disagreed to the amendments and the House insisted and asked a conference, naming as its conferees Messrs. Forsyth, William Lowndes, of South Carolina, and Henry St. George Tucker, of Virginia. The Senate joined as conferees Messrs. Rufus King, of New York, James Barbour, of Virginia, and W. W. Bibb, of Georgia.<sup>5</sup>

On February 19<sup>6</sup> the House conferees reported to their House. Their report, after stating that the disagreement between the Houses related to their respective constitutional powers, continues:

In the performance of this duty the committee of the House of Representatives are inclined to hope that it will sufficiently appear that there is no irreconcilable difference between the two branches of the Legislature.

They are persuaded that the House of Representatives does not assert the pretension that no treaty can be made without their assent, nor do they contend that in all cases legislative aid is indispensably necessary, either to give validity to a treaty or to carry it into execution. On the contrary, they are believed to admit that to some, nay, many, treaties no legislative sanction is required, no legislative aid is necessary.

On the other hand, the committee are not less satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory, if, indeed, this power exists in the Government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted that the legislative body must act in order to give effect and operation to a treaty; and if in any case it be necessary, it may confidently be asserted that there is no difference

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<sup>1</sup> Journal, p. 159; Annals, p. 674.

<sup>2</sup> Annals, pp. 46–89.

<sup>3</sup> Annals, p. 89.

<sup>4</sup> Journal, pp. 200, 281; Annals, pp. 719, 897.

<sup>5</sup> Journal, pp. 335, 350; Annals, pp. 136, 960.

<sup>6</sup> Journal, p. 364; Annals, pp. 1014–1023.

of principle between the two Houses; the difference is only in the application of the principle. For if, as has been stated, the House of Representatives contend that their aid is only in some cases necessary, and if the Senate admit that in some cases it is necessary, the inference is irresistible that the only question in each case that presents itself is whether it be one of the cases in which legislative provision is requisite for preserving the national faith or not.

This appears to the committee to be by no means an unimportant point gained. Its influence upon the feelings with which the two bodies will naturally approach questions of this description may be of no trivial consequence; for as every case, according to this course of reasoning, would appear to rest upon its own foundation, there is less danger of its being drawn into precedent and therefore less occasion for solicitude in regard to it. It is a view of the subject, therefore, calculated to harmonize and to enable us to yield at all times to the application of another principle which the committee deem of the utmost consideration on all such occasions.

The committee allude to the principle which inculcates the propriety of always taking care if we do err to err on the safe side. Should Congress fail to legislate where legislation is necessary, either the public faith must be broken or, to avoid that evil, the executive branch of the Government must be tempted to overstep the boundaries prescribed by the Constitution. If, on the contrary, Congress should legislate where legislation is not necessary, the act could only be drawn into precedent in a case precisely similar; because upon the principle assumed, "that each case rests upon its own circumstances," it never could serve as a precedent, save where those circumstances are the same. Nor is it indeed unimportant to mention that there is little danger of much respect being paid to precedents upon great constitutional questions. Conscience will always burst the trammels of precedent unless restrained by reason.

The committee therefore believe that it is safer in every doubtful case to legislate, and by the joint act of the whole Congress give authority to the execution of the stipulations of a treaty by the executive, than to leave a doubtful case, without the sanction of the legislature, to tempt the executive to overleap its proper bounds, or to endanger the public faith by a failure to perform the provisions of a treaty which has received a constitutional ratification.

After referring to the passage of the bill by the Senate in the first instance as an act which manifests unequivocally the conviction of the Senate, either that the treaty did require legislative aid or that the case was at least doubtful, the report continues:

Both Houses having thus united in the opinion that a legislative act is necessary, the Senate having clearly assented to the propriety of passing a law, the committee waive any argument on the necessity of a legislative act. It only remains to consider whether the scheme of the House of Representatives or the bill of the Senate is best calculated to effect the object of legislation. The committee will succinctly offer the reasons which, as they believe, support the correctness of the amendments of the House of Representatives.

The first amendment proposed to strike out the word "declared," the insertion of which, in the enacting clause of the law, has not appeared to the House to be justified by the usages of the legislative body \* \* \*. It forms, in their estimation, a sufficient objection to the phraseology alluded to, that it departs from the accustomed style of the acts of the Congress of the United States. \* \* \* The retention of the words "and declared" was considered by the Senate expedient, with a view of giving to the bill a declaratory as well as an enacting form. It was said, also, that they were not unprecedented, that they were to be found in the acts of Congress not declaratory in their nature, and might be considered as not affecting the character of the present bill. Believing these words to be mere surplusage, not changing the character or impairing the force of the legislative act, that they have been introduced into previous acts of Congress; that no agreement could take place between the two Houses without permitting them to remain, your committee consented to recommend to the Houses to recede from the first amendment to the Senate's bill.

The report discusses further the other amendments, which only go to perfect the bill and do not involve the constitutional features of the disagreement.

The Senate conferees, who submitted their report to the Senate on February 27,<sup>1</sup> say:

The conferees of the Senate did not contest but admitted the doctrine that of treaties made in pursuance of the Constitution some may not and others may call for legislative provisions to secure their execution, which provision Congress in all such cases is bound to make. But they did contend that the convention under consideration requires no such legislative provisions, because it does no more than suspend the alien disability of British subjects in commercial affairs in return for like suspension in favor of American citizens; that such matter of alien disability falls within the peculiar province of the treaty power to adjust; that it can not be securely adjusted in any other way, and that a treaty duly made and adjusting the same is conclusive, and by its own authority suspends or removes antecedent laws that are contrary to its provisions.

That even a declaratory law to this effect is matter of mere expediency, adding nothing to the efficacy of the treaty, and serving only to remove doubts wherever they exist.

The conferees of the Senate therefore insisted on retaining the word "declared," in addition to the usual formula of enactment, because it imparts to the bill passed by the Senate the character of a declaratory law, a quality without which any law would in this case be inadmissible.

The Senate agreed to the report of their conferees as soon as it was presented, the amendments proposed being concurred in.

The House, on February 24,<sup>2</sup> agreed to the recommendations of the conferees, yeas 100, nays 35.

**1507. In 1820 the House considered, but without result, its constitutional right to a voice in any treaty ceding territory.**—On April 3, 1820,<sup>3</sup> the House proceeded in Committee of the Whole House on the state of the Union to consider the following resolutions, submitted by Mr. Henry Clay, of Kentucky, then Speaker:<sup>4</sup>

*Resolved*, That the Constitution of the United States vests in Congress the power to dispose of the territory belonging to them, and that no treaty, purporting to alienate any portion thereof, is valid without the concurrence of Congress.

*Resolved*, That the equivalent proposed to be given by Spain to the United States in the treaty concluded between them, on the 22d day of February, 1819, for that part of Louisiana lying west of the Sabine, was inadequate, and that it would be inexpedient to make a transfer thereof to any foreign power or renew the aforesaid treaty.

In discussing the right of the House of Representatives to express its opinion on the arrangement made in that treaty, Mr. Clay contended that in acting on the subjects committed by the Constitution to the charge of Congress the treaty-making power should have the concurrence of Congress. The House had uniformly maintained this right to deliberate on those treaties in which their cooperation was asked by the Executive. This was illustrated in the proceedings on the Jay treaty, in 1795, and later on the convention of 1815 with Great Britain. In the latter case, although a compromise was the final result, the House substantially maintained its contention. It was to be admitted that a treaty might fix disputed limits of territory without the cooperation of Congress, for the object in such cases was only to make

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<sup>1</sup> Annals, pp. 160, 161.

<sup>2</sup> Journal, pp. 396, 397; Annals, pp. 1048–1050, 1057.

<sup>3</sup> First session Sixteenth Congress, Annals, pp. 1719–1781.

<sup>4</sup> The Annals (p. 1691) would indicate that Mr. Clay offered these resolutions in the House, but the Journal of March 28 does not contain any reference to them (pp. 343–346). At that time original propositions were offered in Committee of the Whole.

certain what was before uncertain. This was to be distinguished from a proposition to cede away whole provinces.

Mr. William Lowndes, of South Carolina, urged that the resolution went much farther than the contention of the House in 1795, and declared that there was not time for so long a discussion as would be necessary.

Mr. John Rhea, of Tennessee, opposed the resolutions, contending that there was no power vested in Congress by the Constitution to alienate territory of the United States, and that the treaty-making power was confided to the Executive and the Senate.

The discussion consumed the time of the House until April 5, when the House passed finally to other business without any decision on the resolutions.

**1508. In 1868, after discussion with the Senate, the House's assertion of right to a voice in carrying out the stipulations of certain treaties was conceded in a modified form.**

**In 1868 the House declined to assert that no purchase of foreign territory might be made without the sanction of a previously enacted law.**

On May 18, 1868,<sup>1</sup> Mr. Nathaniel P. Banks, of Massachusetts, from the Committee on Foreign Affairs, reported the bill (H. R. 1096)—

to enable the President of the United to fulfill the treaty between the United States and Russia, of March 30, 1867.

The report, after reviewing the history and nature of the treaty-making power under our Constitution, proceeds to review the instances where this power has come in conflict with the authorities of other branches of the Government, beginning with the Creek treaty of 1790, and noting the precedents of 1794, when a question arose between the President and House concerning the correspondence relating to that treaty; the treaty of 1819, the Spanish treaty of 1831, and the French treaty, and quotes the opinions of commentators on the Constitution—Jefferson, Story, and Kent. The report then proceeds with the following views as to the power of the House:

A treaty, then, is a contract between the United States and the sovereign power of a foreign government; and if within the authority conferred upon the treaty-making power by the Constitution both the House of Representatives and the Senate are solemnly bound to give effect to the conditions of the treaty by proper legislation. In the discharge of this duty the House has an unquestionable right to all the information connected with the subject, if not inconsistent with the public interest or safety. It can not be doubted that the House was entitled to the information it demanded in 1794, unless, upon other grounds, its communication would have been prejudicial to the Government. It must be remembered that this was the first occasion in which the treaty-making power was discussed by Congress, and that this was but one of several difficult and delicate questions considered and decided, for the first time, by the different branches of the Government. The information then called for has never been refused as to any subsequent treaty. Mr. Hamilton, who was regarded by Mr. Jefferson as the author of the President's message, afterwards expressed his regret that a qualified answer had not been returned. It is now conceded that the House is entitled to consider the merits of a treaty that it may determine whether its object is within the scope of the treaty power; but, if it be not inconsistent with the spirit and purpose of the Government, Congress is bound to give it effect, by necessary legislation, as a contract between the Government and a foreign nation. If, on the contrary, it is found to be in conflict with the fundamental principles, purposes, or interests of the Government, it would be justified, not merely in withholding its aid, but in giving notice to foreign nations interested that it would not be regarded as binding

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<sup>1</sup>Second session Fortieth Congress, House Report No. 37.

upon the nation, in passing laws for its abrogation, and preparing the State for whatever consequences might attend its action.

This was the course pursued by the Government in 1798 in regard to the three treaties of alliance, commerce, and consular representation concluded with France in 1778, the first treaties negotiated by this Government with any foreign nation, and which were concluded immediately upon the recognition of American independence by France. The House would be justified in such action in regard to any treaty which should change the character of the Government; bring into the Union and confer political powers upon large populations incapable of self-government, whose participation in its affairs would imperil our institutions and endanger the peace and safety of the people; which should alienate territory, surrender political power to any other Government, civilized or uncivilized; bind the Government to engage in the wars of other nations, or surrender the rights of the nation on the high seas in any part of the world; which should admit as States of the Union distant foreign nations or Indian tribes, conferring upon them representative powers, as was proposed under the confederation with regard to the Delaware Indians; reestablish slavery, annul the institution of marriage, or interdict the Christian religion. In such case the House would be justified in aiding in its rejection or its abrogation by any act within its power. But when a treaty is limited to objects consistent with the interests of the Government, which can not be attained except by the treaty-making power, its first and highest duty is to enact such measures as are necessary to carry the treaty into effect. To say that a treaty is not a treaty until approved by the House is to make the House a part of the treaty-making power. To say that the House has no rights in regard to foreign treaties, except when they are referred to the House by its provisions, is to admit that the House is not a part of the Government.

Mr. Cadwallader C. Washburne, of Wisconsin, in behalf of himself and Mr. George W. Morgan, of Ohio, presented minority views, contending that the House had the right to withhold the appropriation needed to carry the treaty into effect, and cited authorities in support of this contention—Jefferson, Madison, and the Supreme Court.

The report having been made to the House, the subject, especially in its constitutional aspects, was debated at length from June 30 to July 14, 1868.<sup>1</sup> On the latter date the bill was reported from the Committee of the Whole with two amendments. The first amendment, which had been adopted on motion of Mr. William Loughridge, of Iowa, proposed to insert the following preamble and additional section:

Whereas the President of the United States, on the 30th of March, 1867, entered into a treaty with the Emperor of Russia, by the terms of which it was stipulated that in consideration of the cession by the Emperor of Russia to the United States of certain territory therein described, the United States should pay to the Emperor of Russia the sum of \$7,200,000 in coin; and whereas it was further stipulated in said treaty that the United States shall accept of such cession, and that certain inhabitants of said territory shall be admitted to the enjoyment of all the rights and immunities of citizens of the United States; and whereas the subjects thus embraced in the stipulations of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect; having taken into consideration the said treaty, and approving of the stipulations therein, to the end that the same may be carried into effect; Therefore,

SECTION 1. *Be it enacted*, That the assent of Congress is hereby given to the stipulations of said treaty.

This amendment was agreed to, yeas 89, nays 49.

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<sup>1</sup>Second session Fortieth Congress, Globe, pp. 3620, 3658, 3661, 3804, 3809, 3883, 4052–4055; Appendix, pp. 305, 382, 385, 421, etc.

The second amendment, which had been adopted on motion of Mr. Thomas D. Eliot, of Massachusetts, proposed to add the following proviso to the bill:

*Provided*, That no purchase in behalf of the United States of any foreign territory shall be hereafter made until after provision by law for its payment; and it is hereby declared that the powers vested by the Constitution in the President and Senate to enter into treaties with foreign governments do not include the power to complete the purchase of foreign territory before the necessary appropriation shall be made therefore by act of Congress.

This amendment was disagreed to by the House, yeas 78, nays 80.

The bill, which consisted, besides the amendment adopted, of a simple enactment appropriating the money, was then passed by the House and went to the Senate, where, on July 17,<sup>1</sup> the Senate concurred with the Committee on Foreign Relations in striking out all of the bill except the simple proposition for appropriating the money. With these amendments, the bill was returned to the House, where the amendments of the Senate were disagreed to, and the bill was sent to conference, Messrs. Banks, Loughridge, and Samuel J. Randall, of Pennsylvania, being the House conferees, and Messrs. Charles Sumner, of Massachusetts, O. P. Morton, of Indiana, and J. R. Doolittle, of Wisconsin, the Senate conferees.

The conference report, which was signed by all the conferees, was presented in the House on July 23, and provided that the Senate agree to the preamble with the insertion, after the words "Emperor of Russia" where they first occur, the following: "And the Senate thereafter gave its advice and consent to said treaty," and with the further amendment striking out all of the preamble after the words "immunities of citizens of the United States;" and inserting the words, "and whereas said stipulations can not be carried into full force and effect except by legislation to which the consent of both Houses of Congress is necessary." The conference report also struck out the following section of the bill proper: "That the assent of Congress is hereby given to the stipulations of said treaty."

Thus the result of the conference was the amended preamble, and the section of the bill reduced to the form in which it was originally reported from the House Committee on Foreign Affairs, viz, a simple clause appropriating the money for the purchase in accordance with the treaty.

The report<sup>2</sup> was debated at some length in the House, the House conferees explaining that they were forced to waive the extreme contention of the House, because to have insisted on it would have been to defeat the appropriation. The report was agreed to, yeas 91, nays 48.

In the Senate the report was agreed to without debate.

**1509. President Washington, in 1796, declined the request of the House that he transmit the correspondence relating to the recently ratified treaty with Great Britain.**

**Discussion of the right of the House to share in the treaty-making power.**

**In 1796 the House affirmed that when a treaty related to subjects within the power of Congress it was the constitutional duty of the House to deliberate on the expediency of carrying such treaty into effect.**

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<sup>1</sup> Globe, p. 4159.

<sup>2</sup> Globe, pp. 4392, 4404.

The House declared in 1796 that its constitutional requests of the executive for information need not be accompanied by a statement of purposes.

On March 24, 1796,<sup>1</sup> the House agreed to this resolution:

*Resolved*, That the President of the United States be requested to lay before this House a copy of the instructions to the minister of the United States, who negotiated the treaty with the King of Great Britain (communicated by his message of the 1st instant), together with the correspondence and other documents relative to the said treaty; excepting such of the said papers as any existing negotiation may render improper to be disclosed.

This treaty had been communicated to both House and Senate by the President for information, on March 1. The resolution calling for the additional papers was the subject of a long debate, beginning on the 7th of March. The extent to which the House had the right to share in the treaty-making power was discussed at length, as well as the question of how much right to call for information was involved in the House's constitutional prerogative of making appropriations to carry into effect the provisions of treaties.<sup>2</sup>

The resolution was finally agreed to, yeas 62, nays 37, and Messrs. Livingston and Gallatin were appointed a committee to wait on the President with the resolution.

On March 30<sup>3</sup> President Washington transmitted to the House a message in which he stated at length his reasons for declining to transmit the papers. He said that to admit the right of the House of Representatives to demand and receive as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

It does not occur—

he continues,

that the inspection of the papers called for can be relative to any purpose under the cognizance of the House of Representatives except that of an impeachment, which the resolution has not expressed.

After discussing the intention of the constitutional convention when it framed the clause relating to treaties, the President concludes:

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty, as the treaty with Great Britain exhibits in itself also the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved; a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid a compliance with your request.

On April 7,<sup>4</sup> at the close of a long discussion, the House agreed to the following resolutions, the vote on each being 54 yeas to 37 nays:

*Resolved*, That it being declared by the second section of the second article of the Constitution, "That the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," the House of Representatives do not claim

<sup>1</sup> First session Fourth Congress, Journal, p. 480 (Gales & Seaton ed.); Annals, pp. 394, 426–782.

<sup>2</sup> Annals pp. 426–782.

<sup>3</sup> Journal, pp. 487–489.

<sup>4</sup> Journal, p. 499. The Annals (p. 771) show that the resolutions were proposed by Thomas Blount, of North Carolina, and supported by James Madison, of Virginia. Annals, pp. 782, 783.

any agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as, in their judgment, may be most conducive to the public good.

*Resolved*, That it is not necessary to the propriety of any application from this House, to the Executive, for information desired by them, and which may relate to any constitutional functions of the House; that the purposes for which such information may be wanted, or to which the same may be applied, should be stated in the application.

In relation to the treaty with Great Britain, as well as in relation to several other treaties, the House came to the resolution that it was expedient to pass the laws necessary to carry it into effect.<sup>1</sup>

**1510. The House has requested the President to lay before it information as to the carrying out and the violation of treaties, and the information has been furnished.**—On January 2, 1797,<sup>2</sup> the House, after some debate as to the propriety of the request, agreed to this resolution:

*Resolved*, That the President of the United States be requested to cause to be laid before this House information what measures have been taken for carrying into effect the treaty between the United States and the Dey and Regency of Algiers, and also whether any, and what, further legislative aid may be necessary for that purpose.

On January 3 Mr. Parker, of the committee appointed to wait on the President with the resolution, reported that the President was already preparing to send the papers when the resolution was passed and would transmit them as soon as they should be made out.

**1511.** On December 17, 1802,<sup>3</sup> on motion of Mr. John Randolph, of Virginia—

*Resolved*, That the President of the United States be requested to cause to be laid before this House such information in possession of the Department of State as relates to the violation, on the part of Spain, of the twenty-second article of the treaty of friendship, limits, and navigation between the United States and the King of Spain.

Messrs. Randolph and Huger were appointed a committee to present the foregoing resolution to the President of the United States.

On December 22 President Jefferson transmitted the information.

**1512. In 1822 the House called generally and specifically for papers relating to the treaty of Ghent and obtained them, although the Executive advised against their publication.**—On January 17, 1822,<sup>4</sup> the House proceeded to the consideration of a resolution requesting of the President

all the correspondence which led to the treaty of Ghent which has not yet been made public.

After debate as to the propriety of leaving to the President the option of communicating such only of the correspondence as he might think it not improper to disclose, the House, on motion of Mr. William Lowndes, of South Carolina, agreed to this amendment:

and which, in his opinion, it may not be improper to disclose.

The resolution as amended was agreed to.

<sup>1</sup>Journal, pp. 511, 512, 529–531; Annals, pp. 939–1291.

<sup>2</sup>Second session Fourth Congress, Journal, pp. 634, 636 (Gales & Seaton ed.); Annals, pp. 1763–1767.

<sup>3</sup>Second session Seventh Congress, Journal, pp. 253, 257 (Gales & Seaton ed.); Annals, pp. 281, 285.

<sup>4</sup>First session Seventeenth Congress, Annals, p. 733.

**1513.** On April 19, 1822,<sup>1</sup> the House agreed to this resolution:

*Resolved*, That the President of the United States be requested to cause to be communicated to this House, if not injurious to the public good, any letter or communication which may have been received from Jonathan Russell, esq., one of the ministers of the United States who concluded the treaty of Ghent, after the signature of that treaty, and which was written in conformity to the indications contained in said minister's letter, dated at Ghent 25th December, 1814.

On May 4<sup>2</sup> President Monroe, in a message to the House, after explaining the circumstances of the letter, said:

On full consideration of the subject, I have thought it would be improper for the Executive to communicate the letter called for unless the House, on a knowledge of these circumstances, should desire it, in which case the document called for shall be communicated.

On May 7<sup>3</sup> the House called for the letter, although the propriety of such a course was questioned.

The letter was promptly transmitted to the House.<sup>4</sup>

**1514. The House sometimes requests the Executive to negotiate a treaty, although the propriety of the act has been questioned.**—On May 15, 1826,<sup>5</sup> Mr. Edward Livingston, of Louisiana, offered these resolutions:

*Resolved*, That the President of the United States be requested to inform this House whether any arrangement has been made with the Government of Great Britain in consequence of the resolution of this House of the 23d of December, 1823, requesting that a negotiation should be opened for the cession of certain keys on the Bahama Banks.

*Resolved*, That the President be requested to open a negotiation with the Spanish Government for the cession of a proper situation for a light-house on one of the double-headed shot keys, to be used solely for the purpose of such light-house.

On May 16 the resolutions were considered, and Mr. Livingston explained that the resolution of 1823 requested the President to open negotiations for the cession of a part of the island of Abaca, and that the President had done so, but the efforts of our minister in London had been without avail.

The first resolution was agreed to without division, but there was objection to the second, Mr. John Forsyth, of Georgia, urging that, in spite of the precedent, it was irregular for the House to request the President to exercise any of his constitutional powers. The second resolution was then laid on the table.

**1515.** On February 28, 1823,<sup>6</sup> on motion of Mr. Charles F. Mercer, of Virginia, and by a vote of 131 yeas to 9 nays, the House agreed to this resolution:

*Resolved*, That the President of the United States be requested to enter upon, and to prosecute from time to time, such negotiations with the several maritime powers of Europe and America, as he may deem expedient for the effectual abolition of the African slave trade, and its ultimate denunciation as piracy, under the law of nations, by the consent of the civilized world.

<sup>1</sup> First session Seventeenth Congress, Journal, pp. 468, 471; Annals, pp. 1617, 1619.

<sup>2</sup> Journal, p. 554; Annals, p. 1791.

<sup>3</sup> Journal, pp. 576, 585; Annals, p. 1877.

<sup>4</sup> Journal, p. 599; Annals, p. 1891.

<sup>5</sup> First session Nineteenth Congress, Journal, pp. 567, 576; Debates, pp. 2634–2638.

<sup>6</sup> Second session Seventeenth Congress, Annals, pp. 1147–1155; Journal, p. 280.

**1516.** On December 3, 1833,<sup>1</sup> the President, in his annual message, stated that he had—

the satisfaction to inform you that a negotiation which, by desire of the House of Representatives, was opened some years ago with the British Government for the erection of light-houses on the Bahamas, has been successful.

**1517.** On April 3, 1876,<sup>2</sup> the House agreed to this resolution:

Whereas it is alleged that at the present time there are over 100,000 Chinese on the Pacific coast, many of whom have been brought thither under contracts for servile labor, and that their numbers are being constantly increased, to the great detriment of the laboring men of the coast and in derogation of the treaty stipulations existing between the United States and the Empire of China: Therefore,

*Be it resolved,* That the President be, and he is hereby, requested to open negotiations with the Chinese Government for the purpose of modifying the provisions of the treaty between the two countries and restricting the same to commercial purposes.

A concurrent resolution of similar intent was<sup>3</sup> introduced later, but was referred and not acted on.

**1518. In 1848 President Polk declined on constitutional grounds to honor the unconditional request of the House for a copy of the instructions to the minister sent to negotiate a treaty with Mexico.**—On January 4, 1848,<sup>4</sup> the House, by a vote of 146 yeas to 15 nays, agreed to the following resolution, which was offered by Mr. William L. Goggin, of Virginia:

*Resolved,* That the President of the United States be requested to communicate to this House any instructions which may have been given to any of the officers of the Army or Navy of the United States, or other persons, in regard to the return of President General Antonio Lopez de Santa Ana, or any other Mexican, to the Republic of Mexico, prior or subsequent to the order of the President or Secretary of War, issued in January, 1846, for the march of the Army from the Neuces River, across the “stupendous deserts” which intervene, to the Rio Grande; that the date of all such instructions, orders, and correspondence, be set forth, together with the instructions and orders issued to Mr. Slidell, at any time, prior or subsequent to his departure from Mexico, as minister plenipotentiary of the United States to that Republic.

*Resolved further,* That the President be requested to communicate all the orders and correspondence of the Government in relation to the return of General Paredes to Mexico.

On January 13 President Polk communicated to the House a portion of the information called for, but in relation to another portion, took the following grounds:

The resolution calls for the “instructions and orders issued to Mr. Slidell at any time prior or subsequent to his departure for Mexico, as minister plenipotentiary of the United States to that Republic.” The customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations has been omitted in the resolution before me. The call of the House is unconditional. It is that the information requested be communicated, and thereby be made public, whether, in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers), such information when disclosed would be prejudicial to the public interest or not. It has been a subject of serious deliberation with me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my prede-

<sup>1</sup>First session Twenty-third Congress, Journal, p. 11.

<sup>2</sup>First session Forty-fourth Congress, Record, p. 2158.

<sup>3</sup>First session Forty-fourth Congress, Record, p. 3087.

<sup>4</sup>First session Thirtieth Congress, Journal, pp. 193, 194–197, 233, 566, 567, 570; Globe, pp. 103, 166–170, 203–207, 461, 463.

cessors, as I should do by a compliance with the request of the House. President Washington, in a message to the House of Representatives of the 30th of March, 1796, declined to comply with a request contained in a resolution of that body, to lay before them "a copy of the instructions to the minister of the United States who negotiated the treaty with the King of Great Britain, together with the correspondence and other documents relative to the said treaty, excepting such of the said papers as any existing negotiations may render improper to be disclosed." In assigning his reasons for declining to comply with the call, he declared that "the nature of foreign negotiations requires caution, and their success must often depend on secrecy; and, even when brought to a conclusion, a full disclosure of all the measures, demands, and eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate—the principle on which that body was formed confining it to a small number of Members. To admit, then, in the House of Representatives, a right to demand and to have, as a matter of course, all the papers respecting a negotiation with a foreign power, would be to establish a dangerous precedent." In that case the instructions and documents called for related to a treaty which had been concluded and ratified by the President and Senate, and the negotiations in relation to it had been terminated. There was an express reservation, too, "excepting" from the call all such papers as related to "any existing negotiations" which it might be improper to disclose. In that case President Washington deemed it to be a violation of an important principle, the establishment of a "dangerous precedent," and prejudicial to the public interests, to comply with the call of the House. Without deeming it to be necessary on the present occasion to examine or decide upon the other reasons assigned by him for his refusal to communicate the information requested by the House, the one which is herein recited is, in my judgment, conclusive in the case under consideration.

Indeed, the objections to complying with the request of the House, contained in the resolution before me, are much stronger than those which existed in the case of the resolution of 1796. This resolution calls for the "instructions and orders" to the minister of the United States to Mexico, which relate to negotiations which have not been terminated, and which may be resumed. The information called for respects negotiations which the United States offered to open with Mexico immediately preceding the commencement of the existing war. The instructions given to the minister of the United States relate to the differences between the two countries out of which the war grew, and the terms of adjustment which we were prepared to offer to Mexico in our anxiety to prevent the war. These differences still remain unsettled; and to comply with the call of the House would be to make public, through that channel, and to communicate to Mexico, now a public enemy engaged in war, information which could not fail to produce serious embarrassment in any future negotiation between the two countries. I have therefore communicated to Congress all the correspondence of the minister of the United States to Mexico which in the existing state of our relations with that republic can, in my judgment, be at this time communicated without serious injury to the public interest.

Entertaining this conviction, and with the sincere desire to furnish any information which may be in possession of the Executive Department, and which either House of Congress may at any time request, I regard it to be my constitutional right and my solemn duty, under the circumstances of this case, to decline compliance with the request of the House contained in their resolution.

Debate at once arose over this message, Mr. John Quincy Adams, of Massachusetts, saying that he believed that the House was right in asserting its position in 1796, and urging that it should maintain its position now, that it had a right to the information. The subject was debated at length on this day, and again on January 19 and March 14 and 15; but no further action seems to have been taken.

**1519.** On July 17, 1848,<sup>1</sup> the House agreed to the following resolution:

*Resolved*, That the President be requested to communicate to this House (if not inconsistent with the public interest) copies of all instructions given to the Hon. Ambrose H. Sevier and Nathan Clifford, commissioners appointed to conduct negotiations for the ratification of the treaty lately concluded between the United States and the Republic of Mexico.

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<sup>1</sup>First session Thirtieth Congress, Journal, pp. 1051, 1145; Globe, pp. 943, 1025.

On August 2, the President (Mr. Polk) responded in a message in which he said:

I avail myself of this occasion to observe that, as a general rule, applicable to all our important negotiations with foreign powers, it could not fail to be prejudicial to the public interest to publish the instructions to our ministers until some time had elapsed after the conclusion of such negotiations.

In the present case the object of the mission of our commissioners to Mexico has been accomplished. The treaty, as amended by the Senate of the United States, has been ratified. The ratifications have been exchanged, and the treaty has been proclaimed as the supreme law of the land. No contingency occurred which made it either necessary or proper for our commissioners to enter on any negotiations with the Mexican Government further than to urge upon that Government the ratification of the treaty in its amended form.

**1520. The House has at times advised the Executive in regard to treaties affecting the revenue.**—On December 13, 1869,<sup>1</sup> the House, on motion of Mr. John A. Peters, of Maine, agreed to the following resolution, after declining, by a vote of yeas 43, nays 129, to lay it on the table:

*Resolved*, That the sentiment of this House accords with the opinion expressed in the message of the President of the United States, that a renewal of a treaty of reciprocal trade with the British provinces on this continent would be wholly in favor of the British producer, and should not in our present condition be favorably considered.

**1521.** On March 3, 1869,<sup>2</sup> the last day of the Congress, Mr. Robert C. Schenck, of Ohio, from the Committee of Ways and Means, reported the following resolution:

*Resolved*, That while this House does not admit any right in the Executive and treaty-making power of the United States to conclude treaties or conventions with any foreign government by which import duties shall be mutually regulated, it is, however, of the opinion, and recommends to the President, that negotiations with the Government of Great Britain should be renewed and pressed, if possible to a definite conclusion regarding commercial intercourse and securing to our own citizens the rights claimed by them in the fisheries on the coasts of the British provinces of America, and the free navigation of the St. Lawrence River from its source to the sea.

This resolution was referred to the Committee of the Whole House on the state of the Union.

**1522.** On April 23, 1879,<sup>3</sup> the House, on motion of Mr. Fernando Wood, of New York, and without debate, agreed to the following:

*Resolved*, That the President be respectfully requested to consider the expediency of entering into a convention with the Government of France for the negotiation of a treaty which shall secure a more equal interchange of the products and manufactures of each country and serve to cement closer relations of amity, trade, and commerce.

**1523. In 1871 the House asserted its right to a voice in carrying into effect treaties on subjects submitted by the Constitution to the power of Congress.**—On April 20, 1871,<sup>4</sup> under suspension of the rules, and without debate or division, the House agreed to the following:

*Resolved*, That it being declared by the second section of the second article of the Constitution "that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," the House of Representatives do not claim any

<sup>1</sup> Second session Forty-first Congress, Journal, pp. 54, 55; Globe, p. 99.

<sup>2</sup> Third session Fortieth Congress, Journal, p. 521; Globe, p. 1877.

<sup>3</sup> First session Forty-sixth Congress, Journal, p. 190; Record, p. 741.

<sup>4</sup> First session Forty-second Congress, Journal, p. 200; Globe, p. 835.

agency in making treaties; but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on the law or laws to be passed by Congress; and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or in expediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good.

**1524. In 1880 the House declared that the negotiation of a treaty affecting the revenues was an invasion of its prerogatives.**—On January 19, 1880,<sup>1</sup> Mr. William D. Kelley, of Pennsylvania, moved to suspend the rules and agree to the following resolution:

*Resolved*, That it is the sense of this House that the negotiation by the Executive Department of the Government of a commercial treaty whereby the rates of duty to be imposed on foreign commodities entering the United States for consumption should be fixed would, in view of the provision of section 7 of article 1 of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives.

Mr. Benjamin Wilson, of West Virginia, opposed the resolution on the ground that the Foreign Affairs Committee were examining the subject,<sup>2</sup> and action should be deferred until their report.

But the House agreed to the resolution, yeas 175, nays 62.

**1525. In 1881 the House Committee on Foreign Affairs, discussing the treaty-making power, concluded that the House had no share in it.**—On February 14, 1881,<sup>3</sup> Mr. George A. Bicknell, of Indiana, from the Committee on Foreign Affairs, submitted the following report on the House joint resolution (H. J. Res. 132) relating to the treaty-making power:

This resolution affirms that the treaty-making power of the United States “does not extend to treaties which affect the revenue, or require the appropriation of money to execute them; but that in such cases the consent of the law-making power of the Government is required, which includes, as one of its branches, the House of Representatives.”

It is assumed in the preamble of this resolution that article 1, section 7, of the Constitution, which declares that “all bills for raising revenue shall originate in the House of Representatives,” is in conflict with the subsequent provisions in article 2, section 2, and in article 6 of the Constitution, which declares that the President, “by and with the advice and consent of the Senate, provided two-thirds of the Senators present shall concur,” shall have power to make treaties, and that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”

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<sup>1</sup>Second session Forty-sixth Congress, Journal, pp. 261, 323, 324; Record, pp. 394, 532.

<sup>2</sup>Reference here seems to be made to the consideration of the fishery provisions of the treaty of Washington. The Committee on Foreign Affairs reported on June 9, 1880. (H. Rept. 1746, second session Forty-sixth Congress, p. 4.) In the course of this report they say: “The decisions of our highest law tribunal go so far as to say that in all matters within the purview of Congress, as, for instance, the tariff, as on hemp in the case of *Tyler v. Morton* (Curtis’s Reports, vol. 2, p. 454), no treaty should intervene to prevent the action of the Federal legislation as to imposts on foreign articles. The question as to the right of the treaty-making power to affect duties on imports is not a new question. The Constitution in delegating such a power did not, however, interfere with that of Congress to regulate commerce and impose duties. It is not necessary to discuss here and now how far Congress may participate in the matter of reimposing duties on fish, which were made free by the Washington treaty, as whatever power the Federal Government had to make the treaty as to imposts may of right be controlled by Congress. This part of our constitutional duty it is not proposed to assume by the bill reported. No one can question the power of Congress to control the revenues to be derived from fish and fish oil.”

<sup>3</sup>Third session Forty-sixth Congress, House Report No. 225.

In the opinion of your committee there is no conflict in these provisions. The words "all bills for raising revenue," in section 7 of article 1 of the Constitution, do not embrace treaties; a treaty is not a bill for raising revenue, and the requirement that "all bills for raising revenue shall originate in the House of Representatives" is not a limitation upon the treaty-making power, but is only a condition imposed on the ordinary law-making power of the Government. The President and the two Houses of Congress constitute the ordinary law-making power of the Government; the President and two-thirds of the Senators present constitute the treaty-making power. Neither of these powers has anything to do with the other, and to require the consent of the House of Representatives to make a treaty valid would violate the Constitution by making the House of Representatives a branch of the treaty-making power.

The first clause of section 8 of article 1 of the Constitution declares that "Congress shall have power to lay and collect taxes, duties, imposts, and excises." It is sometimes asserted that this clause impairs the force of the subsequent grant of the treaty-making power to the President and Senate already referred to.

Provisions apparently conflicting, in the same writing, must be construed so as to give effect to all of them if possible; but if that is not possible, then the latest clearly-expressed intention must prevail. And it will be observed that if the mere grant of power in section 8 of article 1 excludes all the subjects mentioned in that section from the treaty-making power, the latter power will be confined within very narrow limits. Under that construction the President and Senate could not make a commercial treaty with a foreign nation, because said section 8 gives power to Congress "to regulate commerce with foreign nations," and no treaty could be made to promote the general welfare because the same section gives power to Congress to provide "for the general welfare."

Treaties, however, for the general welfare, and commercial treaties and reciprocity treaties affecting duties, have often been made.

It seems clear to your committee that section 8 of article 1 of the Constitution refers exclusively to the ordinary law-making power, but section 2 of article 2 creates the extraordinary treaty-making power, in which the House of Representatives can not participate.

The making of treaties is the exercise of the supreme power of the State (Vattel, 192). Ordinarily it belongs to the executive department, but wherever it may be placed by a written constitution, it is a supreme power, subject to no limitations except such as are expressed in the Constitution, or are necessarily implied from the nature of the subject-matter, or from the distribution of the constitutional powers. (Halleck, 189; Wheaton, 457.)

A treaty can not be construed so as to destroy other powers given in the Constitution, or to change the form of Government, or to renounce the national sovereignty, or to alienate the entire national domain. (Story, sec. 1508.) It has been asserted that treaties altering the rules of trade and navigation may require the sanction of the legislature (Wheaton, 457), and in 1816 a question was made whether a certain treaty changed the revenue and whether an act of Congress was necessary to reinforce it, and such an act was passed (3 Stat., 354); but it seems to be agreed by American writers on public law that a treaty within constitutional limits and free from fraud, and not renouncing the national sovereignty or giving up the national domain, is binding upon Congress, and that a refusal by Congress to carry the treaty into effect might be regarded by the other party as just cause of war. (See authorities already cited, and 2 Peters, 314; 6 Peters, 375.) But within our own jurisdiction, in case of a conflict between a valid treaty and a valid act of Congress, they both being the law of the land, it seems that the later law would govern. The resolution under consideration (H. J. Res. 132) affirms a proposition which, under existing constitutional provisions, can not be sustained. Your committee therefore recommend that the same be not adopted.

In the House on the same day that this report was presented the joint resolution was laid on the table<sup>1</sup> without debate.

**1526. In 1884 and 1886 the Ways and Means Committee assumed that the right of the House to a voice in making treaties affecting the revenue had been conceded.**—On June 17, 1884,<sup>2</sup> Mr. Abram S. Hewitt, of New York, from the Committee on Ways and Means, made a report on the convention

<sup>1</sup>Third session Forty-sixth Congress, Journal, p. 400; Record, p. 1568.

<sup>2</sup>First session Forty-eighth Congress, House Report No. 1848.

between the United States and Mexico, in which the following principles are laid down:

Under the Constitution the right to negotiate treaties is vested in the executive power, subject to the ratification of the Senate. The intervention of the House of Representatives is not required, unless the treaty calls for the exercise of powers which, by the Constitution, are vested in the Congress. Commercial treaties dealing with questions of revenue, which, by the Constitution, are subject to the control of the Congress, could not be carried into effect without affirmative action of the legislative branch of the Government. It is true the question has been raised whether it would not be competent for the President and Senate alone to enter into treaties which would change the laws for the collection of revenue; but the practice has been uniform, and the House has always insisted that where the rates of duty are changed by treaty the approval of the Congress is necessary for its execution. In the case of the treaty under consideration, however, this question does not arise, for the reason that the Senate, before ratifying the convention, adopted the following amendment:

“The present convention shall take effect as soon as it has been approved and ratified by both contracting parties according to their respective constitutions, but not until laws necessary to carry it into operation shall have been passed by both the Congress of the United States of America and the Government of the United Mexican States, and regulations provided accordingly, which will take place twelve months from the date of the exchange of ratifications to which article 10 refers.”

The adoption of this amendment by the Senate is a substantial admission, in the nature of a precedent, which may be expected hereafter to govern treaties affecting the revenue.

**1527.** On May 25, 1886,<sup>1</sup> the Committee on Ways and Means reported adversely the bill (H. R. 1513) to carry into effect the reciprocity treaty with Mexico. This treaty contained a clause making its validity dependent on the law-making power, and the report of the committee, as well as the minority views, assume this as a recognition by the treaty-making power of the right of the Congress to have a voice in treaties relating to the revenue.

**1528. After long and careful consideration, the Judiciary Committee of the House decided, in 1887, that the Executive branch of the Government might not conclude a treaty affecting the revenue without the assent of the House.**—On January 15, 1884,<sup>2</sup> Mr. Roger Q. Mills, of Texas, presented and the House agreed to the following:

*Resolved*, That the Judiciary Committee be directed to report to the House whether the President, by and with the advice and consent of the Senate, can negotiate treaties with foreign Governments by which the duties levied by Congress on importations can be changed or abrogated.

On March 3, 1885,<sup>3</sup> at the end of the Congress, and when there was no time for action by the House, Mr. J. Randolph Tucker, of Virginia, chairman of the Judiciary Committee, made a very elaborate and able report on this subject. The remaining members of the committee sign a statement accompanying, stating that they have not had time to examine the important question, and that they are not to be considered as assenting or dissenting from the report or its conclusions.

The report offers the following resolution, as the conclusion to which the arguments come:<sup>4</sup>

*Resolved*, That the President, by and with the advice and consent of the Senate, can not negotiate treaties with foreign Governments by which the duties levied by Congress can be changed or abrogated, and such treaties to be operative as law must have the sanction of an act of Congress.

<sup>1</sup>First session Forty-ninth Congress, Report No. 2615.

<sup>2</sup>First session Forty-eighth Congress, Journal, p. 316; Record, p. 412.

<sup>3</sup>Second session Forty-eighth Congress, Journal, p. 814; House Report No. 2680.

<sup>4</sup>In 1884–85 (second session Forty-eighth Congress, Record, pp. 175, 231, 506, 548) this subject was discussed at length in the Senate.

Mr. Tucker, after quoting those articles of the Constitution bearing on the treaty-making power, says it will not be denied that the power to make treaties is exclusively vested in the President and Senate; but he denies that this power is absolute and unlimited, even as to the rightful subjects within its scope. He says:

The question then recurs, What limitations are there on the power of the President and Senate to make treaties? Or, to limit the inquiry to the terms of the resolution referred to us, Can a treaty (so called) made by President and Senate repeal existing tax laws or impose taxation *propro vigore*, or make it imperative on the House of Representatives to pass laws conforming to the terms of the treaty relative to taxation?

A treaty is a contract, or agreement between nations. It binds each nation when made by its lawful authority. If not so made it is not binding at all. The agency through which the national faith is bound must be authorized to bind it. The power to make some contracts may be exclusive and even absolute, but the question still remains, what contracts may be made? When, therefore, it is asserted that the President and Senate alone have authority to make treaties, it does not follow that it may by treaty do anything which is a possible subject of contract. What subjects the treaty power embraces is untouched by the conclusion of the exclusive authority to make treaties being vested in the President and the Senate.

What limitations exist as to the subjects within the treaty power are to be determined by the circumstances.

Vattel declares a treaty is not valid which is contrary to a former one with another nation. (Vattel, Book II, chap. 12, secs. 164, 165, p. 196; 2 Phil. International Law, 75.)

So he declares that no treaty is binding on a nation which is pernicious to the nation for whose safety the Government is constituted a trustee. (Vattel, Book II, chap. 12, sec. 160, pp. 194–195.)

It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of the State. (*Id.*, section 154, p. 193.)

It is therefore beyond question that a treaty is invalid which destroys the Constitution of the nation, or the rights of its people thereby secured. A treaty can not violate the Constitution of the nation. It is a sound principle of international law, on the high authority just cited, that the government of a nation can not annul the Constitution from which its authority is derived.

But it is also a clear constitutional doctrine. The language of the Constitution of the United States, which gives the character of “supreme law” to a treaty, confines it to “treaties made under the authority of the United States.” That authority is limited and defined by the Constitution itself. The United States have no unlimited but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that the power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated by the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It can not contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story Com. on Const., sec. 1501.)

It is on this principle that a treaty can not take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty can not alien a State or dismember the Union, because the Constitution forbids both.

In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the nexus which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null and can not bind them.

We advance to a further limitation. Can a treaty do what the Constitution has expressly delegated to another department the exclusive and independent authority to do? Or can a treaty compel a department to do what the Constitution submits to its exclusive and absolute will? And is not the obligation of the treaty conditioned upon its free action in those things which the Constitution confides to it as an exclusive and independent department?

If a treaty has any operation to supersede legislative action, or to constrain it, it would follow that by treaty a State might be admitted to the Union. Congress alone has that power. The treaty between the United States and Texas did not propose to make her a member of the Union, and the admission was made by the action of Congress.

Congress has power to naturalize foreigners. A treaty can not do so without or contrary to the will of Congress. So as to bankruptcy, patents, copyright, coinage of money, etc.; so as to the Army, Navy, postal service, exclusive legislation in the District of Columbia. If a contract may be made with a foreign nation as to all these subjects which is obligatory on the United States, then it follows that foreign intervention in all our internal concerns may supersede under treaty stipulations all the powers of Congress intrusted to it by the Constitution. The cases of the power to tax and to appropriate money to public objects is a stronger case than any other against the construction which gives this supremacy to the treaty power. The same results follow as to the powers of the President and of the judiciary. These, too, may be subordinated by treaty to the supreme control of foreign nations through the action of the treaty-making power under this construction. Treaties may not usurp the chair of the Executive and the bench of the judges.

The report then goes on to an analysis of the terms of the Constitution, the English precedents, including the treaty of Utrecht, which, in respect to a clause respecting reciprocity of commerce, was never sanctioned by parliamentary consummation, and to a view of the debates during the framing of the Constitution, and of the precedents of the House, those of 1796 and 1816. The report made in the Senate in 1844<sup>1</sup> by Mr. Rufus Choate, of Massachusetts, and the action of President Jackson in 1834, in regard to the French treaty.<sup>2</sup>

The report also quotes the law writers and commentators on the Constitution.

**1529. On January 22, 1887,<sup>3</sup> Mr. Nathaniel D. Wallace, of Louisiana, submitted as a question of privilege a resolution reciting that the President and Senate had ratified a convention with Hawaii, which convention, unlike the preceding one of the same kind, was not subject to the approval of Congress, and further setting forth that the new convention provided for the admission of certain articles into the United States free of duty. Therefore the resolution provided for the investigation of the subject by the Committee on the Judiciary.**

The point of order being made that the resolution was not privileged, the Speaker<sup>4</sup> held that such subjects, referring to the constitutional prerogatives of the House, had always been considered as privileged.

The resolution was agreed to and on March 3 Mr. J. Randolph Tucker, of Virginia, chairman of the Committee on the Judiciary, reported from that committee the following resolutions:

That the President, by and with the advice and consent of the Senate, can not negotiate a treaty which shall be binding on the United States whereby duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the Government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress.

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<sup>1</sup> First session Twenty-eighth Congress, Journal of Senate, p. 445.

<sup>2</sup> Annual Register, 1834, Public Documents, p. 352; Stat. L., pp. 574-576.

<sup>3</sup> Second session Forty-ninth Congress, Journal, pp. 349, 852; Record, pp. 914, 2721; House Report No. 4177.

<sup>4</sup> John G. Carlisle, of Kentucky, Speaker.

That the President is respectfully requested to withhold final action upon the proposed convention and to condition its final ratification upon the sanction of an act of Congress, in respect of the duties upon articles to be imported from the Hawaiian Islands.

Accompanying these resolutions was a report similar to that in the preceding Congress. It appears, however, that in this case, the report was authorized by the committee, and it does not appear that there was dissent. The report was made too late for action by the House.

**1530. On January 31, 1902,<sup>1</sup> the following resolution was reported from the Committee on Rules and agreed to by the House:<sup>2</sup>**

Whereas it is seriously claimed that under the treaty-making power of the Government, and without any action whatever on the part of the House of Representatives or by Congress, reciprocal trade agreements may be negotiated with foreign governments that will of their own force operate to supplant, change, increase, or entirely abrogate duties on imports collected under laws enacted by Congress and approved by the Executive for the purpose of raising revenue to maintain the Government: Now, therefore, be it

*Resolved by the House of Representatives,* That the Committee on Ways and Means be directed to fully investigate the question of whether or not the President, by and with the advice and consent of the Senate, and independent of any action on the part of the House of Representatives, can negotiate treaties with foreign governments by which duties levied under an act of Congress for the purpose of raising revenue are modified or repealed, and report the result of such investigation to the House.

No report on this subject was made at this session of Congress.

**1531. The House maintains that customs duties may not be changed otherwise than by an act of Congress originated by itself.**

**Approvals by Congress of reciprocity treaties affecting customs duties.**

**Discussion of the prerogatives of the Senate as to treaties affecting customs duties.**

On November 16, 1903,<sup>3</sup> the House proceeded, in Committee of the Whole House on the state of the Union, to the consideration of the bill (H. R. 1921) to carry into effect a convention between the United States and the Republic of Cuba signed on the 11th day of December, in the year 1902:

*Be it enacted, etc.,* That whenever the President of the United States shall receive satisfactory evidence that the Republic of Cuba has made provision to give full effect to the articles of the convention between the United States and the Republic of Cuba, signed on the 11th day of December, in the year 1902, he is hereby authorized to issue his proclamation declaring that he has received such evidence, and thereupon, on the tenth day after exchange of ratifications of such convention between the United States and the Republic of Cuba, and so long as the said convention shall remain in force, all articles of merchandise being the product of the soil or industry of the Republic of Cuba which are now imported into the United States free of duty shall continue to be so admitted free of duty, and all other articles of merchandise being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of 20 per cent of the rates of duty thereon, as provided by the tariff act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted. The rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of said convention preferential in respect to all like imports from other countries: *Provided,* That while said convention is in force no sugar imported from the Republic of Cuba, and being the product of the soil or industry of the Republic of Cuba, shall be admitted into the United States at a reduction of duty greater than 20 per cent of the rates of duty

<sup>1</sup>First session Fifty-seventh Congress, Journal, p. 287; Record, p. 1178.

<sup>2</sup>On January 29, 1902, Mr. Shelby M. Cullom, of Illinois, had made in the Senate a speech on this subject. (First session Fifty-seventh Congress.)

<sup>3</sup>First session Fifty-eighth Congress, Record, p. 260.

thereon, as provided by the tariff act of the United States approved July 24, 1897, and no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897: *And provided further*, That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House.

SEC. 2. That so long as said convention shall remain in force the laws and regulations adopted or that may be adopted by the United States to protect the revenues and prevent fraud in the declarations and proofs that the articles of merchandise to which said convention may apply are the product or manufacture of the Republic of Cuba shall not impose any additional charge or fees therefor on the articles imported, excepting the consular fees established, or which may be established, by the United States for issuing shipping documents, which fees shall not be higher than those charged on the shipments of similar merchandise from any other nation whatsoever; that articles of the Republic of Cuba shall receive, on their importation into the ports of the United States, treatment equal to that which similar articles of the United States shall receive on their importation into the ports of the Republic of Cuba; that any tax or charge that may be imposed by the national or local authorities of the United States upon the articles of merchandise of the Republic of Cuba embraced in the provisions of said convention subsequent to importation and prior to their entering into consumption into the United States shall be imposed and collected without discrimination upon like articles whencesoever imported.

The report<sup>1</sup> of the Committee on Ways and Means, submitted by Mr. Sereno E. Payne, of New York, began as follows:

The enactment of this bill into law is necessary to give effect to the convention providing for reciprocal trade between this country and Cuba.<sup>2</sup> This results not merely because the convention itself provides that it "shall not take effect until the same shall have been approved by the Congress," but because the Constitution gives no power to the President and the Senate to make a convention or treaty changing the rates of revenue. That power is expressly lodged in the Congress. (Sec. 8, Article I, of the Constitution.) Section 7 of the same article provides that "all bills for raising revenue shall originate in the House of Representatives." It is not intended here to cite authorities or advance reasons on this proposition. The records of Congress abound with unrefuted arguments on the affirmative of this contention, and the practice of Congress has been uniformly in the same direction. The reciprocity treaties with Great Britain in reference to our trade relations with Canada and with Hawaii were by their terms each dependent upon the passage by the Congress of appropriate legislation reducing the duties and making provision for the carrying into effect of their terms.<sup>3</sup> Every treaty requiring the payment of money, from the Jay treaty to the treaty of Paris with Spain, has been referred to the Congress to make the necessary appropriation of money. Foreign countries in making treaties with us are bound to take notice of this requirement of our Constitution, and, whether it is expressed in the treaty or not, the whole matter is subject to the necessary legislation by the Congress.

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<sup>1</sup>House Report No. 1, Record, pp. 274–276. Mr. S. B. Cooper, of Texas, filed individual minority views, holding that it "was plainly a subterfuge to contend that this is a bill of the House when its only purpose and effect is to ratify a treaty or law already perfected in form by the other branch of Congress, and practically already ratified in that branch, under the treaty-making power conferred by the Constitution, which treaty or law the House is now simply called upon by the majority to accept as a *fait accompli*, without any voice as to the wording of the original document, and even without the privilege of amending or modifying the terms laid down by its constructors. It certainly appears an unconstitutional proceeding thus to tie the hands of the House of Representatives in a matter of legislation affecting the revenue."

<sup>2</sup>For text of this treaty see Executive Document No. 2, first session Fifty-eighth Congress. This treaty provided: "This convention shall not take effect until the same shall have been approved by Congress."

<sup>3</sup>Both Canadian and Hawaiian treaties had clauses requiring legislation of Congress, and acts were passed in accordance therewith. (See 10 Stat. L., pp. 587, 1092; 13 Stat. L., p. 566; 19 Stat. L., p. 200.) The Mexican reciprocity treaty also had a similar clause, but the legislation failed and the treaty did not become effective. (24 Stat. L., p. 988; 25 Stat. L., p. 1370.)

The convention to which this bill refers is by its terms not to “take effect until the same shall have been approved by the Congress.” If, in the judgment of Congress, the terms of the treaty are to become the law of the land, it is necessary, both by the terms of the convention and by force of the express requirement of the Constitution, that Congress pass the requisite legislation authorizing the change in our revenue laws.

To render the convention valid it is necessary to enact into law the language of the proviso of Article VIII: “And no sugar the product of any other foreign country shall be admitted by treaty or convention into the United States while this convention is in force at a lower rate of duty than that provided by the tariff act of the United States approved July 24, 1897.” To enact these words into law would be to admit, by implication, that duties could be lowered by treaty or convention. Your committee can not consent to this proposition, nor is it believed that such an admission would be sanctioned by any Member of the House. The bill therefore adds the following saving clause at the conclusion of this proviso:

“*And provided further*, That nothing herein contained shall be held or construed as an admission on the part of the House of Representatives that customs duties can be changed otherwise than by an act of Congress originating in said House.”

This proviso, in the judgment of your committee, preserves the contention of the House as to its rights and prerogatives under the Constitution.

The bill was debated November 16<sup>1</sup> and succeeding days and passed the House without amendment.<sup>2</sup>

In the Senate on December 14 and 16,<sup>3</sup> Mr. Joseph W. Bailey, of Texas, discussed at length the constitutional question, holding the initiatory action of the Senate unconstitutional. On December 16 Mr. John C. Spooner, of Wisconsin, also discussed the question in controversy with Mr. Bailey.

Mr. Bailey laid down three propositions:

My first proposition is that—

The House of Representatives alone has the right to originate revenue bills; and neither the President alone nor the President and the Senate jointly possesses that power.

My second proposition is that—

The Constitution commits the treaty-making power of the Government to the President and the Senate; and the House of Representatives has no right to approve or to disapprove a treaty.

My third proposition is that—

The President and the Senate, acting in conjunction with the House of Representatives, can not validate an invalid law or treaty; and that what is null and void from the beginning must remain null and void to the end.

Mr. President, in declaring that all revenue bills must originate in the House of Representatives I merely repeat the very language of the Constitution, and it follows as a corollary from that that neither the President alone nor the President and the Senate acting together can initiate such a measure.

Mr. Bailey, in the course of the discussion of his propositions, said:

In 1843 the President of the United States negotiated what is commonly known as the “Zollverein commercial treaty,” and transmitted it to the Senate for its ratification. That treaty was referred to the Committee on Foreign Relations, and from that committee, on the 14th day of June, Senator Choate, of Massachusetts, submitted a report in which he states the case against the President’s right and power to negotiate a treaty of this kind so much better than I could hope to state it that I shall ask the Secretary to read it.

I commend this report<sup>4</sup> to the careful attention of all Senators, but I especially commend it to the attention of the Senators from Massachusetts. I do not need to remind them that Rufus Choate was not a strict-construction Democrat, who insisted upon the cold letter of the Constitution. He was a Whig,

<sup>1</sup> Record, pp. 260–276, 293–312, 323–349, 361–389.

<sup>2</sup> Journal, p. 81; Record, pp. 388, 389.

<sup>3</sup> Second session Fifty-eighth Congress, Record, pp. 178–194, 277–286.

<sup>4</sup> See section 1532 of this chapter.

and a leader in the party which had elected the President who had negotiated this treaty and urged its ratification. But over and above his political affiliations he was a profound lawyer, whose learning and eloquence are still cherished by the Massachusetts bar, even if his advice is not followed by the Massachusetts Senators.

Mr. John C. Spooner, of Wisconsin, during the debate, said:

That the question the Senator has discussed as to the power of the President and the Senate by treaty alone to change tariff rates was not raised by this treaty, because it is part of the agreement itself that it should not take effect until it had been approved by Congress. I did not say, nor do I say, nor do I think that if that provision had not been in the treaty the treaty would have been unconstitutional, although I assume, for the purposes of argument, and I should be strongly inclined to the opinion, that it would have remained executory until legislation originating in the House had given effect to it.

\* \* \* \* \*

I certainly can not agree that where a treaty is of such a character that it can not become effective until Congress has supplied the legislation to carry it into effect it becomes a perfect obligation, unless there is a provision in the treaty itself that it shall not become effective until it has been approved by Congress. The Constitution itself is written into the treaty and if it can not take effect under the organic law without affirmative action by Congress, that is in the body of the treaty. The nations must take notice of the limitations upon the treaty-making power.

If the Senator will pardon me a moment, Wheaton says:

“The treaty, when thus ratified, is obligatory upon the contracting states, independently of the auxiliary legislative measures which may be necessary on the part of either in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied—”

As the Senator from Texas thinks in this case—

“from the distribution of its constitutional powers—such, for example, as a prohibition of alienating the national domain—then the treaty may be considered as imperfect in its obligation until the national assent has been given in the forms required by the municipal constitution.”

And so it is said by Mr. Story; and so it is said in *Foster v. Neilson* by Chief Justice Marshall; and so it is said by Mr. Justice McLean, who, in the case of *Turner v. The American Baptist Union*, expressed himself as follows:

“A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not, be, the supreme law of the land where the concurrence of Congress is necessary to give it effect.”

That is either where it provides as a part of the agreement that it shall not take effect until approved by Congress or where it is provided as a part of the Constitution that it shall not take effect until approved by Congress. Justice McLean continues:

“Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money can not be appropriated by the treaty-making power. This results from the limitations of our Government.”

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The point of the Senator’s argument was that the House was no part of the treaty-making power. That is true. A treaty which the President and the Senate may lawfully enter into would be no better if it provided for approval by the House, but would be an attempt to confer by contract a power upon the House which under the Constitution it does not possess, which it claimed long ago in President Washington’s day, but which it abandoned then and has never since asserted.

But a provision that the treaty shall not take effect until approved by Congress is a valid provision unless the Senator takes the narrow view of the word “approved,” that it involves a ratification of the treaty by the House and by the Senate as legislative bodies. You will find the word “approved” in the provision of the Dingley Act as to commercial treaties. If that word means what the Senator seems to think it does, it is bad; there is no sense in it. If it means what I think it means, until the House, where it relates to duties, shall approve by legislation the duty provisions of the treaty, it is entirely harmonious with my contention that it is constitutional. It is a different proposition from that which the Senator was making a moment ago.

In the course of the debate, Mr. Eugene Hale, of Maine, said:

But when you come to an event which it is declared is absolutely indispensable to the operation of the treaty, an act by Congress, what better can you have than that? I can see none, and that is the reason why I am going to vote for this bill, that all the rights of the great body of popular Representatives of the Government are preserved.

I do not agree with certain Senators here that the President and the Senate can ride roughshod over the popular branch, and that the power, which is given in terms to negotiate treaties undermines and destroys the fundamental proposition that revenue measures must originate in the House. I do not agree with Senators in that. My education in the House and all my thought and reflection since have been in the other direction. I shall vote for this bill because it has been so amply guarded in that direction that the right of the House is maintained, and the treaty is dependent upon a single event which must be initiated and started and adopted by the House and the Senate as Congress.

On December 16,<sup>1</sup> Mr. George F. Hoar, of Massachusetts, said:

The Constitution provides for two methods of legislation. It declares that bills passed in accordance with the Constitution and treaties shall be the law of the land. They have equal authority, and the latest bill or treaty is the latest declaration of the law and repeals all others in conflict with it. Then the Constitution proceeds to say, not that measures or even laws for raising revenue shall originate in the House, but that bills for that purpose shall do so—that is, in substance, that when the method of doing this is by majority vote the method of accomplishing it is by statute, the origin of which is a bill, the popular branch shall have the sole prerogative of originating it. But the Constitution leaves untouched, by any suggestion of a provision, direct or indirect, the otherwise unlimited authority to make any kind of law by treaty.

It is true there are many treaties which, while pledging the faith of the Government, require an act of Congress to give them effect, just as there are many laws which, while pledging the faith of the Government, require a supplementary act of Congress to give them effect. A law providing for a public debt and authorizing the Secretary of the Treasury to sign the evidences of the public debt requires a future law making an appropriation for its payment, but it is operative and pledges the faith of the Government to the public creditor, and it becomes the bounden duty of both Houses to make the appropriation, just as much as it becomes the bounden duty of both Houses to carry into effect any other provision of the Constitution whatever. So in the matter of the salaries of judges. But it is not necessary to carry the illustration further.

There may be treaties affecting revenue—and it makes no difference, as I agree with the Senator from Wisconsin, whether their effect is the diminution or the raising of revenue—which require future legislation to carry them into effect. It is not necessary to illustrate that. And there may be treaties which require no further legislation to carry them into effect. For instance, suppose, being in the habit of charging \$100 head money on every passenger brought into the United States, we should make a treaty with Spain in these words: “Hereafter no officer of the United States shall receive or exact any head money from any passenger coming from Spain.” That would be a complete, perfect enactment. It would be the law of the land, by the express provision of the Constitution, requiring no farther act of Congress to give it effect or to provide any mechanism for carrying it out. I hold that such a treaty, although it affects revenue and never has been in the House, is as absolutely, by the plain meaning of the Constitution, the law of the land as if those same words were put into a statute enacted by both Houses.

The bill, on December 16, was passed by the Senate without amendment, yeas 57, nays 18.<sup>2</sup>

**1532. In 1844 the Senate took the view that the constitutional method of regulating duties was by act of Congress rather than by treaty.**

**Argument that duties are more properly regulated with the publicity of Congressional action than by treaties negotiated by the Executive and ratified by the Senate in secrecy.**

<sup>1</sup> Record, p. 277.

<sup>2</sup> Record, p. 286.

On June 14, 1844,<sup>1</sup> in executive session of the Senate, Mr. Rufus Choate, from the Committee on Foreign Relations, to whom had been referred the convention with Prussia and the other states of the Germanic Association of Customs and Commerce, reported the same adversely. In the report the committee says:

That the Senate ought not to advise and consent to the ratification of the convention aforesaid.

In submitting this report the committee do not think it necessary to say anything on the general object sought to be accomplished by the convention, or on the details of the actual arrangement; not to attempt to determine, by the weight and measure of the reciprocal concessions, which Government, if either, has the best of the transaction. These subjects have not escaped their notice, but they propose to confine themselves to a very brief exhibition of another and single ground, upon which, without reference to the particular merits of the treaty, they advise against its ratification.

The committee, then, are not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of Government by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them either *ex directo* and by its own vigor, or it engages the faith of the nation and the faith of the Legislature through which the nation acts to make the change. In either aspect it is the President and Senate who, by the instrumentality of negotiation, repeal or materially vary regulations of Commerce and laws of revenue which Congress had ordained. More than this, the executive department, by the same instrumentality of negotiations, places it beyond the power of Congress to exceed the stipulated maximum of import duties for at least three years, whatever exigency may intervene to require it.

In the judgment of the committee the Legislature is the department of Government by which commerce should be regulated and the laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. They infer this from the language of the Constitution, from the nature and principles of our Government, from the theory of Republican liberty itself, and from the unvaried practice, evidencing the universal belief of all, in all periods and of all parties and opinions. They think, too, that, as the general rule, the representatives of the people sitting in their legislative capacity, with open doors, under the eye of the country, communicating freely with their constituents, may exercise this power more intelligently, more discreetly, may acquire more accurate and more minute information concerning the employments and the interests on which this description of measures will press, and may better discern what true policy prescribes and rejects, than is within the competence of the executive department of the Government.

To follow, not to lead; to fulfill, not to ordain the law; to carry into effect, by negotiation and compact with foreign governments, the legislative will, when it has been announced, upon the great subjects of trade and revenue; not to interpose with controlling influence, not to go forward with too ambitious enterprise—these seem to the committee to be the appropriate functions of the Executive.

Holding this to be the general rule upon the subject, the committee discern nothing in the circumstances of this case, nothing in the object to be attained or in the difficulties in the way of obtaining it, which should induce a departure from this rule. If Congress think the proposed arrangement a beneficial one, it is quite easy to pass a law which shall impose the rates of duty contemplated by it, to take effect when satisfactory information is conveyed to the President that the stipulated equivalents are properly secured.

Upon this single ground, then, the committee advise that the treaty be rejected. It may help to reconcile the Senate to this conclusion if they add that they do not regard the stipulated concessions of the foreign contracting power as in any degree equivalent to the considerations by which we obtain them. \* \* \*

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<sup>1</sup> Senate Executive Journal, 1841–1845, pp. 333–334.

On June 15, 1844, by a vote of yeas 26, nays 18, the treaty was laid on the table.

On February 26, 1845,<sup>1</sup> the Committee on Foreign Relations, to whom had been referred a message of the President, submitting arguments as to the merits of the convention rather than as to the constitutionality of the question involved, made a second report,<sup>2</sup> in which was reiterated the reason of the former report, and which then continues:

The committee have experienced no change of these views. The fact of the President and Senate being invested with authority to control Congress in a sphere so appropriate to its jurisdiction furnishes no sufficient cause for the exertion of the authority, unless for peculiar reason of injury to be avoided or advantage realized which legislation may not reach with the same facility or effect. Retaliatory regulation, when required, for example, may be best arranged or obviated by treaties. In such cases the cooperation of Congress may always be expected, with no impairment of harmony between the departments.

The question has been debated how far Congress would be bound to give effect, in cases requiring its cooperation, to regulations by treaty on subjects put within its express province by the Constitution. Whichever may be the better opinion, the doubt supplies reason enough against putting the question to trial in other circumstances than those in which the concurrence of Congress may be safely assumed. And the reason is the stronger for this forbearance from the fact that in the contingency of conflict it would be not the interests only, but the faith, too, of the nation which might be compromised, as this would have been committed by the adoption of the treaty regulations.

The condition of the Government at this point is of peculiar delicacy as regards the arrangement of its imposts. Parties have been arrayed with vehemence and the greatest sensibility awakened on the subject. Regulation by treaty in these circumstances would doubtless be carried into effect by the House of Representatives. But the temper in which the supposed intrusion might be expected to be received would be anything but cordial or placid. Ought not the occasion to be considerable, the motive urgent, to warrant the exercise of the authority at this cost? This is a topic requiring only to be displayed, not dwelt on.

It is further to be considered, if we were to have separate regulation of duties with the various powers which might invite or desire this course of action, how inconveniently diversified and mottled our tariff system might soon become, whilst we should be precluded from simplifying and restoring it to uniformity and symmetry by engagements we were not at liberty to retire from, or which we could only retract at the hazard of disturbing harmony and possibly inciting changes of tariff unfavorable to our interests.

We have at this time treaty stipulations with twenty-one foreign States, engaging that their articles of produce or manufacture, respectively, shall be liable to the payment of no higher or other duties on importation into the United States than shall be payable on the like articles from other countries. We say that this pledge does not preclude us from changes of our rates of duty for equivalents without letting other powers to participation, unless in the render of the same equivalents by these other powers. Let this view be granted to be correct. Is it not true, nevertheless, that others might be found to contest this construction, and, whilst they could not prevail on us to abandon it, might still seek occasion of dissatisfaction on our refusal, possibly to the extreme of introducing change to our disadvantage in their tariffs? The consequence may not be hazarded on light inducements in any event.

If we make regulations of reduction and favor in regard to articles from a foreign country, unless (the instances of which are rare) they are peculiar to that country, the operation will not be confined to these articles, but extend to 0 of the same class from all countries, or, it may be, have the effect to derange the established channels of trade, not in these classes of articles only, but much larger classes in connection with these, as having formed their associates in importation from the same country. The committee do not feel required to expand and assign their full development to views of this character. They regard it their duty, however, to bring them to the attention of the Senate, for a better and wiser consideration, with the expression of the opinion that they are worthy of that consideration. The effect of granting reductions of impost on the revenue of the country is, in this view, not to be confined to

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<sup>1</sup> Senate Executive Journal, 1841–1845, pp. 406–410.

<sup>2</sup> This second report was submitted not by Mr. Choate, but by Mr. William S. Archer, of Virginia.

the mere estimate of the articles to be introduced from the country with which the stipulation for the reduction has been made. The reduction must affect the articles of the same class from all countries, and, of course, the revenue which the duties on them will afford.

Such, in a condensed form, are the views which the committee entertain as regards the general question of the propriety and policy of interference by regulations of treaty with the tariff arrangements of the Government. The power under the Constitution to interfere is not contested. The possible occurrence of occasions in which it may be advisable to exert it is not disputed. But the opinion is intended to be expressed that the occasions should be marked by the promise of very superior advantage, or lie out of the convenient reach of the exertion of the ordinary power of Congress.

**1533. Discussion by a Senate committee as to the jurisdiction of the Senate over revenue treaties.**

**Provisions of the tariff act of 1897 in reference to reciprocity treaties.**

On December 15, 1902,<sup>1</sup> the Senate removed the injunction of secrecy from the following report made at the preceding session by Mr. S. M. Cullom,<sup>2</sup> of Illinois, from the Committee on Foreign Relations:

The Committee on Foreign Relations, having adopted the following report of a subcommittee appointed to consider the question of the jurisdiction of the Senate to act upon the reciprocity treaties now pending in that body, submits the same for the consideration of the Senate.

The subcommittee to whom was referred the question whether the Senate has jurisdiction to act upon the reciprocity treaties transmitted to the Senate, and now pending in that body, begs leave respectfully to report as follows:

Section 4 of the tariff act of 1897, commonly known as the Dingley Act, provides

“SEC. 4. That whenever the President of the United States, by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall, within the period of two years from and after the passage of this act, enter into commercial treaty or treaties with any other country or countries concerning the admission into any such country or countries of the goods, wares, and merchandise of the United States and their use and disposition therein, deemed to be for the interests of the United States, and in such treaty or treaties, in consideration of the advantages accruing to the United States therefrom, shall provide for the reduction during a specified period, not exceeding five years, of the duties imposed by this act, to the extent of not more than twenty per centum thereof, upon such goods, wares, or merchandise as may be designated therein of the country or countries with which such treaty or treaties shall be made as in this section provided for; or shall provide for the transfer during such period from the dutiable list of this act to the free list thereof of such goods, wares, and merchandise, being the natural products of such foreign country or countries, and not of the United States; or shall provide for the retention upon the free list of this act during a specified period, not exceeding five years, of such goods, wares, and merchandise now included in said free list as may be designated therein; and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and public proclamation made accordingly, then and thereafter the duties which shall be collected by the United States upon any of the designated goods, wares, and merchandise from the foreign country with which such treaty has been made shall, during the period provided for, be the duties specified and provided for in such treaty, and none other.”

It will be observed that the treaties contemplated by this section are those which the President of the United States, “by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall enter into within the period of two years from and after the passage of this act,” such treaties to be operative if they shall provide for a reduction of duties imposed by the act during a specified period, not exceeding five years, and to an extent of not more than 20 per cent. The section contains other similar limitations.

The act was approved July 24, 1897. The pending treaties were negotiated by the President and transmitted to the Senate within two years from the passage of the act, but have not been ratified by

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<sup>1</sup>Second session Fifty-seventh Congress, Senate Document No. 47.

<sup>2</sup>While Mr. Cullom was a Member of the House a resolution on this subject was pending. Second session Fortieth Congress, Globe, p. 3885.

the Senate within the time limited by section 4, although the time fixed by the treaties for the exchange of ratifications has been extended by agreement between the parties thereto.

It is difficult to discover the theory upon which this section was drawn. It certainly was not drawn upon the theory that such treaties require, as a condition precedent to their becoming effective, the approval of Congress, and that the act gave conditionally that approval in advance, for the section provides that when such treaties shall have been duly ratified by the Senate and approved by Congress, and proclamation made accordingly, then and thereafter the duties which shall be collected, etc., \* \* \* shall be the duties specified and provided for in such treaty, and none other.

The single question submitted to the subcommittee for examination and report is whether the treaties not having been ratified by the Senate within two years from July 24, 1897, are still within its jurisdiction.

Section 2 of article 2 of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

The President and the Senate are, under the Constitution, the treaty-making power. The initiative lies with the President. He can negotiate such treaties as may seem to him wise, and propose them to the Senate for the advice and consent of that body, which is as free and independent in its action upon the same as the President is in exercising his power of initiative and negotiation.

The power of the President and the Senate is derived from the Constitution. There is under our system no other source of treaty-making power. The Congress is without power to grant to the President or to the Senate any authority in respect of treaties, nor does the Congress possess any power to fetter or limit in any way the President or the Senate in the exercise of this constitutional function. It can not enlarge or in any wise limit or attach conditions to the exercise of the treaty-making power.

Whether the treaty is one which is self-executing, or one which requires legislation by the Congress to give it effect, it must first in any event be negotiated by the President and ratified by the Senate. Whether he will negotiate a treaty and when, and what its terms shall be, are matters committed by the Constitution entirely to the discretion of the President, and whether the Senate will advise and consent to it, with or without amendment, is a matter committed entirely to the discretion of the Senate.

If a treaty be such as to require legislative action, and when entered into by the President and ratified by the Senate does not meet the approval of Congress, it has the power to withhold the legislation requisite to give it effect, but with the preliminary steps of negotiation and ratification the Congress has nothing whatever, under the Constitution, to do.

The subcommittee is clearly of the opinion therefore that nothing contained in section 4 constitutes any valid restriction upon the jurisdiction and power of the Senate to act upon the commercial treaties now pending.

Whether such treaties operate without the approval of Congress, to change tariff duties theretofore fixed by law, is a question not involved, and upon which the subcommittee expresses no opinion.

The fact that the Senate as a legislative body concurred with the House of Representatives in the enactment of the tariff act of 1897, including section 4, is without weight upon the subject, for the obvious reason that it is impossible for the Senate by participation, deliberate or inadvertent, as a legislative body in such an enactment to disable itself in the slightest degree from exercising the power conferred upon it by the Constitution to act upon treaties negotiated by the Executive.

It is entirely competent for the Senate to amend these treaties so as to provide that they shall not take effect without the approval of Congress. Several treaties have thus provided, among others that with the Hawaiian Government in 1876. Such an amendment can not be objected to by the governments which have entered into these treaties with the United States, because they were known to be entered into with reference to the provisions of section 4.

The subcommittee therefore recommend, without reference to the merits thereof, that each of said treaties be amended by the Senate by inserting therein the following additional provision:

"This treaty shall not take effect until the same shall have been approved by the Congress."

**1534. Even in the case of an application for papers relating to an Indian treaty, President Jackson asserted the Executive prerogative as opposed to the contention of the House.—**In 1832 the Committee on the Public

Lands were instructed by a resolution of the House to inquire concerning the lease of a certain tract of land reserved by treaty with the Chickasaw tribe of Indians. In the course of this investigation the committee called on the Secretary of War for a copy of a certain treaty with these Indians and a copy of the journal of the commissioners negotiating the treaty and such other papers as might be in the Department touching the subject before the committee. The committee accompanied their request with the statement that it was made subject to the judgment of the President as to whether or not the communication could be made without injury to the public service.

On March 2, 1832,<sup>1</sup> Secretary of War Lewis Cass transmitted the information required, but accompanied this with an exposition of the views of President Jackson, who did not wish this compliance to be made a precedent. The Secretary says:

The Constitution has assigned to the different departments of the Government their appropriate duties. To the President and Senate it has given the treaty-making power. And although there is, in many important particulars an obvious difference between the treaties concluded with the civilized nations of the world and the compacts formed with the various Indian tribes, subject to the jurisdiction of the General Government or of the respective States, still the latter, as well as the former, have, by the usage of the Government since its establishment, been negotiated and ratified by the same authority and under the same general provision of the Constitution, and many of them expressly require the action of the Senate.

The same principle, therefore, which regulates one of these subjects must regulate the other whenever any question arises involving the exercise of an authority connected with either. Upon the preservation of the Constitution, as well in its partition of duties as in its limitations upon their exercise, depends, in the opinion of the President, the stability of this Government which the people have established.

In considering the application made by the committee the President does not perceive that a copy of any part of the incomplete and unratified treaty of 1830 can be "relative to any purpose under the cognizance of the House of Representatives, except that of impeachment, which the resolution has not expressed." If this quotation, which gives the view taken of this subject by General Washington in his message to the House of Representatives of March 30, 1796, applied to the circumstances of a call for the papers relating to a ratified treaty in the process of execution, and for the faithful performance of which an appropriation was required, it will apply with much more force to the present application, which calls for a paper that will be wholly inoperative until the parties have again met and completed their arrangements, which at present gives no rights, and can "change" none, and which has not and ought not yet be submitted to the coordinate branch of the treaty-making power for their concurrence.

That circumstances may not yet arise in which the papers relating to a ratified or an unratified treaty should be transmitted to either House of Congress upon their application the President is not prepared to deny; more particularly when such ratified "treaty stipulates regulations on any of the subjects submitted by the Constitution to either House of Congress," and when "it must depend for its execution as to such stipulations on a law or laws to be passed by Congress."

Such are the views of the President upon this subject—a subject connected with the relative duties of the executive and legislative departments of the Government and which may hereafter involved, as it has heretofore involved, consequences of the highest importance. He is therefore anxious that his sentiments upon the general subject, not less than the reasons of his course in this particular case, should be distinctly made known and understood. Precedents established for good purposes are easily perverted to bad ones, and while, therefore, he assents to the application which has been made in this particular case, he does so under his own views of its peculiar circumstances, and not because the committee has a right to call for the information or he is bound to furnish it.

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<sup>1</sup>House Report No. 488, pp. 14, 15, first session Twenty-second Congress.

**1535. After long discussion the House, in 1871, successfully asserted its right to a voice in approving Indian treaties.**—In a report made to the House on July 20, 1842,<sup>1</sup> by the Committee on Indian Affairs<sup>2</sup> the committee discussed the nature of treaties with the Indians as related to the power of the House over such subjects:

There is scarcely a point of resemblance between the relations of this Government with an Indian tribe and a foreign independent nation. The Indian tribes are not regarded as foreign nations by the Constitution, for, amongst the enumeration of the powers of Congress by that instrument there is one which gives it authority “to regulate commerce with foreign nations and among the several States, and with the Indian tribes.” Our relations with these tribes and the business of negotiating with them is not entrusted to the Department of State, whose duty it is to conduct negotiations with foreign Governments. By the act of Congress which established the War Department the execution of all duties relating to our Indian affairs was devolved upon it. The laws of the United States for many purposes extend over and are in force in the Indian Territory. No person is permitted to trade in the Indian country without a license from the superintendent of Indian affairs. The President may prohibit the introduction of goods or of any particular article into the country belonging to any Indian tribe either by citizens of the United States, foreigners, or any other tribe. The whole of the country occupied by the tribes who have removed west of the Mississippi is annexed to the judicial district of the United States to which it is contiguous. The jurisdiction of our courts extends to crimes committed in the Indian country, and Congress has always claimed to exercise the power of protecting the Indians. Indeed, the Indian tribes can not in any sense be regarded as independent nations, the wardship exercised over them by the Government of the United States being entirely incompatible with their independence. There is no reason, therefore, for regarding our negotiations with them in the light and subject to the rules which prevail in relation to the treaties negotiated with foreign nations.

**1536.** In 1870<sup>3</sup> the Indian appropriation bill (H. R. 1169) failed because of adherence by both House and Senate after two unsuccessful conferences. The point of difference was the refusal of the House to appropriate to carry out the stipulations of certain treaties. The House took the ground that the Indian treaties did not stand on the same grounds under the Constitution as did the treaties with foreign nations. In short, the House denied the right of the President and Senate to bind the Government by a treaty with Indians. The Senate held that the right had been recognized by the House and the Supreme Court from the organization of the Government until the present Congress, and declined to yield what it conceived to be one of its prerogatives.

A new bill was then passed in the House (H. R. 2413) without provision for payment of certain treaty stipulations. The Senate amended it in accordance with their contention, and a disagreement arose, which in the last hours of the session was composed by a provision of the conference report as follows:

That nothing in this act contained, or in any of the provisions thereof shall be construed as to ratify, approve, or disaffirm any treaty made with said tribes, bands, or parties of Indians, since the 20th of July, 1867, or affirm or disaffirm any of the powers of the Executive and Senate over the subject.

Mr. Henry L. Dawes, of Massachusetts, said in presenting the report that it merely postponed the question at issue. The report was agreed to, and the bill became a law.<sup>4</sup>

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<sup>1</sup>Second session Twenty-seventh Congress, House Report No. 960.

<sup>2</sup>This committee: Messrs. James Cooper (Pa.), Robert L. Caruthers (Tenn.), Thomas C. Chittenden (N. Y.), Augustus R. Sollers (Md.), William Butler (S. C.), Harvey M. Watterson (Tenn.), Wm. A. Harris (Va.), John B. Weller (Ohio), and John C. Edwards (Mo.).

<sup>3</sup>Second session Forty-first Congress, Globe, pp. 4971, 5008, 5111, 5572, 5606, 5609.

<sup>4</sup>Journal, p. 1292, Globe, p. 5656.

The conflict between the two Houses was renewed in 1871, when the Indian appropriation bill (H. R. 2615) came up for consideration. The difficulties were submitted to a conference composed, on the part of the House, of Messrs. Aaron A. Sargent, of California; James B. Beck, of Kentucky, and Sidney Clarke, of Kansas. On the part of the Senate the conferees were Messrs. Cornelius Cole, of California; James Harlan, of Iowa, and John P. Stockton, of New Jersey.

On March 1 they agreed to a conference report, which all the conferees signed, and which included, among other provisions, the following:

That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

In the Senate the report was assailed by Mr. Garrett Davis, of Kentucky, and others as a surrender of a great principle, but the report was agreed to in both Houses without division.<sup>1</sup>

**1537. The meaning of a treaty may not be controlled by subsequent explanations sanctioned by a majority vote only of the Senate.**—In the case of *Fourteen Diamond Rings v. The United States*,<sup>2</sup> Chief Justice Fuller, in delivering the opinion of the court, discussed the following joint resolution, which had been passed by the Senate:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands.<sup>3</sup>

The Chief Justice says:

But it is said that the case of the Philippines is to be distinguished from that of Porto Rico because on February 14, 1899, after the ratification of the treaty, the Senate resolved that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States nor to permanently annex those islands.

We need not consider the force and effect of a resolution of this sort, if adopted by Congress, not like that of April 20, 1898, in respect of Cuba, preliminary to the declaration of war, but after title had passed by ratified cession. It is enough that this was a joint resolution; that it was adopted by the Senate by a vote of 26 to 22, not two-thirds of a quorum; and that it is absolutely without legal significance on the question before us. The meaning of the treaty can not be controlled by subsequent explanations of some of those who may have voted to ratify it. What view the House might have taken as to the intention of the Senate in ratifying the treaty we are not informed, nor is it material; and if any implication from the action referred to could properly be indulged, it would seem to be that two-thirds of a quorum of the Senate did not consent to the ratification on the grounds indicated.

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<sup>1</sup>Third session Forty-first Congress, Journal, p. 456; Globe, pp. 1811, 1822.

<sup>2</sup>183 U. S., pp. 179–180.

<sup>3</sup>Record, Fifty-fifth Congress, third session, vol. 32, p. 1847.