THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS

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"The transaction of business with foreign nations is executive altogether."—*Jefferson*

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PREFACE

The numerous interesting questions which have arisen since Mr. Wilson went to Washington as to the powers of the President in the diplomatic field suggested the idea that it might be worth while to bring together the principal historical incidents illustrating the subject and the most instructive parts of the discussions which these incidents evoked. It is fortunate that at the very outset of our national history a debate occurred between the two ablest members of the body which framed the Constitution bearing upon this subject, and disclosing its most fundamental issues. This was the debate between "Pacificus" (Hamilton) and "Helvidius" (Madison) which is included in Part I of this volume, while an interesting parallel to this early discussion is furnished by the debate between Senators Spooner and Bacon, upon the same issues, which makes up Part III. In Part II, which constitutes the main body of the book, I have had two objects in mind: first, to cull from a rather voluminous "literature" the best material perti-

nent to the subject, and secondly, to state succinctly the results that seem to spring from the discussions canvassed and from actual practice. For the most part, my indebtedness is simply to the sources, the *Annals,* the *Globe,* the *Record,* the *Reports,* the "Opinions of the Attorneys-General," and to the "Messages and Papers of the Presidents." Other minor obligations are duly recorded in the footnotes. E. S. C.

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INTRODUCTION

The power of the national Government in the control of the foreign relations of the United States is both plenary and exclusive. The Court in the Chinese Exclusion Cases says:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . The control of local matters being left to local authorities, and national matters being intrusted to the Government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for the national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.[1]

The same idea is reiterated by the Court in Fong Yue Ting v. U. S. in the following words:

> The United States are a sovereign and independent nation, and are vested by the Constitution with the entire

[1] 130 U. S. 581, 604.

control of international relations, and with all the powers of government necessary to maintain that control and make it effective. The only government of this country, which other nations recognize or treat with, is the Government of the Union; and the only American flag known throughout the world is the flag of the United States.[2]

The powers, however, which compose this plenary control are shared by three branches of the national Government: Congress, the President, and the Senate. The clauses of the Constitution which give Congress its participation in the control of our foreign relations are the following, in Article I, Section 8:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . to regulate commerce with foreign nations; . . . to establish an uniform rule of naturalization; . . . to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer time than two years; to provide and maintain a navy; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The President's powers in the same connection, shared in some instances by the Senate, spring from the following provisions of the Constitution, in Sections 1, 2, and 3 of Article II:

[2] 149 U. S. 698, 711. See also C. J. Taney's opinion in Holmes v. Jennison, 14 Peters 540, 569 ff.

The executive power shall be vested in a President of the United States of America. . . . The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; . . . he shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls. . . . The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. . . . He shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Finally, Article VI, Paragraph 2, of the Constitution provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The questions that have arisen on the basis of the above provisions of the Constitution, so far as they touch the subject of the control of our foreign relations, are of two classes: first, those which have arisen because of the insufficiency of these provisions, without construction, to afford the national Government its putative complete sovereignty in this field; secondly, those which have arisen because of the fact

that the powers bestowed by these provisions on different organs frequently overlap.

Illustrations of the first class of questions are the following: Congress is given the power to declare war; the President and the Senate are given the power to make peace by treaty; but on the subject of neutrality the Constitution is silent. It is also silent on the subject of abrogating treaties; also, on the subject of according recognition to new governments; also, on the subject of international agreements short of treaties, etc.

Illustrations of the second class of questions will occur to any reader. Thus Congress is given the power to declare war, while treaties are made by the President and the Senate. Suppose that the President and the Senate make a treaty of alliance with another government by the terms of which the United States becomes obligated at a particular moment to declare war on a third power: is Congress under constitutional obligation so to declare war? Or, suppose that before a treaty made in due form by the President and the Senate can be carried out, Congress must vote an appropriation: is it constitutionally bound to do so? This question, in fact, arose in 1796,[3] in connection with the unpopular Jay Treaty, and it has been suggested in similar situations many times since, though actually Congress seems never to have refused the required appropriation.

The principles that have been developed in the solu-

[3] See Part II, Chapter III, Section 2, dealing with the enforcement of treaties.

tion of these questions will appear more in detail in Part Two of this work, but for the guidance of the reader the two preeminent ones should be stated briefly at this point: First, the gaps above alluded to in the constitutional delegation of powers to the national Government, affecting foreign relations, have been filled in by the theory that the control of foreign relations is in its nature an executive function and one, therefore, which belongs to the President in the absence of specific constitutional provision to the contrary. But, as the debate given in Part I between "Pacificus" (Hamilton) and "Helvidius" (Madison) shows, the theory was, to begin with, vigorously disputed.

Secondly, the difficulty arising from overlapping powers has been met by attributing to the respective bearers of such powers full constitutional discretion in their discharge. The difficulty has, in other words, been converted from a legal one to a political one, with the result that the real solution has to be sought as each case arises by the methods of compromise and practical statesmanship. Thus if the President, in the exercise of his powers, brings the country at any time to the verge of war, Congress still retains theoretically its discretion in the matter of declaring war, but actually no President has ever ventured so far to lose touch with Congress that the latter has not supported his foreign policy, even to the last resort, though such a case came near occurring in Tyler's administration.

But the reader may at this point object that, since the initiative in foreign intercourse has largely passed

to the President, Congress is generally at a great disadvantage in attempting to assert its viewpoint in such matters, even in the discharge of its acknowledged powers. This is no doubt true to an extent, though we must not forget either the disadvantages of the President's position. In the first place, the President must discharge his functions ordinarily through the agencies provided by Congress, by virtue of its power to "pass all laws necessary and proper for carrying into execution . . . all powers vested by this Constitution in the Government of the United States, or any department or officer thereof." In the second place, the President may expend the public revenue only for the purposes which Congress may choose to dictate. Finally, the President is under direct constitutional obligation to "take care that the laws be faithfully executed."

The actual necessities of the case have more and more centred the initiative in directing our foreign policy in the hands of the President. But this is far from saying that the President is even yet an autocrat in this field. And so long as the above mentioned checks upon his power subsist, it is difficult to see how he can become an autocrat, save at extraordinary moments and when backed by the overwhelming approval of American public opinion.

PART ONE: THE GENERAL ISSUE

CHAPTER I

"PACIFICUS" AND "HELVIDIUS"

Upon the outbreak of war between France and Great Britain in 1793 Washington, under date of April 22 of that year, issued what is usually called a Proclamation of Neutrality.[1] The proclamation, which was drafted by Jay, declared the intention of the United States to "pursue a course friendly and impartial to both belligerent powers," and enjoined upon all citizens its observance upon pain of prosecution.[2] Though it avoided the use of the word "neutrality," the document was soon attacked by French sympathizers as beyond the President's power to issue, as well as upon other grounds. The defense of the

[1] For the text of the Proclamation, see Wm. MacDonald, *Documentary Source Book of American History*, p. 243.

[2] For a prosecution that took place in pursuance of this threat, see Gideon Henfield's Case, Wharton's *State Trials*, p. 49; *Federal Cases*, No. 6360. The prosecution, which was sustained by the United States Circuit Court at Philadelphia, comprising Justices Wilson and Iredell of the Supreme Court, and District Judge Peters, was based on the theory that the Federal courts have a common law jurisdiction of offenses against the sovereignty of the United States, an idea which has long since disappeared. See U. S. v. Goodwin, 7 Cranch 32; Wheaton v. Peters, 8 Peters 591.

proclamation was thereupon undertaken by Hamilton in a series of eight articles contributed to *The Gazette of the United States* (Philadelphia), under the pseudonym "Pacificus." The first article, dated June 29, 1793, alone deals with the constitutional question. It follows:

No. 1

As attempts are making, very dangerous to the peace, and, it is to be feared, not very friendly to the Constitution of the United States, it becomes the duty of those who wish well to both, to endeavor to prevent their success.

The objections which have been raised against the proclamation of neutrality, lately issued by the president, have been urged in a spirit of acrimony and invective, which demonstrates that more was in view than merely a free discussion of an important public measure. They exhibit evident indications of a design to weaken the confidence of the people in the author of the measure, in order to remove or lessen a powerful obstacle to the success of an opposition to the government, which, however it may change its form according to circumstances, seems still to be persisted in with unremitting industry.

This reflection adds to the motives connected with the measure itself, to recommend endeavors, by proper explanations, to place it in a just light. Such explanations, at least, cannot but be satisfactory to those who may not themselves have leisure or opportunity for pursuing an investigation of the subject, and who may wish to perceive that the policy of the government is not inconsistent with its obligations or its honor.

The objections in question fall under four heads:

1 That the proclamation was without authority.

2 That it was contrary to our treaties with France.

3 That it was contrary to the gratitude which is due from this to that country, for the succors afforded to us in our own revolution.

4 That it was out of time and unnecessary.

In order to judge of the solidity of the first of these objections, it is necessary to examine what is the nature and design of a proclamation of neutrality.

It is to *make known* to the powers at war, and to the citizens of the country whose government does the act, that such country is in the condition of a nation at peace with the belligerent parties, and under no obligations of treaty to become an *associate in the war* with either, and that this being its situation, its intention is to observe a corresponding conduct, by performing towards each the duties of neutrality; to warn all persons within the jurisdiction of that country, to abstain from acts that shall contravene those duties, under the penalties which the laws of the land, of which the *jus gentium* is part, will inflict.

This, and no more, is conceived to be the true import of a proclamation of neutrality. . . .

If this be a just view of the force and import of the proclamation, it will remain to see, whether the president, in issuing it, acted within his proper sphere, or stepped beyond the bounds of his constitutional authority and duty.

It will not be disputed, that the management of the affairs of this country with foreign nations is confided to the government of the United States.

It can as little be disputed, that a proclamation of neutrality, when a nation is at liberty to decline or avoid a war in which other nations are engaged, and means to do so, is a *usual* and a *proper* measure. *Its main object is to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principles of neutrality;* an object of the greatest moment to a country whose true interest lies in the preservation of peace.

The inquiry then is, what department of our government is the proper one to make a declaration of neutrality, when the engagements of the nation permit, and its interests require that it should be done?

A correct mind will discern at once, that it can belong neither to the legislative nor judicial department, of course must belong to the executive.

The legislative department is not the *organ* of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties. It is therefore not naturally that member of the government, which is to pronounce the existing condition of the nation, with regard to foreign powers, or to admonish the citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties.

It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon.

It must then of necessity belong to the executive department to exercise the function in question, when a proper case for it occurs.

It appears to be connected with that department in various capacities:—As the *organ* of intercourse between the nation and foreign nations; as the *interpreter* of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the *power* which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force.

This view of the subject is so natural and obvious, so analogous to general theory and practice, that no doubt can be entertained of its justness, unless to be deduced from particular provisions of the Constitution of the United States.

Let us see, then, if cause for such doubt is to be found there.

The second article of the Constitution of the United States, section first, establishes this general proposition, that "the EXECUTIVE POWER shall be vested in a President of the United States of America."

The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.*

It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, "All legislative powers herein granted shall be vested in a congress of the United States." In that which grants the executive power, the expressions are, *"The executive power* shall be vested in a President of the United States."

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the Presi-