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The Treaty That Made America a World Power

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The Treaty That Made America a World Power

The Treaty of Paris, signed 200 years ago this month, recognized the United States as a nation and gave rise to our unusual constitutional provision on treaties.

By William F. Swindler

THE extended bicentennial period from 1976 to 1987-89 is highlighted by at least two developments. The first occurred on March 1, 1781, when the first instrument of national government, the Articles of Confederation, went into effect. (See "Our First Constitution: The Articles of Confederation," *ABA Journal*, February 1981, page 166.) The second was the Treaty of Paris signed Sept. 3, 1783, which gave the formal sanction of international law to the Declaration of Independence.

The treaty of 1783 was an essential step toward the Constitution itself. In enrolling the fledgling American government into the society of nations, the treaty formally vested the United States under the Articles of Confederation with all the responsibilities that those nations assumed and expected of one another. Whether the tentative republic would be capable of discharging these responsibilities was, at the time, an open question.

Already the shaky internal authority nominally established by the articles was being subjected to severe strains as the necessities of defense against hostile armies now were removed. The equally pressing necessities of establishing a complete organization of state governments to replace the former colonial governments—a matter dealt with ad hoc or provisionally since Lexington and Concord—demanded virtually all of the energies of the Founding Fathers.

The French maneuver

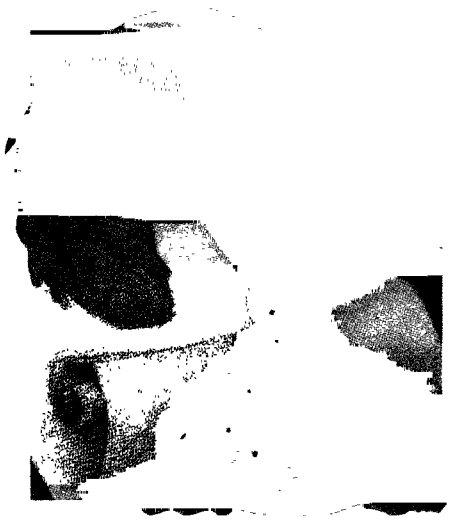
A preliminary treaty had been concluded in Paris the previous November and ratified by Congress on April 15, 1783. These articles, as their text made clear, were "to be inserted in, and to constitute, the treaty of peace," but the formal instrument was not to be concluded "until terms . . . shall be agreed upon between Great Britain and France."

The maneuverings for advantage of the French negotiators, particularly the minister of state, le comte de Vergennes, had dragged on for almost a year. The American representatives in Paris—John Adams, Benjamin Franklin, John Jay and Henry Laurens—had difficulties enough with their British counterparts, who finally left details to a single commissioner, Robert Oswald. Laurens was a prisoner in the Tower of London when peace conversations began, having been captured on the high seas en route to Holland in 1780. He arrived in Paris only two days before the preliminary articles were agreed to.

Meet the Americans

The four American negotiators were perhaps the most experienced of all their countrymen in foreign affairs.

In 1778 Adams arrived in France with his 10-year-old son, John Quincy, as commissioner to the Bourbon court, on the heels of French diplomatic recogni-



Artist Chuck Slack visualizes Benjamin Franklin, John Jay, Henry Laurens and John Adams, who represented the incipient United States of America in negotiating the Treaty of Paris.

tion of the independence of the American states. He took up residence in the same house with Benjamin Franklin, who had spent a number of years in England as a representative of Pennsylvania and several other colonies and who had held a royal commission as postmaster general for North America.

Franklin had gone to Paris as one of the members of the wartime commission of the Continental Congress, and his enjoyment of the court life there, where he was a popular favorite of many of the men in high office and an even greater favorite of the women of the court, made him a less than critical observer of French intrigue. He may have influenced Adams unduly, before the future second president learned enough to make his own judgments. In any case, Adams had learned enough by the closing years of the war to keep some of his judgments to himself, as in opening the prolonged negotiations for a Dutch commercial treaty.

John Jay, the former chief justice of New York and future chief justice of the United States, had served in 1779 as a member of a secret committee of correspondence, appointed by the Continental Congress to contact potential European allies. The following year he had been sent to Spain in the hope of gaining diplomatic recognition. The best Jay was able to do was to secure some secret supply of materiel and money for the American government.

Laurens, who like Franklin had spent much of his youth as a colonial in England, was a Charleston merchant whose export-import business had developed many European commercial contacts. His diplomatic mission to Holland, to assist Adams in trying for a Dutch loan, had resulted in his capture on the high seas by the British and a British declaration of war against the Netherlands.

It wasn't the first

Although the definitive treaty, when finally ratified in London and in the United States, formally removed all legal question of the legitimacy of the American claims to sovereignty, it was not the only international agreement negotiated by the Continental Congress. The military alliance with France and the concurrent treaty of commerce both came in 1778. The commercial treaty with the Netherlands came in 1782, and another with Sweden in 1783 before the settlement in Paris.

Congress also would conclude several treaties with Indian nations and other continental powers before it was succeeded by the government created by the Constitution. It is significant that Article VI of that instrument— "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"—recognized and continued in force these agreements made by the Continental Congress.

International politicking

Ending the state of war was a complicated business. It involved directly or indirectly five different countries. The United States and Great Britain were the principal high contracting parties. But France—the Gallic imagination would not overlook the fact that 1783 marked the 20th anniversary of another peace treaty signed in Paris that deprived her of her major North American possessions in Canada at the end of the French and Indian War—had separate matters to settle with Britain. France intended to maintain a sphere of influence in the newly independent United States and see to it that postwar trade agreements did not freeze her out of commercial advantages as the American resources were developed.

The Gallic imagination would not overlook the fact that 1783 marked the anniversary of another peace treaty depriving her of major possessions.

French imperial politics had led her to an alliance with Spain, with France having promised assistance in recovering Florida from the British, and perhaps Gibraltar as well. Finally, there was the Netherlands, which had gone to war with England in 1780 for its unneutral American sympathies and its commercial treaty with the United States in 1782. An Anglo-Dutch preliminary treaty of peace was signed in Paris on Sept. 2, the day before the definitive treaty with the other powers.

The new American nation was thus getting its feet wet in international politics as well as international law. The Anglo-American preliminary agreement of 1782, in fact, had contained a secret provision that if Florida remained in British hands, the southern border of the independent United States would be at the latitude of present-day Vicksburg. Although this provision was not included in the 1783 treaty because Spain got Florida as a trade-off for abandoning its efforts to get Gibraltar, this essentially converted the Anglo-Hispanic disputes into a foreign relations problem between Spain and the new nation, not to be settled fully until 1819 when the United States acquired Florida from Spain by treaty.

There were other important issues left unsettled by the 1783 instrument. Most pressing was the question of pre-Revolutionary debts owed British creditors by erstwhile colonials, which at last was disposed of by Jay's Treaty of 1795. In the same year Pinckney's Treaty (the Treaty of San Lorenzo) settled other Spanish questions, such as the status of "West Florida" (the Gulf Coast near New Orleans) and the right of free navigation on the Mississippi.

Questions of quorum

Ratification of the Treaty of Paris was delayed for a number of months, largely because of the slowness of trans-Atlantic communications and the fact that most delegates to the Continental Congress had gone home indefinitely to participate in state affairs. On Jan. 3, 1784, a committee including Jefferson, Elbridge Gerry and others reported the lack of a quorum. Only seven of the 13 states were represented and "these differ in opinion." Some pointed to the stipulation in the Articles of Confederation that nine states were to be represented when Congress ratified a treaty, while others argued that since

nine had been present the previous winter when the provisional treaty had been ratified and had instructed the American commission to sign the final version, seven now was a sufficient quorum.

The strict constructionists won out, however, and it was resolved that "the states now present in Congress do declare their approbation . . . so far as they have power" and proposed that the commissioners seek an extension of the deadline for ratification until at least nine states could be represented.

Things cleared up more quickly than expected, however. On Jan. 14 a quorum of nine had been mustered, and final ratification was forwarded to Paris on the heels of the earlier material. Congress then resumed its record of sporadic attendance of delegates, with a kind of executive committee of the states set up to perform caretaker functions. This committee on Aug. 2, 1784, received official notice from Franklin, now minister plenipotentiary to the Court of Versailles, that the final formal exchange of certified copies of ratification had been made the previous May 12.

A grandiloquent preamble

The treaty was a concise general instrument of 10 articles, although its preamble was grandiloquent enough, describing the parties of the first and second parts, respectively, as "the most serene and most potent prince George the Third, King of Great-Britain, France and Ireland, defender of the faith, duke of Brunswick and Lunenburg, arch-treasurer and prince elector of the Holy Roman empire," and, in plain republican terms, the United States of America.

The first two articles recognized the independence of each of the 13 states by name and set out a detailed geographic definition of the boundaries of the new nation, while the third professed to ensure the right of American fishing off the Newfoundland Banks. The seventh made the 1781 cease-fire permanent and stipulated that remaining British troops were to be withdrawn from points within the territory defined in Article 2. The eighth article proclaimed freedom of navigation on the Mississippi to nationals of both countries, the ninth provided for mutual restitutions and assurances and the 10th set out the schedule for ratification.

Simplistic isn't good

The seedbed for subsequent diplomatic and legal problems was the fourth, fifth and sixth articles. The fourth simply (indeed, all too simply) states: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." Article 5 committed Congress to "earnestly recommend" to the individual states that confiscated British property be restored, and Article 6 pledged that no future confiscations would be made.

These prepared the way for the early constitutional cases of *Ware v. Hylton*, 3 Dall. 199, in 1796 and, somewhat indirectly, *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). John Marshall as an attorney lost his only case before the

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Supreme Court when he represented Daniel Hylton, a Richmond merchant whose name also figured in the first major tax decision, *Hylton v. United States*, 3 Dall. 171 (1796), and as chief justice he recused himself in the original appeal of the *Hunter* case when it came up as *Fairfax's Devisee v. Hunter's Lessee*. By then, after prolonged negotiations, a special debts claims commission finally had settled the creditors' rights.

The essential difficulty in discharging the undertaking in Article 4 arose from the practice of several of the Revolutionary state governments of sequestering the debts owed to overseas creditors, sometimes offsetting them with liquidated property seized from departed loyalists or other enemy aliens and sometimes in effect simply extinguishing them by an assumed sovereign prerogative. In Virginia, for example, the "interregnum" government created a state claims office, to which local debtors brought their written evidence of liabilities. The state office issued certificates of discharge and gathered in the documents presented, interposing the doctrine of sovereign immunity.

Postwar suits for recovery of these prewar debts were brought in the new state courts when these eventually opened, and there the immunity of the state was entered as a plea in bar. So long as the only available forum remained in these states, creditors were unable to obtain judgments against either the original debtors or the state. Marshall and several other lawyers received so much business in defending against the creditors that they had a standardized, printed form to be filled in when entering the defense plea.

Constitution to the rescue

Thus matters stood until the Constitution's Article III went into effect and created a system of federal courts in which a new action could be initiated. Under the treaty clause of Article VI, Hylton was again made defendant in a suit brought by representatives of the assignee of the original creditor, now long deceased. The Supreme Court of the United States held that Article 4 of the Treaty of Paris retroactively nullified the Virginia legislation, invalidated token payments made by the original debtors in return for discharge, revived the debt and vested a right of recovery in the claimants notwithstanding any contrary state law.

The frustration of the fourth (and fifth and sixth) articles of the treaty in the state courts had led to the unique language of Article VI of the Constitution, which was first construed in the *Hylton* case. Although the Articles of Confederation vested sovereign authority in Congress to negotiate treaties, the enforcement of specific treaty undertakings depended on the state courts in the absence of a national court system. British creditors, unsuccessful in the state courts, complained to John Jay, American minister of foreign affairs under the Articles of Confederation, who finally urged Congress in 1786 to send the usual precatory communication to the states, in this case urging them to repeal all

laws repugnant to the treaty. This communication was issued in April 1787, on the very eve of the Philadelphia Convention. Some states complied; others did not. Because of this, the draftsmen of the Constitution transferred jurisdiction of subject matter of "all treaties [already] made" to the national government in the supremacy clause.

Treaty clause conceptualized

The experience with the 1783 treaty, therefore, directly affected the conceptual language of the Constitution. Treaties under certain circumstances not only could be self-executing when ratified by the Senate but become the rule of decision in municipal law. The Supreme Court on two important occasions recognized this consequence of the language in Article VI.

Chief Justice Marshall in 1829 in *Foster v. Neilson*, 2 Pet. 253, made the first interpretation:

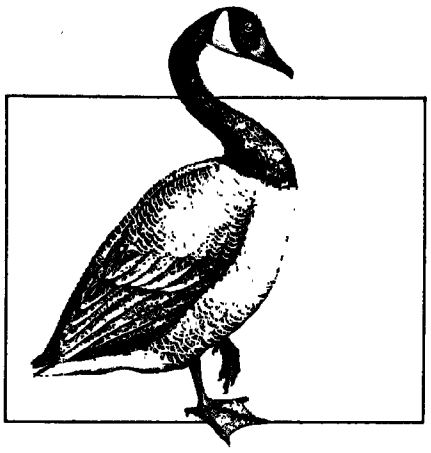
"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infraterritorial [*sic*]; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court."

A variant on this was given in 1884 by Justice Samuel F. Miller in the *Head Money Cases*, 112 U.S. 589, when he declared: "A treaty is primarily a compact between independent nations. . . . But [it] may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of that country."

Treaties and migratory birds

While most treaties ratified by the Senate, even with what appear to be self-executing provisions, then are implemented by enacting domestic statutes, treaties in effect do introduce international law as a source of national power complementary to the other powers vested by the Constitution. The somewhat fortuitous result of the experience with the pre-Article VI Treaty of Paris has provided the United States in its subsequent history with an option for implementing national policy, which on appropriate occasions has been exercised.

The best-known instance is the 1916 Migratory Bird Treaty between the



United States and Great Britain, acting on behalf of Canada. Two years after the treaty's ratification, Congress passed an implementing act authorizing the Department of Agriculture to issue appropriate regulations to carry out the treaty obligations to protect migratory birds in passage between Canada and the American states. Two years later Missouri sought a bill in equity to enjoin federal game wardens from acting under the regulations, alleging that the treaty infringed reserved state powers under the 10th Amendment.

In *Missouri v. Holland*, 252 U.S. 416 (1920), Justice Oliver Wendell Holmes, speaking for a seven-two majority of the Supreme Court, upheld the district court's dismissal of the petition, declaring:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. . . .We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. . . .

"Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another national power. The subject matter is only transitorily within the state and has no permanent habitat there. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while . . . the protectors of our forests and our crops are destroyed. . . ."

Putting a gloss on Holmes

While later Congresses and Supreme Courts have glossed Holmes' doctrine with assurances that the treaty power may not be invoked in contravention of any explicit limitation contained in the Constitution itself, the ill-conceived effort to amend Article VI through the so-called Bricker proposal of the 1950s was defeated. The fact is that treaty provisions, whether self-executing or executory and although deriving original validity from international rather than constitutional law, are enforceable only in terms of their consonance with the Constitution. This is one of the ultimate contributions of the 200-year-old Treaty of Paris. **Journal**

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