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The Constitution and Foreign Relations

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BULLETIN

The COLLEGE of WILLIAM and MARY in VIRGINIA

The Constitution and Foreign Relations

JOHN HOLLADAY LATANÉ
Johns Hopkins University

THIRD LECTURE ON THE CUTLER FOUNDATION

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The COLLEGE of
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CUTLER FOUNDATION
THE CUTLER LECTURES

Established at the College of William and Mary in Virginia by James Goold Cutler of Rochester, N. Y.

The late James Goold Cutler of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a
result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The third lecturer in the course was Dr. John Holladay Latané, member of the staff of the Walter Hines Page School of International Relations of the Johns Hopkins University.
THE CONSTITUTION AND FOREIGN RELATIONS

JOHN HOLLADAY LATANÉ

Member of the Staff of the Walter Hines Page School of International Relations of the Johns Hopkins University

In the first lecture on this foundation the Hon. James M. Beck described the Constitution of the United States as "a living instrument of government" which is "ever changing to meet the necessities of a changing time and a changing people." Of no part of the Constitution is this statement truer than of the rather meagre clauses containing the grants of power over foreign relations. These grants, designed to meet the needs of a small isolated republic which proposed to stay at home and mind its own business, have been enlarged by interpretation to cover the activities of a great world power.

The framers of the Constitution wisely decided that the conduct of foreign relations was a federal function and delegated it to the central government. They also decided that it was an executive function and confided it to the President, subject to certain checks in accordance with the general theory of checks and balances which underlies
our constitutional system. The main check upon the President is the requirement that he must obtain the consent of two-thirds of the senators present before ratifying a treaty. This provision was adopted, as I shall show, to meet a special situation, and is at the present time a serious obstacle to the proper functioning of the United States in the role it is called upon to play in world politics. The great expansion of executive power and the efforts of the Senate to exercise control over foreign policy through the exercise of its veto power over treaties are the subjects which I propose to develop in the course of this lecture.

In a federal government, such as ours, the control of foreign relations is a delegated power and must be exercised within constitutional limits. It is not regarded as an inherent attribute of sovereignty, as in most unitary or highly centralized states. In all states having written constitutions, whether federal or unitary, the foreign relations power is subject to limitations of some sort. Such limitations are usually greater in federal than in unitary states, and they are usually greater in federations formed by the union of pre-existing states, such as ours, than in federal states created more or less artificially for the purpose of decentralizing administration, such as certain of the South American republics. In most federations the control of foreign affairs
is intrusted to the central government and denied to the states, though in some instances, such as Germany and Switzerland, the member states retain the right to make treaties, practically limited, it would seem, to the regulation of frontier matters. The members of the German Reich retain the further right of legation, that is, they may send and receive foreign ministers.

(In the Constitution of the United States the control of foreign relations is delegated to the federal government and denied to the states. The grant of this power is not found in any one section of the Constitution and when the scattered sections expressly delegating it are collected the power does not seem altogether adequate, but under the doctrine of implied powers the grants of the foreign relations power have proved to be quite extensive and on the whole sufficient.)

Postponing for the moment the powers given to the President and Senate, we find that article I, section 8, gives Congress the power to regulate commerce with foreign nations; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to maintain and make rules for the government of the army and navy; and to legislate on the subject of immigration and naturalization.
Article I, section 10, declares that, "No State shall enter into any Treaty, Alliance, or Confederation; grant letters of marque and reprisal;" lay duties on imports or exports, without the consent of Congress; and finally, "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign Power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

One of the strangest omissions in the Constitution, in view of the subsequent course of American expansion, was the failure to authorize the acquisition of new territory. Article IV, section 3, provides that,

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

It is evident, I think, that in adopting this section the members of the convention had in mind the thirteen original states and the Northwest Territory. President Jefferson, as a strict constructionist, hesitated to annex the vast Louisiana
territory without a special constitutional amend-
ment, but he was urged by Livingston and
Monroe to hasten the ratification of the purchase
treaty lest Napoleon should change his mind. So
Jefferson sacrificed his constitutional scruples on
the altar of expediency. It remained for his great
political antagonist John Marshall to find con-
stitutional justification for this and other an-
nexations under the doctrine of implied powers.
In a case involving the validity of the annexa-
tion of Florida, Chief Justice Marshall declared:

The Constitution confers absolutely on the
government of the Union the powers of making
war, and of making treaties; consequently the
government possesses the power of acquiring ter-
ritory either by conquest or by treaty.

If the government has the power to acquire
territory by conquest or by treaty, it would ap-
pear to have the power to cede territory as the
result of an unsuccessful war. Fortunately such
a contingency has never arisen. The question
has, however, been discussed on several occasions,
notably in connection with the Webster-Ashbur-
ton Treaty, which settled the Maine-New Bruns-
wick boundary dispute by a compromise giving
Great Britain territory claimed by the state of
Maine. During the negotiations the Maine and
Massachusetts legislatures passed resolutions de-
claring that no power was delegated to the na-
tional government to cede territory within a state without its consent. Webster wrote to the governor of Maine:

Although I entertain not the slightest doubt of the power of the government to settle this question by compromise as well as in any other way, I suppose it will not be prudent to stir in the direction of compromise without the consent of Maine.

On the promise of Webster to pay to Maine and Massachusetts the sum of $150,000 each, plus an equal division of "the disputed territory fund" which Great Britain was to hand over to the United States, the commissioners of Maine and Massachusetts agreed to accept the compromise and their senators voted in favor of the ratification of the treaty. The peculiar feature of the transaction was that the agreement to make these payments was incorporated in the fifth article of the treaty with Great Britain. Lord Ashburton at first objected to this stipulation as a matter with which his government had no concern, but when Webster explained that this was the only way to insure the votes of those states in the Senate for ratification he withdrew his objection. Webster later referred to these payments as bribes to secure ratification.

If the United States should ever be so unfortunate as to be compelled to cede part of the
territory of a state as the result of a military defeat, it is hardly conceivable that the Supreme Court would declare the treaty making the cession unconstitutional. It would probably regard it as a political act not subject to judicial review.

The annexation of territory by joint resolution of the two Houses of Congress is an illustration of how the Constitution may be stretched by interpretation. The first case was that of Texas. Unable to secure the necessary two-thirds vote in the Senate for the ratification of a treaty of annexation, President Tyler resorted to a joint resolution, which requires only a majority vote, the justification for such a method being that Texas was to be admitted as a State and that Congress had the power to admit new states to the Union. Half a century later when the Senate refused to ratify a treaty providing for the annexation of the Hawaiian Islands, the problem was again solved by joint resolution based on the Texas precedent. It was a false analogy, however, for there was no intention of admitting the Hawaiian Islands to statehood.

(When we come to consider the President's powers over foreign relations we find the express grants in the Constitution very meagre. Article II, section 2, makes him the commander-in-chief of the army and navy. The same section provides that
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, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.

Section 3 contains the very important clause: "he shall receive ambassadors and other public ministers." This gives him the sole right to recognize new governments or new states, or to withhold recognition.

The President’s very extensive powers in the conduct of foreign relations are, however, not derived from specific grants, but from the fact that he is vested with the executive power and that he is the only channel of communication between the United States and foreign nations. The Constitution simply declares that, “The executive power shall be vested in a President of the United States of America.” It does not undertake to define the extent of this power, though it does place limits upon it in certain cases, as in the making of treaties. Early in Washington’s administration the question was raised as to the scope of the President’s powers in foreign relations and Jefferson as Secretary of
State was called upon to prepare an opinion. This he did with great care and his conclusion was as follows:

The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are especially submitted to the Senate. Exceptions are to be construed strictly.

In this opinion Jefferson referred to the Senate as the only check on the executive in the conduct of foreign relations, but it should not be overlooked that the House of Representatives has always claimed a share in the treaty-making power in cases where a treaty requires a money appropriation for its execution. The Constitution gives Congress the exclusive power to appropriate money. Does a treaty, constitutionally negotiated and ratified, which involves a money payment, constitute an absolute obligation? Our answers to this question have not always been consistent. When the French Chamber of Deputies failed to appropriate money for the payments due under the treaty of 1831 in settlement of the famous “Spoliation Claims,” Secretary of State Livingston presented the case to the French government in the following rather emphatic language:

The government of the United States presumes
that whenever a treaty has been concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations.

President Jackson pushed this case to the point of an actual rupture of diplomatic relations with France, but Great Britain acted as mediator and the French Chamber finally voted the appropriation.

President Jackson and Secretary Livingston on this occasion took the international point of view. The House of Representatives, however, has upon more than one occasion insisted on its constitutional rights. In 1796 and again in 1871 it resolved 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 in 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.

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Treaties which require for their execution legislative action on the part of the member states of a federation are sometimes signed subject to such action, in which case they are understood to be mere recommendations. For instance, in the treaty of peace of 1783 with England it was agreed that Congress should earnestly recommend to the legislatures of the respective states the restoration of the confiscated estates of Tories. Although the American commissioners warned the British commissioners that the states would probably not carry out this recommendation, the British government later alleged the failure of the states to make restitution to the Tories as one of the reasons for not carrying out some of its treaty obligations.

The Labor Organization of the League of Nations deals with subjects that lie outside the range of federal powers and within the competence of local legislation. Foreseeing the difficulties that might arise the framers of the Treaty of Versailles expressly provided that,

In the case of a federal state whose power to enter into conventions on labor matters is subject to limitations, its government may treat a draft convention as a recommendation only.

As a matter of practice conventions drafted under the auspices of the Labor Organization
which require legislative action are not signed by the delegates, but are submitted to the states participating as recommendations. The fact that labor legislation is a matter of state control in the United States has caused the Labor Organization of the League to be very unfavorably regarded in this country.

Treaties limiting the size of navies, such as those adopted by the Washington Conference and the London Naval Conference, might be considered to deprive Congress of its discretionary right "to provide and maintain a navy," but even if the House of Representatives should pass an appropriation exceeding the treaty stipulations, it is hardly conceivable that such a measure should pass the Senate which ratified the treaty or escape the veto of the President who negotiated it. It is of course possible that a Senate whose personnel has changed and a subsequent President might agree to disregard such a treaty, but this is unlikely because such treaties are limited to a relatively brief term of years.

The President, who is the sole channel of communication between the United States and foreign nations and whose powers in this connection are so great, has a dual responsibility. He is subject, on the one hand, to the limitations of the national constitution from which he derives his powers, and, on the other hand, as the rep-
resentative of the nation before the world, he must recognize his international responsibilities and act in accordance with the standards of international law. It is difficult at times to reconcile these two points of view. International law is recognized by the Constitution in the clause giving Congress the power “to define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations,” and our courts, following the precedents of the English courts, have always recognized international law as a part of the law of the land. As a member of the family or community of nations we are bound by the law of nations, although we have not yet accepted membership in the League of Nations. Of course if Congress should pass a law in direct conflict with a rule of international law our courts and the executive would have to follow the act of Congress, but John Marshall at an early period announced the principle, which the Supreme Court has time and again reiterated, that, “an act of Congress should never be construed to violate the law of nations if any other possible construction remains.” If Congress deliberately intends to violate a rule of international law or a treaty obligation the country must stand the consequences if the injured nation is strong enough to resent it.

During the hundred and forty-odd years that
have elapsed since the Constitution was adopted
the control of foreign affairs has become more
and more centered in the hands of the President.
The principal check upon his authority is the
veto power of the Senate in the making of treaties,
which with the important role now played by the
United States in world politics has become a
subject of heated controversy. Many treaties of
a formal character go through the Senate without
serious discussion or opposition, but on a vital
question of foreign policy it is usually impossible
for the President to command the constitutional
two-thirds vote necessary for ratification. He is
thus seriously handicapped in the carrying out
of his policies. As a result of the long term of
service senators can and frequently do ignore
public opinion. For instance, it seems evident
that for some time the great majority of the
American people have wanted to see the United
States take its place in the World Court, and yet
notwithstanding this fact and the earnest recom­
mendations of two Presidents, whose party had
a large majority in the Senate, that body has
quibbled over technical points of minor signifi­
cance and refused to lend the great moral support
of the United States to one of the most hopeful
agencies for the promotion of world peace.
Had the framers of the Constitution required
merely a majority vote of the Senate for ratifica­
tion, or a majority of both the Senate and the House, propositions which were considered by the convention, the President would have a sporting chance to carry out his policies. The two-thirds requirement was adopted to meet a particular situation. In 1785 John Jay, who was Secretary for Foreign Affairs, had asked the Congress of the Confederation for authority to suspend for a term of years, in return for commercial concessions from Spain, the right of citizens of the United States to navigate the Mississippi River. The eastern and middle states voted for Jay’s proposal, while the delegates from the southern states voted solidly against it. The right to navigate the Mississippi River to the Gulf was a matter of vital concern to the people of the south and west, and the vote of the eastern and middle states to abandon it, even temporarily, created great indignation. Fortunately Jay was unable to come to terms with Spain even on the basis proposed.

When the question of control of the treaty-making power came up in the federal convention two years later the Mississippi question figured in the debate and in order to guard against the possible sacrifice of territory or rights in the southwest the southern members insisted that no treaty should be ratified without the consent of two-thirds of the members of the Senate present.
The World War and the peace negotiations at Paris raised no more difficult or fundamental question than that of the control of foreign relations under representative or democratic forms of government. The problem was not confined to the United States, although there the spectacular fight between the President and the Senate attracted world-wide attention and had disastrous results. To the great majority of Americans the issue was new, because in only two cases had the Senate ever before discussed a treaty in open session. The senatorial opposition to the Treaty of Versailles was, therefore, attributed to the alleged autocratic methods and personal peculiarities of President Wilson. The public did not know that the Senate's jealousy of the executive in the field of foreign relations was as old as the government itself, that upon one occasion President Washington went to the Senate with the project of a treaty in his hands for the purpose of seeking the constitutional "advice and consent" of that body, that the Senate referred his communication to a committee and declined to discuss it in his presence, and that as he left the chamber he muttered in audible tones that "he would be damned if he ever went there again."

Anyone who imagines that the contest between the President and the Senate for the control of
foreign policy began with the administration of Woodrow Wilson would do well to read John Hay's letters. The contest reached an acute stage during Roosevelt's first administration over the compulsory arbitration treaties negotiated by Hay, which were amended by the Senate so as to require the submission of each case to the Senate for approval. Roosevelt considered this as a nullification of the compulsory feature and refused to ratify the treaties as amended. The Senate had been aroused by Roosevelt's negotiations with the Dominican Republic, of which they disapproved. When the treaty providing for the appointment by the President of a receiver of Dominican customs failed to receive the consent of the Senate, Roosevelt ignored that body and carried out his policy of financial supervision under a *modus vivendi* until the Senate finally acquiesced and ratified the treaty in amended form. During the discussion over the arbitration treaties Secretary Hay expressed his opinion of the Senate in caustic letters to his friends. He declared that thirty-four per cent of the Senate would "always be found on the blackguard side of every question" that came before them, and that he did not believe that another important treaty would ever be ratified by that body. He also said: "A treaty entering the Senate is like a bull going into the arena:
no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive."

President Cleveland once referred in characteristic phraseology to “the customary disfigurement which treaties undergo at the hands of the United States Senate.” In fact it has long been a habit of the Senate to amend treaties or attach reservations to them, frequently for no other apparent reason than to assert the authority of that body or to create the impression that the executive has bungled matters and that better results would have been obtained had the Senate been consulted or had a share in the negotiation.

Since the Spanish War the Senate has gone a long way toward securing the right to be represented in the negotiation of important treaties in addition to its right of advice and consent in the question of ratification. At the close of the Spanish War President McKinley appointed a commission of five members, three of whom were senators, to negotiate a treaty of peace. The senators were William P. Frye, president pro tem of the Senate, Cushman K. Davis, chairman of the foreign relations committee, both Republicans, and George Gray, the leading Democratic member of the committee. This was regarded as a shrewd but questionable innovation on the part of President McKinley. It undoubtedly
enabled him to secure the consent of the Senate to ratification, but the appointment of senators as negotiators called forth protests and criticisms. Senator Hoar maintained that the participation of members of the Senate in the negotiation of a treaty would prevent impartial consideration of that treaty when it came up for ratification.

In selecting commissioners for the peace conference at Paris President Wilson did not follow President McKinley's example, and much of the opposition to the Treaty of Versailles was due to the fact that the President did not take Senator Lodge or any of his colleagues to Paris. President Harding reverted to the McKinley precedent and appointed Senator Lodge, chairman of the foreign relations committee, and Senator Underwood, the Democratic leader of the Senate, as members of the delegation to the Washington Conference of 1922; and President Hoover appointed Senator Reed, Republican, and Senator Robinson, the Democratic leader, as delegates to the London Naval Conference of 1930. Both treaties were promptly ratified.

The Senate advanced another claim in connection with the London Naval Treaty. It demanded that all the correspondence leading up to the treaty be laid before it. Secretary Stimson replied that all essential information had
been transmitted, but that it would seriously embarrass our relations with other powers to make public all notes and cablegrams that had been exchanged. President Hoover refused, therefore, to comply with the request of the Senate. Senator Reed did not help the situation by assuring his colleagues that as a delegate he had examined all the correspondence and could vouch that it was all right. This raised the question as to whether one senator was entitled to more information than his colleagues. If the Senate should establish as a principle the right to have all correspondence relating to a treaty before giving its consent to ratification, it would gain nothing, for our diplomats would soon learn not to commit to writing anything relating to a private or confidential conversation, in which case the texts of treaties would be submitted with even less information than the Senate now gets.

In rejecting the Treaty of Versailles the Senate won what is likely to prove a fruitless victory. That body, so jealous of its rights, already appears to have been short-circuited. It has kept us out of the League of Nations, but it has not kept us out of European politics. The executive has already found a way of dispensing with its “advice and consent” by handling delicate and important matters “unofficially.” In order to win in 1920 the Republican party indiscrimi-
nately repudiated the great achievements of Woodrow Wilson and proclaimed so loudly a return to the isolation of the “founding fathers” that when they assumed the responsibilities of office they found themselves hampered at every turn by the reactionary views which they had disseminated among the people. Secretary Hughes extricated himself from this situation to some extent by the device of sending “observers” to European conferences and soon built up a system of “unofficial diplomacy.” His part in the adjustment of the reparations question was “unofficial,” though none the less effective. Upon several occasions he set forth the advantages of this sort of irregular co-operation with Europe over membership in the League of Nations. In an address before the New York State Republican convention in 1924 he said that if Congress had been asked to authorize executive action in conferences such as had been taking place in Europe from time to time, “the Congress itself most probably would reserve the authority to give instructions, and you can well imagine what the debate would be and what the instructions would be.”

Just after the London Conference of 1924, which gave effect to the Dawes Report, Secretary Hughes, who had visited London, Paris, and Berlin in the effort to put the Dawes plan
through, said before the Society of Pilgrims in London:

Without wishing to say anything controversial on this occasion, I may give it as my conviction that had we attempted to make America’s contribution to the recent plan of adjustment a governmental matter, we should have been involved in a hopeless debate, and there would have been no adequate action. We should have been beset with demands, objections, instructions.

However effective this method of procedure may be, it is anything but democratic. It is in line with secret, not open, diplomacy.

Wilson and Lloyd George both undertook to bring foreign relations under democratic control. It is not yet possible to determine how far they succeeded. Notwithstanding the ridicule heaped upon the expression “open covenants openly arrived at,” it cannot be denied that a new order of diplomacy was introduced by the World War. The main difference between the old diplomacy and the new is frequently said to be the difference between the transaction of business by professional diplomats in the privacy of chancelleries and the drafting of agreements at public conferences in the full glare of publicity. This difference is more superficial than real, for experience has shown that unless the way has been carefully
prepared in advance for such conferences, little is accomplished. What is actually done is usually agreed on beforehand and only the results announced in plenary sessions. This was true of the Paris Conference, where all important questions were determined in private by the Big Four.

The same general method of procedure was followed by the Washington Conference of 1922 and the recent London Naval Conference. Indeed it is difficult to see what other procedure could be followed. Nevertheless the international conference serves to focus public attention on important questions about which the public knows little and formulates issues for submission to the final verdict of public opinion. Furthermore it is impossible for the agreements reached at a conference to be kept secret. As a matter of fact all secret compacts have been invalidated by the Covenant of the League, so that open diplomacy has made great gains. With the modern machinery of communication and the various agencies of publicity that now exist it is inconceivable that the old order should return or that public opinion should ever cease to be the force that it has become in international affairs.

The policy of European governments with respect to the publication of foreign office archives
and current information has been revolutionized as a result of the World War. Documents which under the old regime would have been kept secret for a generation or more are now available in print. Strange to say, this demand for publicity in international affairs has so far met with little response in the United States. Professor Manley Hudson’s report submitted to the Conference of Teachers of International Law in April, 1928, shows that our government supplies less information to the public on current international affairs than that of any of the great powers. Mr. Hughes, in commenting on the report, remarked facetiously that a delay of eleven years in the publication of the last volume of “Foreign Relations” tended to take the edge off of criticism.

The requirement of the two-thirds vote in the ratification of treaties, which gives the veto power to thirty-four per cent of the senators present, is a serious handicap on the executive. In order to overcome it successive Presidents have developed to an amazing extent the discretionary powers of the executive under the general doctrine that the conduct of foreign relations is an executive prerogative. The fact that the President is the sole channel of communication with foreign nations gives him, of course, a great advantage in the development of his powers. It
enables him to take the initiative in formulating foreign policies, and it is worthy of comment that all of our distinctive foreign policies have been formulated and announced by Presidents. The Senate obstructs, but it does not initiate.

The President, as already stated, has an unlimited discretion in the recognition of new governments and new states. In the negotiation of treaties and in the transaction of other important business he may use special agents, of uncertain diplomatic status, who are appointed and sent abroad without the consent of the Senate. President Wilson's employment of Colonel House as his personal representative in Europe before and during the World War was not an innovation, though it was the most conspicuous instance of the kind. H. M. Wriston, in his recent book, *Executive Agents in American Foreign Relations*, shows that Colonel House had over four hundred predecessors, that all of our Presidents had made use of special agents appointed without the advice and consent of the Senate. Such temporary use of special agents does not constitute appointment to office within the meaning of the Constitution, because the courts have held that an office carries with it the idea of permanency and must be created by law. Such agents have frequently been given the rank of minister or ambassador, but this does not make them ministers
or ambassadors within the meaning of the clause of the Constitution requiring the advice and consent of the Senate. Thus when President Wilson sent Mr. Root at the head of a special mission to Russia he gave him the rank of ambassador, but did not submit his name to the Senate, for the appointment was temporary and did not create an office.

Presidents have frequently made agreements with other nations of the nature of treaties, but, under the disguise of some other term, such as protocol or modus vivendi, have put them into effect without the consent of the Senate.

Although Congress is given the power to declare war, the President has developed the power to make war. The war-making power which the President has gradually taken to himself is derived, according to Professor Corwin (The President's Control of Foreign Relations, p. 206), largely from two sources:

First, from the coalescence which took place at the time of the Civil War between the President's agency in the enforcement of laws and his power as commander-in-chief of the army and navy; secondly, from our proximity to weak disorderly neighbors, who demand rough handling occasionally but are rarely worth a real war.

The right of the President to land marines or
other armed forces on foreign soil for the purpose of protecting the lives and property of American citizens, to which Professor Corwin has reference in the passage just quoted, is fortified by a long line of precedents dating back to an early period of our history. There are nearly a hundred cases in which marines have been actually landed on foreign soil in various parts of the world and many more cases in which they have been dispatched to the scene of disorders but not actually landed. In most of the cases in which marines have been landed the local government was in abeyance or unable to afford protection, but in recent years the marines have occasionally been used for political purposes, that is, to support a government or faction to which the President had extended recognition. Such was the case in President Coolidge's intervention in Nicaragua. Marines were landed at the request of Diaz who had been recognized by the United States and they waged war against Sandino and his forces. It was war de facto, but not war de jure, because it was not waged against a recognized government and therefore did not require a declaration of war by Congress. The same was true of the Archangel expedition against the Bolshevist regime in Russia, in which the United States participated. There was heavy fighting, but no war in the constitutional or international sense be-
cause the Bolshevist government had not been recognized.

There is no constitutional check upon the discretionary power of the President in such matters, but the power should be exercised cautiously and subject to political scrutiny. It would be perfectly possible for the President to withdraw recognition from the existing government of a Caribbean or Central American state, recognize some claimant to executive power who would be a mere puppet in the hands of the Department of State, and with the consent of the government thus set up land marines for the nominal protection of the lives and property of foreigners, and crush the opposition. Such a course would be unwarranted political intervention and not mere interposition for the protection of foreign lives and property. Mr. Hughes undertook at the Havana Conference to draw this distinction between intervention and interposition, but the distinction is difficult to maintain in practice. It is always possible to allege danger to the lives and property of American citizens as an excuse for landing marines and the President may go a step further and back the faction which he considers more favorable to the enterprises of Americans and therefore more likely to afford them protection.

The use of armed forces for the protection of American citizens and their interests abroad has
not been confined to Latin America. The most striking instance of the President's assumption of the war-making power was President McKinley's dispatch of troops to China at the time of the Boxer uprising. Without any authorization from Congress he ordered over fifteen thousand troops to China. Between five and six thousand of these arrived in time to participate in the expedition to Peking for the relief of the legations. In co-operation with British, French, Russian, and Japanese contingents they stormed the walled city of Tientsin and fought their way to Peking.

The Chinese government was forced to concede the demands of the powers, which included a large indemnity and the guarantee of improved relations, both commercial and political, with foreigners. These and other demands were embodied in the Protocol of 1901. Strange to say, this treaty, although published in the official collection of the treaties of the United States and still in force, was never submitted to the Senate for its approval. The only explanation I have ever heard advanced for the failure of the President to secure the advice and consent of the Senate to this treaty is that while it imposed obligations on China, it imposed none on the United States.

In his first annual message to Congress, in
December, 1929, President Hoover stated that we still had 1600 marines in Nicaragua, 700 in Haiti, and 2605 in China. These are the latest official figures I have seen.

It will thus be seen that the President has almost unlimited discretionary powers in the general conduct of foreign relations. He may not, however, bind the nation to definite obligations and responsibilities without the consent of the Senate, and the Senate is exceedingly jealous of the President's powers and not immediately responsive to public opinion. How to democratize the Senate, or overcome in some other way the handicap which the two-thirds requirement places on the President, is a problem for which no practical solution has so far been proposed. The Senate is not likely to consent to a constitutional amendment which would in any way weaken its veto power. It has not been possible within the limits of this lecture to discuss the highly technical question as to whether the treaty-making power, when constitutionally exercised by the President and Senate, is subject to constitutional limitations. In view of the fact that there are no express limitations and that the Supreme Court has never declared a treaty unconstitutional, the view is sometimes advanced that the requirement of a two-thirds vote for ratification is the only safeguard against the
abuse of the treaty-making power and therefore should never be dispensed with. To those of us who wish to see the United States play a dignified role in world affairs and assume the responsibilities that its position as a world power naturally involves, the present situation is highly unsatisfactory. The speeches made in the Senate in recent years in opposition to presidential foreign policies have too often been appeals not to the intelligence of fellow senators or to the public at large, but to the prejudices of particular constituencies. This is one of the inevitable results of considering treaties in open session.

The United States already holds the balance of world power in its hands and is actively participating in world politics, however much the government may attempt to conceal that fact from the public. But can we continue indefinitely to claim a voice in world affairs unless we are willing to assume our share of responsibility for the maintenance of world peace? The Senate is insistent enough on our rights, but very indifferent to our responsibilities. Can the nations of Europe, for instance, afford to make any material reduction in armaments, naval or military, until they know whether we will permit them to punish an aggressor, or whether under the plea of neutral rights we will continue to trade with a nation which has violated its in-
ternational obligations? To this question we have given no answer, because no treaty providing in advance for such a contingency would stand any chance of being ratified by the Senate. The Senate moves slowly, but in the long run it is responsive to public opinion. Hence the only solution of the problem presented in this lecture would seem to be the development of a well informed intelligent public opinion on international questions. This cannot come to pass until the Department of State adopts a more democratic policy in the matter of publicity. A great many of the criticisms of the executive in questions of foreign policy are due to lack of full information. If we believe in democracy and in popular education, we can look forward as we gain experience to a more harmonious adjustment of the control of foreign relations.