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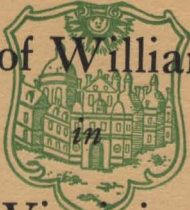
Constitutional Aspects of Foreign Affairs

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The College of William and Mary

Virginia

Constitutional Aspects
of
Foreign Affairs

LINDSAY ROGERS

*Sixteenth Lecture Under the
James Goold Cutler Trust*

WILLIAMSBURG, VA.

The
College of William and Mary
in
Virginia



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CONSTITUTIONAL ASPECTS OF FOREIGN AFFAIRS



JAMES GOOLD CUTLER LECTURE

By LINDSAY ROGERS

Delivered at the College of William and Mary, February 8, 1944



The architectonic principle of government under the American Republic is that constitutionality is placed above every other earthly consideration. Amendment, judicial decision and custom have interpreted and changed the last will and testament of the Founding Fathers, but we are still bound by its explicit provisions.

To an Englishman it is almost incredible that the United States must embark on the disguised civil war of a presidential election at a time when the war against National Socialism may be at its most critical stage. "Why don't you postpone the election?", says the Englishman. You reply that the Constitution requires the election to be held. "Why don't you amend the Constitution, and have your election when the war is won?", asks the Englishman. You answer that the procedure is too tedious and cumbersome to work effectively before the date of the election and that anyway the amendment probably would not carry. Its real purpose, opponents would charge, was to continue in office the present President and Commander-in-chief, and that the avoidance of an election in war time was only a pretense.

As the tide of governmental activity ebbs and flows and as each decade, almost each year, brings problems that suddenly seem acute, particular paragraphs of the last will and testament of the Founding Fathers

wax and wane in their importance. Blood shed in the War between the States wiped out the constitutional ambiguity over slavery. The inability of the national government to levy income taxes without apportioning them among the States missed being catastrophic only because a constitutional amendment came into effect not too long before the country entered its first World War. Only recently have judicial decisions done much (but not enough) in clearing up the debris and waste which resulted from the immunity of State instrumentalities from federal taxation and the reciprocal relief of federal instrumentalities from the impact of State taxation.

A decade ago there were grave doubts first, as to whether the Fourteenth Amendment did not prevent the States from protecting their working populations, and, secondly, whether Congress was doomed to stand by idly while the economic life of the country slowly ebbed. In the first case those doubts were resolved, so far as minimum wage legislation was concerned, by the Supreme Court of the United States changing its mind, or rather by one judge changing his mind. As my friend, Thomas Reed Powell, put it: "A switch in time saved nine". On the second point the doubts were resolved not only by a change of mind but by a change in the Court.

Happily the provisions of the last will and testament of the Founding Fathers have never been unduly limiting in respect of the exercise of the war power. Constitutional pedants have sometimes viewed with alarm and there were grave discussions concerning unconstitutionality during the War between the States. But in 1861 and 1917 national power was not hamstrung, and in this conflict, whatever weakness and indecision may be charged to its conduct have come from human frailties and are not compelled by any language of the Founding Fathers. The exchange of destroyers for naval and air bases, Lend-Lease, priorities, price controls, rationing—there is a plentitude of power and its use can be prompt.

In respect of the manner in which we conduct our foreign relations, however, the situation is vastly different. The formulation and execution of policies which seek to preserve and organize peace, and which if unsuccessful require, in Clausewitz' phrase, "another means" to carry them out, are under a dark shadow cast by the testamentary provisions of the Founding Fathers. If they remain there the United States, after emerging victorious from a second World War, will again be defeated by the peace. That it is not only unwise but unnecessary for our foreign relations to be hampered by the Constitution is the thesis I offer you today.

I.

When, after the first World War ended a quarter of a century ago, we had difficulties in making peace, our constitutional arrangements for the control of foreign affairs were vehemently discussed and their wisdom seriously questioned. Now, while the second World War is still in progress, they are again being discussed and only a tiny minority in the country dares to deny a change would be desirable. As I shall argue with you, change is possible by custom. Indeed, some change has already come about. But I shall also argue, in Edmund Burke's phrase, that the laws reach but a little way. "Constitute government how you please," Burke declared, "infinitely more will depend on the wisdom and discretion of those who have it in charge." Political courage, political morality, accommodations between the executive and the legislature within the wide ambit which the constitutional texts allow for rashness and discretion—these matters may prove as fateful to the future welfare of the country as the constitutional requirement that the President "shall have the power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Senators present concur". Political intelligence and courage in high places is something we can only hope for and seek to deserve.

But the constitutional provision that one more than one-third of the Senate can veto treaties, that, as John Hay put it, "for all time the kickers should rule", is a matter we can do something about.

And we must do it if we are not to lose the peace. Happily there seems to be an increasing awareness of this truth. During recent weeks there has been a good deal of discussion of the behavior of the Senate when it was dealing with the Treaty of Versailles. A distinguished Senator warns against "another kiss of death" and maintains that the osculatory preparations are already under way. This is not the place to rehash old controversies. It is sufficient to say that in 1919-1920 all the fault was not on one side. Proper compromises by President Wilson would have taken the United States into the League of Nations and launched a foreign policy that might have been tolerable in respect of the problems of the post-war world. Whether the succeeding Republican administration, which was so shy of the League of Nations that it refused to acknowledge communications from the Secretary-General, would have cooled on that policy and abandoned it speedily can only be a matter of conjecture.

The plain fact is—and no one can deny it—that, in Mr. Wilson's phrase, used in 1917 when the Senate was considering legislation, "a little group of wilful men"—that is, Senators—can make the great Government of the United States helpless and contemptible. In 1917 the little group did it by filibustering against the Armed Ship Bill. One more than one-third of the Senate can do it in respect of any treaty, and there are few save Senators who would raise their voices to say that such an arrangement is tolerable. To friendly foreign governments with which we negotiate, the arrangement seems intolerable. An English writer uses the sport of kings to illustrate the American position. "The President of the United States", he says, "is in the position of a trainer who (to the distress of the Jockey Club) is allowed to enter his horse 'America' for the classic races. But only the owner

'We the people of the United States' has the power to put up the stake money without which, in this drab world, entries are not finally accepted. For example, every American President since Wilson's time has entered 'America' for the World Court. And each time the owners, represented by their chosen trustees, the Senate, have cancelled the entry. There is no evidence that the owners have become more ready to put up the stake money than they were in 1920 or anytime down to 1939."¹

II.

The history of the treaty provision in the Philadelphia Convention has been dealt with in many authoritative volumes. I have myself dealt with it in a book which was rather called "provocative"². But here it is worth while to make a brief reference to that history.

As is well known, the framers were all nervous of unrestrained authority, whether it was possessed by an executive or a legislature. With the exception of a small minority, in which Alexander Hamilton was most conspicuous, the men in the Philadelphia Convention desired to get away from a strong government and by checks and balances to avoid tyranny by any branch of the political establishment or even by a majority of the people acting through their elected representatives. That system of checks pervades the whole constitution and is carried so far that practically but one power is conferred without a corresponding restraint on its exercise. This is the power of executive clemency and for misusing it, the President would be accountable to the Senate in an impeachment proceeding.

One of the early drafts of the Constitution provided that "the Senate of the United States shall have the power to make treaties and to appoint ambassadors and judges of the Supreme Court". This was objected

¹ D. W. Brogan: "British and American Foreign Policy", *Nineteenth Century*, January 1943.

² "The American Senate" (1926).

to by Madison on the ground "that the Senate represented the States alone and that for this, as well as other obvious reasons, it was proper that the President should be an agent in treaties". There were, however, certain causes which operated to incline the Convention to favor dual control of foreign relations. Hamilton apart, the framers desired to get away from the English precedent of treaty negotiation by ministers and ratification by the Crown. They feared possible autocracy in case the function was given to one man. It was suggested that since other clauses in the Constitution prohibited the States from making individual treaties they should be compensated for this loss through power being given to the representatives of the States in the upper house; they would thus be safeguarded against injury by federal treaty action. Finally, under the Articles of Confederation, the power of entering into treaties and alliances had been vested in "the United States in Congress assembled" and nine—that is, two-thirds—of the thirteen States voting as units in Congress had to assent to any commitments. Congress had been so determined to keep foreign matters in its own hands that when a Foreign Secretary was appointed in 1782 he was instructed by a resolution to submit to Congress for its inspection and approval all letters to Ministers of Foreign Affairs relating to treaties and the plans of treaties themselves. That this was clumsy machinery could not be denied, but clumsy machinery the weaknesses of which are known—in 1782 or a century and a half later—sometimes seems more desirable than a nicely balanced machinery that may run too rapidly. In any event some arrangement midway between that of the Crown and that of the Thirteen Colonies seemed to be indicated.

A fortnight before the Convention adjourned a new draft of the treaty-making clause joined the President with the Senate. To the proposal that ratification by the House of Representatives should be necessary also it was answered that general legislative approval would frustrate the desire for secrecy. If it were to be the

Senate alone, there should be a two-thirds vote. Hence, when the Committee on Style reported only three days before the adjournment of the Convention, the language of the constitutional provision which we now have appeared for the first time. The clause was the result of a compromise. Had the Convention remained in session longer there might have been a change. But the more prolonged the session the more the opportunity for criticism in the country. Moreover, the weather in Philadelphia was quite warm. The delegates were exhausted. They wished to conclude their labors quickly. Not independent of accidental causes, therefore, was the emergence of the provision now in the Constitution. Thus the tergiversations in the Convention should serve to remind us that there is nothing particularly sacred about this clause of the Constitution. It is a child of chance rather than of logic or experience.

The difficulty now is that the advice and consent of the Senate are looked upon not as a check but as inviting the substitution of senatorial judgment for executive judgment. The Senate can and does dictate to the President. "One more than one-third of our number", its ultimatum reads, "will defeat the treaty in its present form but we will approve the treaty if changes are made in certain particulars which we specify. Our judgment is better than yours. Public opinion will not be able to touch us until it has forgotten or is distracted by other issues. We care nothing about delays or embarrassments vis-à-vis other nations, so you had better agree to accept the only conditions on which our minority will not exercise its constitutional veto."

A legislative chamber may of course present a similar ultimatum on pending bills but it is proper that statutes should emerge from the conflict and reconciliation of different views, and that minorities should receive some concessions. Mutilation of a bill is rarely so important or so final as mutilation of a treaty, and there is no foreign contracting party to consider.

Furthermore, on legislation there is no constitutionally protected veto by one more than one-third. Perhaps it is not true, as John Hay maintained, that "there will always be 34 per cent. of the Senate on the black-guard side of every question that comes before them". But there will always be Senators who insist on their individual prejudices or who espouse sectional or racial interests. Not a few Senators are profoundly convinced that their wisdom is greater than that of the Executive. Senator Borah, Chairman of the Senate Committee on Foreign Relations, proclaimed to the country that through his own sources of information which he thought were better than the sources available to the Executive, he had been assured that there would be no European war. Moreover, with the backscratching and capricious accommodation which flourish in every assembly not subject to responsible party leadership, it is easy to create a minority larger than 34 per cent. and to propose the substitution of its program for the program submitted by the Executive.

"There are only two things wrong with Henry Cabot Lodge", wrote Henry Adams. "One is that he is a Senator. The second is that he is a Senator from Massachusetts." This is a political imponderable which cannot be weighed but only pondered. There are ninety-six Senators. The *amour propre* attaching to membership in that august body seems considerably greater—certainly its manifestations are more obvious and objectionable—than the *amour propre* attaching to membership in a chamber composed of 435. It would probably be incorrect to argue that a larger percentage of Senators than of Representatives hold queer opinions or are demagogues or crackpots. But because there is unlimited debate in the Senate, because the newspapers think that the views of one of ninety-six are more important than the views of one of four hundred and thirty-five, the country becomes much more aware of the mental eccentricities of certain Senators than of the eccentricities of their counter-

parts in the House of Representatives. In Great Britain rules of procedure in the House of Commons, the relative unimportance of the private, dissident member, and the shortage of newsprint combine to make demagogues blush unseen. Who will deny that this is an advantage?

Psychologically also the constitutional provision [that action may be prevented by one more than one-third of a body is an invitation to individuals to make up a large enough minority to interpose their veto. How, save on grounds such as these, is it possible to explain the refusal of the Senate to consider the protocol establishing the Permanent Court of International Justice when the House of Representatives was voting overwhelmingly—303 to 28—in favor of adherence and asserting its readiness “to participate in the enactment of such legislation as will necessarily follow such approval”? Even if the majority be viewed as somewhat swollen because the House had no direct responsibility and was taking a hortatory rather than a decisive action, it surely represented a willingness in the country for the Senate to act favorably. Yet for ten years after that vote in the House the Senate refused to act and when the test finally came, more than the one-third minority was in being.

How account for the fact that the Fulbright resolution passed the House of Representatives by 360 to 29; that the Senate hemmed and hawed for six months; and that only the tremendous popular acclaim which was given the Moscow Agreement sufficed to rouse the upper chamber from its lethargy, or, more accurately, to make it abandon its antagonism and finical concern with its own constitutional prerogatives? That a resolution which admitted that the country is part of the world was finally passed is encouraging, but I find myself unable to agree with those who think that this is a cause for rejoicing. The resolution is in such broad terms that one could vote for it and then could find good and sufficient reasons to oppose any specific scheme for implementation. If, after months

of consideration, the impact of an unexpected world event was necessary to force the Senate to give approval to a measure which is in such vague terms as to be almost platitudinous, how can one be sanguine of Senate behavior when the question is that of cleaning up the mess that this war will leave in its wake? During the debate on the Treaty of Versailles, Senator John Sharp Williams said that the Senate would not vote approval of the Ten Commandments or the Lord's Prayer without insisting on reservations. I suppose that if the Senate recited "Now I lay me down to sleep", someone would insist on adding "and other appropriate forms of repose".

III.

How far the framers intended the Senate to be a privy council charged with foreign affairs is not clear. Certainly they thought that the Senate—then quite a small body—would consult with the President frequently. Washington did consult but his experience was such that future collaboration was not attempted. The accident of an early incident determined the development of a constitutional practice which has been just as important as constitutional language.

In his memoirs John Quincy Adams gives a much-quoted account of President Washington's having gone to the Senate with a project of a treaty, and of having been present while the Senators deliberated upon it. "They debated it", wrote Adams, "and proposed alterations so that when Washington left the Senate Chamber he said he would be damned if he ever went there again", and ever since that time treaties have been negotiated by the Executive without submitting them to the consideration of the Senate. Only on rare occasions since have there been consultations. In 1830 Jackson asked the Senate for its advice on a proposed Indian Treaty, "fully aware that in thus resorting to the early practice of this government by asking the previous advice of the Senate in the dis-

charge of this portion of my duties I am departing from a long and for many years unbroken usage in similar cases". Sixteen years later President Polk, in his message on the Oregon Boundary settlement, said that "this practice, though rarely resorted to in latter times was, in my judgment, eminently wise and may, on occasions of great importance, be properly revived". If the President is wise, as Lord Bryce remarked, "he feels the pulse of the Senate which, like other assemblies, has a collective self-esteem". But the growing size of the Senate made it inevitable that formal consultation would be rare. The rules still provide for executive sessions with the President, but in 1906 Senator Lodge said that if a request of that sort were made by the President it would be resented.

Until the debate on the Treaty of Versailles, however, the Senate held executive sessions when it considered relations with foreign powers. In 1919, there was unlimited debate on the peace treaties and the Covenant. The Senate was a legislative chamber, amending and reserving. It is not desired "at this particular moment to afford opportunity for intemperate and trouble-making debate on the floor of the Senate. It is known to all well-informed men that the utmost freedom of debate is permitted under the Senate rules. It is further known that Senators do not hesitate to avail themselves of that unlimited freedom. International relations are delicate and sensitive. Unity and harmony require consultation and co-operation". Thus Senator Connally when, for the Senate Committee on Foreign Relations, he explained the reasons for not reporting the Fulbright Resolution.¹

Secretaries of State consult with the Senate Committee on Foreign Relations but not as much as they should. The ease with which in 1913 Secretary of State Bryan's conciliation treaties were accepted was due to the fact that the then Great Commoner had discussed them with the Senate Committee. Recently

¹ *New York Times*, September 25, 1943.

there have been promising contracts between certain Senators and the State Department for the consideration of post-war policies, but a good deal more could be done. The British House of Commons, which is not organized in committees, does have an informal group of members who are specially interested in international questions. The Secretary of State for Foreign Affairs occasionally appears before this group and discusses matters with them more frankly than he could in the House. The advice and criticism he may get are helpful, and members of the group, made more *au courant* with developing policies, are likely to be better informed and more sympathetic supporters of the Secretary of State when matters become before the House for discussion. Secretary Hull's appearance before Congress to report on the Moscow agreements was all to the good even though, unlike Mr. Eden in the House of Commons, Mr. Hull simply made a pronouncement and did not participate in any debate. The more the State Department abandons its aloofness from Congress and its members the more likely a sympathetic understanding of its policies²

IV.

The one more than one-third of the Senate could be made up of Senators from the seventeen smallest States which contain not more than one-twelfth of the people of the country. It may be said that such a calculation is fanciful, and it probably is. But the elected representatives of the people of the United States number 531, and I submit that there is no reason in allowing 33—less than 7 per cent. of them—to determine the foreign policy of the United States. It should in

² See the correspondence between Secretary Hull and Senator Wiley over the latter's proposal to set up a Foreign Relations Advisory Council composed of high officials of the State Department and of representatives of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. *Congressional Record*, November 25, 1942.

frankness be added that the 7 per cent "might protect" the more populous States of the country nine of which contain a majority of the population. The Senators from these nine States plus sixteen other Senators could defeat a combination of the thirty-one smallest States. But such alignments have never taken place and it is inconceivable that they could in the field of foreign policy. Section versus section (New York *and* Delaware; California *and* Nevada); farmer versus labor; wealth versus poverty—alignments could and will be on these lines but happily not on bigness versus smallness. Happily also our racial stocks are not thus distributed over the country. Nor is the argument against the two-thirds rule affected by the fact that 24 States with 23 millions would have the same voting power as 24 States with 108 millions population. Who is alarmed by that in respect of legislation?

It should be remembered that, when the present constitutional arrangement was accepted, the conduct of foreign relations was much more the peculiar province of kings than it now is. This is not the place to argue whether, as diplomacy has become democratized, it has become more successful, or to consider the merit or the demerit of the second part of the first of Mr. Wilson's Fourteen Points: "open covenants of peace, openly arrived at". The first part is unchallenged. No non-totalitarian government today, with responsible political leaders, would propose that that government accept international commitments without the nature of the commitments being known in advance, discussed by the public and approved by elected representatives of the people—tacitly, as is the case with the British Parliament, or explicitly in other countries by some legislative ratifying authority. If, as Walter Bagehot said seventy-five years ago, legislation of exceedingly minor importance is debated clause by clause and must run the gamut of parliamentary approval, there is no reason why a

treaty which may commit the lives and fortunes of millions of citizens should not run a similar gamut of criticism and be submitted for approval by a representative assembly.

Indeed, it may be argued that our present machinery for advising and consenting to the ratification of treaties is obsolete and undemocratic not only because a minority of the Senate can interpose a veto but because two-thirds of the Senate are not sufficiently representative to put the kind of imprimatur of approval that there should be on an international engagement. A foreign policy would have much more moral backing if, as a policy, it had to be supported by the House of Representatives as well as by the Senate in order to be binding. Such support must come later when the House passes appropriations or implementing legislation. In effect, then, the House has a veto which it does not exercise.

In so far as the content of foreign policy is concerned, the House of Representatives has a greater interest than it had when international questions were predominantly political. Domestic problems and international relations are far more closely intertwined than they used to be. A Hawley-Smoot Tariff Act sets up a series of tariff retaliations in Europe which lead to economic misery—the well-watered soil in which the seeds of dictatorship blossom and burgeon rapidly. A policy of reflation—as was Mr. Roosevelt's policy in 1933—torpedoes the World Economic Conference in London and has far-reaching international complications. The question of whether we retain in operation the synthetic rubber plants which have been built in this war will determine the prosperity or the penury of native populations in the Pacific Islands and in South American states. Foreign offices, even though reluctantly, have come to recognize that the emissaries that they send abroad must be more than diplomats: they must know something of business and economic organization. They must not be permitted to become aloof from currents of opinion

and from emerging domestic problems in their own countries. Hence both the British Foreign Office and the State Department are paying attention to the problem of recruiting men for the foreign service whose training will cover much more than diplomatic history, diplomatic forms, international law—in short, what one of the writers on diplomacy called the art of negotiation with princes. Pending the recruitment of such a type of public servant, every Embassy now has economic experts, commercial counsellors, labor advisers, press and radio officers whose jobs are more important than the jobs of the military, naval and air attachés.

When war came foreign offices and embassies were not so staffed. Hence a plethora of special agencies which performed special tasks in respect of international relations: economic warfare and foreign propaganda. In the United States there was quarrelling over who was to do what. Economic warfare was at first a kind of step-child of the army and then under a Board headed by Vice-President Wallace. A violent quarrel with the Reconstruction Finance Corporation, which was itself waging economic battles for raw materials, resulted in all such activities, theoretically at least, going under the control of the State Department. But then in September last this new organization, the competing show which the State Department had been running, and Lend-Lease, which had been and still was separate, were thrown together into a Foreign Economic Administration not formally under the Secretary of State but with great powers that must be “exercised in conformity with the foreign policy of the United States as defined by the Secretary of State”. Meanwhile, the internal fermentation in the State Department had been incessant. A mere enumeration of the many shifts, which I list in an appendix, will show vividly how the task of diplomacy has been transformed. Once diplomats had to court monarchs and curry favor with royal mistresses. Then it was important that they interpret the views of and get

along well with "the governing classes"¹. Their popularity with the peoples of the governments to which they are accredited must now be taken into account. But above all, ambassadors must now administer swollen chancelleries and large staffs of their own. They must also keep in touch with and seek to coordinate the activities of a host of officials from different national departments or agencies—commerce, agriculture, labor, information, propaganda—who are seeking to carry out what is the supposed foreign policy of their country. Great Britain has attempted an *ad hoc* solution of the problem in the Middle East and Washington by appointing emissaries of cabinet rank. When this war began foreign offices thought their cavalry was still all important. The bombers and the tanks were manufactured in other branches of the government. Now foreign offices properly seek to take over the direction of the new arms.

In short, modern diplomacy is the business of the executive and the representatives of the people in a sense that it has never been before. Under American constitutional law, as I have said, treaties are not self-executing but always require legislation to implement them. Money must be provided and that can be forthcoming only by an appropriation approved by Congress. The size of the army and navy and air force and the wealth or penury of those forces in weapons are determined by Congress. Why, then, should it be thought that an international engagement from which important domestic and fiscal consequences will flow has enough general backing if it is approved only by two-thirds of the Senators of the United States? Why should the liquidation of lend-lease, arrange-

¹ Since the war began Atticus, a well-known Englishman who contributes a column to the London *Sunday Times*, wrote as follows concerning the appointment of a new British Ambassador to Brazil. It was, he said, "swift promotion for a man who, three years ago, was counsellor at our Embassy in Rome. Sir ———, who will be fifty this year, played golf with Ciano, was faultlessly correct with the Germans, and did his best to keep Mussolini sane. With his excellent wardrobe, his epicurean taste as a host, his good-humoured imperturbability, and his attractive wife, he will make friends quickly in Rio de Janeiro".

ments for currency stabilization, the provision of international development funds, the disposition of excess merchant shipping, and agreement on air routes be subject to veto by one more than one-third of the Senate, or approved without the consent of the House of Representatives? If Congress must declare war, why should the treaty-making machinery be allowed to make peace? These questions have become familiar ones and there is now a growing body of opinion which is eager to put the two-thirds vote on the shelf and to see international engagements approved by a majority vote in both branches of Congress precisely like domestic legislation.

This, of course, would strengthen the position of the President. He would have a much easier time getting a majority of Congress to follow the course which he had charted on what he conceived to be the interests of the country than he has had in the past or than he would have in the future of getting two-thirds of the Senate. But though he would have an easier time he would have a great many difficulties.

Opinion in the House of Representatives is just as accurate a reflection of opinion in the country as a whole as is the opinion of the Senate. Indeed there are sound reasons for assuming that the House is a better mirror—that it may sometimes be too good a mirror when, in yielding to pressure groups, Representatives think more of re-election at the end of their two-year term than they do of serving the interests of their country. It is then that the House becomes too much like a Congress of Ambassadors which does not deliberate and agree but follows instructions. Senators, secure for a six-year term, can afford to be more independent of such pressures. They can also be much more individualistic.

Because of the shorter term, because of the size of the body, because no publicist has ever thought it pertinent to say of a Representative, "I have two faults to find with him: he is a Representative and he is a Representative from a particular state", the House

of Representatives would be a more cooperative partner in the conduct of foreign relations that the Senate has proved to be. But even when the President deals with Congress as a whole, he still has difficulties. He is unable to crack the whip of party discipline. Mr. Chamberlain, to be sure, cracked that whip too effectively when he threw Mr. Eden overboard from his Cabinet and when he flew to Munich.¹ But few in the United States would deny that presidential inability to use the whip at all handicaps him severely in all his dealings with Congress and permits his leadership in foreign policy to be flouted with impunity. There is in the United States an institutional encouragement of legislative antagonism to the President instead of institutional encouragement to cooperation. Sectional or racial pressure which in England is effectively channelled through the conduit of recognized executive leadership and effective party control would continue to intimidate our solons—and also our executive. But President versus Congress on foreign policy would present issues to the country. One-third of the Senate versus the President clouds issues.

Difficulties have arisen from the fact that, during recent years those responsible for the initial formulation of our foreign policy and for explaining that formulation to the legislature and to the public have seemed to be confused in their own minds and have spoken with divided voices.² They may reply, to be sure, that they fear to be too explicit because they thereby invite congressional criticism and antagonism. That explains but does not excuse their conduct. For example (*Time*, January 30) Secretary Hull rather

¹ I never use this word without recalling some magnificent lines in Frank Sullivan's Christmas greetings in the *New Yorker* (December 1939):

"To every moral eunuch
Who had a hand in the Pact of Munich,
The rhyme is bad but the Pact was worse
What was Neville's plane will be Europe's hearse."

² Some years ago a group of British Liberals, in a statement of policies they would like to see pursued—a statement which was remarkable because it was agreed to rather than because of its substance—referred to the difficulties arising "from the fact that, owing to the American Constitution and

vehemently denied that there had been any reticence in respect of what the State Department knew about the intentions of Hitler and particularly of the Japanese war lords. Those intentions, he said, were all spelled out in the report which the State Department issued some months ago called "War and Peace". The i's were dotted and the t's crossed in the supporting volume of documents which was published later.

True it is that those who paid some attention to the sweep of affairs, who had had some experience in interpreting newspaper dispatches and the urbane understatements of diplomats, "will be forced to view with alarm, etc., etc.", knew that the Far Eastern situation was steadily worsening. The plain fact, however, is that no one in a high place ever told Congress or the American people in plain terms what Ambassador Grew is now effectively telling the people he had reported to the State Department and what the "War and Peace" volume shows that the State Department knew long before Pearl Harbor. There was no real reporting to Congress or to the nation.

The Department of State is the only one of the executive departments which does not send an annual report to Congress. If as Chief of Staff General Marshall can present to Congress a statesmanlike document which deals rather frankly with strategy, matériel, I see no reason why the Department of State could not present a comparable report. What education of the country there is derives from speeches or press conferences, and here the voices are not infrequently discordant. The counsellors are multitudinous and the people cannot detect which wisdom it is

American traditions, the foreign policy of the United States is less predictable than that of other countries. In America, the agreements which the State Department negotiates with other countries have to be based to an exceptional degree upon principles firmly rooted in American public opinion; and other countries must recognize that the arrangements that they may make with the United States cannot be relied upon to stand in face of a substantial change in American public opinion. Thus the predictability of American foreign policy has perforce to be based not wholly, or even mainly, upon binding treaty engagements, but rather upon the enunciation, and the evident acceptance by public opinion, of certain cardinal principles of policy." *The Next Five Years* (1935), pp. 239-240.

that they should make their own. There was truth as well as cynicism in the remark that Lord Melbourne is supposed to have made after a Cabinet meeting: "Did we act in order to raise the price of corn, or to lower it? It does not matter what we say so long as we all say the same thing." There are other considerations, some minor, some major. Save when Mr. Bryan was Secretary of State, there has not been much attempt to work with the Senate Committee on Foreign Relations. Moreover, the State Department lives in a dark shadow cast by lawyers. Save, I think, in one or two cases, the Secretaries have always been of the profession which, in Burke's phrase, may quicken the intellect but which, save in those happily born, will not invigorate the understanding. Elihu Root and Mr. Hull have been exceptions. They can keep themselves from thinking like lawyers.

V.

To remove the difficulties which I have been considering would not require constitutional change. They are matters of administrative habits and political custom and there is no reason why in respect of them there could not be substantial and early improvement. But the constitutional difficulty would still remain. Proposals have recently been made in many quarters for a constitutional amendment which would assimilate treaties to ordinary legislation and make it impossible for the kickers—that is, for one more than one-third of the Senate—to have the final say. Such a proposal seems to me quite impractical. Save as the result of an unmistakable and long-continued insistence by the country, the Senate could not be expected to join in the submission of such a constitutional amendment to the states for ratification. It is improbable, almost impossible, that a constitutional amendment could be ratified in time to permit the Congress rather than the Senate to approve the post-war settlements. Agitation over such an amendment would be dangerous. Ratifi-

cation by three-quarters of the Conventions in the states or by three-quarters of the legislatures might be possible but it would be opposed by the anti-British, anti-Russian elements, by narrow nationalists who would feel that they would have less hope of getting their views to prevail through a congressional majority than they now have through one more than one-third of the Senate. They would cry, "God save the fair fabric of our constitution from mutilation" when what they really meant was that they wished to retain a constitutional arrangement which would permit them, a minority, to have their way. Their intellectually dishonest opposition would get support from the inertia which works against any institutional change. Meanwhile the Senate would accept the implicit invitation to insist on the full use of all its prerogatives until by the amending authority those special prerogatives had been taken away.

Hence it seems to me that the sensible—indeed the only practicable—procedure is to put the treaty-making authority on the shelf and for the President to enter into international undertakings through executive agreements discussed in advance, so far as is possible, with the House and Senate committees and ratified by joint resolutions of Congress. For this there are many precedents, which have been much discussed.¹

If, after the Senate, because of the two-thirds rule, refused to advise and consent to the ratification of proposed treaties, Congress could by joint resolutions admit Texas to the Union, annex Hawaii and conclude peace with Germany, what subject of international agreement can be conceived inappropriate for Presidential-Congressional approval? The transfer of fifty destroyers for leases of British bases near the United States was negotiated by the President and legislative approval came when Congress appropriated for the construction of installations in the islands. We have

¹ Wallace McClure: *International Executive Agreements. Democratic Procedure under the Constitution of the United States* (1941).

in effect a continuing defensive alliance with Great Britain which is not in the form of a treaty but which for that reason is no less binding. The President sent the Lend-Lease Bill to Congress and its enactment into law gave the Executive authority to negotiate mutual aid agreements which are binding without Senatorial approval. The agreements setting up the United Nations Relief and Rehabilitation Administration were drafted in consultation with certain members of the Senate and the House, were deliberately withdrawn from the treaty-making authority, and were approved by Congress. The country and Congress realized that they were necessary. Why let a few Senators who spoke only for themselves each cast two votes against the agreements? Who indeed would say that any one of the measures I have enumerated could have been put in the form of a treaty without causing a long and painful fight in the Senate with perhaps mutilation the price that would have to be paid to buy off the one more than one-third.

The complete abandonment of treaty-making in the technical sense would not be anti-democratic, anti-constitutional, or even extra-constitutional. Of course it will be said that putting the treaty provisions on the whelf would do violence to the literary theory of the Constitution. But constitutional and political morality are more important than literary theory. What constitutional morality really means was well expressed by the historian Grote when he was discussing the working of Athenian democracy in the time of Kleisthenes. It meant "the perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the spirit of the constitution will be no less sacred in the eyes of his opponents than in his own".

Quadrennially, we witness in the United States a perfect expression of such constitutional morality: when we elect a President. Anyone who worries about the literary theory of the Constitution and who challenges the approval of international agreements by a majority of Congress rather than by two-thirds of the

Senate should go on to argue that the 1944 Electoral College should disregard the popular vote and exercise a free choice of the President of the United States. There was no constitutional amendment imposing on the Electoral College the requirement that it be a rubber-stamp. Even though the framers intended the Electoral College to be an efficient mechanism and to avoid the choice of the President by popular vote, agreement and custom, now long unchallengeable, have worked the change. We could deal in the same way with the treaty-making authority.

As is so frequently the case in problems of government—in what the late Mr. F. S. Oliver called “The Endless Adventure”—forms are less important than spirit and substance. This was well put by de Tocqueville when he addressed the French Chamber just before the overthrow of Louis Phillippe:

“It is not the mechanism of the laws,” he declared, “that produces great events but the inner spirit of government. Keep the laws as they are if you wish. I think you would be wrong to do so; but keep them. Keep the men too if it gives you any pleasure . . . but in God’s name change the spirit of your government for, I repeat, that spirit will lead you directly to the abyss.”

NOTE.—Other undertakings and absence from the country have delayed me in preparing this lecture for publication. Although, in the meantime, much water has flowed under the bridge which was my text, I have resisted the temptation to make an extensive revision, and the words which have been read (or not read) are substantially those that were spoken on February 8th. Since then two books have appeared which support the position I took: Edward S. Corwin, *The Constitution and World Organization*, and Kenneth Colegrove, *The American Senate and World Peace*.

I should add, however, that the 1944 Republican Platform, after favoring “responsible participation by the United States in post-war cooperative organization among sovereign nations to prevent military aggression and to attain permanent peace”, declares that:

“. . . any treatment or agreement to attain such aims . . . shall be made only by and with the advice and consent of the Senate of the United States, provided two-thirds of the Senators present concur.”

If this pledge should receive more honour than planks in party platforms usually receive, the country might just as well make up its mind that the continuation of policy by means other than war will not be successful.

APPENDIX

Most observers of the Washington scene have had the impression that the administrative organization to deal with international economic operations and problems has not been clear cut and unconfused. When the detailed schedule of starts and halts, of trials and errors, of reorganization and streamlining is examined, the wonder grows that the confusion has not been much worse.

In its issue for 5 February 1944 the *Department of State Bulletin* reviewed the earlier development of organizations to deal with economic operations—a chronology which came down to the end of 1943, when the Department reorganized itself and established twelve major “line” offices. Two of the new offices—the Office of Wartime Economic Affairs and the Office of Economic Affairs—“were created to initiate and coordinate policy and action, so far as the Department of State is concerned, in all matters pertaining to the economic relations of the United States with other governments”.

During the previous four and one-half years there had been many committees, commissions, corporations, bureaux and offices. The *Foreign Agricultural Service* and the *Foreign Commerce Service* had been transferred to the Department of State on 1 July 1939. On 3 October of that year an *Inter-American Financial and Economic Advisory Committee* had been set up. Two months later there came into being an *Inter-departmental Committee for the Coordination of Foreign and Domestic Military Purchases*. On 26 February 1940 the Department of State established a *Division of Commercial Affairs*. In May the *Office for Emergency Management* was created. June saw the birth of an *Inter-American Development Commission*, *Rubber Reserve Company*, *Metals Reserve Company* and *Division of Commercial Treaties and Agreements*. In July an

Office of the Administrator of Export Control was established. Fourteen months later its responsibilities and duties were transferred to the *Economic Defense Board*. In August 1940 the *Council of National Defense*, with the approval of the President, created an *Office for Coordination of Commercial and Cultural Relations Between the American Republics*, and the President and the Canadian Prime Minister set up a *Permanent Joint Board on Defense, United States and Canada*, "to consider in the broad sense the defense of the north half of the Western Hemisphere".

There was a lull until January 1941. There then came into being the *Office of Production Management*; February saw the setting-up of a *Committee for Coordination of Inter-American Shipping*; in March Congress passed the *Lend-Lease Act*; and in May an Executive Order established the *Division of Defense Aid Reports* in the *Office for Emergency Management* to provide "a channel for clearance of transactions and reports and to coordinate the processing of requests for aid under the Lend-Lease Act". Six months later this *Division of Defense Aid Reports* was abolished and its functions were taken over by the *Office of Lend-Lease Administration*. Meanwhile, during these six months the United States and Canada established a *Material Coordinating Committee* and *Joint Economic Committees*. In July the President vested in the Secretary of State, in collaboration with the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Administrator of Export Control and the Coordinator of Commercial and Cultural Relations Between the American Republics, the authority to issue and maintain lists of names of persons and firms who because of pro-Axis ties, would be denied the right to trade with residents of the United States. The Department of State established a *Division of World Trade Intelligence* on 21 July, and on 30 July an Executive Order created the *Office of the Coordinator of Inter-American Affairs* and established in it a *Committee on Inter-American Affairs*. On the same day the President set up an *Economic Defense*

Board, which six months later became the *Board of Economic Warfare*. In July 1943 this latter agency was abolished. Its functions were transferred to the *Office of Economic Warfare*, which two months later was itself transferred to the *Foreign Economic Administration*.

The *Office for Emergency Management* acquired in August 1941 a *Supply Priorities and Allocations Board*. In October the Department of State set up a *Board of Economic Operations* and a *Division of Commercial Policy and Agreements*, which latter absorbed the *Division of Commercial Treaties and Agreements*, created in July 1940. As part of the same organization the Department of State set up a *Division of Exports and Defense Aid*, which was abolished in June, 1942; a *Division of Defense Materials*, which was abolished in August 1942; a *Division of Studies and Statistics*, which was abolished in June 1942; and a *Foreign Funds and Financial Division*, which was abolished in August 1943.

A special *Caribbean Office* came into being in October 1941.

In November 1941 the Canadian-American *Joint Defense Production Committee* became the *Joint War Production Committee, United States and Canada*. The Department of State established a *Financial Division and Foreign Funds Control Division* in November 1941.

In January 1942 the President abolished the *Office of Production Management* and transferred its powers to the *War Production Board*. He and Prime Minister Churchill set up a *Combined Raw Materials Board*, a *Munitions Assignments Board* and a *Combined Shipping Adjustment Board*. The American section of this Shipping Board was to be in the *Office for Emergency Management* as a *War Shipping Administration*.

In February 1942 the State Department created an *American Hemisphere Exports Office*. In March the *Anglo-American Caribbean Commission* came into existence. June saw the birth of a *Combined Food Board* and a *Combined Production and Resources Board*. July

marked the beginning of institutional interest in relief. First, there was the *War Relief Control Board* and in November the *Office of Foreign Relief and Rehabilitation Operations*. In November also the Department of State established an *Office of Foreign Territories* to have "responsibility for dealing with all non-military matters arising as a result of the military occupation of territories in Europe and North Africa by the armed forces of the United Nations and affecting the interests of the United States". Seven months later this was abolished.

In January 1943 the *Division of Economic Studies* was established. In February 1943 the Department of State set up a *Division of Exports and Requirements* and abolished its *American Hemisphere Exports Office*. In April the Treasury made public a provisional outline of a plan for post-war international monetary stabilization (*Post-War International Monetary Stabilization Plan*); in May the *United Nations Conference on Food and Agriculture* met in Hot Springs. In the same month there was a meeting of the *Mexican-United States Commission of Experts To Formulate a Program for Economic Cooperation Between the Two Governments*, and the *Office of War Mobilization* was set up. In June the President sent the Secretary of State a *Plan for Coordinating the Economic Activities of United States Civilian Agencies in Liberated Areas*. Also in June the Department of State set up an *Office of Foreign Economic Coordination* and abolished its *Office of Foreign Territories* and its *Board of Economic Operations*. In July an Executive Order created an *Office of Economic Warfare*, to which was transferred all powers and duties of the *Board of Economic Warfare* and all subsidiaries of the *Reconstruction Finance Corporation* engaged in financing foreign purchases and imports. This Office lived only two months and was transferred to the *Foreign Economic Administration* on 25 September. In August the *War Commodities Division* and the *Blockade and Supply Division* came into existence in the *Office of Foreign Economic Coordi-*

nation of the Department of State, and the *Foreign Funds Control Division* and the *Division of Defense Materials* were abolished. As has been said, 25 September saw the creation of the *Foreign Economic Administration* in the *Office for Emergency Management*. It was to centralize the activities formerly carried on by the *Offices of Lend-Lease Administration, Foreign Relief and Rehabilitation Operations, Economic Warfare, and Foreign Economic Coordination*. The Department of State on 6 November abolished its *Office of Foreign Economic Coordination* and appointed four groups of advisers to be "concerned, respectively, with the foreign policy aspects of matters relating to the allocation of supplies, of wartime economic activities in liberated areas, of wartime economic activities in eastern hemisphere countries other than liberated areas, and of wartime economic activities in the other American republics". On 9 November came the *Signature of Agreement for United Nations Relief and Rehabilitation Administration*.