

CONGRESSIONAL PARTICIPATION IN THE TREATY PROCESS

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The treaty power in the United States Constitution is both explicit and inexplicable. The bare outlines of this power are readily available. Article II, section 2, empowers the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur" Article I, section 10, prohibits states from entering into any treaty, alliance, or confederation. That section also prohibits a state, without the consent of Congress, from entering into "any Agreement or Compact" with a foreign power. And finally, the supremacy clause in article VI defines treaties, along with the Constitution and statutes, as "the supreme Law of the Land."¹

These passages say nothing about the President's freedom to negotiate treaties single-handedly, although that was later argued by some commentators. The Constitution is also silent about the process of terminating a treaty, or the allocation of authority to interpret and/or re-interpret a treaty. And nothing is said about the role of the House of Representatives, which not only provides funds to implement treaties but must also guard against treaties that usurp its prerogatives, especially over foreign commerce. On all those questions, and others, history and custom have gradually filled in the picture, but many corners of the treaty power remain obscure.

This commentary focuses on two questions; the first is discussed in detail in this forum, while the other has received only scant attention. First, what exactly is the Senate's role in treaty-making and interpretation? Is it excluded from the process of negotiation and invited only at the last minute to accept or reject the President's finished project? Secondly, what role does the House of Representatives play, given its power to provide authorizations and appropriations?

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¹ U.S. CONST. art. II, § 2, cl. 2; art. I, § 10, cls. 1 & 3; art. VI, cl. 2.

I. NEGOTIATING TREATIES

A. *The Historical Myth of the Presidential Monopoly*

The process of drafting and negotiating a treaty is often called a "presidential monopoly," to use the words of Professor Edward S. Corwin.² Justice Sutherland, writing the opinion for *United States v. Curtiss-Wright*, claimed that the President "alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."³ These assertions, however, are not supported by the text of the Constitution, the debates at the Philadelphia convention, or the precedents established during the Washington administration.

With regard to the constitutional text, the treaty-making process is not divided into two stages that are exclusive and sequential: negotiation by the President followed by Senate action. The President "makes" treaties, by and with the advice and consent of the Senate.⁴ The constitutional language for the treaty process is markedly different than for appointments, which does depend on exclusive and sequential stages. The Constitution provides that the President "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"⁵ Here the President's authority to nominate is set apart solely as an executive responsibility. No such division of authority is mandated by the treaty process.

The phrase "advice and consent" implies that the Senate will have an opportunity to shape the content of a treaty. If it had been the intent of the framers to limit the Senate to voting yes or no to a treaty prepared exclusively by the President, the word "advice" is superfluous and the phrase should have been reduced to a simple "consent."

The first President, George Washington, did not assume that the process of making treaties was a "presidential monopoly." When he first communicated to the Senate regarding the appropriate procedure for treaties, he stated that oral communications with the Senate "seem indispensably necessary; because in these a variety of matters are contained, all of which not only require consideration, but some of them

² CONGRESSIONAL RESEARCH SERVC., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. REP. NO. 16, 99th Cong., 1st sess. 496 (1982). This document originated in 1952 as a Corwin product. See also E. CORWIN, THE PRESIDENT: THE OFFICE AND POWERS 211-12 (1957).

³ 299 U.S. 304, 319 (1936).

⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵ *Id.*

may undergo much discussion; to do which by written communication would be tedious without being satisfactory.”⁶ Significantly, Washington concluded that his actions on nominations should be done only by written messages.⁷ He thus appeared to invite the Senate to shape the content of treaties. A subsequent letter from Washington to the Senate seems to underscore his concept of partnership: “In the appointment to offices, the agency of the Senate is purely executive, and they may be summoned to the President. In treaties, the agency is perhaps as much of a legislative nature and the business may possibly be referred to their deliberations in their legislative chamber.”⁸

Washington’s distinction is consistent with the difference in constitutional text already discussed. His position echoes that of Alexander Hamilton, in Federalist 75, who observed that the power of making treaties “will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.”⁹ The similarity between this language and Washington’s letter suggests that the author in each case may have been Hamilton. The important point is that both Washington and Hamilton regarded the treaty power as more legislative than executive.

Washington and Hamilton knew that for more than four out of the five months at the Philadelphia Convention the Framers gave the Senate exclusive power to make treaties and appoint ambassadors.¹⁰ After the Great Compromise established a House of Representatives based on population while giving each state two senators elected by state legislatures, there was fear that an aristocratic Senate might abuse its powers. As a necessary check, the President was added to the treaty-making and appointment process. To now argue that the Constitution vests in the President an overriding power to make treaties is contrary to what the Framers wanted. They did not adopt the British model or John Locke’s “federative” power, which placed external powers solely in the hands of the Executive.¹¹ As Hamilton explained in Federalist 69, the President only had “concurrent power with a branch of the legislature in the formation of treaties,” whereas the British King “is

⁶ 30 THE WRITINGS OF GEORGE WASHINGTON 373 (Fitzpatrick ed. 1937) [hereinafter WRITINGS OF WASHINGTON].

⁷ *Id.* at 374.

⁸ *Id.* at 378.

⁹ THE FEDERALIST NO. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961).

¹⁰ 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 155, 169, 183, 197-98, 392-94 (1966).

¹¹ Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties — the Original Intent of the Framers and the Constitution Historically Examined*, 55 WASH. L. REV. 1, 40-41, 73-77 (1979).

the *sole possessor* of the power of making treaties."¹²

There is little evidence that anyone at that time regarded the negotiation of treaties as a "presidential monopoly." It is true that John Jay, in Federalist 64, wrote that the negotiation of treaties sometimes requires "perfect *secrecy* and immediate *dispatch*," justifying certain executive initiatives.¹³ In general, however, Jay said about treaties that the President "must, in forming them, act by the advice and consent of the Senate . . ."¹⁴ James Madison told his colleagues at the Virginia ratifying convention that "the object of treaties is the regulation of intercourse with foreign nations, and is external."¹⁵ The regulation of intercourse with foreign governments dovetails so closely with the duties of Congress, especially over foreign commerce, that it is untenable to assert that the President could exclusively draft treaties without any legislative involvement.

That conclusion is strengthened by the communications from Washington to the Senate. When he discussed the treaty process he referred to presidential ideas as "propositions" put to the Senate for consideration.¹⁶ His choice of language suggests that treaty proposals were just that: proposals that could be changed and improved by senators.

He sent a message to the Senate on August 21, 1789, stating his intention to meet with senators in the Senate Chamber "to advise with them on the terms of the treaty *to be negotiated* with the Southern Indians."¹⁷ Washington met with senators the following day. He put to the senators a series of questions, requesting advice on the instructions to be given to the commissioners selected to negotiate the treaty.¹⁸ The disappointments experienced by both sides have often been recounted. The Senators did not want to rely solely on the information provided by the Secretary of War, who had accompanied Washington. The noise from the carriages traveling past made it difficult to follow the discussion. When the Senators announced that they would not commit themselves to any positions that day, Washington felt inconvenienced by the trip. He returned two days later and obtained the Senate's answers to his questions and consent to the treaty, but he never again went to seek

¹² THE FEDERALIST NO. 69, at 422 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

¹³ *Id.* No. 64, at 392 (J. Jay) (emphasis in original).

¹⁴ *Id.* at 393.

¹⁵ 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 514 (Philadelphia 1836).

¹⁶ See WRITINGS OF WASHINGTON, *supra* note 6, at 378.

¹⁷ 1 ANNALS OF CONG. 67 (J. Gales ed. 1789) (emphasis added).

¹⁸ *Id.* at 69-71.

the advice of Senators to a treaty draft.¹⁹

It is error to conclude from this unhappy incident that Washington and future Presidents thereafter excluded the Senate from the negotiation process. Washington continued to seek the advice of Senators, but he did that through written communications rather than personal appearances.²⁰

This practice continued under later presidents. President Andrew Jackson understood the value of seeking the advice of Senators on how best to pursue treaty negotiations. On May 6, 1830, he submitted to the Senate "propositions" for a treaty with the Choctaw Indians. He indicated the amendments he thought necessary, but elicited the Senate's views: "Not being tenacious though, on the subject, I will most cheerfully adopt any modifications which, on a frank interchange of opinions my Constitutional advisors may suggest and which I shall be satisfied are reconcilable with my official duties."²¹ Similar to Washington, Jackson asked the opinion of the Senate on a series of questions regarding the proposed treaty. Of the reasons he gave for seeking the Senate's advice, two are of special interest. First, the Indians requested that their propositions be submitted to the Senate. Second, the Senate's opinion "will have a salutary effect in a future negotiation, if one should be deemed proper."²² Obtaining the Senate's views, according to Jackson:

on this important and delicate branch of our future negotiations would enable the President to act much more effectively in the exercise of his particular functions. There is also the best reason to believe that measures in this respect emanating from the *united counsel* of the treaty-making power would be more satisfactory to the American people and to the Indians.²³

Several weeks later the Senate Committee on Indian Affairs responded to Jackson's request. The Committee offered its opinion that President Jackson ought to withhold his sanction to the treaty until the full sense of the Choctaw nation "could be fairly taken."²⁴ The com-

¹⁹ W. MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES 122-26 (1880).

²⁰ See 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 64-65, 68-69, 71-72, 81-84, 110-113, 115 (J. Richardson ed. 1897) [hereinafter MESSAGES OF THE PRESIDENTS].

²¹ 4 J. SEN. EXEC. PROC. 98 (1887).

²² *Id.*

²³ *Id.* at 99 (emphasis added).

²⁴ *Id.* at 111.

mittee also stated its belief that the proposed treaty terms were "so unreasonable" that the United States should not agree to them even if the Choctaw nation agreed to the terms unanimously.²⁵ Finally, the committee thought it inadvisable to decide further details on the treaty "in advance of any negotiation," for such specifications might be self-defeating in eventually reaching an acceptable treaty.²⁶

President James K. Polk also invited the Senate's advice on negotiating a treaty. He regarded the Senate as a "branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration the President secures harmony of action between that body and himself."²⁷

Over the years, Senators have been asked to approve the appointment of treaty negotiators and even to advise on their negotiating instructions.²⁸ What this brief survey of history reveals is that far from being a presidential monopoly, the negotiation of treaties is often shared with the Senate in order to build legislative understanding and support.²⁹

This statement, of course, does not deny that there have been periods of tension and confrontation between the branches over this subject. A famous example is Woodrow Wilson and the Versailles Treaty. Wilson believed that the President should not consult with the Senate and treat it as an equal partner. Writing as an academic, he advised Presidents to negotiate treaties on their own and then drop the finished product in the Senate's lap as a *fait accompli*. According to his calculation, legislative acquiescence would be compelled by getting the country "so pledged in the view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscreet threats of the Department of State."³⁰ These words of Professor Wilson proved far too clever, as President Wilson was later to learn with the Versailles Treaty.³¹ Wilson's experience has not been

²⁵ *Id.*

²⁶ *Id.* at 112.

²⁷ See 5 MESSAGES OF THE PRESIDENTS, *supra* note 20, at 2299.

²⁸ T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 136 (1979).

²⁹ See 2 G. HAYNES, THE SENATE OF THE UNITED STATES 576-602 (1938).

³⁰ W. WILSON, CONGRESSIONAL GOVERNMENT 233-34 (1885). Similar views appear in his W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1908).

³¹ Wilson's thesis has been decisively refuted in Black, *The United States Senate and the Treaty Power*, 4 ROCKY MT. L. REV. 1 (1931); Webb, *Treaty-Making and the President's Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L. J. 490 (1970).

unique; other Presidents who attempted to commit the nation unilaterally to international agreements discovered that the Senate has ample resources to retaliate by tacking on amendments, shelving treaties, or rejecting them outright.³²

Aware of this potential problem, Presidents such as William McKinley, Warren Harding, and Herbert Hoover have included Senators and Representatives as members of United States delegations that negotiate treaties.³³ The lesson of Wilson's failure to include Senators in the delegation to the Paris Peace Conference and the subsequent failure of the Versailles Treaty has not been lost. During the negotiations of the North Atlantic Treaty, Senators Thomas Connally and Arthur Vandenburg were with Secretary of State Dean Acheson "all the time," and Senator Walter George actually wrote one of the treaty provisions.³⁴ Members of Congress attend international conferences and serve as delegates to the North Atlantic Assembly, the Interparliamentary Union and other interparliamentary groups, and are appointed as United States Representatives to the U.N. General Assembly. The Carter Administration consulted with at least seventy Senators during the final phase of the negotiations of the Panama Canal Treaty.³⁵ And during negotiations on arms control agreements, members of Congress participate either as advisors or observers. During 1977 and 1978, twenty-six Senators served in Geneva as official advisers to the SALT II negotiating team.³⁶ The same practice continued under the Reagan Administration.

B. *The Sole Organ Theory*

In *Curtiss-Wright*, Justice Sutherland attempted to bolster his argument that the President alone negotiates by developing the now-famous "sole organ" theory. He quoted a sentence from John Marshall on March 7, 1800, made during debate in the House of Representa-

³² See T. FRANCK & E. WEISBAND, *supra* note 28, at 136-37.

³³ CONGRESSIONAL RESEARCH SERVC., LIBRARY OF CONG., PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. PRINT NO. 205, 98th Cong., 2d sess. 98 (1984).

³⁴ *Executive Privilege: The Withholding of Information from the Executive; Hearings before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 262-64 (1971). See also Heindel, *The North Atlantic Treaty in the United States Senate*, 43 AM. J. INT'L L. 633 (1949).

³⁵ Destler, *Treaty Troubles: Versailles in Reverse*, 35 FOREIGN POL'Y 45, 50 (Winter 1978-79).

³⁶ Destler, *Executive-Congressional Conflict in Foreign Policy: Explaining It, Coping With It*, in CONGRESS RECONSIDERED 310 (L. Dodd & B. Oppenheimer eds. 1981).

tives. While Marshall said that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations,"³⁷ Sutherland took the sole-organ theory a step further by using it to advocate inherent powers for the President in foreign affairs. He speaks of the President's power "as the organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"³⁸

From these fragments Sutherland implies that Marshall promoted an exclusive, independent power for the President in foreign affairs, but that was never Marshall's intent. Marshall never suggested that the President makes foreign policy unilaterally, for he knew that foreign policy is shaped jointly by the President and Congress. When one reads Marshall's sentence in the context of the month-long House debate, it is evident that the President acts as "sole organ" *only after* Congress establishes national policy, either by statute or treaty. Nothing in Marshall's statement endorses inherent presidential powers in foreign affairs. In the particular dispute in the House, national policy had been set by an extradition treaty with England and Marshall defended the right of President John Adams to execute that treaty in his capacity as "sole organ of the nation in its external relations"³⁹

If Marshall cannot be used as a prop for Sutherland's theory, neither is Thomas Jefferson any help. His statement in 1790 that the "transaction of business with foreign nations is Executive altogether"⁴⁰ seems consistent with Sutherland's position, but when his statement is read in full, Jefferson did not mean anything other than what John Marshall declared ten years later: that *after* foreign policy has been established by the President and the Senate through the treaty power, or by the President and Congress through the statutory process, the President is the exclusive party in transacting and executing national policy. Similarly, in 1804 Jefferson said that the Constitution "has made the Executive the organ for managing our intercourse with foreign nations,"⁴¹ and yet the context of this lengthy statement acknowledges that Congress has the power to place "a temporary trust to the President, which could be put an end to if abused."⁴²

This lack of rhetorical support for the sole organ theory is paralleled by historical practice as outlined above. Thus, Justice Suther-

³⁷ *Curtiss-Wright*, 299 U.S. at 319 (quoting John Marshall in 10 ANNALS OF CONG. 613 (1800)).

³⁸ *Id.* at 320.

³⁹ 10 ANNALS OF CONG. 613 (1800).

⁴⁰ 16 THE PAPERS OF THOMAS JEFFERSON 379 (Boyd ed. 1961).

⁴¹ 11 THE WRITINGS OF THOMAS JEFFERSON 5 (Mem. ed. 1904).

⁴² *Id.* at 11.

land's dicta should be read merely as an assertion that lacks a doctrinal and historical basis.

II. HOUSE PREROGATIVES

Professor Koplow's Article is silent about the participation of the House of Representatives in the treaty-making process. It is true that the idea of co-equal status for the House was considered and rejected by the Framers both during the Philadelphia Convention and during the ratification debates.⁴³ For example, during the convention it was proposed that the House be included with the Senate in giving advice and consent to treaties. The proposal lost handily, ten states opposed and one in favor.⁴⁴

Some of the framers objected to any involvement by the House of Representatives in the treaty process. In Federalist 75, Hamilton said that the "fluctuating and . . . multitudinous composition" of the House necessarily excluded it from a position of trust: "[a]ccurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous."⁴⁵ In Federalist 64, Jay claimed that decisions on treaties should be placed in the hands of the Senate, whose members would be chosen by the "select assemblies" of state legislatures and presumably would possess greater expertise than members of the House.⁴⁶

Jay's logic became less compelling after the seventeenth amendment subjected senators to popular election. Jay had also argued that the small size of the Senate permitted greater secrecy and dispatch than the House. But by 1859 the Senate had grown from twenty-six members to sixty-six, or larger than the original House membership of

⁴³ Several delegates at the Philadelphia Convention recommended that treaties be subjected to action by both houses rather than simply by the Senate. They reasoned that treaties, accorded the status of law under the Constitution, required approval by the entire Congress. Gouverneur Morris proposed that "no Treaty shall be binding on the U.S. which is not ratified by law." See 2 M. FARRAND, *supra* note 10, at 392. Madison thought this would be too inconvenient for some treaties, such as treaties of alliance during time of war. The Morris motion was defeated, eight states opposed and one (Morris' state of Pennsylvania) in favor. *Id.* In Philadelphia, Madison did wonder whether a distinction might not be made between different kinds of treaties, allowing the President and the Senate to make treaties "eventual and of Alliance for limited terms," and requiring the concurrence of both Houses for other treaties. *Id.*

⁴⁴ See *id.* at 538.

⁴⁵ THE FEDERALIST NO. 75, at 452 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

⁴⁶ *Id.* No. 64, at 391 (J. Jay).

sixty-five. These changes prompted the House in 1945 to adopt a resolution, passed by the margin of 288 to 88, to amend the Constitution to provide for treaty ratification by a majority of both Houses. Not unexpectedly, the Senate never acted on the bill.⁴⁷

Although the Constitution continues to exclude the House from the treaty process, the dependence of treaties on appropriations makes the House a major player. This is reflected in historical practice. In offering a resolution requesting President Washington to send documents on the Jay Treaty to the House, Congressman Edward Livingston insisted that the House possessed "a discretionary power of carrying the Treaty into effect, or refusing it their sanction."⁴⁸ Congressman Albert Gallatin elaborated on Livingston's position. The exercise of the treaty-making power might clash with certain powers specifically delegated to Congress by the Constitution, such as the authority to regulate foreign trade.⁴⁹ Gallatin added that the treaty power was limited by "the general power of granting money, also vested in Congress . . ."⁵⁰ The argument was based on the notion that unless the House made clear its power to reject treaties of a certain character, its prerogatives could be usurped whenever the President, two-thirds of the Senate, and a foreign country reached agreement.

Livingston's resolution passed by a vote 62 to 37.⁵¹ Nevertheless, Washington denied the request on the ground that the Constitution limited legislative participation in treaty matters to the Senate.⁵² The House later adopted a resolution stating these principles:

when a Treaty stipulates regulations of any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.⁵³

⁴⁷ 91 CONG. REC. 4326-68 (1945). For a House critique of the Senate's record in the treaty process, see H.R. REP. NO. 2061, 78th Cong., 2d Sess. (1944).

⁴⁸ 5 ANNALS OF CONG. 428 (1796).

⁴⁹ *Id.* at 437.

⁵⁰ *Id.* at 466.

⁵¹ *Id.* at 759-60.

⁵² See 1 MESSAGES OF THE PRESIDENTS, *supra* note 20, at 186-88.

⁵³ 4 ANNALS OF CONG. 771 (1796). This language has been adopted on other occasions, such as on April 20, 1871, see 2 HINDS' PRECEDENTS § 1523 (1907). See also Stone, *The House of Representatives and the Treaty-Making Power*, 17 KY. L.J.

This has proven to be no mere rhetorical flourish. The involvement of the House of Representatives in agreements reached between the United States and other countries was conspicuous with the Louisiana Purchase. Congress had appropriated \$2 million to be applied toward the purchase of New Orleans and the Floridas.⁵⁴ President Jefferson, uncertain of his authority, proceeded to reach an agreement with France to buy the whole of Louisiana. Congressional support for the treaty obviously required more than the advice and consent of the Senate. Both Houses of Congress would have to provide additional funds. With this in mind, Jefferson sent copies of the ratified treaty to both Houses, acknowledging: "You will observe that some important conditions can not be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay."⁵⁵ Congress passed legislation enabling Jefferson to take possession of the Louisiana Territory.⁵⁶

Treaties that depend on appropriations have been blocked by the House of Representatives. Two examples serve to illustrate the danger of ignoring the House: the Alaskan purchase treaty with Russia in 1867;⁵⁷ and the assertion of House prerogatives over Indian matters.⁵⁸

The potential overlap between the treaty power and House prerogatives over foreign commerce and tariffs resulted in another assertion of House authority in 1880. The House declared that the negotiation of a commercial treaty that fixed the rates of duty to be imposed on foreign imports would be "an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representa-

217 (1929) (arguing for a greater role in the treaty-making process for the House of Representatives).

⁵⁴ Ch. 8, § 1, 2 Stat. 202 (1803).

⁵⁵ 1 Messages of the Presidents, *supra* note 20, at 362-63 (Oct. 21, 1803).

⁵⁶ Ch. 1, 2 Stat. 245 (1803); ch. 38, 2 Stat. 283 (1804).

⁵⁷ See S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 210-11 (1916); See also 2 G. HAYNES, *supra* note 29, at 689-90.

⁵⁸ For almost a century, Indian tribes were treated as independent nations and subjected to the treaty-making power of the President and the Senate. However, the Constitution also empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3. Partly because of corruption and mismanagement in the Office of Indian Affairs, the House of Representatives began to object to its exclusion from Indian affairs. In 1869, the Senate added funds to an appropriations bill to fulfill Indian treaties it had approved, but the House refused to grant the funds. See F. COHEN, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 66 (1971). The House completed its reassertion two years later by enacting this language: "Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . ." Ch. 120, 16 Stat. 566 (1871).

tives."⁵⁹ Three years later a commercial treaty with Mexico contained language making its validity dependent on action by both Houses of Congress.⁶⁰ Although subsequent treaties extended the time available for congressional approval, the House did not support the treaty and it was not implemented.⁶¹

III. CONCLUSION

If they wish, Presidents may keep the negotiation of treaties a purely executive matter. Certainly they may treat the nomination stage as an executive prerogative. Although such strict interpretations have some basis of support in the constitutional text and our history, to proceed in this fashion invites major risks and costs for the presidency. Submitting nominations informally to the Senate, before announcing the names, is a healthy way to avoid embarrassment for an administration. By taking the Senate into his confidence, a President may obtain useful information to guide his actions on treaties as well as nominations. Such actions are not constitutionally compelled; they are merely smart. Nothing in the Constitution prohibits the President and his assistants from following intelligent and constructive procedures.

The treaty power, like other powers in the Constitution, represents a composite of many forces. It is defined partly by the constitutional text, but that does little more than open the door to issues that beg further definition. The treaty power is shaped by a rich and changing dialectic among text, historical forces, and executive-legislative practices. Each branch must articulate its own constitutional interpretation of the treaty power. In this exchange it is important for the participants in the debate to have a profound understanding of constitutional principles and institutional needs. The ultimate objective of the treaty process is to enter into foreign commitments capable of being sustained. To honor those promises, especially those that commit the nation's economic and military resources, it is necessary for the President to develop a consensus with both branches of Congress by seeking their advice throughout the process of negotiating and making a treaty.

⁵⁹ 2 HINDS' PRECEDENTS § 1524 (1907).

⁶⁰ 24 Stat. 975, 983 [Art. VIII] (1883).

⁶¹ 25 Stat. 1370, 1371 (1885). *See also* 2 HINDS' PRECEDENTS § 1526-1528.