THE
AMERICAN LAW REGISTER
AND
REVIEW.

MARCH, 1894.

POWER OF THE PRESIDENT TO APPOINT SPECIAL DIPLOMATIC AGENTS WITHOUT THE ADVICE AND CONSENT OF THE SENATE.

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The executive power under the Constitution of the United States is vested in the President. In the administration of that power much must, necessarily, be left to his discretion. In the formal constitution of a government, the written instrument cannot precisely define the modes by which the powers granted shall be exercised. The implication is, that when any department of the government is charged with a duty, it may do, under the limitations of the Constitution, what is necessary and proper, in order to perform it. Hence, as the President is clothed with the executive power of the government, he may use all subordinate and ancillary powers essential to its due exercise.

As was said by Chief Justice MARSHALL in Marbury *v.* Madison, 1 Cranch. 137, 165: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . and whatever opinion may be entertained of the manner in which

executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive the decision of the Executive is conclusive."

(1.) The President is the Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the active service of the United States.

(2.) He has the power to make, with the sanction of the Senate, treaties of peace, commerce, alliance, and of every other description, subject to only one limitation, namely, that the treaties thus made shall not violate the principles of the Constitution.

(3.) He has the power, too, with the like sanction, to appoint ambassadors, other public ministers and consuls.

By international usage four classes of diplomatic agents are recognized. First: Ambassadors, papal legates and nuncios; second: Envoys and ministers plenipotentiary accredited to the sovereign; third: Ministers resident, accredited to the sovereign; fourth: Chargés d'Affaires, accredited to the Minister of Foreign Affairs.

Congress has no legislative power to create the office of "public minister." Any attempt to do so by introducing a new nomenclature, and, designating a commissioner with inferior and temporary functions as a "public minister," or "diplomatic officer," who must be appointed with the advice and sanction of the Senate, would exceed the legislative power. Of course, if a commissioner is, in fact, a "public minister" with diplomatic functions and rights under the law of nations, then, undoubtedly, his appointment must be with the sanction of the Senate, but irrespective of any Act of Congress, and irrespective of his official designation.

The offices of these ministers do not exist under or by virtue of any Act of Congress, but under the Constitution and under the law and usages of nations. It is to these offices thus existing that appointments are made by the President with the advice and consent of the Senate. Persons not

appointed to fill these offices are not, in the constitutional sense, and in the sense of the law of nations, "public ministers." Persons appointed for a special and temporary purpose in connection with foreign affairs, and whose employment ceases when the purpose is accomplished, are mere *pro tempore* aids to the President in the performance of his executive functions.

The President is the official head and representative of his country in its intercourse with foreign nations. Our ministers to those nations do not possess any defined, substantive powers, but they act under his instructions. "Within the range of constitutional authority, they have such powers as the President sees fit to grant, and no more" (C. Cushing, 7 Opinions of Attorney-General, 211).

An ambassador or other public minister is an officer of the United States, and holds an office under the Government of the United States. An agent sent out to a foreign country to investigate, to ascertain and report facts, or to negotiate a treaty, does not hold an office; but is engaged in a temporary employment. An office is a continuing position, and though the incumbent be changed, the duties remain. But an employment which is transient, occasional or incidental, can in no proper sense be termed an office.

In United States *v.* Hartwell, 6 Wallace, 385, 393, the distinction is clearly stated by the Supreme Court of the United States.

"An office," said the Court, "is a public station, or employment, conferred by the appointment of the government. The term embraces the ideas of tenure, duration, emolument and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary."

In United States *v.* Germaine, 9 Otto, 508, 512, the Supreme Court, by reference to United States *v.* Hartwell, reaffirmed its definition of office as a position whose duties were

continuing and permanent, not occasional and temporary. "In the case before us," said the Court, through Mr. Justice MILLER, "the duties are *not* continuing and permanent, and they *are* occasional and intermittent."

It has been the theory and practice throughout all periods of our government, for the President, in conducting its foreign affairs, to appoint special agents for special and temporary purposes; agents whose duties are not "continuing and permanent," but "occasional and temporary." And it is observable that among the most illustrious of our presidents and statesmen none have doubted that these appointments were a due exercise of executive authority, and did not need the advice and consent of the Senate.

Mr. Cushing, when Attorney General of the United States under President Pierce, in his letter to Mr. Marcy, the Secretary of State, on the Act of Congress, entitled, "An Act to remodel the diplomatic and consular systems of the United States," gives a resumé of cases, "in illustration of the power of the Executive to negotiate," as follows:

"President Washington granted to David Humphreys, on the second of March, 1793, without the previous concurrence of the Senate, a commission as commissioner plenipotentiary to treat with Algiers.

"Passing over intermediate incidents of the same nature, we come to the case of Charles Rhind, David Offley and Commissioner James Biddle, who, on the twelfth of September, 1829, were commissioned by President Jackson as joint and several 'Commissioners of the United States' to negotiate and did negotiate the existing treaty between the United States and Turkey.

"The same President, on the twenty-sixth of January, 1832, appointed Edmund Roberts as 'Commissioner of the United States' to negotiate treaties with the governments of Cochin-China and Siam; the result of which was the existing conventions with Muscat and Siam.

"On the sixteenth of August, 1849, Joseph Balestier received from President Taylor the appointment of 'Special agent of the United States' to Cochin-China and other parts of

Southeastern Asia; out of which came our treaty with Borneo.

"In conclusion of these precedents, we have the late case of the appointment of Commissioner Matthew C. Perry, under commission from President Fillmore of the thirteenth of November, 1852, to negotiate with Japan.

"We have modern examples, indeed, of commissions of the same nature for negotiations with some of the nations of Christendom, among which the following may be noted:

"On the third of May, 1838, Nathaniel Niles was commissioned by President Van Buren as 'Special agent of the United States' to the kingdom of Sardinia, and as such negotiated our treaty with Sardinia.

"On the twenty-eighth of March, 1846, A. Dudley Mann was appointed by President Polk 'Special agent of the United States' to treat with sundry States of Germany, and as such agent he negotiated the treaty with Hanover.

"Now, in the case of neither of these appointments, covering, as they did, important negotiations in Europe as well as in Asia, was there any authorizing Act of Congress, any preparatory specific appropriation, nor even a commission by and with the advice and consent of the Senate. In each instance, the successive Presidents acted, as did the earlier Presidents *in consimili casu*, in virtue of their constitutional power 'to make treaties,' that is, to negotiate and prepare them for the consideration of the Senate, just as in virtue of direct authority of the constitution, and without the aid of any mere enabling statute, he has the power to grant pardons for offences against the United States."

The foregoing are cases cited by Mr. Cushing; but the list is not complete. Succeeding administrations followed in the same line and under the same constitutional sanction. General Jackson appointed Edmund Roberts, of Portsmouth, N. H., a sea captain, as his agent, to visit the Indian Ocean for the purpose of examining the means of extending the commerce of the United States by commercial arrangements with the powers whose dominions bordered on those seas. He embarked on board of the United States sloop-of-war, the

Peacock, rating as captain's clerk, carrying with him blank letters of credence, and with instructions from Edward Livingston, Secretary of State, that if he should find the prospect favorable, he might fill up one of his letters to the Emperor of Japan for the purpose of opening trade. Did this create a breach of the constitution? Was this a usurpation on the part of the President? If so, it was not perceived by Mr. Livingston, who was a statesman and constitutional lawyer of great ability, not so great, perhaps, as the ability of present Senatorial critics, but who stood among the intellectual giants of his time, if not first, yet in the very first line.

In June, 1851, Mr. Webster, Secretary of State, instructed Commodore Aulick to proceed to Yeddo in his flag-ship, with as many vessels of his squadron as might conveniently be employed in the service, and deliver to such high officers of the Emperor of Japan as might be appointed to receive it—a letter from President Fillmore to the Emperor. The ostensible purpose of this visit, a visit in force, and suggestive of the *ultima ratio*, was to arrange for supplies of coal; but Commodore Aulick received "full power to negotiate and sign a treaty of amity and commerce between the United States and the Empire of Japan." In November, 1852, Commodore Perry, with an increased force, and with a copy of Commodore Aulick's instructions, which he was directed to consider as "in full force and applicable to his command," was sent to Japan, and where, as is well known, he concluded a treaty with the Emperor on the thirty-first of March, 1854.

In none of these instances were the agents nominated to the Senate, but were appointed by an act of executive authority alone. Nor were the names of Cæsar A. Rodney, Theoderick Bland and John Graham sent to the Senate, who went out in a ship-of-war during the South American wars of Independence in 1816, as commissioners by appointment of Mr. Monroe, to inquire into the condition of affairs in those colonies, and to report as to whether they were likely to be successful in the pending struggle. This was done to aid the President in considering the question whether to acknowledge their independence. When they sailed the Senate was in

session, but, as we have seen, they were not nominated to that body, nor were their expenses paid out of the contingent fund. They were subsequently paid by Congress; Congress thereby becoming *particeps criminis* in this violation of the constitution!

During the Hungarian struggle for independence, President Taylor appointed Mr. Dudley Mann his agent, and invested him with power to declare to the Hungarians the willingness of the United States promptly to recognize their independence in the event of their ability to sustain it. His instructions were "to obtain information in regard to Hungary, and her resources and prospects, with a view to an early recognition of her independence and the formation of commercial relations with her."

Here was the delegation, as has been said, of sovereign powers to an agent, and that agent, not nominated to the Senate! And yet no one, so far as we know, was so bold as to claim that his appointment by President Taylor was an unconstitutional exercise of executive authority.

We had at the time a minister at the Court of Vienna, regularly appointed by the President of the United States, with the advice and consent of the Senate, and it might occur to those even who are not at all times accustomed "to peep narrowly into marrow bones," that it was a part, and a necessary part, of his diplomatic functions, in so grave a conjuncture, to obtain and furnish to his government information in regard to a rebellious province of the Empire to which he was accredited, and to keep it constantly advised as to the resources and prospects of the rebels.

It might be said, with great semblance of truth, if not with truth itself, that the functions of the known and acknowledged minister were, *pro tanto*, superseded by an unknown and secret agent, for his instructions enjoined on him not "to give publicity to his mission." And yet, the constitutional power of the President alone to make the appointment was not questioned, and this, too, at a period when the Senate of the United States was composed of abilities equal to any that have distinguished that body at any period of its history.

Austria, indeed, complained and reminded our government that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy."

Mr. Webster replied to the Austrian protest and complaint in his well-known letter to Mr. Hülsmann. "The American Government," he said, "sought for nothing but truth; it desired to learn the facts through a reliable source. . . . Mr. Mann's mission was wholly unobjectionable and strictly within the rule of the law of nations, and the duty of the United States as a neutral power."

It was not foreseen by Mr. Webster that one of his successors in that Senate over which he fulmined, would denounce the desire of President Cleveland to learn the facts respecting the revolution in Honolulu through a reliable source, as President Taylor desired to do with respect to the revolution in Hungary, as a bold and utter violation of the Constitution of the United States! And yet, President Cleveland, having withdrawn the treaty with Hawaii, submitted to the Senate by his predecessor for further consideration, was especially desirous of learning the exact facts of the situation, so that he might intelligently act with regard to them. It was a pending and pressing question.

During the Mexican war Mr. N. P. Trist, Chief Clerk in the Department of State, was sent to the headquarters of our army, under General Scott, without the sanction of the Senate, 'clothed with full powers to conclude a treaty of peace with the Mexican Government, should it be so inclined.' Should he arrange for a suspension of hostilities, then the army and navy were to "act in accordance with his directions and suspend actual hostilities until further orders from the Department."

Mr. Trist, as is well known, concluded a treaty of peace with Mexico, which was ratified by the Senate by a vote of 38 yeas to 14 nays; and the wise men of that day did not deny the executive authority to appoint the negotiator without the advice and consent of the Senate, nor criticise the fact

that Mr. Trist was invested with full power to arrange for a suspension of hostilities, without the intervention of either the naval or military commander, both of whom *quoad hoc* were subject to his directions.

It is needless to multiply examples, and we shall cite but one other, showing how uniform has been the practice of successive Presidents to appoint, upon their executive authority alone, these special diplomatic agents. About four months after the inauguration of President Grant, a negotiation was opened for the annexation of the Dominican Republic. Mr. Blaine, in his twenty years in Congress, Vol. 2, p. 468, tells the story, as follows: "In July General O. E. Babcock, one of the President's private secretaries, was despatched to San Domingo, upon an errand of which the public knew nothing. He bore a letter of instructions from Secretary Fish, apparently limiting the mission to an enquiry into the condition, prospects and resources of the island. From its tenor the negotiation of a treaty at that time was not anticipated by the State Department. General Babcock's mission finally resulted, however, in a treaty for the annexation of the Republic of Dominica, and a convention for the lease of the bay and peninsular of Samana—separately negotiated, and both concluded on the twenty-ninth of November, 1869."

President Grant laid this treaty, apparently negotiated by his special agent under secret instructions, before the Senate, and it was rejected. And what is observable is this, that the executive authority to send a special agent, without the advice and consent of the Senate, and the negotiation of a treaty by such agent, providing for the annexation of a foreign country to the United States, was not questioned by the Senate. The Senate of that day had not risen to the height of the great argument! It did not perceive the rent in the constitutional vesture! It did not seem conscious of the grave usurpation of the President, and his disregard of its dignity and powers!

It will be remarked that in the instances which we have cited of the appointment by the Executive of these diplomatic agents, the Senate was sometimes in session at the date of their appointment, and sometimes not. But in the greater

number of instances it was in session. That, however, is an immaterial circumstance. If he has the constitutional power of appointment alone it is of no consequence whether he appoints during the session or vacation of the Senate. And that he has this power we have endeavored to show.

As Commander-in-Chief of the Army and Navy the President may invest our ministers abroad with discretionary power to use the naval forces of the government stationed in their respective jurisdictions to protect American life and property. And as such Commander-in-Chief he may, in a particular instance, and in the exercise of his discretion, withdraw such power from the resident minister, and confer it upon a special commissioner, entrusted with a temporary duty. The wisdom of such withdrawal is a matter of purely executive discretion, and the decision of the Executive is conclusive.

The resident minister acts under instructions from the President. The President to enable his special commissioner more efficiently to perform the particular duty with which he is charged, may withdraw, *pro tanto* and *pro hac vice*, his instructions from the permanent minister, and make them applicable to the temporary commissioner. This does not change the character of the latter's service.

In accord with these principles were the instructions of the President, through the Department of State, to Mr. Blount, his special commissioner to the Hawaiian Islands.

"You will investigate," says the Secretary, Mr. Gresham, "and fully report to the President all the facts you can learn respecting the condition of affairs in the Hawaiian Islands, the causes of the revolution by which the Queen's Government was overthrown, the sentiment of the people toward the existing authority and, in general, all that can fully enlighten the President touching the subjects of your mission.

"To enable you to fulfill this charge, your authority in all matters touching the relations of this Government to the existing or other government of the Islands, and the protection of our citizens therein is paramount, and in you alone, acting in coöperation with the commander of the naval forces,

is vested full discretion and power to determine when such forces should be landed or withdrawn.

"You are, however, authorized to avail yourself of such aid and information as you may desire from the present minister of the United States at Honolulu, Mr. John L. Stevens, who will continue until further notice to perform the usual functions attaching to his office not inconsistent with the powers intrusted to you. An instruction will be sent to Mr. Stevens, directing him to facilitate your presentation to the head of the Government upon your arrival, and to render you all needed assistance."

As commentary upon the constitutionality and propriety of these instructions nothing more need be desired than the report of the Senate Committee on Foreign Relations. Although the *vox dei* is not always recognizable in the utterances of a majority, yet the report of this committee on this particular question, speaks, at any rate, the language of statesmanship and constitutional law. It is as follows:

"A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information, which, the President believed, was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions without dissent on the part of Congress or the people of the United States. The employment of such agencies is a necessary part of the proper exercise of the diplomatic power, which is intrusted by the Constitution with the the President. Without such authority our foreign relations would be so embarrassed with difficulties that it would be impossible to conduct them with safety or success. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, or as to the instructions which the President may give them.

"An authority was intrusted to Mr. Blount to remove the American flag from the Government building in Hawaii, and

to disclaim, openly and practically, the protectorate which had been announced in that country by Minister Stevens, and also to remove the troops from Honolulu to the steamer Boston. This particular delegation of authority to Mr. Blount was paramount over the authority of Mr. Stevens, who was continued as minister resident of the United States at Honolulu, and it raised the question whether the Government of the United States can have at the same foreign capital two ministers, each of whom shall exercise separate and special powers.

"There seems to be no reason why the Government of the United States can not, in conducting its diplomatic intercourse with other countries, exercise powers as broad and general, or as limited and peculiar, or special, as any other government. Other governments have been for many years, and even centuries, in the habit of intrusting special and particular missions to one man representing them in a foreign court, and to several men in combination when that was found to be desirable. In fact, there has been no limit placed upon the use of a power of this kind, except the discretion of the sovereign or ruler of the country. The committee fail to see that there is any irregularity in such a course as that, or that the power given to Mr. Blount to withdraw the troops from Honolulu, or to lower the flag of the United States, was to any extent either dangerous or interrupting to any other lawful authority existing there in any diplomatic or naval officer. There may be a question as to the particular wording of the order which Mr. Blount gave to Admiral Skerrett for the lowering of the flag and the withdrawal of the troops, but that is a hypercriticism, because the substantial fact was that Mr. Blount executed the command of the President in communicating to Admiral Skerrett such order, as the order of the President of the Untted States. Mr. Blount's authority had been known to Admiral Skerrett; his instructions had been exhibited to Admiral Skerrett; and they both understood that what Mr. Blount was then doing had received the sanction of the President of the United States before Mr. Blount had entered upon the discharge of his ministerial functions, and that his act