Amendments and Reservations to the Treaty

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AMENDMENTS AND RESERVATIONS TO THE TREATY.

The subject involves consideration of (I) the power of organs of the United States to make reservations, (II) the legal effect of reservations and (III) the expediency of making reservations. The first is a question of constitutional law, the second of international law, and the third of policy and ethics.

I. POWERS OF THE SENATE AND PRESIDENT.

"(The President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." That the Senate has power to reject a treaty by refusing to "consent" to its ratification is clear. That it can "advise" amendments or reservations, or even make its "consent" conditional upon their acceptance is also established though it has occasionally been questioned.

2 Crandall, Treaties their Making and Enforcement, 2nd ed., p. 82 notes seventeen cases of rejection of treaties by the Senate. All of these were bi-lateral treaties.
3 Crandall, op. cit. pp. 67-72 notes eighteen instances, described as "exceptional" in which the advice of the Senate has been sought by the president prior to negotiations and half of these occurred in the administration of Washington prior to negotiation of the Jay treaty (1794) which established the precedent of Presidential independence in negotiation. Only once was advice sought by the President in person and on that occasion, a few months after the constitution went into operation, President Washington's experiences were such that an eye witness described his departure from the Senate chamber as "with sullen dignity" and "a disconsolate air." Maclay, Sketches of Debates in the First Senate of the United States, G. W. Harris, ed., p. 125; 6 J. Q. Adams, Memoires, 427. The Senate on its own initiative has sometimes advised the conclusion of treaties, which advice the President is competent to ignore, and it has claimed the right to confirm the agents negotiating the treaty, but the use of special agents acting under the president's authority alone is established in practice. Crandall, op. cit. 77; Corwin, The President's Control of Foreign Relations, pp. 58 et seq. See on the general subject, H. C. Lodge, 31 Scribners Magazine, 33. Sen. Doc. 104, 57th Cong., 1st Sess. J. W. Foster, The Practice of Diplomacy, pp. 243, et seq.

4 Sutherland, Constitutional Power and World Affairs, p. 127; Crandall, op. cit. p. 81; Lodge, loc. cit. Of over 650 treaties signed by the United States, in about one-tenth the Senate has qualified its consent to ratification, and this includes multi-lateral treaties, such as the Supplementary Industrial Property Convention, (1891); the African Slave
also evident that the President is the final authority in ratifying
as well as negotiating a treaty and is under no obligation to sub-
mit a treaty, mutilated by Senate amendments or reservations to
the other signatory powers. Thus Presidents Roosevelt and
Taft each abandoned arbitration treaties when it appeared that
the Senate was prepared to insist upon essential alterations.
When proposed reservations are of a character nullifying the
essential purpose of a treaty or unacceptable to the other signa-
tories this would seem to be the proper course and of these facts
the president who has conducted the negotiations is the most
competent judge. It would hardly tend toward international good
will to offer a stone when the signatories have agreed to buy
bread.

As is the case with the treaty itself, the President and Senate
must each consent to amendments, reservations or interpretations.
Attempts of either to act separately have been unavailing. The
Supreme Court said in reference to a joint resolution passed by
a majority of the Senate, stating the purpose of the Senate in
ratifying the treaty annexing the Philippines:

Trade General Act, (1890); the Algeciras Convention, (1906); and the
Hague Conventions, (1899, 1907). In most cases the other state or states
have assented to the qualification, but "The proposed treaty is not in-
frequently so amended as to be unacceptable to the other power and no
treaty results." Crandall, op. cit. p. 82. For instances see 5 Moore, In-
ternational Law Digest, 199-201. Senate Rule XXXVII, provides for
vote on amendments in committee of the whole and in session and then
on "a resolution of ratification with or without amendment." "On the
final question to advise and consent to the ratification in the form agreed
to, the concurrence of two-thirds of the Senate present shall be necessary
to determine it in the affirmative, but all other motions and questions upon
a treaty shall be decided by a majority vote, except a motion to postpone
indefinitely, which shall be decided by a vote of two-thirds."

"The objection usually urged is that amendments are in the nature
of an ultimatum and are made by those not familiar with the prior nego-
tiations." Crandall, op. cit. p. 82. See also, Mr. Monroe, Minister to
Great Britain to Sec. of State, June 3, 1804, 3 Am. St. Pap., For. Rel., 93;
5 Moore, Digest, 201.

Taft, Our Chief Magistrate and his Powers, p. 106; Crandall, op.
cit. pp. 81, 94.

Crandall cites 13 instances in which the President refused to ratify
treaties in the form approved by the Senate, op. cit. p. 97 to which may be
added the two Taft Arbitration treaties of 1911. He also cites 10 in-
stances in which the President withdrew treaties while still under Senate
consideration, p. 95; 9 in which he withheld them from the Senate alto-
gether, p. 99; and 11 in which he submitted them to the Senate with rec-
ommendation for amendments, p. 97.

S Crandall, op. cit. p. 98; Taft, op. cit. p. 106; Charles, Treaties, etc.,

Fourteen Diamond Rings v. United States, (1901) 183 U. S. 176, 46
L. Ed. 138, 22 S. C. R. 59. "The power to make treaties is vested by the
"We need not consider the force and effect of a resolution of this sort. . . . The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it." Justice Brown, concurring said:

"It cannot be regarded as part of the treaty, since it received neither the approval of the president nor the consent of the other contracting power. . . . The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty."

A similar fate has met interpretations or reservations made by the President without consent of the Senate, even when accepted by the other signatory. Thus explanatory notes signed by the plenipotentiaries on exchange of ratifications to the Mexican peace treaty of 1848 and the Clayton-Bulwer treaty with Great Britain of 1850 were subsequently held by the United States to be of no effect, and on other occasions the president has submitted such explanatory documents to the Senate before proclaiming the treaty.

II. EFFECT OF RESERVATIONS UNDER INTERNATIONAL LAW.

The effect of reservations and amendments to treaties, though often a matter of complexity in concrete application depends
upon a single principle. "Treaties are contracts between states. To their validity it is essential . . . that consent be reciprocally and regularly given."12 "Assent must be to the same thing in the same sense. It must comprehend the whole of the proposition, must be exactly equal to its extent and provisions and must not qualify them by any new matter."13 This statement, made of private contracts, is believed to be equally applicable to treaties, and under it, clearly no modification can be effective as to any party which has not consented to it.

"There is," said the Supreme Court in refusing to apply an amendment to which the Indians had not consented, "something which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigency of a particular case may demand it."14

Various names have been given to proposals to modify treaties. An amendment is a proposed modification of the terms of the instrument. An interpretation is a proposed determination of the meaning of the terms of the instrument. A reservation is an amendment or interpretation stated as a condition of consent to the terms of the instrument. An amendment is a more drastic modification of a treaty than an interpretation. In fact the latter may not be a modification at all. If it is simply a statement of the meaning which a court applying international law would ascribe

12 Crandall, op. cit. p. 3.
13 Bouvier, Law Dictionary, 14th ed., p. 154, tit. "Assent." There must be both "consent" and "assent." The first is defined as "An act of the will," Standard, or "a willingness that something about to be done, be done," Bouvier, tit. assent; the latter as "an act of the understanding," Standard, or "approval of something done," Bouvier, loc. cit. An interpretation not "assented" to would be as destructive of the complete agreement necessary as would an amendment not "consented" to. There must be a complete meeting of the minds. When as often happens there is not in fact reciprocal "assent" to the meaning of words or phrases, the law presumes assent to the meaning derived by application of recognized principles of interpretation. Want of mutual "consent" on the other hand renders the purported agreement, no agreement and void.
to the terms of the treaty it is from a legal standpoint entirely superfluous. A reservation may be drastic or mild, but its distinguishing feature is that it qualifies consent to the treaty.

From the standpoint of international law, the distinction between amendments and interpretations is immaterial. Neither is effective as against a non-consenting state.

The essential distinction from the standpoint of international law is whether the modification does or does not qualify consent to the treaty, i.e. whether it is or is not a reservation. If the United States' ratification is qualified by reservations, then the treaty will not be valid as between the United States and any signatory who does not consent to the modifications. On the other hand if the United States' ratification is not so qualified, then the treaty will be valid as to all ratifying powers, while any amendments or interpretations which may have been proposed, will apply only as to those signatories who consent to them.

OBLIGATION TO RATIFY.

Since consent must be by the treaty-making authority of the state, ratification by that authority, of a treaty signed by plenipotentiaries has become customary. Early publicists denied the existence of any discretion in this act, unless the plenipotentiaries had exceeded their powers, and where their powers are derived from the full treaty-making authority of the state, at least a moral obligation to ratify seems to be recognized today. Thus in countries where treaty making is vested in the Crown, the signature of plenipotentiaries who have acted within instructions given them by the Crown should be regarded as final. The act of ratification becomes mainly formal, unless discretion is expressly reserved in the treaty itself, and the other signatory could take exception either to its refusal or to its qualification.

15 Harley, The Obligation to Ratify Treaties, Am. J. Int. Law, July, 1919; Crandall, op. cit. 2; 5 Moore, Digest, 184 et seq.
16 2 Grotius, De Jure Belli ac Pacis, c. 11, sec. 12; 2 Vattel, Le Droit de Gens, c. 12, sec. 156; 2 Martens, Précis des Droit des Gens, c. 1, sec. 36.
17 After citing 5 authorities supporting an absolute obligation to ratify, 13 for a moral obligation, 8 for no obligation at all, and the circumstances of 10 causes célèbres in which ratification was refused, Harley, loc. cit. concludes, "It would seem that the weight of opinion holds that a moral obligation to ratify exists." See also 5 Moore, Digest, 187.
18 The United States has sometimes protested the failure of other powers to ratify treaties although, because of the constitutional need of Senate approval, maintaining its own right to refuse. A claim convention signed with Spain in 1802 was rejected by the Senate but on new evidence being presented, the Senate changed its mind. Now, however,
The same situation would exist in the United States if the President and two-thirds of the Senate had joined in instructing plenipotentiaries. "The committee, to which the treaty of July 2, 1791, with the Cherokees, had been referred, observed, in its report to the Senate, that the treaty strictly conformed to the instructions of the President based upon the advice and consent of the Senate as given August 11, 1790," consequently ratification became obligatory.19

Since however the early "attempts of the executive to follow out the clear intention of the framers of the Constitution in consulting the Senate prior to the opening of negotiations, have been followed only in exceptional instances"20 and the negotiators of treaties have ordinarily acted under authority of the President alone, the Senate has asserted, and other powers have generally admitted the right under international law of the full treaty power

Spain refused to ratify. "Were it necessary," replied Secretary Madison, "to enforce these observations by an inquiry into the right of His Catholic Majesty to withhold his ratification in this case, it would not be difficult to show that it is neither supported by the principles of public law, nor countenanced by the examples which have been cited." Madison to Yrujo, Oct. 15, 1804, Am. St. Pap., For. Rel., 2: 625. The convention was finally ratified by Spain in 1818. Almost immediately a similar controversy arose over the Florida cession treaty. Secretary Adams said, "The President considers the treaty of 22nd February last as obligatory upon the honor and good faith of Spain, not as a perfect treaty, ratification being an essential formality to that, but as a compact which Spain was bound to ratify." He then drew an analogy between an unratified treaty and a covenant to convey land, asserting that "the United States have a perfect right to do what a court of chancery would do in a transaction of similar character between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion." It should be noted that in the full powers of his plenipotentiary, the Spanish monarch had expressly promised to ratify "whatsoever may be stipulated and signed by you." 5 Moore, Digest, 189-190. In both of these cases the United States distinguished its own position, in which the recognized constitutional rights of the Senate precluded an obligation to ratify.

19 Crandall, op. cit. p. 79. The first treaty to come before the Senate after adoption of the constitution, the consular convention with France, signed in 1788, had in substance been submitted to Congress, in which the treaty power was vested under the Articles of Confederation, in 1784 and was rejected on the ground that it did not conform to the original plan proposed by Congress, but with a promise to ratify one which did so conform. This promise was repeated in the commission to Jefferson as Minister to France, and the new treaty was signed accordingly. On his advice being asked, John Jay, who continued in charge of foreign affairs, replied that "while he apprehended that the new convention would prove more inconvenient than beneficial to the United States, the circumstances under which it had been negotiated made, in his opinion, its ratification by the Senate indispensable." The Senate immediately proceeded to ratify. Crandall, op. cit. p. 79.

20 Crandall, op. cit. p. 70. See also supra, note 3
of the United States to refuse or qualify\textsuperscript{21} ratification of a treaty duly signed by the plenipotentiaries. Frequently this right is expressly reserved in the treaty,\textsuperscript{22} but foreign states are presumed to be cognizant of the composition of the treaty power of the states with which they deal, and of the resulting incapacity of plenipotentiaries with authority derived from only part of it.\textsuperscript{23}

\textsuperscript{21} Qualified ratification has sometimes been objected to, where the right of rejection is admitted. Supra, note 5. Doubtless where many states are involved a qualified ratification is undesirable. Protocol No. 24 of the Paris Congress of 1856 provided with reference to the Declaration of Paris, “On the proposition of Count Walewski; and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not at the same time rest on the four principles which are the object of the said declaration.” This was recognized as a binding obligation on the powers and as a result the United States being unwilling to accept one provision of the Declaration was excluded from the treaty, a situation which proved most disadvantageous upon the outbreak of the Civil war five years later. Naval War College, International Law Topics, 1905, p. 110. Article 65 of the proposed Declaration of London of 1909 provided: “The Provisions of the present Declaration form an indivisible whole.” Upon which, the drafting committee, of which M. Renault was chairman, commented as follows: “This article is of great importance, and is in conformity with that which was adopted in the Declaration of Paris. The rules contained in the present Declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the Delegations; some concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory. A legitimate expectation would be defeated if one Power might make reservations on a rule to which another Power attached particular importance.” Ibid. 1909, p. 155. See also Harley, loc. cit.

\textsuperscript{22} Crandall, op. cit. p. 94.

\textsuperscript{23} “Without doubt a government should know the various phases that the project must follow at the hands of the other contractant; it is not able to raise reclamations if the treaty fails in one of these phases.” Geffcken, note to Heffter, Das Europäische Völkerrecht der gegenwart, p. 201. “The maxim of the early Roman law, ‘qui cum alio contrahit, vel est vel debet esse non ignarus condicienis eius,’ Ulpian, Digest L. XVII, 19 applies in the making of treaties. To know the power of him with whom negotiations are conducted requires a knowledge not only of his special mandate and powers, the exhibition of which may always be demanded before the opening of the negotiations, but also of the fundamental law or constitution of the state which he professes to represent, and of any limitations which may result from an incomplete sovereignty.” Crandall, op. cit. p. 2. “This question (the obligation to ratify) has no significance in regard to states, by whose form of government the engagements made by the executive with foreign powers need some further sanction.” Woolsey, International Law, sec. 111. “The Government of His Brittanic Majesty is well acquainted with the provision of the Constitution of the United States, by which the Senate is a component part of the treaty making power, and that the consent and advice of that branch of Congress are indispensable in the formation of treaties. According to the practice of this government, the Senate is not ordinarily
EXPRESS CONSENT.

Though the United States can not be reproached with violation of international law if it refuses to ratify or qualifies its ratification of a treaty signed by authority of the President alone, yet a qualified ratification is of no effect unless consented to by the other signatories. How may this consent be evidenced? Express consent to reservations by statement in the act of ratification or exchange of notes would of course be sufficient, as would accept-

consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration." Mr. Clay, Sec. of State to Mr. Addington, British Minister, April 6, 1825, 5 Moore, Digest, 200. See also ibid. 5: 189, 198, 199, and supra, note 21. Though knowledge of the constitutional authorities necessary for the conclusion of a treaty may be presumed, knowledge of the authorities necessary for the execution of a treaty may not. When a treaty is concluded in the constitutional method, it is an obligation, which can not be escaped on the plea of need for legislation to execute. The legislature will sacrifice the good faith of the country and render it liable to international reclamation if it refuses to act. (Infra notes 49, 50.)

24 The Senate advised ratification of the treaty with France of Feb. 3, 1801, provided a new article be substituted for article II. Bonaparte ratified with this modification but added a new proviso. Ratifications were exchanged at Paris, but before proclamation President Jefferson resubmitted the treaty to the Senate which accepted Bonaparte’s proviso. Malloy, Treaties, etc., p. 505. After consenting to ratification of the General act for the suppression of the African Slave Trade (1890), the Senate “Resolved further, That the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the protocol signed at Brussels, January 2, 1892.” It then made a reservation on its own behalf. The protocol of deposit of ratifications of Feb. 2, 1892, provided for in article 99, of the treaty, recites the Senate’s resolution and states: “This resolution of the Senate of the United States having been preparatively and textually conveyed by the Government of His Majesty the King of the Belgians to the knowledge of all the signatory powers of the General Act, the latter, have given their assent to its insertion in the present Protocol which will remain annexed to the Protocol of January 2nd, 1892.” Malloy, Treaties, etc., p. 1992. In the treaty of 1911, Japan gave express assent to an “understanding” and tacit assent to an “amendment.” The proclamation of President Taft reads:

“And whereas, the advice and consent of the Senate of the United States to the ratification of the said Treaty was given with the understanding ‘that the treaty shall not be deemed to repeal or affect any of the provisions of the Act of Congress entitled ‘An Act to regulate the Immigration of Aliens into the United States,’ approved February 20th, 1907; And whereas, the said understanding has been accepted by the Government of Japan; And whereas, the said Treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven; Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Treaty, as amended,
The power proposing reservations can presume that the terms of such a note have been consented to by all the organs constituting the treaty power of the states to whom it is sent. If in fact, it has not received such consent, there has been a violation of the constitutional law of the receiving state, but under international law the reservation would be binding. Thus interpretative agreements signed by authority of the President upon exchange of ratifications of treaties with Mexico (1848) and Great Britain (1850) though not valid under the law of the United States because of failure to submit them to the Senate, were doubtless valid under international law and might have been made the basis of valid claims before an international tribunal.

Tacit consent to qualified ratification.

Tacit consent to reservations is also possible. The process of concluding treaties involves three steps: signature, ratification, and exchange of ratifications. The first and last are formal ceremonies and suitable occasions for the proposal of reservations. It would appear that if such proposals are stated as conditions of consent by the proposing power, on either of these occasions, lack of protest by others would be construed as tacit consent. At the

and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof. In testimony whereof, etc." Charles, Treaties, etc., p. 82. An interpretation proposed by the Senate to the treaty of 1868 with the North German Confederation was duly communicated to that government and accepted as the true interpretation of the article. It was, however, omitted in the exchange copy given by that government. This omission being noticed later, a special protocol was signed in 1871, recognizing the interpretation. Crandall, op. cit. p. 88.

In negotiating the treaty of 1850 with Switzerland, the American negotiator agreed that the unqualified most-favored-nation clause of article 10 should be interpreted absolutely. In 1898, Switzerland claimed, under this clause, the benefits offered to France under a reciprocity agreement of May 30, 1898. At first the United States objected that to admit the claim would be contrary to her accepted interpretation of identical most-favored-nation clauses, but "It was found upon an examination of the original correspondence that the President of the United States was advised of the same understanding and that the dispatch in which it was expressed was communicated to the Senate when the treaty was submitted for its approval," consequently customs officials were directed to admit Swiss importations at the reduced rate. 5 Moore, Digest, 284.

Supra, note 10. Mexico and Great Britain respectively asserted the validity of these agreements. 5 Moore, 205; Lord Clarendon to Mr. Buchanan, May 2, 1854, Br. and For. St. Pap., 46: 267, Moore, 3: 138. The Mexican agreement is printed after the Treaty in Malloy, Treaties, etc., p. 1119.
Hague Conferences, the numerous reservations offered upon signature of the Conventions and maintained by the power upon ratification were accorded tacit consent in this manner.27

Where the usual process prevails, of exchanging ratifications by formal meeting of the plenipotentiaries, generally recorded in a protocol, acceptance by a plenipotentiary of a text with qualified ratification would amount to tacit consent to the reservation. Thus in reference to an explanation attached by the king of Spain to his ratification of the Florida cession treaty of 1819, the Supreme Court said:28

“It is too plain for argument that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation and the treaty is afterwards ratified by the other party with the declaration attached to it and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument as it stood when the ratifications were exchanged.”

In multi-lateral treaties, however, this procedure has been often abandoned and provision made for deposit of ratifications at a central bureau. This was provided in the African Slave Trade, Algeciras, Hague, and other Conventions. In the present treaty article 440 provides:

“The present treaty of which the French and English texts are both authentic, shall be ratified.

The deposit of ratifications shall be made at Paris as soon as possible.

Powers of which the seat of the Government is outside Europe, will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that

27 The Marie Glaeser, L. R. [1914] P. 218; The Appam, (1916) 243 U. S. 124, 61 L. Ed. 633, 37 S. C. R. 377, Infra Note 38. In most cases reservations were offered at signature and affirmed at ratification though sometimes they were offered for the first time at ratification. Thus the Senate resolution advising ratification of the 1907 Hague Convention for the Pacific Settlement of International Disputes affirmed the declaration made by the American plenipotentiaries on signature and added a new reservation. Malloy, Treaties, etc., p. 2247. The reservations with statement of the method of presentment are given in full in the Carnegie Endowment for International Peace edition of the Hague Conventions and Declarations of 1899 and 1907. Presumably a reservation made at signature but not maintained at ratification is not effective.

28 Doe v. Braden, (1853) 16 How. (U.S.) 635, 14 L. Ed. 1090. See also Crandall, p. 88.
their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible.

A first procès-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of Principal Allied and Associated Powers on the other hand.

From the date of this first procès-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification.

The French Government will transmit to all the signatory Powers a certified copy of the procès-verbaux of the deposit of ratifications.”

It is believed that qualified ratifications might be deposited in the method provided but if upon receipt of the procès-verbal of the deposit of such qualified ratification, any signatory objected to the reservations, the treaty would not be in effect as between those signatories. As to signatories offering no objection the reservations would be regarded as tacitly consented to, and the treaty would be in effect as from the date of deposit of ratifications. Thus it might, and if reservations were submitted materially modifying the treaty, probably would happen, that a deposit of qualified ratification by the United States would result in conclusion of the treaty with some signatories but not with others. If it were felt desirable to conclude a treaty with the latter, as would doubtless be the case were they enemy powers, new negotiations would be necessary.29 In other words if the United

29 The following draft of a Protocol of Jan. 2, 1892, is printed in Malloy, Treaties, etc., p. 1990, following the African Slave Trade General act of 1890:

“The undersigned, . . . met at the Ministry of Foreign Affairs at Brussels, in pursuance of Article XCIX of the General Act of July 2, 1890, and in execution of the Protocol of July 2, 1891, with a view to preparing a certificate of the deposit of the ratifications of such of the signatory powers as were unable to make such deposit at the meeting of July 2, 1891.

“His Excellency the Minister of France declared that the President of the Republic, in his ratification of the Brussels General Act had provisionally reserved, until a subsequent understanding should be reached, Articles XXI, XXII, XXIII, and XLII to LXI. The representatives . . . acknowledged to the Minister of France the deposit of the ratifications of the President of the French Republic, as well as of the exception bearing upon Articles XXI, XXII, XXIII, and XLII to LXI.

“It is understood that the powers which have ratified the General Act in its entirety, acknowledge that they are reciprocally bound as regards all its clauses.
States attached any reservation or interpretation however mild, to her ratification as a condition thereof, Germany would have it within her power and right to object to such qualification and compel the United States to negotiate peace with her separately, or from the international standpoint continue in a state of war. ③0

It may seem strange that a power making qualified ratification should be able to throw the burden of positive action upon signatories who have already unconditionally ratified and who object to any qualification of the treaty. Practice, however, in the Algeciras, Hague and other general international conventions seems to sanction the method. Reservations, in some cases not presented at signature, have been held to have received tacit consent upon the deposit of ratifications so qualified. ③1

CONSENT TO AMENDMENTS AND INTERPRETATIONS NOT QUALIFYING RATIFICATION.

If, however, amendments or interpretations are presented and ratification is not conditioned upon their acceptance, a failure to

"It is likewise understood that these powers shall not be bound toward those which shall have ratified it partially, save within the limits of the engagements assumed by the latter powers.

"Finally, it is understood that, as regards the powers that have partially ratified, the matters forming the subject of Articles XLII to LXI, shall continue, until a subsequent agreement is adopted to be governed by the stipulations and arrangements now in force.

"In testimony whereof . . ."

The United States Senate resolution of ratification expressly accepted the French reservation and made another which was consented to by the powers prior to deposit of ratification. Supra note 24.

①0 Though Congress might declare peace by resolution which would be valid in municipal law, it would have no effect under international law and Germany would be entitled to regard herself as still at war. "I have yet to learn that a war in which the belligerents, as was the case with the late civil war, are persistent and determined can be said to have closed until peace is conclusively established, either by treaty when the war is foreign, or when civil by proclamation of the termination of hostilities on one side and the acceptance of such proclamation on the other." Mr. Bayard, Sec. of State to Mr. Muruaga, Spanish Minister, Dec. 3, 1886, 7 Moore, 337.

①1 A Senate reservation to the Algeciras Convention of 1906 was in the same spirit but different terms from a reservation attached to American signature of the treaty. Apparently the qualified ratification was accepted when deposited as required by article 121 of the treaty. Malloy, Treaties, etc., p. 2183. The Procès-Verbal of Deposit of Ratifications to the International Sanitary Convention of 1903 notes reservations attached to the ratifications of the United States, Great Britain, and Persia, which apparently were tacitly accepted. Ibid. p. 2129. In the First Hague Convention of 1907 a reservation in addition to that made at signature by the United States appears to have been tacitly accepted on deposit of ratifications, Ibid. p. 2247, and this was true of other Hague Conventions. See supra note 27.
object would be construed as rejection of the amendment or interpretation but acceptance of the ratification. If the United States deposited ratifications and at the same time suggested amendments or interpretations it would be bound by treaty to all the ratifying powers, but the amendments or interpretations would be effective only as between those who expressly consented to them.\textsuperscript{32}

If, in such circumstances, the United States acted on the basis of such amendments as to powers which had not expressly consented to them, it would be a violation of the treaty, which would become voidable at the discretion of such power. The situation would be similar to that discussed in the Charlton case.

Italy refused to extradite her own citizens to the United States as she was obliged to do under the terms of the treaty. Upon Italy requesting the extradition of an American citizen from the United States, the request was granted, the Supreme Court saying:\textsuperscript{33}

"If the attitude of Italy was as contended, a violation of the obligation of the treaty, which in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void;\textsuperscript{32}"

\textsuperscript{32}See protocol with reference to African Slave Trade General Act, supra note 29. In the resolution giving consent to the treaty of 1911 with Japan portions of an exchange of notes on the so-called gentlemen's agreement limiting Japanese immigration were incorporated. This reservation, however, was not included by the President in the formal ratification, express assent having already been given by Japan. Supra note 24. Frequently Senate reservations relate to domestic matters not suitable for submission to the other power. Thus instructions to the President as to future treaty negotiations contained in the resolution consenting to ratification of the Korean treaty of 1882, Malloy, Treaties, etc., p. 340, Crandall, op. cit. p. 77 and a stipulation requiring the issue of a certificate by the President before ratification of the treaty contained in the Senate resolution consenting to ratification of the Military Service convention with Great Britain of June 3, 1918, were not included in the acts of ratification. With such matters, the other power clearly has no concern and the same would be true of reservations describing the manner in which the treaty is to be executed, e. g., it is clear that an appropriation or a declaration of war require congressional action, but this is a constitutional, not an international matter, so a Senate reservation on the subject would not be a proper subject for submission to the other signatories. Their consent to such a reservation could not increase the rights of Congress under the constitution or diminish its obligation to perform acts necessary for the execution of a treaty. See Memorandum by D. H. Miller, Oct. 25, 1919.

\textsuperscript{33}Charlton vs. Kelly, (1913) 229 U. S. 447, 468, 57 L. Ed. 1274, 33 S. C. R. 945.
and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligations as if there had been no such breach. 7 Kent's Comm., p. 175."

Under such circumstances the United States might be a party to the treaty and act upon its amendments for years but always under sufferance of powers who protested such action.

The effect of interpretations officially declared by the United States but not as a qualification to its ratification would be somewhat different. Certainly the United States could not be accused of bad faith in acting upon such interpretations. On the other hand, signatories which had not expressly consented to such interpretations would not be estopped from asserting a different one. Future agreement or the decision of an international tribunal would be necessary to settle the matter, after which insistence by either party on a contrary interpretation would be a violation of the treaty and grounds for voidance.

CONSENT BY ACQUIESCENCE IN ADVERSE ACTION.

If, however, non-consenting powers refrained from protest and acquiesced for a long period of time in action by the United States on the basis of such amendments or interpretations, it would probably be construed as tacit consent. Practice is recognized as a source for interpreting treaties. Thus the Spanish treaty claims commission felt justified in applying article VII of the treaty with Spain of 1795, which forbade the "embargo or detention" of "vessels or effects" of subjects or citizens of the other contracting power, to detention of goods on land. The negotiators of the treaty appear to have intended application only to property at sea. No question was raised for over seventy years, after which the United States consistently maintained the broad interpretation. 34

"Whether or not," said the court, "the clause was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the commission will adhere to such construction in making its decisions."

INTERPRETATIONS AS EVIDENCE OF MEANING OF TREATY.

Non-conditional interpretations, though not binding unless expressly consented to, or unless action under them had been

acquiesced in for a long time, would be admissible as evidence of the true meaning of the treaty. The intent of the negotiators is recognized as a source for interpreting treaties, and preliminary correspondence, official interpretations and contemporary discussion are frequently introduced as evidence of this intent. This has been especially frequent in interpreting boundary treaties where the description does not correspond to geographical facts as subsequently ascertained. An instance of a different kind occurred in connection with a treaty concluded by the United States with Switzerland in 1850. Contemporary correspondence evidenced an intention on the part of both parties to interpret the general most-favored-nation clause unconditionally. Thus fifty years later the United States interpreted the clause in this treaty contrary to its usual view, saying: "Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." Such material, however, is only persuasive and will not overrule the clear meaning of the text. Thus the French Prize Court held that the opinion of the drafting committee that reservists were not "persons embodied in the armed forces of the enemy" was not conclusive of the meaning of article 47 of the Declaration of London. Consequently the court justified the taking of enemy reservists from a Spanish vessel holding that in fact they were embodied in the armed forces. An interpretation offered by only one signatory power would of course be of less weight than one which had been the subject of general correspondence among the signatories.

RECIPROCAL APPLICATION OF RESERVATIONS.

States which have consented to reservations whether expressly or tacitly are entitled to reciprocal application of the reservations, provided the rights of third states who are parties to the treaty but have not consented to the reservation are not involved. Thus in signing the VI Hague Convention of 1907, Germany reserved on article 3, which exempted from confiscation enemy merchant vessels met at sea ignorant of hostilities. Although Great Britain had signed and ratified the Convention without reservation, the prize court held that a German vessel captured in

35 Crandall, op. cit. p. 377 et seq.
36 5 Moore, Digest, 284; Crandall, op. cit. p. 382.
TREATY AMENDMENTS AND RESERVATIONS

this situation could be confiscated. Germany was not entitled to the privilege which by her reservation she refused to others. 38

RESERVATIONS ON POLITICAL QUESTIONS.

The interpretation of a treaty should undoubtedly be an international matter, that is, it should be settled by the application of established principles of international law is possible, otherwise by agreement of the parties. 39 To assure such interpretation there should be appeal to an international tribunal. The impropriety of having a party judge in his own case applies to international as well as private litigation, 40 consequently in arbi-


39 The United States had ratified the XIII Hague Convention of 1907, with reservation of article 23, which provided for the sequestration of prizes in neutral ports. Germany had ratified without reserving on this article, and Great Britain had not ratified at all. The Appani, a British vessel captured by Germany, was sent into an American port for sequestration. The British owners sought restoration of the vessel and won. Though the treaty probably was not applicable at all, because by article 28 it was applicable only in wars where all belligerents were parties, the reservation was held to be persuasive of the attitude of the United States and to justify her in a refusal to permit sequestration of prizes. Here, so far as the reservation was effective it operated against Germany which had not reserved on that article, but had tacitly accepted the reservation of the United States. If the tables should ever be turned, Germany would be justified in refusing sequestration to American prizes. Where there is a one-sided interpretation of a treaty, not assented to but tolerated, the rule of reciprocal application does not apply. "It should moreover be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us." Charlton v. Kelly, (1913) 229 U. S. 447, 57 L. Ed. 1274, 33 S. C. R. 945.

40 Wright, Treaties and the Constitutional Separation of Powers in the United States, 12 Am. J. Int. Law, 92.

40 Lords Hobart, Coke, Holt and others held that to make a man judge in his own case was so contrary to natural equity that even an act of Parliament attempting to do so would be void. Dr. Bonham's Case, 8 Co. Rep. 113b, 118a; Day v. Savadge, (1610) Hob. 85, 87; City of London v. Wood, (1701) 12 Mod. 669, 687; I Thayer, Cases on Constitutional Law, 47 et seq. In Bates' Case, (1606-10) 2 Howell St. Tr. 371, Darrel's Case, (1629) 3 Howell St. Tr. 1, and others the right of the king to judge his own competence in matters of the prerogative was admitted with the result according to Anson that "all attempts to define the prerogative by rules of law were rendered nugatory." Law and Custom of the Constitution, 2nd ed. Vol. 2, p. 30. These precedents have been long since overruled and the prerogative has become subject to law. "If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever
tration treaties, the interpretation of treaties has frequently been declared a justiciable question suitable for compulsory arbitration, and the United States courts have held that the interpretation of treaties may always be submitted to international agreement or arbitration, individual rights to the contrary notwithstanding. National courts in interpreting treaties are accustomed to apply international law and have held that interpretations of their own government are not necessarily binding if not accepted by the other party, though doubtless they show a partiality to such interpretations. There is however, one exception, namely where execution of the treaty is the duty of a political organ of government. In such cases national courts are obliged to follow the interpretation of the political organs of their own government. Consequently if the United States reserved freedom of action in making war, withdrawing from the League, or other matter within the province of Congress or the President to execute, it would also be within their province to decide whether the reservation is binding, so far as national law is concerned, and United States courts would have to assent. An international court, on the other hand, would be competent to interpret the hesitation it be arrived at, must prevail over any executive order." The Zamora, L. R. [1916] 2 A. C. 77. Vattel lays it down as a principle for interpreting treaties, "Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind." Op. cit. II, c. 17, sec. 265. As Bishop Hoadley said "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes." Sermon preached before the king, 1717, 15th ed. p. 12; Gray, Nature and Sources of the Law, pp. 100, 120. Obligations are of little avail if the parties reserve complete liberty of interpretation.

41 See I Hague Conventions, 1907, art. 38; Treaties concluded by United States with Great Britain and other countries, 1908, Art. 1, (Malloy, Treaties, etc. p. 814); League of Nations Covenant, Art. XIII.


44 United States courts have always maintained the American interpretation of the most-favored-nation clause, Whitney v. Robertson, (1881) 124 U. S. 190, 31 L. Ed. 386, 8 S. C. R. 456. See also Charlton v. Kelly, (1913) 229 U. S. 447, 468, 37 L. Ed. 1274, 33 S. C. R. 945.

effect of such a reservation on grounds of international law as would other parties to the treaty who might be affected by the American interpretation. Thus while under national law a reservation of this character would doubtless be binding even if other signatories to the treaty had not consented, such would not be the case under international law.\textsuperscript{46}

III. EXPEDIENCY OF MAKING RESERVATIONS.

Assuming that the United States is favorable to the general policy of the treaty and that reservations are not a mere cloak for rejection, the expediency of making reservations seems to depend upon (1) the effect of the article in question upon international relations and national policy, (2) the probability of the reservation being accepted, and (3) the extent to which the United States is committed to the article. The first question is one upon which discussion has largely centered and will not be considered here.\textsuperscript{47}

PROBABILITY OF CONSENT.

The second question is however, of primary importance for while reservations on a particular article taken by itself might seem desirable, yet should it appear that such reservation would result in exclusion of the United States from the treaty a different decision might be reached. This consideration relates only to reservations, i.e., proposals qualifying ratification, and the probability of rejection by other signatories would of course depend upon the substance rather than the form of the reservation. Numerous considerations must always be weighed in forming a judgment on question of policy, and the ones here discussed are regarded by the writer, not as necessarily conclusive, but as of great importance.

\textsuperscript{46}In \textit{re Cooper}, (1892) 143 U. S. 472, 502, 36 L. Ed. 232, 12 S. C. R. 453, the Supreme Court held that interpretation of the reference in a statute to "all the dominions of the United States in Behring Sea" was a political question, but before the Behring Sea arbitration court the extent of these dominions became a judicial question. 1 Moore, Digest 744, 912, et. seq. In \textit{Harold v. Arrington}, (1885) 64 Tex. 232, 234, the Texas Supreme Court held that determination of the northern boundary of the state was a political question and followed the decision of the political authorities of Texas, but before the Supreme Court of the United States which exercised an international jurisdiction as between Texas and Oklahoma territory, the question became judicial. \textit{United States v. Texas}, (1891) 143 U. S. 621, 36 L. Ed. 285, 12 S. C. R. 488.

\textsuperscript{47}The writer has attempted to consider some of these effects in an article in the American Political Science Review, November, 1919.
The possibility of Germany refusing consent to reservations should be given due consideration. By the treaty she sacrifices claim to considerable sums in the hands of the Alien Property Custodian, yields valuable commercial privileges, agrees to indemnify American citizens for property seized in Germany, and makes other concessions, some of which are probably in excess of her liability under international law.\textsuperscript{48}

It would not seem unreasonable for German statesmen to anticipate better terms in a treaty negotiated independently with the United States at a time when renewed military pressure was not to be feared.

While the Allied Powers would probably consent to bona fide interpretative reservations, they might properly hesitate before entering into a league with a state whose cooperation was not to be counted on in emergencies.\textsuperscript{49} Some of the proposed reservations relating to the use of military force and embargoes might be construed as tending toward this effect. Certainly the discretion of Congress should not be impaired, but it should be recognized that it is a discretion to decide on the action necessary to carry out the responsibilities assumed under the treaty. No suggestion should exist of a liberty on the part of Congress or any other organ to repudiate such responsibilities.\textsuperscript{50}


\textsuperscript{49} Referring to those who "insist and profess to believe that treaties like acts of assembly, should be repealable at pleasure," Jay wrote in the Federalist, No. 64, "This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it."

\textsuperscript{50} "The government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations." Mr. Livingston, Sec. of State to Mr. Serurier, June 3, 1833, 2 Wharton, International Law Digest, 67. "The extent to which Congress would regard itself as bound, as a matter of good faith, to enact legislation for the purpose of carrying out treaties has been the subject of debate, from time to time, since the days of Washington. Despite these debates, and notwithstanding its power to frustrate the carrying out of treaties, Congress in a host of instances has passed the necessary legislation to give them effect; and the disposition has frequently been manifested to
TREATY AMENDMENTS AND RESERVATIONS

Reservations definitely opposing concessions made to specific powers could hardly be expected to receive the consent of those powers. Thus Japan would be unlikely to consent to a reservation relating to her succession to former German rights in China, and the British Dominions to one depriving them of votes.

RESPONSIBILITIES ASSUMED BY THE UNITED STATES.

The third question relates to moral responsibilities, by which the writer understands, a responsibility the specific application of which belongs to the free interpretation of the parties. A legal responsibility should be interpreted by an impartial authority external to both parties—no one should be judge in his own

avoid any basis for the charge of bad faith through a disregard of treaty stipulations." After considering the possibility that Congress might refuse to hold itself under a moral obligation Mr. Hughes continues: "Foreign nations, however, might be expected to take the view that they were not concerned with our internal arrangements and that it was the obligation of the United States to see that the action claimed to have been agreed upon was taken. If that action was not taken, although Congress refused to act because it believed it was entitled to refuse, we should still be regarded as guilty of a breach of faith. It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly." C. E. Hughes, Address in New York, March 26, 1919, on The Proposed Covenant for a League of Nations, International Conciliation, Special Bulletin, April, 1919, pp. 689-691. See also Wright, American Journal of Int. Law, 10: 710; 12: 93 et seq. For the general proposition that national legislation or the lack of it can not affect international obligations or liabilities see discussion in the Alabama Claims Arbitration, 4 Moore, Digest of International Arbitrations, 4101; 7 Digest, 878. See also supra note, 23.

52 The Canadian minister of Justice said on July 25, 1919: "The right of Canada as a member of the league to be eligible for representation on the council under the provisions of the covenant was insisted upon by her representatives and that those provisions conferred upon her that right was clearly understood and unequivocally recognized by all concerned. A reservation in effect negating that right would involve further change in the contract—after acceptance and signature by all parties—in regard to a matter which from the Dominion's point of view is of its essence. As such it is clearly inadmissible and not distinguishable from a refusal to ratify." Press Report July 26, 1919.
case,—but a moral responsibility is to be decided according to the conscience of the parties. For this reason on such questions opinions may properly differ.

It has been pointed out that under normal circumstances the Senate's right to refuse ratification of a treaty signed under authority of the President alone is recognized at international law. But, acting within his recognized constitutional powers, the President alone has authority to commit the United States to general lines of policy which may involve the treaty power in moral responsibilities, should its cooperation be necessary to make the policy effective. "Protocols of agreement as to the basis of future negotiation are clearly within the authority of the President" says Crandall,\textsuperscript{53} citing agreements made with Costa Rica.

\textsuperscript{53} Crandall, op. cit. p. 111; Willoughby, The Constitutional Law of the United States, secs. 200-202, discusses three types of executive agreements within the constitutional power of the president, as follows:

1. The term "protocol" as used in international law describes "an agreement reached between the foreign offices of two countries which has been reduced to definite written statement, but has not been ratified as a treaty by the States parties to it. How far such agreements, though not legally binding, morally bind the parties to them depends upon the particular circumstances of each case. The most common use to which protocols in this sense are put, is in fixing the general terms in which a final treaty—especially a treaty of peace—is to be negotiated. A recent example of this is the protocol of 1898 providing for the appointment of a commission to negotiate the Treaty of Peace with Spain. The constitutional authority of the President without consulting the Senate to enter into protocols of agreement as the basis for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate. He cites the Boxer protocol of 1901 and the protocol for the administration of San Domingan customs houses of 1905 as illustrations and refers to 2 Butler, The Treaty Making Power 371 note, for others.

2. "As the term indicates, a modus vivendi is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doctrine that these modi vivendi may be entered into by the President without consulting the Senate." For instances see I Butler 369, note.

3. "In the exercise of his power as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A conspicuous example of international agreements thus entered into is the protocol signed at Pekin in 1901, to which reference has already been made. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners of war, etc. The President's military powers exist in time of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes."
and Nicaragua in reference to future negotiations for the construction of an Isthmian canal, and agreements made with Great Britain in 1891 in reference to the conclusion of a treaty for arbitrating the Bering Sea question. The most important agreement of this character was the protocol with Spain of August 12, 1898, "Embodying the terms of a Basis for the Establishment of Peace" between the two countries. It seems clear that the conclusion of armistices and preliminaries or peace are in the power of the President and constitute obligations upon the conscience of the United States.

Mr. Lansing's note of November 5, 1918, accepted by the Allies and Germany as the basis for an armistice and conclusion of peace was undoubtedly such a commitment. According to its terms:

"Subject to the qualifications which follow they (the Allied Governments) declare their willingness to make peace with the Government of Germany on the terms of peace laid down in the President's address to Congress of January, 1918, and the principles of settlement enunciated in his subsequent addresses."

The Senate in the opinion of the writer is under a moral obligation to approve a treaty along the general lines indicated by the fourteen points and later addresses of the President. Rejection of the treaty on the grounds that it does not accord with these terms as understood by the parties, or amendment to make it so conform would be unobjectionable from the standpoint of international ethics, though it might be difficult to prove such disaccord inasmuch as the other parties to the agreement of November 5, 1918, have ratified the treaty. But reservation on articles which are clearly in conformity with the fourteen points can scarcely be regarded as other than a breach of faith. Of this character would be a repudiation of article X of the treaty which is an almost literal reproduction of the fourteenth point of January 8, 1918, itself designed to embody the President's.

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54 Malloy, Treaties, etc., p. 1688, Crandall, op. cit. p. 103, et seq.
55 Official U. S. Bulletin, Nov. 6, 1918; 13 Am. Journ. Int. Law, Supp 95. The "qualifications" referred to freedom of the seas and reparations They had no reference to the 14th point.
56 "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."
57 "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike."
proposal of January 22, 1917, for a Monroe Doctrine for the World. \textsuperscript{58}

That reservations of a kind likely to defeat the purpose of the League of Nations would in effect be a repudiation of the general responsibility for the reconstruction of world order, which the United States has assumed through words and action is generally admitted.

Thus Ex-President Taft has said:\textsuperscript{59}

"Surely the United States fought the war to achieve a great purpose. Surely the treaty of peace is to be the embodiment and clinching of that purpose. Surely the treaty imposed upon an unwilling Germany and the other treaties imposed upon reluctant Austria, Bulgaria, and Turkey will not enforce themselves. Who must enforce them, then? The nations who fought the war. They must continue the league entered into to conduct the war and now amended and framed to maintain the peace they won."

\textit{SUMMARY.}\textsuperscript{60}

I. From the standpoint of the constitutional law of the United States, the Senate may reject the treaty or make its consent

\textsuperscript{58}"They (the people of the United States) can not in honor withhold the service to which they are now about to be challenged. They do not wish to withhold it. But they owe it to themselves and to the other nations of the world to state the conditions under which they will feel free to render it. That service is nothing less than this, to add their authority and their power to the authority and force of other nations to guarantee peace and justice throughout the world. . . . And in holding out the expectation that the people and Government of the United States will join the other civilized nations of the world in guaranteeing the performance of peace upon such terms as I have named I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfillment, rather, of all that we have professed or striven for. I am proposing, as it were, that the nations with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful." In his war message of April 2, 1917, the President said "I have exactly the same things in mind now that I had in mind when I addressed the Senate on the twenty-second of January last."


\textsuperscript{60}A former Justice of the Supreme Court, a Senator from Minnesota, a former Secretary of State, a former President, and the American expert on international law at the Paris Conference, have considered the effect of reservations on the treaty. Their conclusions follow:

"It is manifest that attempted reservations will be ineffectual unless they qualify the act of ratification. The adoption of resolutions by the Senate setting forth its views will not affect the obligations of the Cov-
TREATY AMENDMENTS AND RESERVATIONS

II. From the standpoint of international law, neither the form nor substance of the modification is material. No amendment, reservation or interpretation of the treaty, however mild, can bind states which have not assented to it.

Enant, if it is in fact ratified without reservations which constitute part of the instrument of ratification. . . . Assuming that the reservations are made as a part of the instrument of ratification, the other parties to the Treaty will be notified accordingly. As a contract the treaty of course will bind only those who consent to it. The Nation making reservations as a part of the instrument of ratification is not bound further than it agrees to be bound. And if a reservation, as a part of the ratification, makes a material addition to, or a substantial change in the proposed treaty, other parties will not be bound unless they assent. It should be added that where a treaty is made on the part of a number of nations, they may acquiesce in a partial ratification on the part of one or more. But where there is simply a statement of the interpretation placed by the ratifying state upon ambiguous clauses in the treaty, whether or not the statement is called a reservation, the case is really not one of amendment, and acquiescence of the other parties to the treaty may readily be inferred unless express objection is made after notice has been received of the ratification statement forming a part of it. Statements, to safeguard our interests, which clarify ambiguous clauses in the Covenant by setting forth our interpretation of them, and especially when the interpretation is one which is urged by the advocates of the Covenant to induce support, can meet with no reasonable objection.” Letter of Hon. C. E. Hughes, to Hon. Frederick Hale, Senator from Maine, July 24, 1919.

“No one doubts, of course, that the Senate has the power to make any reservations or amendments it sees fit and to make the ratification of the treaty conditional upon those reservations and amendments. There is also no question, in my opinion, that where the meaning of the instrument is at all in doubt the Senate may, by reservation, make a binding declaration construing the treaty. However, I wish to make perfectly clear that, in my opinion, where either an amendment or a reservation clearly changes the meaning of the treaty it will require the instrument to be resubmitted to all other signatory powers. That such acceptance may be evidenced either by a formal ratification by the other signatory powers, by exchange of notes or if not objected to by such powers, and the treaty is put into operation, such an amendment would undoubtedly be considered as having been accepted. There are cases in which such reservations do not appear to have been formally accepted by affirmative action of the other powers, but were undoubtedly tacitly accepted by putting the treaty into operation.” Speech of Hon. Frank B. Kellogg, Senator from Minnesota, in the Senate, Aug. 7, 1919.

“This reservation and these expressions of understanding are in accordance with long established precedent in the making of treaties. When included in the instrument of ratification they will not require a reopening of negotiation, but if none of the other signatories expressly objects to the ratification with such limitations, the treaty stands as limited as between the United States and the other powers. If any doubts were entertained as to the effect of such action, the doubt could be readily dispelled by calling upon the four other principal powers represented in the council to state whether they do in fact object to the entrance of the United States into the league with the understandings and reservations stated in the resolution.” Letter of Hon. Elihu Root to Hon. Henry C. Lodge, June 19, 1919.
Consent to reservations in the treaty may be given expressly by formal exchange of notes, or tacitly by acceptance of a formal note or of a qualified ratification. Amendments or interpretations not qualifying ratification require express consent; though subsequent practice, acquiesced in by the parties, and contemporary discussion, is admissible evidence of the true meaning of a treaty.

III. From the ethical and political standpoint the form of modification is immaterial but the substance is material. The United States in the opinion of the writer is under a moral obligation to assume responsibilities under the terms agreed upon as a basis of peace. To reject the treaty, or to amend it in a manner contrary to those terms would seem to amount to a repudiation of these responsibilities.

Signatory states, enemy as well as associated, are under no obligation, legal, moral or political to consent to amendments, reservations or interpretations of the treaty, and they are not likely to consent to modifications essentially altering its meaning or

"Speaking generally, I wish to emphasize my conviction that the United States Senate might well ratify the present treaty, without any reservations or interpretations. I am confident that the actual operation of the treaty after ratification would bring about exactly the same result as that which would be attained by the acceptance of these interpretations and reservations, but it seems to me to be the part of statesmen to recognize the exigencies, personal, partisan and political, of a situation in seeking to achieve real progress and reform." Letter of Hon. William Howard Taft to Mr. Will Hays, July 20, 1919.

"For practical purposes the difference between an amendment and a reservation is that, in case of an amendment, the ratification will not take place unless all the nations signatories to the treaty formally agree that as to all of them and their obligations the treaty is amended. A ratification with reservations is one which is conditioned on a change or a qualification or an interpretation applicable only to the obligations under the treaty of the nation making the reservation. A reservation really does not require express acquiescence by any of the other parties if they go on with the treaty without objection." (Letter of Hon. W. H. Taft to Philadelphia Public Ledger, Nov. 10, 1919.)

"Any reservations to the treaty of peace with Germany contained in the instrument of ratification of the United States are in reality proposals to the other signatories of the treaty, and to that extent involve negotiations with those powers invited to accede to the Covenant. . . . Thus the form of each instrument of ratification of the treaty with Germany will be submitted to all the signatory powers, including Germany, for their consideration, approval and acceptance, and any one of those powers will have the right to disapprove and refuse to accept. Indeed it is obvious from the precedents that each signatory power has an interest in considering the instruments of ratification of the other powers, as its own acceptance or rejection of the treaty might depend on reservations contained in such instruments." Hon. David Hunter Miller, American expert on International Law at the Paris Conference, Memorandum, Oct. 25, 1919.
reserving special privileges for one party. Refusal of any signatory to consent to a qualified ratification by the United States would result in exclusion of the United States from the treaty as to that signatory.

Interpretative reservations designed in good faith to clarify the actual meaning of the treaty would presumably be accorded tacit consent by the other signatories of the treaty.

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